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[No. 125]

SUBCOMMITTEE HEARINGS ON H. R. 2575, TO AMEND THE ARTICLES OF WAR TO IMPROVE THE ADMINISTRATION OF MILITARY JUSTICE, TO PROVIDE FOR MORE EFFECTIVE APPELLATE REVIEW, TO INSURE THE EQUALIZATION OF SENTENCES, AND FOR OTHER PURPOSES

House of Representatives,
Committee on Armed Services,
Subcommittee No 11, Legal,
Monday, April 14, 1947.

The subcommittee met at 11 a. m., Hon. Charles H. Elston (chairman) presiding.

Mr. Elston. Gentlemen, we have met this morning to consider H. R. 2575, as well as a number of other bills, on the subject of improving the administration of military justice and to provide a more effective review, to equalize sentences, and for other purposes.

The hearings will more or less proceed on all of the bills. It may be that before the hearings are concluded the Navy Department will present a bill which we understand is now under consideration. If so we will be glad to proceed with the Navy Department's bill also.

We hope that before the hearings are concluded we will be able to write some legislation applicable to both the Army and the Navy, so that the entire system within those branches may be revised.

(H. R. 2575 is as follows:)

[H. R. 2575, 80th Cong., 1st sess.]

A BILL To amend the Articles of War to improve the administration of military justice, to provide for more effective appellate review, to insure the equalization of sentences, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Articles of War (41 Stat. 787 to 811, as amended) are hereby amended as follows:

Article 1 is amended to read as follows:

"(a) The word 'officer' shall be construed to refer to a commissioned officer.

"(b) The word 'soldier' shall be construed as including a noncommissioned officer, a private, or any other enlisted man or woman.

"(c) The word 'company' shall be construed as including a troop, battery, or corresponding unit of the ground or air forces.

"(d) The word 'battalion' shall be construed as including a squadron or corresponding unit of the ground or air forces.

"(e) The word 'cadet' shall be construed to refer to a cadet of the United States Military Academy."

Sec. 2. Article 2, subparagraph (a), is amended to read as follows:

"(a) All officers, members of the Army Nurse Corps, warrant officers, flight officers, and soldiers belonging to the Regular Army of the United States; all volunteers, from the date of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same;"

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SEC. 3. Article 4 is amended to read as follows:

"ART. 4. WHO MAY SERVE ON COURT-MARTIAL.—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial.

All enlisted persons in the active military service of the United States or in the active military service of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on general and special courts-martial for the trial of enlisted persons and persons of these categories shall be detailed for such service when deemed proper by the appointing authority.

When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command and when eligible those enlisted persons of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers and enlisted persons having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of minority membership thereof. No person shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution."

SEC. 4. Article 5 is amended to read as follows:

"ART. 2. GENERAL COURTS-MARTIAL.—General courts-martial may consist of any number of members not less than five."

SEC. 5. Article 6 is amended to read as follows:

"ART. 6. SPECIAL COURTS-MARTIAL.—Special courts-martial may consist of any number of members not less than three."

SEC. 6. Article 8 is amended to read as follows:

"ART. 8. GENERAL COURTS-MARTIAL.—The President of the United States, the commanding officer of a Territorial department, the Superintendent of the Military Academy, the commanding officer of an Army group, an Army, an Army corps, a division, a separate brigade, or corresponding unit of the Ground or Air Forces, or any command to which a member of the Judge Advocate General's Department is assigned as staff judge advocate, as prescribed in article 47, and, when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and may in any case be appointed by superior authority when by the latter deemed desirable.

"The authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Department or an officer admitted to practice law in a court of the judicial system of the United States or in the highest court of a State of the United States and certified by the Judge Advocate General to be qualified for such detail: *Provided*, That no general court martial shall receive evidence or vote upon its findings or sentence in the absence of the law member regularly detailed. The law member, in addition to his duties as a member, shall perform the duties prescribed in article 31 hereof and such other duties as the President may by regulations prescribe."

SEC. 7. Article 9 is amended to read as follows:

"ART. 9. SPECIAL COURTS-MARTIAL.—The commanding officer of a district, garrison, fort, camp, station, or other place where troops are on duty, and the commanding officer of an Army group, an Army, an Army corps, a division, brigade, regiment, detached battalion, or corresponding unit of Ground or Air Forces, and the commanding officer of any other detached command or group of detached units placed under a single commander for this purpose may appoint special courts-martial; but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed desirable."

SEC. 8. Article 11 is amended to read as follows:

"ART. 11. APPOINTMENT OF TRIAL JUDGE ADVOCATES AND COUNSEL.—For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and one or more assistant trial judge advocates and one or more assistant defense counsel when necessary: *Provided*, That the trial judge advocate and defense counsel of each general court-martial

shall, if available, be members of the Judge Advocate General's Department or officers admitted to practice law in a court of the judicial system of the United States or in the highest court of a State of the United States: *Provided further*, That in all cases in which the officer appointed as trial judge advocate shall be a member of the Judge Advocate General's Department, or an officer admitted to practice law in a court of the United States or in the highest court of a State, the officer appointed as defense counsel shall likewise be a member of the Judge Advocate General's Department or an officer admitted to practice law in a court of the judicial system of the United States or in the highest court of a State of the United States: *Provided further*, That when the accused is represented by counsel of his own selection and does not desire the presence of the regularly appointed defense counsel or assistant defense counsel, the latter may be excused by the president of the court: *And provided further*, That no officer who has acted as member, trial judge advocate, assistant trial judge advocate, defense counsel, or assistant defense counsel in any case shall subsequently act as a staff judge advocate to the reviewing or confirming authority upon the same case."

SEC. 9. Article 12 is amended to read as follows:

"ART. 12. GENERAL COURTS-MARTIAL.—General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: *Provided*, That general courts-martial shall have power to adjudge any punishment authorized by law or the custom of the service including a bad-conduct discharge."

SEC. 10. Article 13 is amended to read as follows:

"ART. 13. SPECIAL COURTS-MARTIAL.—Special courts-martial shall have power to try any person subject to military law for any crime or offense not capital made punishable by these articles: *Provided*, That the President may, by regulations, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law: *Provided further*, That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interests of the service so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses herein prescribed, but the limitations upon jurisdiction as to persons and upon punishing power herein prescribed shall be observed.

"Special courts-martial shall not have power to adjudge dishonorable discharge or dismissal, or confinement in excess of six months, nor to adjudge forfeiture of more than two-thirds pay per month for a period of not exceeding six months: *Provided*, That subject to approval of the sentence by an officer exercising general court-martial jurisdiction and subject to appellate review by The Judge Advocate General and appellate agencies in his office, a special court-martial may adjudge a bad-conduct discharge in addition to other authorized punishment.

SEC. 11. Article 14 is amended to read as follows:

"ART. 14. SUMMARY COURTS-MARTIAL.—Summary courts-martial shall have power to try any person subject to military law, except an officer, a member of the Army Nurse Corps, a warrant officer, flight officer, or a cadet, for any crime or offense not capital made punishable by these articles: *Provided*, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a special court-martial: *Provided further*, That the President may, by regulations, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law.

"Summary courts-martial shall not have power to adjudge confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of one month's pay."

SEC. 12. Article 16 is amended to read as follows:

"ART. 16. PERSONS IN THE MILITARY SERVICE—HOW TRIABLE.—Officers shall be triable only by general and special courts-martial and in no case shall a person in the military service, when it can be avoided, be tried by persons inferior to him in rank. No enlisted person may sit as a member of a court-martial for the trial of another enlisted person who is assigned to the same company or corresponding military unit."

SEC. 13. Article 22 is amended to read as follows:

"ART. 22. PROCESS TO OBTAIN WITNESSES. —Every trial judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which

courts of the United States having criminal jurisdiction may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions. Witnesses for the defense shall be subpenaed, upon request by the defense counsel, through process issued by the trial judge advocate, in the same manner as witnesses for the prosecution."

SEC. 14. Article 24 is amended to read as follows:

"ART. 24. COMPULSORY SELF-INCRIMINATION PROHIBITED.—No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military, or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him or to answer any question not material to the issue when such answer might tend to degrade him.

"The use of coercion or unlawful influence in any manner whatsoever by any person subject to military law to obtain any degrading statement not material to the issue, or any self-incriminating statement, admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission, or confession shall be received in evidence by any court-martial."

SEC. 15. Article 25 is amended to read as follows:

"ART. 25. DEPOSITIONS—WHEN ADMISSIBLE.—A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to, or, in foreign places, because of nonamenability to process, refuses to appear and testify in person at the place of trial or hearing: *Provided*, That testimony by deposition may be adduced for the defense in capital cases: *Provided further*, That a deposition may be read in evidence in any case in which the death penalty is authorized by law but is not mandatory, whenever the appointing authority shall have directed that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial: *And provided further*, That at any time after charges have been signed as provided in article 46, and before the charges have been referred for trial, any authority competent to appoint a court-martial for the trial of such charges may designate officers to represent the prosecution and the defense and may authorize such officers, upon due notice, to take the deposition of any witness, and such deposition may subsequently be received in evidence as in other cases."

SEC. 16. Article 31 is amended to read as follows:

"ART. 31. METHOD OF VOTING.—Voting by members of a general or special court-martial upon questions of challenge, on the findings, and on the sentence shall be by secret written ballot. The junior member of the court shall in each case count the votes, which count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court. The law member of a general court-martial or the president of a special court-martial, shall rule in open court upon interlocutory questions, other than challenge, arising during the proceedings: *Provided*, That unless such ruling be made by the law member of a general court-martial, if any member object thereto, the court shall be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank: *And provided further*, That any such ruling made by the law member of a general court-martial upon any interlocutory question other than a motion for a finding of not guilty, or the question of accused's sanity, shall be final and shall constitute the ruling of the court; but the law member may in any case consult with the court, in closed session, before making a ruling, and may change any ruling made at any time during the trial."

SEC. 17. Article 36 is amended to read as follows:

"ART. 36. DISPOSITION OF RECORDS—SPECIAL AND SUMMARY COURTS-MARTIAL.—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by special court-martial and a report of each trial by summary court-martial shall be transmitted to the

headquarters of the officer exercising general court-martial jurisdiction over the command, there to be filed in the office of the staff judge advocate: *Provided, however*, That each record of trial by special court martial in which the sentence, as approved by the appointing authority, includes a bad-conduct discharge, shall, if approved by the officer exercising general court-martial jurisdiction under the provisions of article 47, be forwarded by him to The Judge Advocate General for review as hereinafter in these articles provided. When no longer of use, records of summary courts-martial may be destroyed as provided by law governing destruction of Government records."

SEC. 18. Article 38 is amended to read as follows:

"ART. 38. PRESIDENT MAY PRESCRIBE RULES.—The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, insofar as he shall deem practicable, apply the principles of law and rules of evidence general recognized in the trial of criminal cases in the district courts of the United States: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules and regulations made in pursuance of this Article shall be laid before the Congress."

SEC. 19. Article 39 is amended to read as follows:

"ART. 39. AS TO TIME.—Except for desertion or absence without leave committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court martial for any crime or offense committed more than two years before arraignment of such person: *Provided*, That for desertion in time of peace or for any crime or offense punishable under articles 93 and 94 of this code the period of limitations upon trial and punishment by court-martial shall be three years: *Provided further*, That the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: *Provided further*, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law: *And provided further*, That in the case of any offense the trial of which in time of war shall be certified by the Secretary of War to be detrimental to the prosecution of the war or inimical to the Nation's security, the period of limitations herein provided for the trial of the said offense shall be extended to the duration of the war and six months thereafter."

SEC. 20. Article 43 is amended to read as follows:

"ART. 43. DEATH SENTENCE—WHEN LAWFUL; VOTE ON FINDINGS AND SENTENCE.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all the members present at the time the vote is taken. Conviction of any offense for which the death sentence is not mandatory and any sentence to confinement not in excess of ten years, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote."

SEC. 21. Article 44 is amended to read as follows:

"ART. 44. OFFICERS—REDUCTION TO RANKS.—When a sentence to dismissal may lawfully be adjudged in the case of an officer the sentence may in time of war, under such regulations as the President may prescribe, adjudge in lieu thereof reduction to the grade of private."

SEC. 22. Article 46 is amended to read as follows:

"ART. 46. CHARGES; ACTION UPON.—

"a. SIGNATURE; OATH.—Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein and that the same are true in fact, to the best of his knowledge and belief.

"b. INVESTIGATION.—No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full oppor-

tunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation they shall be accompanied by a statement of the substance of the testimony taken on both sides.

"c. FORWARDING CHARGES; DELAYS; SERVICE OF CHARGES.—When a person is held for trial by general court-martial, the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him."

SEC. 23. Article 47 is amended to read as follows:

"ART. 47. ACTION BY CONVENING AUTHORITY.—

"a. ASSIGNMENT OF JUDGE ADVOCATES; CHANNELS OF COMMUNICATION.—All members of the Judge Advocate General's Department will be assigned as prescribed by The Judge Advocate General after appropriate consultations with commanders on whose staffs they may serve; and The Judge Advocate General or senior members of his staff will make frequent inspections in the field in supervision of the administration of military justice. Convening authorities will at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice; and the staff judge advocate of any command is authorized to communicate directly with the staff judge advocate of a superior or subordinate command, or with The Judge Advocate General.

"b. REFERENCE FOR TRIAL.—Before directing the trial of any charge by general court-martial the convening authority will refer it to his staff judge advocate for consideration and advice; and no charge will be referred to a general court-martial for trial unless it has been found that a thorough and impartial investigation thereof has been made as prescribed in the preceding article, that such charge is legally sufficient to allege an offense under these articles, and is sustained by evidence indicated in the report of investigation.

"c. ACTION ON RECORD OF TRIAL.—Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge advocate or to The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.

"d. APPROVAL.—No sentence of a court-martial shall be carried into execution until the same shall have been approved by the convening authority: *Provided*, That no sentence of a special court-martial including a bad-conduct discharge shall be carried into execution until the same shall have been approved by an officer authorized to appoint a general court-martial.

"e. WHO MAY EXERCISE.—Action by the convening authority may be taken by an officer commanding for the time being, by a successor in command, or by any officer exercising general court-martial jurisdiction.

"f. POWERS INCIDENT TO POWER TO APPROVE.—The power to approve the sentence of a court-martial shall include—

"(1) the power to approve or disapprove a finding of guilty and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

"(2) the power to approve or disapprove the whole or any part of the sentence; and

"(3) the power to remand a case for rehearing under the provisions of article 52."

SEC. 24. Article 48 is amended to read as follows:

"ART. 48. CONFIRMATION.—In addition to the approval required by article 47, confirmation is required as follows before the sentence of a court-martial may be carried into execution, namely:

"a. By the President with respect to any sentence—

"(1) of death, or

"(2) involving a general officer:

Provided, That when the President has already acted as approving authority, no additional confirmation by him is necessary;

"b. By the Secretary of War with respect to any sentence not requiring approval or confirmation by the President, when The Judge Advocate General does not concur in the action of the Judicial Council;

"c. By the Judicial Council, with the concurrence of The Judge Advocate General, with respect to any sentence—

"(1) when the confirming action of the Judicial Council is not unanimous, or when by direction of The Judge Advocate General his participation in the confirming action is required, or

"(2) involving imprisonment for life, or

"(3) involving the dismissal of an officer other than a general officer, or

"(4) involving the dismissal or suspension of a cadet;

"d. By the Judicial Council with respect to any sentence in a case transmitted to the Judicial Council under the provisions of article 50 for confirming action."

SEC. 25. Article 49 is amended to read as follows:

"ART. 49. POWERS INCIDENT TO POWER TO CONFIRM.—The power to confirm the sentence of a court-martial shall be held to include—

"a. The power to approve, confirm, or disapprove a finding of guilty, and to approve or confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

"b. The power to confim, disapprove, vacate, commute, or reduce to legal limits the whole or any part of the sentence;

"c. The power to restore all rights, privileges, and property affected by any finding or sentence disapproved or vacated;

"d. The power to order the sentence to be carried into execution;

"e. The power to remand the case for a rehearing under the provisions of article 52."

SEC. 26. Article 50 is amended to read as follows:

"ART. 50. APPELLATE REVIEW.—

"a. BOARD OF REVIEW; JUDICIAL COUNCIL.—The Judge Advocate General shall constitute, in his office, a Board of Review composed of not less than three officers of the Judge Advocate General's Department. He shall also constitute, in his office, a Judicial Council composed of three general officers of the Judge Advocate General's Department: *Provided*, That the Judge Advocate General may, under exigent circumstances, detail as members of the Judicial Council, for periods not in excess of sixty days, officers of the Judge Advocate General's Department of grades below that of general officer.

"b. ADDITIONAL BOARDS OF REVIEW AND JUDICIAL COUNCILS.—Whenever necessary, the Judge Advocate General may constitute two or more Boards of Review and Judicial Councils in his office, with equal powers and duties, composed as provided in the first paragraph of this article.

"c. BRANCH OFFICES.—Whenever the President deems such action necessary, he may direct The Judge Advocate General to establish a branch office, under an Assistant Judge Advocate General who shall be a general officer of The Judge Advocate General's Department, with any distant command, and to establish in such branch office one or more Boards of Review and Judicial Councils composed as provided in the first paragraph of this article. Such Assistant Judge Advocate General and such Board of Review and Judicial Council shall be empowered to perform for that command under the general supervision of The Judge Advocate General, the duties which The Judge Advocate General and the Board of Review and Judicial Council in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President: *Provided*, That the power of mitigation and remission shall not be exercised by such Assistant Judge Advocate General or by agencies in his office, but any case in which such action is deemed desirable may be forwarded to The Judge Advocate General with appropriate recommendations.

"d. ACTION BY BOARD OF REVIEW WHEN APPROVAL BY PRESIDENT OR CONFIRMING ACTION IS REQUIRED.—Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted to the President or such other

confirming authority, as the case may be, it shall be examined by the Board of Review which shall take action as follows:

"(1) In any case requiring action by the President, the Board of Review shall submit its opinion in writing, through the Judicial Council which shall also submit its opinion in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the Board's and Council's opinions, with his recommendations, directly to the Secretary of War for the action of the President: *Provided*, That the Judicial Council, with the concurrence of the Judge Advocate General, shall have powers in respect to holdings of legal insufficiency equal to the powers vested in the Board of Review by subparagraph (3) of this paragraph.

"(2) In any case requiring confirming action by the Judicial Council with or without the concurrence of the Judge Advocate General, when the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence it shall submit its opinion in writing to the Judicial Council for appropriate action.

"(3) When the Board of Review is of the opinion that the record of trial in any case requiring confirming action by the President or confirming action by the Judicial Council is legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall submit its holding to the Judge Advocate General and when the Judge Advocate General concurs in such holding, such findings and sentence shall thereby be vacated in accord with such holding and the record shall be transmitted by the Judge Advocate General to the appropriate convening authority for a rehearing or such other action as may be proper.

"(4) In any case requiring confirming action by the President or confirming action by the Judicial Council in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, or the sentence, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trail shall be transmitted to the Judicial Council for confirming action or for other appropriate action in a case in which confirmation of the sentence by the President is required under article 48a.

"e. ACTION BY BOARD OF REVIEW IN CASES INVOLVING DISHONORABLE OR BAD-CONDUCT DISCHARGES OR CONFINEMENT IN PENITENTIARY.—No authority shall order the execution of any sentence of a court martial involving dishonorable discharge not suspended, bad-conduct discharge not suspended, or confinement in a penitentiary unless and until the appellate review required by this article shall have been completed and unless and until any confirming action required shall have been completed. Every record of trial by general or special court martial involving a sentence to dishonorable discharge or bad-conduct discharge, whether such discharges be suspended or not suspended, and every record of trial by general court martial involving a sentence to confinement in a penitentiary, other than records of trial examination of which is required by paragraph d of this article, shall be examined by the Board of Review which shall take action as follows:

"(1) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, and confirming action is not by the Judge Advocate General or the Board of Review deemed necessary, the Judge Advocate General shall transmit the holding to the convening authority, and such holding shall be deemed final and conclusive.

"(2) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, but modification of the findings of guilty or the sentence is by the Judge Advocate General or the Board of Review deemed necessary to the ends of justice, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

"(3) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General concurs in such holding, the findings and sentence shall thereby be vacated in whole or in part in accord with such holding, and the record shall be transmitted by the Judge Advocate General to the convening authority for rehearing or such other action as may be appropriate.

"(4) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General shall not concur in the holding of the the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

"f. APPELLATE ACTION IN OTHER CASES.—Every record of trial by general court-martial the appellate review of which is not otherwise provided for by this article shall be examined in the Office of the Judge Advocate General and if found legally insufficient to support the findings of guilty and sentence, in whole or in part, shall be transmitted to the Board of Review for appropriate action in accord with paragraph e of this article.

"g. WEIGHING EVIDENCE.—In the appellate review of records of trials by courts-martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact.

"h. FINALITY OF COURT-MARTIAL JUDGMENTS.—The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53."

SEC. 27. Article 50½ is rescinded.

SEC. 28. Article 51 is amended to read as follows:

"ART. 51. MITIGATION, REMISSION, AND SUSPENSION OF SENTENCES.—

"a. AT THE TIME ORDERED EXECUTED.—The power of the President, the Secretary of War, and any reviewing authority to order the execution of a sentence of a court-martial shall include the power to mitigate, remit or suspend the whole or any part thereof, except that a death sentence may not be suspended. The Judge Advocate General shall have the power to mitigate, remit, or suspend the whole or any part of a sentence in any case requiring appellate review under article 50 and not requiring approval or confirmation by the President, but the power to mitigate or remit shall be exercised by the Judge Advocate General under the direction of the Secretary of War. The authority which suspends the execution of a sentence may restore the person under sentence to duty during such suspension; and the death or honorable discharge of a person under suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence.

"b. SUBSEQUENT TO THE TIME ORDERED EXECUTED.—

"(1) Any unexecuted portion of a sentence other than a sentence of death, including all uncollected forfeitures, adjudged by court-martial may be mitigated, remitted or suspended and any order of suspension may be vacated, in whole or in part, by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States disciplinary barracks, in which the person under sentence may be, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority or by the Judge Advocate General under the direction of the Secretary of War: *Provided*, That no sentence approved or confirmed by the President shall be mitigated, remitted or suspended by any authority inferior to the President: *And provided further*, That no order of suspension of a sentence to dishonorable discharge or bad conduct discharge shall be vacated unless and until confirming or appellate action on the sentence has been completed as required by articles 48 and 50.

"(2) The power to suspend a sentence shall include the power to restore the person affected to duty during such suspension.

"(3) The power to mitigate, remit or suspend the sentence or any part thereof in the case of a person confined in the United States disciplinary barracks or in a penintentiary shall be exercised by the Secretary of War or by the Judge Advocate General under the direction of the Secretary of War."

SEC. 29. Article 52 is amended to read as follows:

"ART. 52. REHEARINGS.—When any reviewing or confirming authority disapproves a sentence or when any sentence is vacated by action of the Board of Re-

view or Judicial Council and the Judge Advocate General, the reviewing or confirming authority or the Judge Advocate General may authorize or direct a rehearing. Such rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding."

SEC. 30. Article 53 is amended to read as follows:

"ART. 53. PETITION FOR NEW TRIAL.—Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad-conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided*, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided*, That only one such application for a new trial may be entertained with regard to any one case: *And provided further*, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States."

SEC. 31. Article 70 is amended to read as follows:

"ART. 70. CHARGES; ACTION UPON, UNNECESSARY DELAY.—When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct."

SEC. 32. Article 85 is amended to read as follows:

"ART. 85. DRUNK ON DUTY.—Any person subject to military law, who is found drunk on duty, shall be punished as a court-martial may direct."

SEC. 33. Article 88 is amended to read as follows:

"ART. 88. UNLAWFULLY INFLUENCING ACTION OF COURT.—Any person subject to military law who attempts to coerce or unlawfully influence the action of a court-martial or any military court or commission, or any member thereof, in reaching the findings or sentence in any case, or the action of an appointing or reviewing or confirming authority with respect to his judicial acts, shall be punished as a court-martial may direct."

SEC. 34. Article 89 is amended to read as follows:

"ART. 89. GOOD ORDER TO BE MAINTAINED AND WRONGS REDRESSED.—All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or wrongfully destroys any property whatsoever or commits any kind of depredation or riot, shall be punished as a court-martial may direct. Any commanding officer who, upon complaint made to him refuses or omits to see reparation made to the party injured, insofar as the offender's pay shall go toward such reparation, as provided for in article 105, shall be dismissed from the service, or otherwise punished, as a court-martial may direct."

SEC. 35. Article 92 is amended to read as follows:

"ART. 92. MURDER—RAPE.—Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct: *Provided*, That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."

SEC. 36. Article 93 is amended to read as follows:

"ART. 93. VARIOUS CRIMES.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct: *Provided*, That any person subject to military law who commits larceny or embezzlement shall be guilty of larceny within the meaning of this article."

SEC. 37. Article 94 is amended to read as follows:

"ART. 94. FRAUDS AGAINST THE GOVERNMENT.—Any person subject to military law who makes or causes to be made any claim against the United States or any officer thereof knowing such claim to be false or fraudulent; or who defrauds or attempts to defraud the Government of the United States or any of its agencies in any manner denounced by the Criminal Code of the United States or in any manner whatsoever, or who steals, knowingly and willfully misappropriates, wrongfully applies to his own use or benefit or wrongfully and knowingly sells or disposes of any ordnance, arms, equipment, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military service thereof shall be punished as a court-martial may direct: *Provided*, That any person subject to military law who commits larceny or embezzlement with respect to property of the United furnished or intended for the military service thereof or with respect to other property within the purview of this article, steals said property within the meaning of this article.

"If any person, being guilty of any of the offenses aforesaid or who steals or fails properly to account for any money or other property held in trust by him for enlisted persons or as its official custodian while in the military service of the United States, receives his discharge or is dismissed or otherwise separated from the service, he shall continue to liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not been so separated therefrom."

SEC. 38. Article 104 is amended to read as follows:

"ART. 104. DISCIPLINARY POWERS OF COMMANDING OFFICERS.—Under such regulations as the President may prescribe, the commanding officer of any detachment, company, or higher command, may, for minor offenses, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

"The disciplinary punishments authorized by this article may include admonition or reprimand, or the withholding of privileges, or extra fatigue, or restriction to certain specified limits, or hard labor without confinement or any combination of such punishments for not exceeding one week from the date imposed; but shall not include forfeiture of pay or confinement under guard; except that any officer exercising general court-martial jurisdiction may, under the provisions of this article, also impose upon a warrant officer or flight officer or officer of his command below the rank of brigadier general a forfeiture of not more than one-half of his pay per month for three months.

"A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense, may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty."

SEC. 39. Article 108 is amended to read as follows:

"ART. 108. SOLDIERS—SEPARATION FROM THE SERVICE.—No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and 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 War, or by sentence of a general or special court-martial."

SEC. 40. Article 110 is amended to read as follows:

"ART. 110. CERTAIN ARTICLES OF WAR TO BE READ OR EXPLAINED.—Articles 1, 2, 24, 28, 29, 54 to 97, inclusive, 104 to 109, inclusive, and 121 shall be read or carefully explained to every soldier at the time of his enlistment or muster in, or within six days thereafter, and shall be read or explained once every six months to the soldiers of every garrison, regiment, or company in the service of the United States. And a complete text of the Articles of War and of the Manual for Courts-Martial shall be made available to any soldier, upon his request, for his personal examination."

SEC. 41. Article 116 is amended to read as follows:

"ART. 116. POWERS OF ASSISTANT TRIAL JUDGE ADVOCATE AND OF ASSISTANT DEFENSE COUNCIL.—An assistant trial judge advocate of a general or special court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the trial judge advocate of the court. An assistant defense counsel shall be competent likewise to perform any duty devolved by law, regulation, or the custom of the service upon counsel for the accused."

SEC. 42. Article 117 is amended to read as follows:

"ART. 117. REMOVAL OF CIVIL SUITS.—When any civil or criminal prosecution is commenced in any court of a State of the United States against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed by law, and the cause shall thereupon be entered on the docket of such district court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine said cause."

SEC. 43. Section 1 of article 121 is amended to read as follows:

"ART. 121. COMPLAINTS OF WRONGS.—Any officer or soldier who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to the officer exercising general court-martial jurisdiction over the officer against whom the complaint is made. That officer shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the War Department a true statement of such complaint, with the proceedings had thereon."

SEC. 44. This Act shall become effective on the first day of the fourth calendar month after approval of this Act.

SEC. 45. All offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the effective date of this Act, under any law embraced in or modified, changed or repealed by this Act, may be prosecuted, punished, and enforced in the same manner and with the same effect as if this Act had not been passed.

Mr. ELSTON. We are very glad to have with us this morning as our first witness the Under Secretary of War, Hon. Kenneth C. Royall. I would suggest that we permit the Secretary to proceed with his statement, after which he may be interrogated with respect to his statement or any other matter pertaining to this subject.

Mr. Secretary, will you proceed?

STATEMENT OF HON KENNETH C. ROYALL, UNDER SECRETARY OF WAR

Mr. ROYALL. Mr. Chairman, I appreciate the opportunity to discuss with this committee the very important subject of military justice, to present the general history and the broad considerations which led to the preparation of H. R. 2575, and to outline some of the principal changes embodied in the bill.

As you know, the Under Secretary represents the Secretary in the administration of military justice. Both officially and personally I

am interested in the subject and am anxious that the best possible legislation be enacted.

The committee has received the report of the American Bar Association committee. I believe you also have the statement of the Secretary of War of February 20, 1947. This statement explains the principal provisions of the bill, and I respectfully recommend that the members of the committee read it carefully.

Maj. Gen. Thomas H. Green, the distinguished Judge Advocate General, and his able assistant, Brig. Gen. Hubert D. Hoover, will later discuss with you the specific provisions of the bill. If thereafter the committee wishes to hear from me further, I will be available at any time.

The Articles of War are the statutory code governing the administration of military justice in the Army. These articles have been on our statute books during the entire history of our Nation. They have been revised from time to time, but their basic characteristics remain unchanged.

It is the War Department's opinion that these characteristics should not now be changed; that the system as a whole has proven itself to be sound. By this I do not mean that the system cannot be improved. No system of justice has ever been devised or will ever be devised which is entirely free from just criticism.

You only have to pick up your own State code to find how many legislative changes have been made in a generation and how many of these changes have been reversed after they have proven to be incorrect. Each change represents a crystallized opinion that the system of justice in the past has been in some way imperfect. Each reversal means a mistake in trying to correct a mistake. And no matter how good the system, it will never be perfectly administered. There is no man, and no group of men, so mentally and temperamentally qualified that they can at all times dispense justice either exactly or uniformly.

Years of civil practice showed me, as it showed many of you, how many mistakes are made in the administration of justice by State and Federal courts.

My observation in the Army and in my present office discloses some of the same kinds of mistakes on the part of courts martial. However, I believe that on the whole more mistakes have been made outside the Army than in it.

Take the matter of guilty men escaping punishment or innocent men being convicted. I am confident that this happens less often in military courts.

I feel that the American Bar Association committee was entirely correct in stating:

> The Army system of justice in general and as written in the books is a good one. * * * It is excellent in theory and designed to secure swift and sure justice. * * * The innocent are almost never convicted and the guilty seldom acquitted.

You have heard allegations that courts martial discriminate between officers and enlisted men. I am by no means sure that this charge is correct, and I am by no means sure that this charge is incorrect. The percentage of total officers in the Army who are convicted by general courts martial is about the same as the percentage of total

enlisted men who are so convicted. In the cases which have come to my personal attention I have observed some disparity both ways, and I could not state with certainty whether on a proportionate basis the balance is one way or another. But I am certain whatever the disparity may be, it is not nearly as marked as the disparity in treatment in civil life between the influential citizen and the average citizen, whether we are considering a parking ticket or a murder charge.

Then there is the suggestion of the lack of uniformity in sentences. That existed in the Army, but, as you lawyer members know, existed to no greater extent than it does in civilian life. The Attorneys General of the United States in many annual reports have commented on the lack of uniformity in the action of district courts in criminal cases.

Recently the present Attorney General said:

> We are all aware of the evil of the wide disparity in sentences imposed in different parts of the country for the same offense—a year's imprisonment one place and 5 years' imprisonment somewhere else for the same violation of the same law.

There have been charges of excessive punishments by military courts. If reference is made to the initial sentences, this charge has certainly been sustained. It is equally certain that these initial sentences are more severe than would be adjudged for like offenses in civil life. And we feel that improvement will be made under this bill. But actually the initial sentence is not a fair criterion by which to judge Army courts martial. It leaves out of account two integral parts of normal Army court procedure, and that is restoration to duty and initial clemency review.

I am not referring to annual clemency reviews or the parole system. These correspond to the pardon and parole procedures in civil life. I am referring to the automatic restoration and clemency processes that are applicable to every case—are in a real sense a part of the original procedure.

Of the approximately 80,000 men convicted by general courts martial during the war, 33,000 were restored to duty and given an opportunity to perform honorable service, and thereby earn an honorable discharge. It is pleasing to know that of this group less than 1 in 7 proved to be a recidivist—a "backslider," as we call it back in my country. So 6 out of 7 who were restored to duty proved their worth.

Initial clemency review considered the 25,000 cases of men who had not been restored or who had not completed short sentences. Eighty-five percent of this 25,000 had their sentences either reduced or set aside.

Now, I invite your attention to this statistical fact: Of the 11,000,000 men who have served in the Army since the beginning of the emergency, today less than 15,000 are serving court-martial sentences, and of these only five or six thousand are serving sentences for civilian-type offenses. Do you know of any comparable record in any military or civilian jurisdiction, now or in the past?

But none of this indicates that our system of military justice cannot be improved. The War Department is not and has not been satisfied by a comparison with the civilian administration of justice, no matter how favorable the comparison might be to the Army. Nor are we satisfied just because we have a fairer and better system than other armies.

After World War I—our first World War of mass troops recruited from civilian life—there was a revision of the military code. World War II, of course, provided a much broader experience in military justice, involving as it did eight or nine times as many man-years of civilian soldiers as compared with World War I.

Even before the fighting war stopped the War Department had begun a study of its experiences in military justice. Col. Phillip McCook, former prominent New York judge, made trips to various theaters in 1944 and 1945 to study this problem. General McNeil, branch judge advocate of the European theater, made a careful study of the situation in our largest theater. There were other reports and studies made.

Within a few months after the end of the war, the matter was brought to the attention of the American Bar Association, with the request that a committee be appointed to study the entire system of military justice and make recommendations theron. Others bar associations, National, State, and local, were invited to transmit their views, either direct to the War Department or to the American Bar Association committee.

The American Bar Association committee was given the War Department studies, and the military and civilian personnel of the War Department were made available to the committee. The committee was given entire freedom of action.

In its report the committee says:

> At all times we have received complete cooperation from the officials of the War Department and from the officers of the Army. There has been no attempt to restrict our inquiries. There has been no attempt to prevent officers from expressing individual views with complete frankness, and views of officers have differed sharply on many points. The committee has had a free hand.

This committee conducted a very thorough investigation. Its study covered a period of 9 months. It heard many witnesses, received many written opinions and comments, and many answers to questionnaires. It held widely advertised public hearings at 11 points throughout the country. There have been few as thorough studies of any system of justice.

The report of the committee was filed in December. It was carefully considered in the War Department, by the military and the civil side. Similarly considered was the report made by the House Military Affairs Committee of the Seventy-ninth Congress, of which some of you were members. This report also exhibited a thorough understanding of many of the problems involved and of the criticisms that had been made.

In considering both these reports we recognized that in matters of this kind the critics of a system are more voluble than its proponents, whether the criticisms are in the press or before a committee. But we also found that most of the conclusions reached and the recommendations made by these committees—that is, the American Bar Association committee and the Military Affairs Committee—were sound recommendations, and the bill follows closely the general lines of these reports, although omitting some matters included in the reports and embodying some matters not included in the reports.

Now, coming to the criticisms of the court-martial system, there have been four principal criticisms—of course, there are some minor

ones also—of the court-martial system. Two of these I have already mentioned—the alleged discrimination against enlisted men and the excessive initial sentences. It has also been said that courts martial have been unduly influenced, and sometimes controlled, by the officers appointing them. Finally, it has been asserted that in all phases of courts martial there has been insufficient use of legally trained officers. All four of these matters are to some extent interrelated and any changes designed to meet one may well affect the others.

As previously indicated, discrimination against enlisted men cannot be clearly shown. Furthermore, the ultimate sentences are mild, rather than severe, that is, on them all—officers and enlisted men—and after the restoration and initial clemency processes. Notwithstanding these facts, it is important to use every reasonable effort to remove any possible defects in the system and as far as possible to put the Army system of justice above reproach, so that it may have the support and confidence of the people of the country as well as of the men in the Army. This is the spirit in which this bill was prepared and the spirit with which changes in the regulations were suggested.

May I outline to you briefly some of the principal changes recommended by the War Department. In the first place, the Judge Advocate General's Department will be substantially enlarged, and its officers will be given advantages in promotion commensurate with those given other professional officer personnel of the Army. These particular changes are not embodied in H. R. 2575, but will be handled largely by and under the general personnel legislation now being offered by the Army, which will come before the Armed Services Committee.

This bill gives to the Judge Advocate General the authority to assign the officers of his own department, after appropriate consultation with the commanders on whose staffs they may serve. And these commanders must afford their staff judge advocates direct access to the commanders in all matters relating to the administration of military justice. They must also be afforded direct access to the Judge Advocate General. That is a change which in the large theaters is important because a commander would have a G–1, or personnel department, in some instances, and the staff judge advocate would have to report through him to the commander, but this is a matter of such importance we provided for direct communication.

The Judge Advocate General is authorized and required by the bill to make or cause to be made by the senior members of his staff frequent inspections in the field as to the administration of military justice.

It is made a jurisdictional requirement—and this is a matter which all lawyers who are familiar with the usual system of civil courts, trying either civil or criminal cases, will appreciate the value of, I am sure—that the law members of general courts-martial must be either officers of the Judge Advocate General's Department or if there are not enough of those, as will sometimes arise in certain situations, trained lawyers designated as qualified by the Judge Advocate General. These law members must be present during the presentation of evidence and also whenever any action is taken upon the findings and sentences. The rulings of the law member will be final on interlocutory legal matters. It gives him, in other words, a position compara-

ble to the presiding judge in the criminal court. It gives a law member considerably more authority.

Whenever practicable, defense counsel in general court cases must be attorneys, and it is contemplated that will be true in most cases. But whether it is practical or not, the defense counsel, in both special and general courts-martial, must always be an attorney in case the prosecuting judge advocate is an attorney, so that the defendant may have qualified legal counsel comparable to the prosecuting counsel. That was a source of criticism in some cases, as you perhaps have heard.

There have been changes in the method of review which are quite important. The final judicial review of all general court-martial cases is placed in the Judge Advocate General's Department, with the right of the Judge Advocate General to establish appellate agencies to assist him in exercising his powers. This is an important feature. In addition to a normal legal scrutiny, the review includes weighing the evidence, which doesn't exist in most civil courts, with the right to vacate findings or to commute, suspend, or reduce or remit sentences. You cannot increase sentences, of course, or reverse the finding of not guilty. The powers of reduction or remission are to be exercised under the direction of the Under Secretary of War.

With this authority, the Judge Advocate General's Office would have the right and opportunity to equalize sentences at an early stage in the judicial proceedings and to reduce excessive sentences at an earlier stage than was present during the rush of the present war; that is, without waiting for action in the initial clemency review.

Sentences which involve dismissals, dishonorable discharges, or bad-conduct discharges must be confirmed by the Judge Advocate General's Office before they become effective. That is to say, they are held in suspension—that part—until the review, thus placing the War Department review of officers' and enlisted men's cases on the same basis—putting them on a parity on the question of review.

The Judge Advocate General is given the power to grant new trials and set aside sentences upon applications submitted within 1 year after final disposition of a case. That is in addition to the power of review. In World War II cases, the 1 year runs from the termination of the war or the final disposition of the case, whichever is later.

In order to free court martial from undue influence by commanding officers, which is a common source of complaint—I am sure it is exaggerated, but there have been instances of it—the bill declares it improper and unlawful for any person other than the prosecution or defense to attempt to influence a court martial in reaching its findings or sentences or to influence an appointing or reviewing authority in passing upon the findings or sentences. And the Manual for Courts Martial will be amended to clarify the right of members of courts martial to exercise their own judgment, and a method to prohibit the reprimand of a court or any of its members with respect to any court martial action. There were instances where a court martial acquitted a man and were reprimanded for it, and that, of course, had an effect upon subsequent courts. This prohibits that. The manual would also delete the present authorization for reviewing authorities to advise courts martial of their nonconcurrence in findings of not guilty. That is a similar situation.

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The bill would make qualified senior enlisted personnel—here is another point that has caused a great deal of criticism, and I am going to discuss that a little more fully later on—from other units than that of the enlisted man tried eligible to serve as members of general and special courts martial which try enlisted men, this to be done within the discretion of the appointing authority.

There has been some feeling that perhaps we should go a little further on that, and I will discuss it more fully in a few minutes.

In order to further meet any feeling of discrimination in favor of officers, the War Department will request an amendment to the existing Executive order of long standing so as to permit the trial of officers by special courts martial. The point has been made that frequently officers were not tried at all because if tried by general courts martial it would almost invariably result in dismissal and therefore they hesitated to try him because he might not have committed a serious enough offense to be dismissed. This permits their trial by special courts martial, which would be designed, among other things, to meet two situations: One, to meet the hesitancy to try officers when they ought to be tried for various offenses; and, second, to enable a court to give a minor sentence for a minor offense.

And the bill would authorize disciplinary punishment without trial of officers up to colonel, the maximum of forfeiture being not more than one-half of his pay for 3 months. That extends the grades under which that can be done. It is now below major and does not at present apply to warrant officers. Court sentences involving loss of commission and concurrent reduction to the ranks would also be permitted. We were met with situations in the war where if an officer were tried and dismissed he was immediately subject to draft and he would come back in as an enlisted man. This would permit that to be done in one operation, which his offense warranted.

In an effort to prevent initially excessive sentences, the Manual for Courts Martial would forbid the imposition of unduly severe sentences just because the court believes that they would later be reduced by reviewing authorities. There was some charge, which I don't believe occurred in many cases but it may have occurred more than I know of, that some courts had the inclination to give a larger sentence, knowing that there would be a subsequent reduction This would instruct the courts to give what they think is a fair sentence and not to give weight to the fact that it might be reduced later The bill provides that maximum punishments in theaters of operation and in wartime as well as in peacetime be prescribed.

Under the bill rape may be punished by a lesser sentence than death or life imprisonment—today it requires one of the two—and the quantum of punishment for murder without premediation is made discretionary.

The bill expressly prohibits coercion in any form in the procurement of admissions and confessions and provides punishment for any violation.

As to enlisted men on the courts—I will come back to that subject in a minute—the bill follows the recommendation of the American Bar Association Committee. The belief has been expressed in some quarters that enlisted men should be required on all courts trying enlisted men and that the matter should not be left discretionary with the

appointing authority. On the other hand, there is a definite feeling that enlisted men may not wish to be tried by other enlisted men. And some combat commanders feel that it would be detrimental to discipline to have enlisted men on courts. For these reasons, I think, the committee left the matter flexible—at least those are our reasons for approving the committee's recommendation.

Now, also I understand that there is some difference of opinion as to the exact amendment that should be made to article of war 88 relating to influence exerted on courts martial. There, again, I am sure that many commanding officers feel very strongly that we should go no further than we have gone, and we feel we have gone pretty far in preventing that influence.

Now, in evaluating the changes that are to be made—and I think this is a very important fact, so important that you may want to hear from some combat commanders on these changes—we must not lose sight of the point of view of the combat commanders. They feel that the Army's job is to build a fighting force and win a war. They believe that the men as a whole, particularly the good men, must be protected. This cannot be done, they say, without discipline over the cowardly and unruly. This discipline in turn requires machinery for swift and effective punishment of the wrongdoer.

On the other hand, as a lawyer I feel and many in the Army feel that we must insure that a man charged with an offense, even in war, must have a full and impartial hearing, free from tyranny and interference. And he must be afforded a fair review of his case. This is important not only in order to prevent injustice to the individual, but it is important because a fair court-martial system is productive of the morale necessary in the army of a free people.

It is our belief that the court-martial system in the past has in general met these two criteria successfully—that while discipline was being maintained the dispensation of justice has been sound and fair and has compared favorably with any in civil life. And we do not propose revision of the Articles of War on the theory that the administration of military justice has appreciably failed, either during the war or at any other time. But we do realize, and have realized, that with the wide experience gained in World War II we can make improvement in the existing system. It is such improvement that we seek in this bill.

Mr. ELSTON. Mr. Secretary, I would like to ask you how you look upon the court martial system? Do you consider it a system to administer justice or a system for the purpose of maintaining discipline?

Mr. ROYALL. Well, sir, I don't think you can omit either of those considerations. No army has ever succeeded without discipline, and they never will. That has been the experience not only of America but of other countries. Lack of discipline has been tried by countries that have very different ideas of government than we—has been tried not too long ago—and found to be unsuccessful.

A commanding officer must be able to command his troops effectively. Therefore, there must be a power in aid of discipline to punish the man who endangers the lives of his fellow soldiers or endangers the success of a campaign or a war. To that extent the court-martial system is helpful in preserving discipline.

On the other hand, that does not mean, and never has meant and it never has been intended to mean that a man should not have a fair trial. He is entitled to a fair trial. I believe he gets a fair trial under court martial—not a perfect trial but as fair as he would get anywhere else. We ought to make that process of trial just as fair as we can, without delaying the disposition of the case unduly and without removing the deterrent effect of sure punishment for the unruly or criminal soldier, in time of war particularly.

I don't believe, sir, you can dismiss either of those ideas. I think both of them must be borne in mind.

Mr. ELSTON. Mr. Secretary. I assume that you endorse all of the provisions of H. R. 2575.

Mr. ROYALL. Yes, sir; I do. Some of them we have given very careful consideration. I certainly don't think that my decision, which was the final decision on most of the questions, on all the questions subject to approval by the Secretary, is right in every instance. I don't mean to say I am 100-percent right. But as I see it, this bill is the correct way of handling it.

Mr. ELSTON. Have you given some study to H. R. 576, the bill introduced by Mr. Durham of the Armed Services Committee?

Mr. ROYALL. I had a comparison made of that bill by the Judge Advocate General's Department, and I did look at their summary of the differences between the two. I don't remember that in detail—it probably will be dealt with better by General Hoover or General Green—but I am familiar enough to feel that the differences should be resolved in favor of this bill, that is H. R. 2575.

Mr. ELSTON. I would like to have you enlarge a little more on the two bills as they now provide for enlisted men serving in courts-martial cases. I notice, in H. R. 2575, that enlisted men will only serve when it is deemed proper by the appointing authority, whereas the bill introduced by Mr. Durham makes it possible for an enlisted man to insist that enlisted men be members of the court.

Mr. ROYALL. Well, sir, that is a question that certainly has two sides to it. I don't know whether you will recall it or whether you were present, but when I appeared before the House Military Affairs Committee, I believe it was before I was Under Secretary, I expressed the personal opinion that service on courts martial should be a right of the enlisted man. I am now inclined the other way, but do not have such a strong feeling in the matter.

Now, I will tell you what led me to make this change. That will probably give you the best idea of the question from my standpoint. In the hearings before the American Bar Association committee and in the questionnaires they sent out, there was a surprising number of enlisted men who did not favor enlisted men serving on the court. I don't remember what the proportion was. However, that view impressed the committee. I talked with some of the members, after they filed their report, and they told me that it had impressed the committee. There was a real difference of opinion on the part of the enlisted men. I think that arises out of the fact that they prefer to be tried by more experienced people.

The second thing is they found that the enlisted men who were in authority—the sergeants and the corporals—were in many instances inclined to be considerably harsher than the officers, which from my

experience in World War I was certainly the case. I don't know whether they have changed since then or not.

So that, or perhaps some other reasons, led the committee to believe that there was a considerable feeling on the part of the enlisted men that they didn't want it.

Another thing is there were some combat commanders—I don't mean to say that this is universal—but there were some combat commanders who felt that to put enlisted men on courts martial might had a bad effect on general discipline; that it might provide, for example, a split on a court, which might become chronic, with officers and enlisted men taking different views, that is, drawing a line that would not be helpful.

Mr. NORBLAD. Pardon me, Mr. Chairman—under the bill the provision is for one-third, so that there couldn't be a split.

Mr. ROYALL. I don't mean that would you have a dissent which would amount to anything, but you would still have a division in the court.

Now, those two considerations I think are the ones that led the American Bar Association Committee to feel that the matter ought to be left more flexible and therefore you shouldn't make it mandatory. Our idea was that with this discretionary provision, the Secretary or Under Secretary of War or the Judge Advocate General would issue regulations making enlisted men on courts the usual practice and then if it proved by experience that it was unwise we wouldn't be bound by the statute to continue it. That is what led me to finally reach the conclusion that it should not be made mandatory.

Mr. ELSTON. Don't you think that where it is optional with the accused to ask for enlisted men on the court, the matter would be taken care of?

Mr. ROYALL. That would serve to meet in part the first objection, as to whether an enlisted man wants to be tried that way. It wouldn't meet it entirely because there would be a certain feeling I think in some instances by an enlisted man that if he didn't ask for enlisted men on the court it would be a reflection one way or the other on him—on his being guilty or innocent.

Mr. ELSTON. Of course, you appreciate that in time of war particularly, where you are resorting to selective service in order to obtain military personnel, you have some very able lawyers among the enlisted men.

Mr. ROYALL. You do.

Mr. ELSTON. And on the other hand, there are many officers who have had no legal training.

Mr. ROYALL. That is right, sir.

Mr. ELSTON. Let me ask you, in that connection, what course of legal training is given at West Point.

Mr. ROYALL. Well, I know they give them a course in military law.

Of course, a little less than 1 percent of the officers in the Army during this war were West Pointers, less than one out of every hundred, so that didn't play a very big part, I don't think, in the original courts martial.

Mr. NORBLAD. May I ask him a question—Isn't it a fact that most of the West Pointers were commanding, whereas the civilian officers were not the commanding officers, and any abuses could arise by way of the commanding officer rather than the man who was under him?

Mr. ROYALL. Certainly as commanding officers, but as I think a much larger percentage of any criticism of the commanding officers would be directed against the West Pointers than 1 percent. I don't know how big a part it would be—probably 20 percent, or 25 percent, I don't know.

Mr. ELSTON. You stated a while ago that there would be a very complete system of review.

Mr. ROYALL. That is right, sir.

Mr. ELSTON. By the Judge Advocate General's Office.

Mr. ROYALL. Yes.

Mr. ELSTON. I would like to ask if new evidence may be received by the reviewing court.

Mr. ROYALL. No; that would not come under the reviewing authority. That comes under the right to reopen the case, where new evidence could be received within 1 year after the review is complete.

Mr. ELSTON. One of the very serious objections to the present system, or at least as it was administered during the war, was that there was not a sufficient pretrial investigation of the facts. What have you to say about that?

Mr. ROYALL. Well, sir, I think that was greatly exaggerated. As a matter of fact, the American Bar Association Committee, in studying numerous cases, I don't think found a single instance where they thought an innocent man had been convicted. Now, I don't mean there weren't any. You couldn't have thousands upon thousands of cases without making a mistake. Nobody could do that, but there really wasn't any difficulty along that score, and appreciable difficulty. Certainly the record was much better than any civil court that I ever knew of. So whether or not there was an adequate preliminary investigation I don't think played any substantial part in the final result.

However, our bill does not make it a jurisdictional factor, but it does contemplate a thorough investigation. In the States in which I have practiced law, preliminary investigatons are never a jurisdictional requirement. I know they are not in the Federal courts, and not in any State where I have tried a criminal case, and I have tried criminal cases in several States. We would be departing radically from accepted judicial practice, generally throughout the United States, if we made that a jurisdictional requirement. That is really the difference between the Durham bill and this, as I understand.

Mr. ELSTON. Yes; of course, in this bill you have nothing comparable to the grand jury system, where you conduct a preliminary examination to determination whether or not formal accusation shall be made.

Mr. ROYALL. I should have added that, sir, because the preliminary investigation does have some of the attributes of the grand jury investigation. However, of course the commanding officer also has to decide whether charges are to be preferred, too, in the Army.

Mr. ELSTON. One objection to the whole system was that too much control over the court was vested in the commanding officer.

Mr. ROYALL. I think that has been a very common source of complaint. And I think, sir, in fairness to the American Bar Association Committee and this committee in its previous investigation, there were

instances, and qute a number of instances, where the commanding officers did exercise a good deal of influence on the courts. I don't think there were as many as the press reports would indicate, but some have come to my attention where I am pretty sure there was influence exercised. We have sought to correct that.

Mr. ELSTON. There was some complaint, also, that because there was an inadequate pretrial investigation, evidence got away.

Mr. ROYALL. Yes, sir.

Mr. ELSTON. Armies were on the move and witnesses were present today and gone tomorrow, as a consequence of which there was an incomplete preliminary investigation and much evidence that might have been helpful to an accused was lost. So don't you think, under such circumstances, there should be some mandatory provision with respect to an adequate preliminary investigation?

Mr. ROYALL. I would not make it mandatory, for the reasons I have stated.

Mr. NORBLAD. You would not, sir?

Mr. ROYALL. Would not make it mandatory. That is also a close question. I don't think you can be too dogmatic either way on that. I think it is sufficient as we have it because it would be done in every case, unless there were some very unusual circumstances. In practice it would be done, under our provisions.

Mr. ELSTON. What would be the reason why it couldn't be done?

Mr. ROYALL. Well, this is another reason: The more legal technicalities we inject into the court-martial system—jurisdictional requirements, one of the principal things lawyers who are technical like to bring up on appeal—the more we have of those, the more we are going to hurt the system.

The reason the court martial has done better in my opinion than any civil system that I know of, in reaching just results, is because we have kept those legal technicalities to a minimum.

Frankly, Mr. Chairman, I think the American system of justice in the civil courts is much too technical today. I think you have many technicalities that ought not to be in it, and I think it affects their results. I think it leads to innocent men being convicted in some instances and in a great many more instances it leads to guilty men getting off. The object of a system of justice ought to be to convict the guilty and acquit the innocent. The other things are merely details. Now, every time you inject some technical point in the criminal process, it is good for the lawyers—I was never a prosecutor, when I tried criminal cases, and as defense counsel I realized the value of having those things—but at the same time, I realize, it doesn't always promote justice.

I would shy away from jurisdictional requirements. When you get a jurisdictional requirement which goes contrary to the normal civil court procedure, I am sort of inclined against it.

Mr. ELSTON. Well, I agree with you that we shouldn't weight the system down with legal technicalities, too many of them at any rate, but on the other hand I don't feel that we should deny to any accused person full and complete opportunity to obtain all the evidence he needs in his defense.

Mr. ROYALL. Well, I agree with that, sir. And we put that specifically in here, as you will remember. I didn't deal with that in my

statement, but that is in there. To remove any question, we recommended that. It is not in the bill, but we have recommended it in the manual.

Mr. ELSTON. We will adjourn until 10 o'clock tomorrow morning.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 11, LEGAL,
Tuesday, April 15, 1947.

The subcommittee met at 10 a. m., Hon. Charles H. Elston (chairman) presiding.

Mr. ELSTON. General Green, will you come forward, please.

General GREEN. My uame is Thomas H. Green. I am a major general, the Judge Advocate General of the Army.

Mr. ELSTON. General, would you just state what the position of the Judge Advocate General is with respect to H. R. 2575?

General GREEN. Well, I was here yesterday when General Royall gave his statement and the position of the War Department. I am a part of the War Department team and I take the same position, sir.

Mr. ELSTON. In other words, you support this bill?

General GREEN. Yes, sir.

Mr. ELSTON. In its entirety?

General GREEN. Well, of course, the War Department has decided that this is the bill that they want to support. There are military considerations, as well as judicial considerations, in legislation of this sort. I believe the legislation is a step forward.

Mr. ELSTON. The bill provides for setting up of an appeal board within the Judge Advocate General's Department.

General GREEN. Yes, sir; a judicial council.

Mr. ELSTON. I wonder if you would explain the details of it, just how it would operate.

General GREEN. Well, under the present law the cases come before a board of review, which consists of three officers of the Judge Advocate General's Department. Certain of the court-martial cases, those which involve a penitentiary sentence, those where the dishonorable discharge is not dispensed, all officers' cases, and all death cases, are reviewed by these boards.

Now, these boards, of which there are now four in my office, consider merely the legal sufficiency of the record. If the record is legally sufficient, they pass it. Thereafter, somebody must take the final action. In some of those cases, they come to me for final action; some go to the Under Secretary of War and of course some go to the President.

Now, the Judicial Council is a high-ranking judicial group of not less than three officers, who, under the Judge Advocate General, will make final determinations in every case except death cases and general officers' cases. They will equalize the sentences, will order new trials, will hear all appeals, and will review the evidence, and any other of the things that are called for and they are called upon to do.

Mr. ELSTON. Will they hear new evidence?

General GREEN. Yes, sir; they would hear new evidence to determine whether a new trial should be ordered.

It goes further than that, sir. In case rights have been taken away, this board has the right to restore those rights. It is in the nature of an appellate court and performs primarily judicial functions.

Mr. ELSTON. What appeal would there be from a decision of the council?

General GREEN. If it is approved by the Judge Advocate General there wouldn't be any appeal. That is a final appeal. It takes the place of what the Secretary of War does now, and what I do and in certain cases what the President does.

Mr. ELSTON. There still would be final review by the President in certain cases, would there not?

General GREEN. Always the President has a right to have that.

Mr. ELSTON. That would be in all general court-martial cases?

General GREEN. Yes, sir. As the law now stands, for example, sir, if a death sentence is passed down by a court martial it has to go to the President, whether everybody along the line recommends that it be cut to a 5-year sentence. This board would cut it off. Also, according to this bill, the commanding general—that is, the first reviewing authority—would have the same power.

Mr. ELSTON. Would this require a considerable increase in personnel in the Judge Advocate's Department?

General GREEN. I wouldn't think so; no, sir. We don't contemplate that we will require very much additional personnel. It probably would require additional rank.

Mr. ELSTON. To what extent?

General GREEN. Well, to the extent that those officers having such tremendous powers should be at least colonels. I believe they should be generals.

Mr. ELSTON. Well, how many would be so affected?

General GREEN. Three, sir.

Mr. ELSTON. In other words, you feel that the three members of this Judicial Council should all be general officers?

General GREEN. I think they should; yes, sir; of the highest type.

Mr. ELSTON. Certainly they should be lawyers?

General GREEN. Oh, certainly; yes, sir. They should be members of the Judge Advocate General's Department. All of them are lawyers, sir.

Mr. ELSTON. Now, one thing I don't believe that we were entirely clear about yesterday and that is the amount of legal training the West Point graduate receives.

General GREEN. I think General Hoover can explain that in detail as he was professor of law up there, but, in general, I think in the last year one-third of their course is law. They have courses in international law, military law, constitutional law, and elementary law.

Mr. VINSON. General, with reference to the appeal provided for in this bill, does every accused have a right to appeal, or is it restricted based upon the degree of sentence he receives?

General GREEN. Under this bill, or at present?

Mr. VINSON. Under this bill.

General GREEN. Yes, sir.

Mr. VINSON. Rules and regulations will be prescribed upon which he can fix his appeal.

General GREEN. Yes, sir—I am speaking of general courts, sir.

Mr. VINSON. That is right—general courts martial.

General GREEN. Yes, sir.

Mr. VINSON. Now, does the bill set out in how many days he must file his application for appeal, or certiorari, or whatever methods you are going to adopt to carry his case to the appeal board?

General GREEN. No, sir; we contemplate that will be by regulation.

Mr. VINSON. Then the appeal board, under this bill, is to consist of at least three or more ranking officers.

General GREEN. Yes, sir.

Mr. VINSON. From the Judge Advocate General's Department.

General GREEN. Yes, sir.

Mr. VINSON. And if he has a general court martial every accused has the right to appeal to the board of appeal?

General GREEN. That is correct, sir.

Mr. VINSON. And the decision of the board is final and conclusive.

General GREEN. That is correct, sir.

Mr. VINSON. Of course, subject to review in death cases by the President.

General GREEN. That is correct, sir.

Mr. VINSON. That is all.

Mr. RIVERS. May I ask one question?

Mr. ELSTON. Mr. Rivers.

Mr. RIVERS. I noticed, General, that Mr. Royall, in his testimony yesterday, said, on questions of law—at least, I understood him to say—that the trial court, or whatever it is down the line, in the original jurisdiction, was final in its decision on matters of admissibility of evidence and other questions of law; is that correct?

General GREEN. That is correct for the purpose of the trial, but not correct for the purpose of the review. All general court-martial cases are reviewed in my office eventually The courts rulings on the law are reviewed at that time.

Mr. RIVERS. If the attorney representing the accused should object on some question of law, it seems to me, whether it is a general court martial or any other kind of court martial, there should be some appeal as to the admissibility of that particular evidence.

General GREEN. There is. Every general court-martial case is reviewed in my office.

Mr. RIVERS. What about any other court martial?

General GREEN. Well, the special courts martial are reviewed by the Staff Judge Advocate in the division commanders office.

Mr. RIVERS. What is your prescribed time of appeal for a general court martial?

General GREEN. Well, there isn't any. It is automatic, as it now stands, so far as the legal sufficiency of the record is concerned.

Mr. RIVERS. You mean an indefinite period of time?

General GREEN. Yes, sir; as soon as the case is tried—may I trace it for you? The case is tried by the general court, in a general court-martial case. The record is then sent to the commanding general who ordered the court. It is then referred to the Staff Judge Advocate, who is one of my men, a lawyer, who makes his recommendation to the commanding general. The commanding general takes his action. Thereafter the record comes to my office for final review.

Mr. RIVERS. Well, does the opposing counsel get a copy of the record upon request?

General GREEN. Yes, sir; the accused gets a copy of the record always. Our procedure includes asking the accused at the beginning of the trial if he desires a copy of the record of trial.

Mr. RIVERS. And the opposing counsel?

General GREEN. Yes, sir.

Mr. RIVERS. Now, I notice Mr. Vinson brought up the fact of appeal. It occurred to be yesterday, when the Under Secretary was testifying, that under the GI bill of rights, if you will recall, there is a certain appellate right vested in all of these cases. How will that conflict with the GI bill of rights?

General GREEN. I don't think the GI bill of rights includes the review of dishonorable discharges.

Mr. RIVERS. I thought it applied in all cases.

General GREEN. I don't think so, sir.

Mr. RIVERS. So there will be no conflict between this bill and what is in the organic, substantive law in the GI bill of rights.

General GREEN. I wouldn't think so, no.

Mr. RIVERS. Now, I was interested to hear his testimony about what the commanders of the armed forces thought about having too much democracy on these juries because of morale and because of results. I wonder if it ever occurred to you that where you have mostly civilians fighting this war you should take that into account whenever you compare them with a bunch—I don't mean to say that disparagingly, but with the Regular Army men who have grown up under these regulations. I hope you keep that in mind when you take the civilians off the streets and from the offices and from the schools. You can't regiment as quickly as you can, possibly, a man who has grown up under the regulations of the Army. In all deference to the great job your commanders did in the field, it should be remembered that civilians were a part of that great result and I hope that they won't be too strict in interpreting the regulations, where these boys sometimes weren't so amenable to the Army regulations—and the Navy regulations, too—inaccountability for the things that they may have done. Did you ever think of that?

General GREEN. Yes, sir, but I haven't lost sight of the fact that most of them were very amenable to it and learned very rapidly.

Mr. RIVERS. I know that, but all of them certainly were not as amenable as the Regular Army man who had grown up under the discipline, throughout the years.

General GREEN. I started as a private myself, Congressman, and I think I understand.

Mr. RIVERS. Well, I, too, started as a freshman Member of Congress, and I am working my way through.

Mr. VINSON. May I ask a question——

Mr. RIVERS. I haven't quite finished. I will finish with this question. Is it true, in all cases of death, where a member of the Army commits homicide, he automatically is sentenced to death, under the Articles of War?

General GREEN. No, sir. For murder we have either life imprisonment or death. That is what the law prescribes. On manslaughter, we have lesser punishments for them.

Mr. RIVERS. As I recall, when we were over in Japan some time ago, one of our boys killed one of those Japs. They got plenty of them over there and I don't know how they even found it out. He was automatically given death, and the President had to commute his sentence.

General GREEN. Well, where they find him guilty of murder the sentence is mandatory, by Article of War 92. It must be death or life imprisonment.

We are recommending a change in here.

Mr. RIVERS. Yes. That is all. Thank you, sir.

Mr. ELSTON. Mr. Vinson.

Mr. VINSON. Just one question. Has an accused, in any special court martial, the right of appeal, or does he go before the board of review?

General GREEN. He has an automatic appeal to the Staff Judge Advocate who is in the division.

Mr. VINSON. That is right.

General GREEN. But those cases do not come before the board of review. However, in this bill it provides for bad conduct discharges and in those cases it provides that they shall go to the board of review.

Mr. VINSON. But, under this bill, one who has a court martial before a special court doesn't have the right to appeal to the appeal board, does he?

General GREEN. He does not, no, sir.

Mr. VINSON. All right.

General GREEN. I presume you are speaking of this council that we provide?

Mr. VINSON. That is right.

General GREEN. The answer is no.

Mr. NORBLAD. Will the gentleman yield?

Mr. VINSON. Yes.

Mr. NORBLAD. I think there is a misunderstanding with reference to special courts martial. In the case of a special court martial there is no record kept of the evidence, of the rulings of law, or anything else. The only thing kept in a special court martial is the actual charges against a man and the verdict of the court—is that not correct?

General GREEN. No.

Mr. NORBLAD. Whereas in a general court, you keep a record of all the evidence, the rulings of law, et cetera.

So a general court can be thoroughly reviewed, whereas with a special court, not being a court of record, it is impossible to make much of a review. In my opinion, that is where a lot of your abuse occurs, in the court martial.

Mr. VINSON. What degree of offenses go before a special court martial? Just what is the character of them? AWOL?

General GREEN. Yes, sir, with the maximum penalty being 6 months and two-thirds pay.

Mr. VINSON. You would classify them as misdemeanor offenses?

General GREEN. Yes, sir, I would.

Mr. VINSON. And drawing a distinction between a misdemeanor and a felony, a felony would go before the general court martial?

General GREEN. That is correct.

Mr. VINSON. And it would be subject to review?

General GREEN. That is correct.

Mr. VINSON. By the appeal board?

General GREEN. Yes, sir.

Mr. VINSON. And with a misdemeanor offense or an offense where the maximum penalty is only 6 months, he would not be permitted an appeal to the appeal board?

General GREEN. That is correct.

Mr. VINSON. That is all.

Mr. ELSTON. General, a special court martial has power, does it not, to grant a bad-conduct discharge?

General GREEN. Under this bill it would, yes, sir; and under those circumstances it would go to this appeal board.

Mr. ELSTON. In other words, if it involves a bad-conduct discharge, it goes to the appeal board?

General GREEN. That is correct, sir.

Mr. VINSON. Otherwise it does not?

General GREEN. That is correct, sir.

Mr. RIVERS. In that connection, Mr. Chairman, for the record, could I ask the General to interpret for us all kinds of courts martial, by name?

General GREEN. Yes. The summary court consists of one officer. It has a jurisdiction of 30 days and two-thirds pay for the same period. A special court martial comprises three or more officers. It has a jurisdiction of 6 months and two-thirds pay for 6 months. The general court martial consists of more than five officers, and it has unlimited jurisdiction. It can adjudge the death penalty, authorized by the Articles of War.

Mr. VINSON. May I ask one more question——

Mr. RIVERS. I just wanted to follow it up, if you don't mind, for the sake of continuity. Would you follow that by putting in the record those of the court martials which are appealable?

Mr. VINSON. General court martial.

Mr. RIVERS. Are generals the only ones?

General GREEN. If you are speaking of appeal to the board of review, I would say the general court martial is the only one now that is reviewed by the board of review.

Mr. RIVERS. And the others can be reviewed under the GI bill of rights?

General GREEN. No, sir; I dont' think that is correct. The GI bill of rights expressly excludes sentences by general courts martial.

Mr. RIVERS. I am talking about the other courts martial.

General GREEN. Well, you wouldn't get a dishonorable discharge on those, you see.

Mr. JOHNSON of California. Mr. Chairman, could I ask a question——

Mr. RIVERS. Of course, I realize the Regular Army man wouldn't have the GI bill of rights, but during the war I know of at least one case where the action of a board was reviewed, in the Navy, for an undesirable discharge. May I ask the Judge Advocate of the Navy, isn't that true?

Admiral COLCLOUGH. The board of review, on discharge dismissals under the GI bill, can review, for the Navy, an undesirable discharge or a bad-conduct discharge, which we have had during the war. It cannot review a dishonorable discharge which is by sentence of a general court martial, which as General Green states, is expressly excepted from section 301 of the GI bill of rights.

Mr. RIVERS. All right, I appreciate it.

General GREEN. The Army does not have now the two discharges that the Admiral speaks of. We have only the dishonorable discharge.

Mr. RIVERS. I see. Thank you, General. I just wanted that for the record.

Mr. ELSTON. Mr. Vinson.

Mr. VINSON. Now, in your summary courts martial and your special courts martial, the accusations are drawn by the officer in direct command?

General GREEN. Usually, yes, sir; although anybody can prefer charges.

Mr. VINSON. That is right. I mean, the actual drawing of the accusation or indictment is done in the field.

General GREEN. Yes, sir; that is correct.

Mr. VINSON. Now, in your general courts martial, they are all drawn in your office, are they not?

General GREEN. No, sir. They are drawn in the field, also.

Mr. VINSON. Then you don't center the drawing of your general court-martial specifications here?

General GREEN. No, sir.

Mr. VINSON. The commanding officers in the field have the authority to draw the general court-martial specifications?

General GREEN. That is correct; yes, sir.

Mr. VINSON. That is all.

Mr. ELSTON. General Green, does the Staff Judge Advocate have the authority to review the evidence, as well as the law, in special court-martial cases?

General GREEN. He has a synopsis of the evidence.

I should like to correct a statement made awhile ago. The synopsis of the evidence in a special court martial goes forward. They don't have a stenographer taking complete notes. The trial judge advocate makes a synopsis of the evidence which goes forward with the record.

Mr. ELSTON. But he can from the synopsis of the evidence review the evidence, as well as the law?

General GREEN. That is correct, yes, sir.

Mr. ELSTON. That is in all cases that do not involve a bad-conduct discharge?

General GREEN. That is true.

Mr. ELSTON. And his decision is final?

General GREEN. No, sir. He makes his recommendations to the commanding general. The commanding general takes final action.

Mr. ELSTON. But it is final within the field?

General GREEN. Yes, sir; that is correct.

Mr. ELSTON. There is no appeal beyond the commanding general?

General GREEN. That is correct.

Mr. ELSTON. And, of course, he is acting for the commanding general and in practically all cases his decision is the decision of the commanding general?

General GREEN. Well——

Mr. ELSTON. That is correct, isn't it?

General GREEN. Yes, sir.

Mr. ELSTON. Now, is that the system that now prevails?

General GREEN. That is so, yes, sir.

Mr. ELSTON. So there has been no change in this bill?

General GREEN. Not a bit in that respect.

Mr. ELSTON. I wonder if you would just indicate what changes this bill generally makes in special court-martial cases?

General GREEN. The only change, that I recall offhand, is in the bad-conduct discharge. It gives the special court the right to give bad-conduct discharges and requires such cases to be reviewed by the Judge Advocate General.

Mr. ELSTON. It also provides, doesn't it, for each special court-martial case the court shall appoint a trial judge advocate and defense counsel?

General GREEN. That is correct.

Mr. ELSTON. And one or more assistant trial judge advocates and one or more assistant defense counsel, if they are necessary.

General GREEN. Yes, sir. That is in effect now, sir.

Mr. ELSTON. There is no change there, then?

General GREEN. There is no change in that.

There is one further change, however, that you will find in there. There is a provision that if the trial judge advocate is a lawyer or a judge advocate, the defense counsel must also be.

Mr. ELSTON. Now that has been changed?

General GREEN. Yes, sir.

Mr. ELSTON. As I understand this section, it provides that the lawyer must be admitted to practice in the Federal courts, or before any State court.

General GREEN. And approved by the Judge Advocate General.

Mr. ELSTON. Do you mean that he would approve in each individual case?

General GREEN. He would have to approve each of them. He would have to be either a member of the Judge Advocate General's Department or approved by the Judge Advocate General as fit to be a defense counsel.

Mr. ELSTON. In other words, he might be admitted to practice before the Supreme Court of some State and still be held by the Judge Advocate to be unfit to act as counsel in a court martial case?

General GREEN. That is correct, sir.

Mr. VINSON. May I ask one question?

Mr. ELSTON. I think that is perhaps a good provision, because some people can be admitted to practice in some States very easily, and it is rather difficult in others.

General GREEN. Well, it was intended to catch men who had simply graduated from law school and who were admitted to the bar and had no experience.

Mr. ELSTON. Now, General, another question which pertains to a pretrial investigation. I think a great deal of complaint has been made about the inadequacy of pretrial investigations. Accused persons have sometimes said that they were not given the opportunity to present all of their evidence; that there wasn't a sufficient investiga-

tion of the facts in the case; that by the time the case got up on review witnesses were gone or evidence has disappeared. Do you think that this bill sufficiently protects the accused in that respect?

General GREEN. I think it does; yes, sir; because it requires the judicial review in my office and any violation of the accused's rights can be accounted for when the review takes place. In other words, we can what we call "bust" the case if any substantial rights of the accused have been violated.

Mr. ELSTON. Well, there isn't very much of a pretrial investigation required.

General GREEN. It may be a serious one or it may not be very serious. In the case of a. w. o. l. all you have is two papers. One shows that the man left and another shows that he came back. That doesn't require a great deal of investigation. But in an involved case it sometimes requires a great deal of investigation.

I am satisfied that a great good has developed by that process, because it washes out those cases where there isn't any case against the soldier or the officer accused.

Mr. ELSTON. Do you have a question, Mr. Johnson?

Mr. JOHNSON of California. Yes.

As I understand it, this law provides that when you assign a judge advocate, say, to a department somewhere in the outlying areas, you consult with the commanding general as to where he is to serve?

General GREEN. Yes, sir.

Mr. JOHNSON of California. When he becomes part of his staff he is subject to his jurisdiction; is he not?

General GREEN. That is correct, sir.

Mr. JOHNSON of California. And when the notations are made on his efficiency report the commanding general there would have the right to review his work as a J. A.; wouldn't he?

General GREEN. Yes, sir.

Mr. JOHNSON of California. Well, now, do you think, for instance, a ground soldier is capable of making an honest appraisal of what a judge advocate does, assuming a cast where he might decide a case or handle a case differently than the commanding general thought it should have been handled?

General GREEN. Well, it has been argued and the complaint has been made that he can't. That question is open to debate.

Mr. JOHNSON of California. Well, I have heard this complaint—although, frankly, I was never able to get a direct verification of it—that during the war commanding officers would upbraid judge advocates for giving too light sentences or too heavy sentences.

They would feel that justice hadn't been accomplished, although the men and courts honestly thought that they were rendering justice. Now, wouldn't it be better to have the man's superior in the Judge Advocate's Department review his work, to see if he had done good work or poor work?

General GREEN. Well, we have—I don't mean to avoid answering—a method of determining how good and how bad a man is, by reason of reviewing his work. Almost every officer in the Department, after he has been there a little while, can be cataloged pretty well, by reason of his work.

Now, if you have the commanding general's power of control over the staff judge advocate taken away, you make a breach there and my man won't be as valuable to me, then, as he might be if he was on the commanding general's staff. The power of assignment is of very great value to us because when the man no longer is satisfactory to the commanding general or he doesn't want to stay, we can then take him out and put him somewhere else. I think we can meet the problem that you have in mind in that way.

Mr. JOHNSON of California. Well, is it not a fact that the bar association recommended a plan where you would have an independent system of justice?

General GREEN. That is correct.

Mr. JOHNSON of California. And the measure of a man's worth would be by the people working in the same department?

General GREEN. They so recommended; yes, sir.

Mr. JOHNSON of California. You certainly have to admit that a judge advocate, if he is a good one, is a specialist.

General GREEN. He is.

Mr. JOHNSON of California. And the administration of justice is something that has to be understood. No layman can really understand it properly and appraise it; isn't that a fact?

General GREEN. Well, the bar association recommended along the lines you suggest, sir.

Mr. JOHNSON of California. It is your view, then, that it might promote friction to have a judge advocate on a commanding general's staff who was only responsible to somebody higher up in the Judge Advocate's Department.

General GREEN. I am inclined to think there is a possibility of it. I think it needs a great deal more thought than has been given to it.

Mr. JOHNSON of California. Well, can you expound on that a little more, so that we can get your views on it?

General GREEN. It is human nature, where you have somebody in your office that is not under your control or direction, to have friction. There is very apt to be friction and possibly a breach there, whereas if the power is given to the Judge Advocate General here, on the matter of judicial review, you can correct all the injustices, so far as the trials are concerned, and if he has the assignment of his officers he can do a great deal to take care of the rights of his men.

Mr. JOHNSON of California. Well, of course, this concerns the administration of justice as far as criminal cases are concerned, but your judge advocates also render legal opinions.

General GREEN. That is correct; yes, sir.

Mr. JOHNSON of California. And give legal advice?

General GREEN. Yes, sir.

Mr. JOHNSON of California. And sometimes you have to give a man some advice that he doesn't want. Naturally, he would antagonize that man, although he was doing his work in lawyerlike way.

General GREEN. Well, the line view would be against that.

Mr. JOHNSON of California. I understand that.

General GREEN. The view of the line officers would be against it.

Mr. JOHNSON of California. But the bar association thought that was a practical way to make the administration a little more perfect.

General GREEN. They so recommended; yes, sir.

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Mr. JOHNSON of California. Now, didn't the committee that studied this in the last Congress—the Seventy-ninth Congress—recommend a similar plan?

General GREEN. Well, in substance; yes, sir.

Mr. NORBLAD. Mr. Chairman, Mr. Johnson just mentioned the fact that he had heard about, but never had confirmed, the matter of undue influence in these court-martial cases. I might say that during the course of the war, in an overseas base of the Ninth Air Force, I was acting as the defense counsel to a man. I was fortunate in having the man given a very light sentence. Immediately upon the commanding officer of that base—not the judge advocate, but the commanding officer of that base—having knowledge of it, he announced throughout the entire base, by a system of loudspeakers which every enlisted man and every officer heard, that he wanted the court brought into his office the following morning at 9 o'clock. We were brought in and we were severely reprimanded because we had given the man a light sentence. We were told that after a man has been charged with a crime he is very probably guilty and we should, in consideration of the case, have kept that in mind.

Further along the same line, to bring out the matter, I had acted as a defense counsel, and he pointed at me and said, "I'll have no lawyers orating in my court," meaning that I was precluded thereafter from making a defense statement at the close of the case, in argument, such as any lawyer has a right to argue.

The man's name happens to be Col. Herbert B. Thatcher, a West Point officer.

Now, on that particular base no man thereafter received any justice because everybody avoided sitting on the court; everybody avoided having anything to do with it whatsoever. There was no one, as I say, who wanted the right of being a member of a court martial.

There is an example of the abuse that you members of the committee have heard about that I was directly involved in.

Mr. JOHNSON of California. Will the gentleman yield for a question?

Mr. NORBLAD. Yes.

Mr. JOHNSON of California. When this man made that statement, had he reviewed any of the evidence in the case?

Mr. NORBLAD. None whatever. He knew the sentence the man had gotten, and it was a fairly light sentence, as I say. That is all he knew about it. He, as I say, reprimanded the entire court. We stood at attention for 15 minutes while he reprimanded the entire court.

Mr. VINSON. May I ask a question? Did the facts justify a very light sentence?

Mr. NORBLAD. Yes. As a matter of fact, I will give you the facts, if the committee wants them.

Mr. VINSON. No.

Mr. NORBLAD. They are very brief, if you would like to have them.

Mr. VINSON. No.

Mr. BROOKS. I may say this to the gentleman: I received a similar complaint to that last Friday. It is not the first complaint that has come to my attention along the same identical lines.

Mr. VINSON. Well, I imagine that you might find the Department of Justice down here sometimes rather critical, behind closed doors, of divisions of the district courts. That is one of the traits of human nature that you can't correct.

Mr. BROOKS. The complaint I received was from an officer in the identical position that our colleague was there.

Mr. RIVERS. Will the gentleman yield?

Mr. NORBLAD. May I make one more statement. I checked that matter with Mr. Royall, as to the officer's background, and found he had taken all the legal courses at West Point. I sometimes wonder if the failure isn't in the West Point system—in what they teach. Aside from teaching a complete respect for their orders, they do not teach them the fundamental rights under the Constitution, the Bill of Rights, and the rights of a man in court.

Mr. RIVERS. If you will yield—since you say the facts are brief, why don't you put them in the record, for the edification of us all?

Mr. NORBLAD. I didn't understand you.

Mr. RIVERS. Why don't you put the facts in the record?

Mr. NORBLAD. The facts of the case were these: The man left the base—I have forgotten the individual's name—and went to London. He was picked up 12 hours later. He did not have a pass and therefore he was technically a. w. o. l. for 12 hours. He was then locked up by the Provost Marshal in London for a matter of 12 to 14 days. He was brought back and charged on this a. w. o. l. of only 12 hours. I pleaded that the man had already been given sufficient punishment, because he had been locked up in the judge advocate's jail in London for a matter of 2 weeks, which was certainly adequate punishment for a small 12-hour a. w. o. l. As a result, the man was given a sentence of either 5 days' restriction to the base or 5 days in our own base jail, I have forgotten which.

Mr. VINSON. May I ask one question? Don't you consider it a very serious offense, during a state of war and where he was almost on the battle line, for a man to be a. w. o. l. for any length of time?

Mr. NORBLAD. I do consider it so; yes, sir; but I felt the man had received adequate punishment. The man was doing work as a cook's assistant at an air base and had been gone only 12 hours, for which he had been locked up 2 weeks, and I felt that was adequate punishment. And apparently the court agreed with me, because that was the sentence they gave. I felt whatever the court gave as a sentence was to be honored by the commanding officer.

Mr. RIVERS. Did you finish with your facts?

Mr. NORBLAD. Yes, sir.

Mr. VINSON. If he is through, I would like to ask one question on that line. Is there anything in this bill relating to the time limit in which an accused must be brought before the special court or a general court?

General GREEN. No, sir; there isn't.

Mr. VINSON. Now, don't you think that something should be written into the law, that when an accusation or a charge has been preferred and a man is put under confinement, he must be given a speedy and prompt trial, instead of keeping him under confinement for 2 weeks or a month, and then bring him to trial?

General GREEN. That is in the court-martial manual now, sir. I don't think there should be anything written into the law, because you then restrict certain special cases where it may be necessary to delay them.

Mr. VINSON. Well, you made your preinvestigation.

General GREEN. Yes, sir.

Mr. VINSON. You acted in the capacity of a grand jury.

General GREEN. Yes, sir.

Mr. VINSON. You have gathered all the evidence.

General GREEN. Yes, sir.

Mr. VINSON. And from that evidence you concluded that the man has committed a certain offense, in the special court-martial and particularly in the general court martial. Now, don't you think he should be given a speedy trial, instead of keeping him under confinement or in the brig for, as oftentime happens, 30, 40, 50, and 60 days, before he is brought before a court-martial?

General GREEN. He ought to be given a speedy trial and I think, generally speaking, is, all things being considered.

You can go the other way, though. During the war, here in the Army Service Forces, we had statistics on it. They finally got it down so it was 1 day, or 2 days—something like that. That is just as bad as keeping the man too long in the guardhouse. You can't give a man a fair trial by giving him only 2 days to prepare his case.

Mr. VINSON. Well, any officer that is preferring charges has all the facts or he has enough facts to justify a charge; isn't that correct?

General GREEN. Yes, sir.

Mr. VINSON. All right. Then, if he has the facts assembled at that time should he not be given a speedy trial, instead of putting him under confinement or locking him up and keeping him 2 or 3 weeks?

General GREEN. Well, I think I better answer it this way, sir: I think unnecessary confinement should be stopped, and every effort is being made to stop it; but to say that he must be tried within a certain limited time is a mistake in my mind, for the reason——

Mr. VINSON. Well, in civil life a grand jury prefers an indictment against a citizen, or he is arrested either on a bench warrant or is already under warrant. Now, he has a constitutional right to have a speedy trial. Why shouldn't the same principle apply on Army offenses? I know cases in the Navy where men have been in the brig for 2 and 3 months after charges had been preferred against them before they are brought to trial, and no doubt it has happened in the Army.

General GREEN. It has, sir.

Mr. VINSON. Now, why shouldn't those men be given a speedy trial, because you are presumed to have enough evidence to convict him when you file the charge against him? At least, you have already made a prima facie case against him.

General GREEN. Well, might I explain this, sir, that in the lower echelons, where the charges are preferred, every guardhouse is required to furnish a report to the staff judge advocate of the division, who investigates and calls to account the local commander, who has a man in the guardhouse over what he thinks is a reasonable time. Now, for instance, you have a unit which has moved off, and your principal witnesses are with that unit. There you have the question

of whether you are going to pull two combat officers away from their company to come back here or keep this man an extra week or two in the guardhouse.

Mr. VINSON. That is the reason he should have a speedy trial, because the witnesses are right there at the time the charges are preferred or made, oftentimes, instead of getting away and out of the jurisdiction of that division.

General GREEN. There may be a thousand reasons, it seems, sir, when you come to investigate, why an immediate trial can't be given.

Mr. ELSTON. What is the provision in the Manual of Courts Martial with respect to speedy trial?

General GREEN. Under article of war 70, it says:

When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court martial may direct.

Mr. VINSON. But the investigation has already been made. A prima facie case has been made when the charges are preferred and when the man is put under retention.

General GREEN. Well, I don't see how you can legislate a specific time limit to fit all cases. I don't see how you can restrict it by legislation.

Mr. BROOKS. General, I want to ask you a number of questions that have come up. Of course, one of the things that I think worries some of the members of this committee is failure to have a preliminary hearing, like the Federal courts, within I think it is 24 or 48 hours after a man is arrested there, to require a preliminary hearing or before some committing magistrate. You can't retain a man in custody without any hearing at all.

Now, there is no provision for that at all.

General GREEN. Yes, sir. Article of war 70 says:

Forwarding charges, service of charges. When a person is held for trial by general court martial, a commanding officer will within eight days after an accused is arrested or confined, if practicable, forward the charges to the officer exercising general court martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The Trial Judge Advocate will cause to be served upon the accused

and so forth, a copy within 8 days of his trial.

Mr. BROOKS. That is notification of the charge against him, by serving the copy?

General GREEN. No, sir; this is going forward with the bringing of him to trial within 8 days, or an explanation why.

Mr. BROOKS. But that doesn't cover preliminary examination, does it?

General GREEN. Article of war 70 does it.

Mr. NORBLAD. Will the gentleman yield?

Mr. BROOKS. Well, if the general will put that in the record there, I would like to read it.

But there is nothing in the law, the basic law, requiring that, is there?

General GREEN. Yes, sir; there is right now.

Mr. NORBLAD. That is being stricken out, under the new bill, though, the 8-day provision.

General GREEN. Yes; but it is covered under article forty-six. The same thing is under article 46.

Mr. SMART. Page 17 of the bill, gentlemen.

General GREEN. May I read this passage to clear it up—this is in the law right now:

> No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in set charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witneses against him, if they are available, and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused.

Mr. BROOKS. Do you think that requires the accused in all cases to be brought before the officer?

General GREEN. Yes, sir.

Mr. BROOKS. Now, I will yield to the gentleman.

Mr. NORBLAD. You have cleared up the point I had.

Mr. BROOKS. All right.

I would like to ask you two or three that I think are fundamental questions here. In the first place, why is it this bill doesn't undertake to cover the Navy, too?

General GREEN. Well, I have discussed the matter with Admiral Colclough, Judge Advocate General of the Navy, my opposite number, as to whether we could get together. It is my opinion—the Admiral is here and he can speak for himself—that it would be possible to draw a court-martial manual and perhaps articles for the government of the armed services, but at the present time we would be better off to go ahead and have the Army get its system ironed out, the Navy to iron its system out, and eventually Congress can put them both together.

Mr. BROOKS. Rather than consolidating them now and getting them all ironed out.

General GREEN. That is my view. I don't think they are ready for it now.

Mr. BROOKS. Then this is interim legislation now.

General GREEN. Yes, sir.

Mr. BROOKS. And we would have to do the same thing later on.

General GREEN. Yes, sir.

Mr. BROOKS. I want to ask, in reference to these statutes that we passed several years ago permitting these cases of general court-martial jurisdiction to be appealed and be disposed of overseas, in overseas theaters, are those statutes still in force or have they been repealed?

General GREEN. No, sir; they are still in force.

Mr. BROOKS. But they are not being used now.

General GREEN. That is true.

Mr. BROOKS. Does this seek to repeal those?

General GREEN. No, sir.

Mr. BROOKS. Shouldn't they be repealed?

General GREEN. No, sir; that is delegation of the authority of the President to the theater commanders during time of war. He did so with the various theater commanders.

Mr. BROOKS. That is true, but I understand they are not being used now and have not been used for some time. However, they are still there.

General GREEN. The President withdrew that power early in 1946, I believe in February 1946.

Mr. BROOKS. But they are still on the books, although the President withdrew the power.

General GREEN. He just withdrew the power from——

Mr. BROOKS. Don't you think it would be wise for Congress to repeal that statute?

General GREEN. No, sir; I do not. I think it worked out very well, indeed. Now, it is repealed in one respect by this bill, and that is to say every death case, whether it be in the theater or in the States, has to go to the President.

Mr. BROOKS. Was it ever used at all?

General GREEN. Yes, sir.

Mr. BROOKS. It was?

General GREEN. Yes, sir.

Mr. BROOKS. Men were executed overseas?

General GREEN. Yes, sir.

Mr. BROOKS. Without any appeal to Washington at all?

General GREEN. That is correct. In other words, in the ETO, General Eisenhower had the same relative position as the President does now.

Mr. BROOKS. I was told overseas, when we were over there in 1944, that one man in particular had been executed and he had had no attorney. I didn't have a chance to run down that case, so I am not putting that in the record as an assertion; but, of course, that is the trouble with disposing of these things overseas.

General GREEN. Well, I don't know what case you are referring to—I don't recall it—but I am sure it is in error. You have been misinformed.

Mr. BROOKS. I asked the man who gave me the case to give me the facts on it, but he said he was afraid to do it.

General GREEN. I am sure he was misinformed.

Mr. BROOKS. Let me ask you one other question. I don't want to consume too much time, Mr. Chairman. Have you given thought to permitting civilian courts to try offenses against civilians or civilian authorities in time of peace?

General GREEN. Well, we do that. We normally do that in time of peace, and in time of peace also all murder and rape cases are turned over to the civil authorities in the United States.

Mr. BROOKS. But that is merely a matter of comity, isn't it?

General GREEN. No, sir; the law says so.

Mr. BROOKS. It is in the law?

General GREEN. Yes, sir.

Mr. BROOKS. What about other offenses, besides murder and rape?

General GREEN. Well, that is usually a matter of comity. As a practical matter, the local JA gets together with the local district attorney and they work together.

Mr. BROOKS. As a rule, the suggestions you get when these cases come up indicate the civilians would rather have the cases tried in civilian courts, and very often the men themselves would.

General GREEN. I don't know. I have been in the Army for 30 years and I have never seen a soldier that didn't want to get back to his own for trial. I never saw one yet.

Mr. BROOKS. I can show the General some files in my office on it, if he wants to see them.

General GREEN. I would like to see them, because I really have never seen them.

Mr. BROOKS. One final question that I want to ask is in reference to the use of sentences, especially in time of war, for policy purposes. For instance, during the war there was a good deal of stealing from the lines of supply and selling to the local natives. That occurred generally, I understand, in all theatres. At one time, especially in France, they imposed terrifically severe sentences for stealing a pack of cigarettes. I have in mind a case where a man got 15 years for stealing a carton of cigarettes, worth less than $20.

Now, what do you think of that?

General GREEN. I think that is an exercise of the command power. I don't think you can take that away from a commander. He is right on the spot. He knows what the difficulties are. I think if you give a commander the right to take our young men into battle and rest on his judgment to have them killed, you ought to give him, certainly, the power to pass on sentences in emergencies of that kind.

Mr. BROOKS. Of course, that is not really command power. It is a judicial power that he is employing.

General GREEN. Well, it is exercised by the commanding general.

Mr. BROOKS. Don't you think that ought to be done in reference to changing the order itself, rather than in insisting on the courts to give sentences running from 15 to say 20 years for stealing a carton of cigarettes?

General GREEN. But all of those cases will be corrected and eventually taken care of by this Judicial Council.

Mr. BROOKS. I will say this, that eventually in those cases the sentences were scaled down to 6 months or a year.

General GREEN. Yes, sir.

Mr. BROOKS. But the thing that disturbed me was whether or not that was proper use of the judicial power.

Mr. ELSTON. Will the gentleman yield?

Mr. BROOKS. I yield to the distinguished chairman.

Mr. ELSTON. It comes to this question, General: It is not purely a case of administering justice, but also maintaining discipline.

General GREEN. Well, discipline and justice in the court-martial system are intertwined. In some cases I think it is just nothing but discipline. In other cases it is nothing but justice, there is nothing to—there is nothing disciplinary about it. Then you have other cases which have a part of each, sometimes more of one and sometimes more of the other. In the case of a man that runs away from the enemy, I don't think you can say that is a great deal of justice, in his trial. The only justice that comes is to make sure that he gets a fair trial, but that is primarily discipline.

On the other hand, a man who steals his bunk-mate's watch, I don't think involves much discipline. I think it is mostly justice.

Mr. ELSTON. How can you reconcile the two, so that justice will eventually be administered, except by providing proper appeal?

General GREEN. Well, I think that is the only thing we have in the civil court, his appropriate appeals. I don't think you can legislate justice.

Mr. ELSTON. Of course, in the civil courts you don't have the matter of discipline.

General GREEN. I think you do, sir, in that there is no justice in getting a parking ticket, for parking out here, at all. That is a matter of discipline, according to my mind. They say they don't want you to park there. There is nothing wrong about it, but you park there and you get disciplined by being fined $5.

Mr. ELSTON. I am referring to the type of discipline that you must maintain particularly in time of war.

General GREEN. Yes, sir; it is a little different than the civil criminal procedure. There is no question about that.

Mr. RIVERS. General, did I understand you to say that the only change which this bill made in the present set-up of the Articles of War, in the conduct of your trial of these cases, was really in the case of special courts martial?

General GREEN. No, sir; mostly in the general courts martial.

Mr. RIVERS. In the general court——

General GREEN. Yes, sir, mostly in the general court martial.

Mr. RIVERS. And your Manual for Courts Martial, by which you conduct your trial of these cases, was set up when?

General GREEN. In 1928.

Mr. RIVERS. So we could assume, then, from your testimony, that you are well satisfied with that; you don't think you need any changes there?

General GREEN. Oh, yes, sir; perhaps I gave you the wrong idea on that.

Mr. RIVERS. I just wanted to get it straight.

General GREEN. No; we have a whole lot of changes that we recommend in that, that we have been accumulating for years.

Mr. RIVERS. Therefore, when you say the only change in general court martial, that is the wrong interpretation.

General GREEN. I think so, so far as the court martial is concerned, but so far as the administration we have a lot of changes which we recommend.

Mr. VINSON. May I ask a question?

Mr. ELSTON. Yes.

Mr. VINSON. Before you leave, General, is there anything in this bill or any new regulations with reference to your court procedure? That is, all courts martial that I ever read—and I have read a great many, of both the Navy and the Army—showed me that about half of the time of the court is taken up by the members of the court retiring from the room, or clearing the room, to rule on the evidence. Anything in here that is going to permit the evidence to be ruled on by the general court-martial members in open court?

General GREEN. Yes, sir.

Mr. VINSON. Or are they still going to go in the back chambers and come out and announce the ruling?

General GREEN. No, sir. The bill provides more powers for the law member, which will correct the very thing that you are interested in, sir.

Mr. KILDAY. Doesn't it just about give the law member the same power as the presiding judge at the trial on questions of evidence?

General GREEN. Yes.

Mr. VINSON. On the question of admissibility of evidence and on other legal questions, I see the bill provides that it will be done in open court by the law member.

General GREEN. Yes, sir.

Mr. VINSON. Now, do I understand the law member's ruling binds the ccurt?

General GREEN. That is true; yes, sir.

Mr. ELSTON. But it doesn't bind the court at the present time, does it?

General GREEN. It does not. They can overrule him.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 11, LEGAL,
Wednesday, April 16, 1947.

The subcommittee met at 10 a. m., Hon. Charles H. Elston (chairman) presiding.

Mr. ELSTON. Gentlemen, the House meets at 11 today, so we will proceed without any further delay.

We have a number of out-of-town witnesses this morning. The first is a representative of the Veterans of Foreign Wars. Mr. Ketchum, I believe you have a witness that you would like to present to the committee.

STATEMENT OF OMAR B. KETCHUM, LEGISLATIVE DIRECTOR, VETERANS OF FOREIGN WARS

Mr. KETCHUM. Mr. Chairman and members of the legal subcommittee of the House Committee on Armed Services, as legislative director for the Veterans of Foreign Wars of the United States, an organization composed of approximately 2,000,000 men who have seen service on foreign soil or in hostile waters during America's wars, campaigns, and expeditions, I am pleased to present here this morning the chairman of the special VFW national committee on military justice, who will present the views of the Veterans of Foreign Wars with respect to revision of laws, rules, and procedures governing military justice.

Judge Donald E. Long, of Portland, Oreg., has an outstanding and distinguished record in military, public, and private life. He is a veteran of World Wars I and II, serving both as an enlisted man and officer in the Twenty-ninth Division during World War I and as chief military government officer for the Third Division in World War II, participating in the D-day landings at Anzio and southern France beaches, and was awarded the Bronze Star for combat support at Anzio. Later he was awarded the Purple Heart for combat wounds and an Oak Leaf Cluster to go with his Bronze Star.

In civil life, he has a wealth of criminal investigative experience with the Federal Bureau of Investigation, has engaged in the general

practice of law, has been a municipal judge in Portland, and for the past 10 years has been a circuit judge of Multnomah County, Oreg.

It is a pleasure to present Judge Donald E. Long, chairman of the VFW special committee on military justice, who will present the views of the Veterans of Foreign Wars.

Mr. John E. Stone, of Jackson, Miss., a former lieutenant in the Navy, who is a member of this special committee on military justice, will share the witness table with Judge Long.

Mr. ELSTON. Judge Long, will you please state your full name to the reporter?

Judge LONG. Donald E. Long.

STATEMENT OF HON. DONALD E. LONG, CIRCUIT JUDGE OF MULTNOMAH COUNTY, OREG., CHAIRMAN OF THE VETERANS OF FOREIGN WARS SPECIAL COMMITTEE ON MILITARY SERVICE

Judge LONG. Mr. Chairman and members of the committee, to conserve time I have prepared a statement. I think each member of the committee has a copy of the statement.

As a preliminary step I desire to say that the committee of the Veterans of Foreign Wars is composed of myself, as chairman; Harry B. Novak, of Brooklyn, N. Y.; John E. Stone, of Jackson, Miss.; Anthony P. Nugent, of Kansas City, Mo.; Neal T. Shea, of Holyoke, Mass.; S. H. Hunsicker, of Alexandria, Va.; and Mr. Charles P. Sullivan, of Washington, D. C. That constitutes the membership of the committee.

We have made our personal investigations in our respective communities. We have talked to a great many former officers of the armed services, both in the Army and the Navy. We have discussed the matter with a great number of enlisted men, pilots and noncommissioned officers.

The committee has had two meetings, one lasting for 2 days in Washington in January of this year and on Monday of this week we held our second meeting.

As a result of our experiences and investigations, we arrived at certain conclusions regarding improvements of military justice, what we consider would be wholesome improvements in its administration.

We would like it to be known that we have tried and attempted to be objective. We have no sympathy for the many that were constantly in difficulties with courts martial. We want to surround the enlisted men and officers of the armed services with a little more protection.

As a result of a resolution which was passed by the National Encampment of the Veterans of Foreign Wars in September of last year, this committee was organized.

I shall go through our conclusions and be glad then to answer any questions, if I can, regarding them.

1. That the Army and Navy have uniform manuals of courts martial, and that the administration in both Army and Navy be the same as far as practicable.

2. That the appointive authority for general courts be removed from immediate command.

3. That it should be a military offense for any commanding officer, officer, or other persons to directly or indirectly influence or attempt

to influence the report of any investigating officer or the findings of any court, whether it be general, special, or summary.

4. If the accused does not select his own attorney, a qualified defense counsel would be designated from a pool. There would be a similar pool from which the accused could have defense council in all special courts of the Army and summary courts of the Navy. Being an Army man I did not know it myself, but I have been informed that a summary court in the Navy has the same jurisdiction as a special court in the Army.

5. The pool of defense counsel would channel through the Judge Advocate General's Department in all general court cases, and special courts, if practical.

6. All defense counsel should have special training in military law.

7. In all general and special court cases, defense counsel should be selected or appointed after the arrest of the accused, and in the Navy "on report" placed in serious cases, so that he could be present at the time the investigating officer interrogated witnesses and that he have an opportunity to cross-examine. This right the accused already has, so far as it is practicable, but the soldier, sailor, or marine hardly ever avails himself of the right. Our thinking was that many cases are determined upon the investigating officer's report in general court cases, and if an attorney or qualified defense counsel was present at the time the witnesses were interrogated it probably, in many cases, would not later be submitted to the staff Judge Advocate for preference of charges.

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

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

10. Article of war 104 should be amended to include field officers.

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

12. Enlisted men should be encouraged to attend general and special courts-martial trials and a notice of the time and place be posted on the unit bulletin board. We appreciate that is more or less administrative, but the committee felt we should make a recommendation in that regard.

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

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

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

16. That the deck court of the Navy be abolished, and the captain's mast be expanded.

17. That the articles of war applicable be better interpreted, by qualified personnel, to all enlisted men, and not just read as at present.

18. That all obsolete articles of war be repealed.

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

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

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

22. That the trial judge advocate and the accused, both, have the right of exercising two peremptory challenges.

23. That proper safeguards in the way of qualified personnel be detailed to all places of confinement, both in the Navy and the Army, so as to prevent harsh and cruel treatment of prisoners, so as to avert any recurrence of what happened at Lichfield, England. That possibly is more administrative than any matter being considered by the committee at this time.

Those, gentlemen, are the conclusions and this constitutes the preliminary report of the committee of Veterans of Foreign Wars of the United States.

Mr. ELSTON. Judge, have you read and considered H. R. 2575?

Judge LONG. Yes, sir.

Mr. ELSTON. And the bill introduced by Mr. Durham——

Judge LONG. Yes, sir.

Mr. ELSTON. Which is H. R. 576.

You will note, of course, that a great many of the recommendations to which you have referred have been taken care of in these two measures.

Judge LONG. Yes, sir. The committee has considered H. R. 2575 and we approve of the changes that have been suggested in this bill, feeling, however, that we go a little further in some respects. However, after considering all the amendments, the committee feels that definitely it is a great improvement over the present Articles of War and their administration.

I think we departed, where we felt it should be mandatory that enlisted men be detailed as members of courts. We discussed the number, having a feeling that not less than two should serve because one enlisted man on a general court would not be very effective. The fact is he probably would feel out of place. We thought that was a matter of mechanics.

Mr. ELSTON. H. R. 576 provides that not less than one-third of the personnel of the court be enlisted men.

Judge LONG. Yes.

Mr. ELSTON. Do you have any comment, Judge, to make on the provisions of any of these measures that are before the committee today, further than the comments you have already made?

Judge LONG. No; unless there are some questions. Of course, our committee is more familiar with this bill, H. R. 2575, than with the companion bill, H. R. 576.

On the question of the convening authority we do feel very definitely—and every officer or even trial judge advocate and defense counsel that I have talked to feel—that the convening authority

should be removed from immediate command because psychologically there is too great an interest in a commanding officer, when charges are preferred, that the court sustain the judgment of the commanding officer. We feel that some higher echelon should be the convening authority.

We also feel that it would be practicable, in time of war as well as in time of peace in many areas to have a circuit court, so to speak, a general court, selected by corps or army in time of war, and that that court's membership be constituted by well-qualified from combat and even down to the first phase, that would go from one place to another, from one division to another, and there hold court, especially in general court cases.

Mr. ELSTON. Are there any questions, gentlemen?

Mr. CLASON. Judge, with reference to courts martial, there has to be, as I understand, in meting out the penalty consideration, particularly when a war is on and the court martial is being held overseas in a fighting area, a relationship between discipline and just ordinary punishment for the particular crime committed, whether it be stealing or whatever else it may be. Would you tell us what your views are with reference to the punishment which should be meted out by a court martial under such circumstances.

Judge LONG. Yes, sir; I will be very happy to.

In the field, from the beachhead at Anzio on through Austria, I sat as president and law member of a good many general courts and I was considered to be rugged, as far as punishment was concerned, because we were fighting a war. However, we came to the conclusion that, whether a soldier received life imprisonment for a 75 violation, or 58, for misconduct in the face of the enemy, with forfeiture of all pay and dishonorable discharge, didn't make a great deal of difference in the disciplinary effect. We were not kidding the soldiers. The soldiers knew that that life imprisonment would be reduced to 10 years. Then they also knew, we felt, that after the war was over it would still be reduced further. So it did not have the disciplinary effect, as is generally believed. That is my personal opinion, from my experience, sir.

Mr. CLASON. Then it is your viewpoint that the punishment meted out ought to be the one which ultimately should be put into effect, rather than to give these extraordinarily heavy punishments and have everybody know they really are going to be commuted or in some way changed later.

Judge LONG. Yes. The reasoning of the general courts and of the commanding generals in combat is that they should receive a jolt, just about the highest penalty that you can give them under the Articles of War. It will have an effect. However, as I have just stated, it does not have that effect.

I think probably punishment has to be consistent within the division. One court should not give a man, say, 5 or 10 years and another court there give 20 or 25 years. That is why I believe in a circuit general court, where there would be more uniformity of punishment. For instance, in two combat divisions serving in the same area under approximately the same combat conditions here is what happened: In one division there were 400 general court cases, and in the other division, only 200. The reason for the difference—

I am not advised except more or less off the record—was that in the division with only one-half the general court cases more of them were referred back through medical channels.

Mr. CLASON. You feel, as I understand from your recommendation No. 13, that persons in the Judge Advocate General's Department or who become judge advocates in connection with courts martial should be placed in a separate promotion group from the regular line officers?

Judge LONG. Yes, sir; I do.

Mr. CLASON. Why is that?

Judge LONG. The reason for that, sir, is that if they had their own channel there would be more independence of thinking. They are not dependent upon the division commander—we will take that as an example—for the efficiency rating or for recommendations and promotions. We have a feeling that it would make the Judge Advocate's Department, both in the Army and in the Navy, a more independent judicial body responsible, may I say, for the administration of military justice.

Mr. CLASON. I would like to ask one more question. Shouldn't these officers be older men, or younger men?

Judge LONG. Many young men are excellent trial judge advocates. I think qualification is more important than age.

That brings up this one other point on defense counsel. My experience was that second lieutenants and first lieutenants, unless they were extreme extroverts, were psychologically intimated in appearing before a general court of a full colonel, lieutenant colonels, majors, and captains. They never put a defense in. They elected, in nearly 95 percent of the cases, to make an unsworn statement so that the accused would not be examined or cross-examined. We had a feeling that there was no defense.

For instance, in one day alone we tried six general-court cases in Austria, and it wasn't the fault of the court. There was just no testimony in favor of the accused. None was put in.

Mr. CLASON. That is all.

Mr. ELSTON. Mr. Vinson.

Mr. VINSON. Mr. Chairman, I have one or two questions, particularly with reference to the 19th recommendation:

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

Judge, do you think your committee thought that out to its final conclusion and is on sound ground in making a recommendation of that character?

Judge LONG. We spent considerable time discussing that feature.

Mr. VINSON. What is the background for it?

Judge LONG. That there are enlisted men who are well qualified to sit as members and that they would be always available.

Mr. VINSON. You just made the answer to the gentleman from Massachusetts that officers of higher rank than lieutenants should probably be detailed for defense counsel, and the reason was that they were intimidated in arguing a case before colonels and majors. Now, wouldn't that same thing hapen in reference to an enlisted man sitting on a court with colonels and majors?

Judge LONG. I understand your point, sir. The duties of the members of the court, of course, differ from those of the defense counsel. Under the procedure, the juniors always vote first, not being influenced by any senior member of the court. I feel, with qualified enlisted men sitting on a court, they would vote their judgment, according to the procedure we have now, both as to the matter of guilt or innocence and as to the penalty.

Now, I stated a brief time ago that it was our feeling more than one enlisted man should be on the court. I think the bill provides for a third. Our feeling, as I said, was not less than two.

Mr. VINSON. The bill doesn't go as far as your recommendation?

Judge LONG. No.

Mr. VINSON. It says when it is convenient to do so.

Judge LONG. That is right.

Mr. VINSON. Now, why isn't that what might be classified as a sort of demagoguery, a little demagoguery? Why isn't having enlisted men on the court, to serve, just a little taint of appealing to the enlisted man, say, where you are going to have somebody sitting on the court of his same rank and group? Why isn't that sort of demagoguery?

Judge LONG. No, sir. I believe that enlisted men on a court can be very effective in a democracy, in an army made up of civilians. It is not demagoguery at all. It is simply accomplishing the same thing, with a representation on the court as near as possible to one of his peers.

Mr. VINSON. According to your conclusion, then, the enlisted men haven't been receiving the proper kind of justice from the officers who constitute the court; thoerefore you must get somebody of the rank of an enlisted man to see that proper justice is accorded.

Judge LONG. No. I don't say that is true. Enlisted men will be just as conscientious and sincere as officers. I believe, in nearly all of the cases, officers attempted to do a good job.

Mr. VINSON. That is all, Mr. Chairman.

Mr. JOHNSON of California. Could I ask a question, Mr. Chairman?

Mr. ELSTON. Yes.

Mr. JOHNSON of California. I wanted to follow that up. Take recommendation No. 11, where you say:

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

Now, I want to ask you, in all your experience in those courts you mentioned, was it obvious to you that enlisted men got a worse deal than the officers?

Judge LONG. Well, in all my experience, I did not sit on any courts trying officers.

Mr. JOHNSON of California. Well, put it this way, then: In your study—and I take it your group has made quite a study of this—did the records which you examined disclose that there wasn't absolutely fair treatment as between enlisted men and officers, in the meting out of punishment?

Judge LONG. That is right.

Mr. JOHNSON of California. Well, can you be specific?

Judge LONG. Yes, sir.

Mr. JOHNSON of California. Or give us a little more detail on that.

Judge LONG. Yes, sir. Possibly, on the summary courts, an officer overstaying his leave for 2 or 3 days or an officer becoming grossly intoxicated usually received a reprimand whereas an enlisted man staying longer than his furlough or leave for 2 or 3 days, would receive a summary court or company punishment. That was generally known in the Army.

Mr. JOHNSON of California. Was that due to the fact that the summary court officer didn't have the nerve or the courage to really mete out punishment to a fellow officer?

Judge LONG. A summary court has no jurisdiction of an officer. An officers has to receive a general court.

Mr. JOHNSON of California. Oh, yes; that is right.

Judge LONG. An officer below the grade of major could be taken under 104.

Mr. JOHNSON of California. You said that is generally understood. Was it a misconception or was that a fact based on actual records?

Judge LONG. Oh, it was a fact, sir. Many men would overstay in Brussels, or Paris, or Rome, or some place, for a few days and they would receive a summary court or company punishment. An officer would do the same thing and probably receive a reprimand.

Mr. JOHNSON of California. What can you say now about the unification of the court-martial procedure for both services? Would you give us a little more detail on that?

Judge LONG. Of course, it is beside the point of this committee's investigation. In the first place, we believe in a merger of the Army and the Navy and feel, in talking to naval officers and enlisted men concerning the discrepancy in the procedures—there is so much difference in the procedures of the Army and the Navy—that it would add to efficiency and understanding if the procedure was the same as in our civil and criminal courts.

Mr. JOHNSON of California. You think it is thoroughly practicable to do that?

Judge LONG. I understand from the Navy men that it is practicable.

Mr. JOHNSON of California. And what is the ratio or number of enlisted men that you think ought to be on these courts?

Judge LONG. Not less than two.

Mr. JOHNSON of California. Now, is it your opinion, based on your experience in this matter, that there are adequate qualified enlisted men available for these jobs?

Julge LONG. Yes, sir. In time of war there are more qualified men available than in time of peace, but in time of peace even the noncommissioned and enlisted men are qualified and available.

Mr. JOHNSON of California. What types would you think would be the kind to select—men that had had training in the Judge Advocate's Department or just general soldiers in the various branches?

Judge LONG. Oh, I think just the average good soldier. He sits more as a juryman.

Mr. JOHNSON of California. Yes. That is what I was going to ask you. You look upon a man sitting as a member of the court like a regular member of a jury.

Judge LONG. That is right.

Mr. JOHNSON of California. And you think if he has common sense and good judgment, that is about all he needs to be a good member.

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Judge LONG. That is right, sir.

Mr. JOHNSON of California. Well, would there be a tendency for those men to be too harsh, perhaps? Younger men sometimes are harsher than older men.

Judge LONG. Yes. I have talked to a number of people on this very point, and the feeling of several generals that I discussed the matter with was that possibly enlisted men might be more severe than officers. My own opinion and the opinion of the committee is that they would attempt to be fair.

Mr. JOHNSON of California. I want to ask you one more question, and that will be the last one. In the efficiency report that the judge advocate would make of his men would he consult the commanding officers with whom that man had served, or should he consult them, in your opinion?

Judge LONG. Well, I don't know——

Mr. JOHNSON of California. I mean, he might want to find out if he knew how to get along with people and if he cooperated. Do you think he should consult the commanding officer or officers with whom the judge advocate served, along those lines, say.

Judge LONG. I don't know that it would be required on the efficiency rating because, in the whole set-up and tie-up of the Judge Advocate's Department, the superior judge advocates, that is, the corps, army, and army group, all know the work that their judge advocates are doing in the different echelons.

Mr. JOHNSON of California. That is all.

Mr. KILDAY. Mr. Chairman——

Mr. ELSTON. Mr. Kilday.

Mr. KILDAY. Judge, the status of a member of a court as a juror is not correct under existing law, is it?

Judge LONG. Well, they determine the facts.

Mr. KILDAY. But they have to vote on questions of law, under the present statute.

Judge LONG. At the present time the law member rules on questions of law.

Mr. KILDAY. But the court is not bound by the decision of the law member.

Judge LONG. They are bound by it on questions of introduction of testimony, as to whether it is relevant, material, or competent.

Mr. KILDAY. But before you would have the status of a juror you would have to have something comparable to what is in their bill to give the law member the final authority to rule on questions of law, wouldn't you?

Judge LONG. Yes, sir.

Mr. KILDAY. Then, as to an enlilsted man serving and saying that it would only be comparable to a juror would depend primarily on whether you were going to relieve the court of its present authority to determine questions of law as well as fact and transfer those law questions to the law member.

Judge LONG. All law questions would be ruled upon by the law member and would be final.

Mr. KILDAY. Yes.

Judge LONG. In other words, you make him practically the judge of the court.

Mr. KILDAY. I agree that he should be, that he should rule on questions of law. Until you do that, you are going to feel that the pressure of enlisted men would enhance the procedure much?

Judge LONG. Well, possibly it would, in a representation of enlisted men on a court, psychologically.

Mr. KILDAY. It just occurs to me—I am not committed one way or another in my own mind about it—if enlisted men are to serve on courts martial you would have to adopt a procedure something similar to what we have in civil courts, where the law questions go to the court and the juror determines the issues of fact. If your enlisted men were sitting there as the triers of fact in the case of an enlisted man on trial it might be effective, but until such time as you would radically change the very concept of court martial I can't see where the presence of enlisted men is going to be very effective. That is just some of my thinking.

Judge LONG. Yes, sir.

Mr. KILDAY. I would like to ask you now about what the committee thought. Of course, I think we should have uniform procedures in the services as far as possible, but wouldn't you agree that uniformity of procedure in the Army and Navy on the question of court martial and the administration of justice is not nearly so important as other procedures?

Judge LONG. I agree with that. I think it would be desirable.

Mr. KILDAY. Ordinarily the vast majority of the men in either service would be serving within their service and under their officers.

Judge LONG. Yes.

Mr. KILDAY. And unity of command would be in the higher echelons.

Judge LONG. That is right, sir.

Mr. KILDAY. So there wouldn't be any real urgency for a uniform procedure in the Navy and the Army.

Judge LONG. No, sir; I agree with you in that regard.

Mr. KILDAY. So we would be justified in going ahead with separate legislation.

Judge LONG. Yes, sir.

Mr. KILDAY. Don't you think that the many years of precedents that have been built up in each service would make it a very valuable thing to continue with your separate procedures rather than to say we just abandon a certain procedure and start over anew, without precedent? Don't you think it would find itself in somewhat the same position that Congress has found itself, the Eightieth Congress, under the reorganization bill, with no precedent, which has had us in a whirl.

Judge LONG. I think it can be accomplished progressively.

Mr. KILDAY. Yes; now, do you think the question of uniformity of punishment is of such importance, in any system of the administration of justice?

Judge LONG. I think we all would like to have uniformity of punishment. We don't have it in the Army or the Navy, or do we have it in our civilian courts.

Mr. KILDAY. Nor can we ever have it. It depends upon the temperament and personnel of the courts.

Mr. KILDAY. And the jury.

Judge LONG. And the jury.

Mr. KILDAY. And also on the intelligence, temperament and whatnot of the accused.

Judge LONG. That is right, sir.

Mr. KILDAY. I have never felt that all men should be held to the same standard of conduct, even under the criminal law, because they don't have the same standard of intelligence or environment.

Judge LONG. That is right.

Mr. KILDAY. And the many other things that enter into it.

Judge LONG. Yes, sir.

Mr. KILDAY. In my experience I have never known two cases of murder, or any other offense, which were identical and as to which you should have standardized punishment. It should fit all the facts and circumstances. Do you agree?

Judge LONG. I think you are right.

Mr. KILDAY. In my State, the jury fixes the punishment as well as determines the guilt of innocence.

Now, with regard to the question that you raised as to the offenses in one division as compared to another division, don't you think that the certainty of punishment of the proven guilty is much more important than the penalty?

Judge LONG. Well, certainty of punishment is very important.

Mr. KILDAY. Everyone dreads getting in the Federal court.

Judge LONG. That is right, because they know of the certainty of punishment.

Mr. KILDAY. But the penaltes in the Federal court are rarely as high as the penalties in the State court.

Judge LONG. However, I did have this feeling, that a number of the boys involved in general court cases, at the time they committed the offense, in the face of the enemy, and dropped back and finally then hid out and became deserters, were not considering what the punishment was going to be.

Mr. KILDAY. That is true.

Judge LONG. They were looking after their lives.

Mr. KILDAY. That dissipates the idea of uniformity of punishment, too, because you should try to put yourself in the position of that man at the time that he did it. Was it completely deliberate? Was he at that time perhaps not fully mentally responsible?

Judge LONG. It doesn't work that way, sir, in the armed services. You never know anything about the background of the boy of, say, 18 or 19 years of age. All you knew was that he lost his courage. He had been in combat. He couldn't take it. He dropped back. He disappeared. He was found. He was given a general court. The division psychiatrist passed him. He was not thrown back through medical channels.

I am glad you asked that question, because I am going to recommend to our commander in chief of the Veterans of Foreign Wars, in our formal report to them, that during peacetime there be more careful selection and classification of combat soldiers and soldiers that are going to perform certain duties. Many a time I have sentenced a boy 18 or 19 years of age to life, with forfeiture of all pay and dishonorable discharge, and then said to the court afterward, "I wish I knew something about that boy." I had a feeling—yet no evidence,

no proof—that that boy never should have been in combat in the first place, that he emotionally was not stable enough for combat service, that when he left and couldn't take the small arms with the artillery fire, he had no control over it whatsoever. Yet we give him a dishonorable discharge, as a group problem, because after all you have to win a war.

Mr. KILDAY. Of course, in that connection, if his failure in the face of the enemy were an isolated case it wouldn't be nearly as important to discipline him, in fighting the war, as if it had become commonplace within the organization; isn't that right?

Judge LONG. That is right, sir.

Mr. KILDAY. Just as in the civilian community, when murder should become rampant, the court or the jury generally would respond with penalties that will deter others from committing the crime. The same would be true in the military organization. The court trying the case would say, "This thing is becoming commonplace here." The tendency is to go on up. That is the case in civilian communities, we all know that. I think that that is another argument. There has been much said here about uniformity of punishment. I don't agree with uniformity of punishment at all. I think everything has to be taken into account.

Now, I want to hurry along. What is your committee's view with reference to the effectiveness of the presumption of innocence, both in the trial before the court martial and on review? Does the presumption of innocence—not technically but actually—remain with the defendant throughout his trial and review?

Judge LONG. The presumption of innocence should remain.

Mr. KILDAY. That is the exact distinction I want to bring out. It should, but doesn't.

Judge LONG. It should, but many officers feel, after an investigating officer, who has a sworn duty to perform, makes his investigation and submits the facts to the staff judge advocate and charges are preferred against him—and I have had officers tell me this—that he was guilty when they started to try him. I never entertained that view, myself. I tried to keep my mind free, and I know of other officers who did, also, but there was a feeling, yes.

Mr. KILDAY. Men who were trained lawyers would, I know.

Judge LONG. That is right.

Mr. KILDAY. But, of course when you have your court composed of men whose speciality is something else, it is another matter. Of course, he can't be a specialist in everything.

Judge LONG. Yes.

Mr. KILDAY. Is it your feeling, in the original trial before the court martial, he has had a comparable advantage of a presumption of innocence that he would have had before a civil court?

Judge LONG. I don't believe he does have.

Mr. KILDAY. Do you have anything to suggest that might insure it to him, to a greater degree than it exists at the present time?

Judge LONG. By well-selected members of courts and by a course of study and instruction as to what the duties of all officers in the Army and Navy are, with more attention being paid to the Articles of War, in the administration of justice. They should have constructive instruction and be told what their duties are, the same as you will instruct a jury regarding their responsibilities.

Mr. KILDAY. Don't you think you can enlarge on your recommendation No. 20, to accomplish something in that regard? In other words, you have that defense counsel as a qualified lawyer. Why not permit the board of review to pass on it with the same idea of presumption of innocence there, passing on the quantum of the evidence, the weight of it, and everything else, especially in time of combat.

Judge LONG. Yes, sir.

Mr. KILDAY. Where the men who are composing that court are doing it incidentally and there is something more important that they have to have done. Why not let the fellow who is sitting in a nice hotel room in the rear do it, where he can calmly go ahead and review the whole thing. After all you want substantial justice.

Judge LONG. Yes, sir.

Mr. KILDAY. There is no importance attached to technicalities in a court martial.

Judge LONG. That is right.

It occurs to me now that one improvement, I think, would be for the War Department and the Navy Department to include in their manuals for courts martial certain required instructions that the law member must give to the members of the court as to reasonable doubt and as to presumption of evidence.

Mr. KILDAY. Have you served on a review board?

Judge LONG. No; my experience has all been in general courts in the field. I never served on a board of review.

Mr. KILDAY. You never served on a board of review?

Judge LONG. No, sir.

Mr. KILDAY. I understand from some men who served on boards of review that they found some very troubling problems which have disturbed them a great deal, because there are technical rules binding on them, the same as there would be on a court of appeal, let us say, very technical matters such as motions that should have been made, for instance, in the original trial, which cut them off. I understand in some instances, even for an offense which on its face, on the face of the charges is barred by limitations, it is possible, on review, that the man may be cut off from consideration because the question was not raised in the trial.

Judge LONG. I think in that regard provision should be made that it is not necessary to take exceptions to any irregularity as to law or the testimony.

Mr. KILDAY. The charges or specifications should show a punishable offense on their face, or they should be kicked out.

Judge LONG. That is right, sir.

Mr. KILDAY. I believe what I am speaking about comes up particularly where a man is convicted of a lesser offense which is included in the graver offense for which he is tried. There are some decisions by the Judge Advocate General's Department which have resulted in substantial injustices. You agree that that should be open for complete review?

Judge LONG. I do.

Mr. KILDAY. Without any technical considerations?

Judge LONG. Without any technical considerations; yes, sir.

Mr. KILDAY. That is all.

Mr. ELSTON. Mr. Norblad.

Mr. NORBLAD. Judge, I want to ask you about one matter here, and that is concerning recommendation No. 21. That provides that the members of the general courts shall be deprived of the privilege of asking questions directly of the accused and that instead the questions shall be submitted to the law member. He shall rule upon their relevancy and then ask the questions.

Well, as you know, I sat as law member in the Ninth Bomber Command for many months, trying dozens of cases, and it was my experience that giving the court the right to ask questions brought out a lot of material and a lot of matter that were very relevant and very helpful in deciding the case. If a question were asked that I did not consider relevant, I then stopped the proceedings, before the accused had to answer it. We handled it in that way and it seemed to work out very well. I am wondering what the reason for this particular recommendation is.

Judge LONG. I think I also should include in there "of the accused or witnesses," to make this more comprehensive. I think it should apply to the witnesses, also.

The reason in the committee's mind was this: In a general court, for instance, the usual procedure is, after the testimony is completed, the question is asked of the members, "Any of you gentlemen have have any questions you want to ask," and sometimes you get the most unusual questions, and they are answered sometimes to the prejudice of the accused, before any objection can be made or you can unring the bell. I have seen it happen a number of times where questions were answered that had no bearing except to possibly prejudice some member of the court. That is the reason for it.

Mr. ELSTON. Judge, if you didn't have some such provision as No. 21, much irrelevant and incompetent evidence might go into the record.

Judge LONG. Yes, sir.

Mr. ELSTON. Because the law member may be the only person who is actually trained in the presentation of evidence.

Judge LONG. Yes, sir. That is our feeling.

Mr. KILDAY. Will the gentleman yield?

Mr. NORBLAD. Yes.

Mr. KILDAY. Of course, what you want to do is to prevent the defendent from being badgered, like a witness is before a congressional committee. Is that it?

Judge LONG. No, sir. I think this is very enjoyable, gentlemen.

Mr. KILDAY. The poor devil who is on trial for his life or his liberty is more or less in the position of a man appearing before a grand jury, with everybody shooting questions at him. Isn't that an important consideration in connection with this recommendation you have here?

Judge LONG. Yes. I think it is unfair to the accused.

As a rule, in our general courts—it has been my experience and I think the experience of others—there is nobody there at all except the military policemen, the members of the court, the trial judge advocate, and the inefficient court reporter. Here he was alone and everybody shooting questions at him, with a lot of them, as I say, not relevant. I always thought it was very unfair.

Mr. RIVERS. May I ask a question?

Mr. ELSTON. Anything further, Mr. Norblad?

Mr. NORBLAD. That is all.

Mr. RIVERS. Judge, how much time has the Veterans of Foreign Wars given to this recommendation here?

Judge LONG. As I stated, we made our own independent investigations in our local communities. Then we met on three full days, in considering, point by point, these proposals.

Mr. RIVERS. I mean it has long been felt, before this recent conflict, that the Manual of Courts Martial, that contains these regulations and rules for trials in courts martial, should be amended and brought up to date. Has that long been a feeling?

Judge LONG. Yes, it has long been a feeling. I have been a member or the Legion, the Forty and Eight, and the Veterans of Foreign Wars for 25 or more years, and we have always had a feeling that the administration of military justice could be improved, without any crystallization of thinking.

Mr. RIVERS. And the focus has come since the last conflict.

Judge LONG. Yes, sir.

Mr. RIVERS. And is the feeling of your splendid organization, I might say—I have a real esteem for them—among the reserves or the civilians, or whatever you want to call them, who fought in this war, that for the most part they have felt they haven't gotten a square deal before the majority of these courts martial? Has that been your experience?

Judge LONG. Not in a majority of cases; no, sir.

Mr. RIVERS. I mean——

Judge LONG. There has been a general feeling, among a lot of Reserve officers and enlisted personnel from the civilian army we had—a lot of them haven't crystallized their feeling, however—that there was not what we considered substantial justice in our courts-martial procedure.

Mr. RIVERS. Has that been fairly universal?

Judge LONG. Yes, sir; that has been, sir.

Mr. RIVERS. Mr. Vinson brought up some thing that is quite important and that is the presence of enlisted men on this court martial and their association with officers. If my memory serves me correctly, I believe it was Doolittle who recommended fraternization between officers and enlisted men; isn't that right?

Judge LONG. I believe he did. He didn't want the line quite so distinct, as it is today.

Mr. RIVERS. Therefore, your suggestion would be more in keeping with that policy, which I think was unwritten by the Secretary.

Judge LONG. That is right.

Mr. RIVERS. So you feel, and your organization's opinion is, that there could be an adequate way worked out to have qualified enlisted men sitting on the court?

Judge LONG. There could be qualified enlisted men.

Mr. RIVERS. And they would sit for enlisted men as well as for officers?

Judge LONG. Well, there is a difference of opinion in the committee. One member of our committee did feel that he could see no objection to enlisted men sitting as members of courts who would try those superior in grade or even trying officers.

Mr. RIVERS. You say he had a definite opinion on it?

Judge LONG. He had a definite opinion on it. He pointed out that the banker is not tried by bankers. He is tried by the bricklayer, the cement worker, and so on, and why wouldn't it be sound to have enlisted men try officers.

Mr. KILDAY. He is not tried by his employees.

Judge LONG. Yes. One member, as I say, had a very definite opinion on that.

Mr. RIVERS. Of course, you are familiar with the procedure in the Federal courts, where the respective group from which the jurors are selected are carefully screened by the Treasury agents, where these alcohol tax people make a careful investigation of all of them.

Judge LONG. Yes, sir.

Mr. RIVERS. Do you feel that sort of a backlog could be built up in the Army and the Navy to investigate these enlisted jurors, or whatever you want to call them, so you could get qualified men who it could be felt would be equally responsible as the officers.

Judge LONG. Yes, sir; I do. I believe names could be submitted, with their backgrounds, both for officers and enlisted men.

Mr. RIVERS. I am speaking for the whole group.

Judge LONG. The whole set-up; yes. I do believe it could be worked out.

The way it works now, G1 of a combat division selects the members of the court and the making of the order by the general is a matter of routine and form. He knows the officers. He knows whether they are pretty tough or maybe they are inclined to be easy.

Now, if a pool could be made up of officers and enlisted men, where they would have a complete record of their qualifications, I agree.

Speaking of the matter of investigating Federal jurors, I happened to be on the shipyard fraud cases after the last war, in Seattle, Wash., and one of my duties was to investigate some 60 proposed jurors from the pool.

Mr. RIVERS. What you said about this pool sounded to me like pretty good sense. You think there should be a pool for the men, including the lawyers?

Judge LONG. Yes.

Mr. RIVERS. And that could be handled by having a sufficient number selected by responsible parties?

Judge LONG. Yes, sir.

Mr. RIVERS. And that appeals should be had on all cases?

Judge LONG. And that they should have the right of appeal, upon the advice of their qualified counsel.

Mr. RIVERS. And there should be a transcript——

Judge LONG. A transcript of the testimony——

Mr. RIVERS. For all kinds of cases?

Judge LONG. General court cases, I would say.

Mr. RIVERS. General court cases?

Judge LONG. Yes, sir.

Mr. RIVERS. Just one other question and I am through, sir.

Judge LONG. Mr. Stone, of Jackson, Miss., a member of the committee thinks it should be also in the summary courts. Of course, a summary court in the Navy is like a special court in the Army. In the Army a summary court is not a court of record, you see. There is no testimony——

Mr. RIVERS. You of course will have your separate recommendations on the Navy bill.

Judge LONG. We have inquired somewhat about the Navy bill, and a representative of our committee, from the Navy, would like to appear then and answer questions with regard to that. We tried to take the over-all situation. However, there will be certain technical things concerning the Navy which the representative of our committee will answer.

Mr. RIVERS. Has it been your experience or information that the commanding officer exercises too much control over these cases, in the trial of these cases, or he could do it?

Judge LONG. He could do it. I think, in the Vanderbilt report it is indicated that a number of them very frankly stated that they were interested in the outcome of the cases.

Mr. RIVERS. My colleague brought out yesterday a case involving a commanding officer. I wonder if you have found that to be true also.

Judge LONG. I understand they can influence them, and they have done it.

Mr. VINSON. May I ask a question there.

In that connection—it is somewhat similar to recommendation No. 2—who would make the appointments, to remove it from the immediate command?

Judge LONG. I think in time of war the mechanics could be worked out dependent upon the tactical situation, where the corps commander or even the Army commander, could be the convening authority and appoint the court from a list of officers and enlisted men as suggested to say their Army judge advocate, so you get them from combat and from different components.

Mr. VINSON. Then, in peacetime, how would it apply?

Judge LONG. It would then be by area commands. You have the western command, at San Francisco, or the northeastern command, and so on. It might add greatly to the efficiency if the command could apoint the general courts, and I am speaking of general courts now, and go from one post to another to try cases.

Mr. VINSON. I would like to know the background of certain of these recommendations. What led you to conclude that the services would be better off by removing the designation from the immediate command?

Judge LONG. The influence, and what was considered honest influence, on members of the courts. It is generally understood in the Army and by Army officers that the general was very much concerned with the judgment of the court martial. There have been cases where officers have been reprimanded for their judgment.

Mr. VINSON. Well, now; would that reprimand that had been received from the commanding general go in the officer's record?

Judge LONG. No, sir, that would not go in his 201 file.

Mr. VINSON. That is all.

Mr. NORBLAD. Along that same line, Mr. Rivers mentioned the case I raised yesterday. I don't want to go into it now as thoroughly as I did because the committee heard me explain it yesterday. But I had a situation like that occur to me, where I defended a man and our commanding officer, a man by the name of Col. Herbert Thatcher, a

West Pointer, then called the entire court before him and reprimanded it because we gave too light a sentence, after which he turned to me and said, "I don't want any lawyers orating in my court."

Now, that would not be covered by your recommendation No. 3. It would be covered by Mr. Durham's bill, where it says, in article 10½, on page 5, that:

> The authority appointing a general, special, or summary court martial shall not censure, reprimand, or admonish such court, or any member thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise, by such court or any member thereof, or its or his judicial responsibility.

Now, the importance of that to me is the fact that your court continues on. This particular court continued on, after the reprimand by Colonel Thatcher, and in my opinion it was impossible for them to give a fair trial to any man thereafter. In a civilian court, where your jury possibly tries this case and that is the end of it, it wouldn't matter so much, but in the military court, with the same court trying a case the next day it would be impossible to give a fair trial after such a reprimand by the commanding officer.

Now, as I say, your recommendation No. 3 would not cover such a situation.

Judge LONG. I get your point on that.

Mr. NORBLAD. Therefore, would you favor this provision of Mr. Durham's bill, which provides that:

> The authority appointing a general, special, or summary court martial shall not censure, reprimand, or admonish such court, or any member thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise, by such court or any member thereof, of its or his judicial responsibility?

Judge LONG. Yes, I would, absolutely.

Mr. NORBLAD. That is all.

Mr. ANDREWS. Judge Long, I think your presentation is an excellent one. I happen to be a lay member of this committee. I have always been interested in the subject, and I think this committee will do a wonderful job in bringing forth a bill.

I might say I have been on both ends of this thing. I was once tried by a general court martial. I was in command of what you might call a small unit in France. I am now on the subject of summary courts. I had a rather unusual cook. Human understanding is the basis of most military justice, I think. I had a sub rosa court of three men, of which the chief cook was the presiding judge, and subversively they tried every possible offense which would warrant a summary court in our unit, with the result that we never had a summary court, in the entire unit. There were some very unusual penalties meted out.

There was only one serious case which came before us and that involved a question of cowardice. It could not be determined upon the recommendation of the cook. I did like a lot of weak commanding officers did, having the man transferred out with a letter to the future commanding officer.

Now, the thing that interested me most in your presentation was recommendations 2 and 3. I must admit, and I think you will agree with me, that a true administration of military justice is much more easily accomplishable in peacetime than in wartime, but getting back

to the prospect, we might be in another war, which is when your recommendations 2 and 3 would particularly apply. I have always been impressed with the fact that the greatest single thing you can accomplish in military justice in wartime would be to divorce so far as possible the court from the command, in other words to divorce, if it is a regiment, the formation of that court from the will or feeling of the colonel, and the same thing in the division or larger units.

Now, I would like to amplify Mr. Vinson's questions along that line. Supposing it was wartime and you were a regimental commander or a division commander in some part of the world. Just how would it work out, in your opinion, for the accomplishment of military justice, under a new proposal within which you attempt to divorce the formation of a court from, we will say, the commander of a division that is operating independently somewhere? How would it actually work out in that particular situation?

Judge LONG. There would be some obstacles where they are widely separated, that is true, but in the Mediterranean area, for instance, and the European theater it would have been very practicable. It could have worked very nicely there. In the South Pacific, in certain islands, it probably would have been a little difficult, but I understand the Navy does it, where they take a man from one island to another, and the witnesses, to a general court.

With those obstacles in mind, I want to go back to the other point, where you possibly could have a traveling general court to take care of it, where small units might be widely separated. However, all in all, in any global war today, I would say that the greatest number of troops would be in areas where the higher command could appoint the courts.

Mr. ANDREWS. How do you feel as to whether the provisions of the bills as written, either Mr. Elston's bill or Mr. Durham's bill, accomplishes those objectives, from a practical point of view?

Judge LONG. I don't know, when you take specifically the provisions of the bills.

Mr. ANDREWS. It comes right down to your recommendations 2 and 3.

Judge LONG. I believe, if their bills were to include those suggestions, that it is practicable. It could be done.

Mr. ANDREWS. That is all.

Mr. ELSTON. Might I ask you, Judge: You believe, under existing law, it is possible for a court to act without some influence on the part of the commanding officer? Whether that is incurred directly or indirectly, consciously or unconsciously, the court does feel that since the commanding officer in the first instance brings the charges perhaps the courts ought to give some consideration to his wishes in the matter.

Judge LONG. Yes; I believe that is true, sir.

Mr. ELSTON. And has it been your experience that courts martial generally have been to a certain extent influenced by commanding officers?

Judge LONG. Well, I know my general never said anything to me at any time, but there was a feeling among the members of the court that he was interested in the outcome of the case.

Mr. ELSTON. And the court, perhaps unconsciously, wanted to know what his viewpoint was before passing sentence.

Judge LONG. I have even had officers ask.

Mr. ANDREWS. If the gentleman will yield—it probably went back to the personality of the commanding officer. He might influence them, without knowing it one way or the other.

Mr. JOHNSON of California. Also, wouldn't they like to render a decision that they thought would please him?

Judge LONG. That is human nature.

Mr. KILDAY. Will the gentleman yield? Of course, after they have decided the case, it goes back to the same man for his approval, doesn't it?

Judge LONG. Well, his staff judge advocate is the one that actually does it. Technically it does; yes, sir.

Mr. KILDAY. It comes back for his signature, and in his approval he can say some very caustic things about the court, if he wants to, and he frequently does, telling them he feels it is grossly inadequate, or anything he wants to. And then they have to go on serving under him.

Judge LONG. That is right. And oftentimes the commanding general will call the staff judge advocate and just ride him for some conduct of the court.

Mr. ELSTON. Don't you feel that even in a special court-martial case there should be an appeal?

Judge LONG. Yes, sir; I do.

Mr. ELSTON. Even though it does not involve a bad-conduct discharge.

Judge LONG. But it involves 6 months' punishment, which is an important consideration, and I think he should have an appeal.

Mr. ELSTON. Yes. In the civil court, he may be fined only $10, but he can take his case up to the Supreme Court of the United States, if it involves a constitutional question.

Judge LONG. That is right.

Mr. ELSTON. After all, his Army record is a very important thing to him and the sentence of even a special court might have an adverse effect on his future life. So don't you think, as a matter of right, the decision of a special court should be appealable?

Judge LONG. I do.

Mr. NORBLAD. May I ask a question along that line?

Mr. ELSTON. Yes, sir.

Mr. NORBLAD. Isn't it a fact, Judge Long, that there is a complete record kept of your general court martial, whereas in the special the only record you have is a statement made by the judge advocate, which he draws up himself, of what occurred during the case, which is just a very general narrative statement, and that is all there is to be reviewed.

Now, I am wondering if it wouldn't be better to make the special courts a matter of record, that is, to have that as a court of record then we would have a real review power.

Judge LONG. We have suggested that.

Mr. NORBLAD. You have suggested that?

Judge LONG. In other words, that the general courts have—we discussed it, in here, I believe—that a record be made of special courts. [Examines document.] We may not have included it here, but anyway that is how the committee feels.

Mr. NORBLAD. There could be no review, the way special courts are held nowadays.

Judge LONG. That is right.

Mr. VINSON. You think there should be an appeal from all special court decisions?

Judge LONG. I think he should have the right of appeal, sir.

Mr. VINSON. Notwithstanding the fact that dishonorable discharge is not involved.

Judge LONG. That is right.

Mr. VINSON. Then why wouldn't you clog up the appeal board to such an extent it would be physically impossible for them to properly review the cases? We have limitations on the right of appeal in civil courts. Why shouldn't the same principle adhere in military justice?

Now, I grant you that where dishonorable discharge has been imposed in the sentence it is proper that it should be reviewed, but where that is not involved, I can't see where there would be any miscarriage of justice, in denying the right of an appeal. You don't have the right of appeal in all misdemeanor cases and the punishment of a special court is similar to punisment for a misdemeanor, being limited to six months.

Judge LONG. In our State, we do have the right of appeal on misdemeanors where the punishment involves time in jail.

Mr. ELSTON. We do in the State of Ohio, and I know in other States, too.

Judge LONG. I think they should have the right of appeal. Frankly, I don't think it would be exercised in very many cases.

Mr. VINSON. I am very much interested in one of the cases you made and that is concerning the defense counsel. From my years of experience with courts martial, I have come to the conclusion that the defense oftentimes do not have qualified men to represent them. Is there any way in which you can insure the accused that he is going to have the benefit of the best legal talent assigned to his division, so as to make them available to him?

Judge LONG. I think it should be required that the Judge Advocate's Department be authorized to build up a pool of qualified defense counsel, if the man does not elect his own counsel, and if he is put in the stockade or is under arrest he should be immediately asked, "Do you have an attorney? Do you want to select your own counsel? If not, one will be designated for you." In that way the defense counsel would be present with the accused at the time the investigating officer was interrogating the witnesses.

It is an idle gesture to say to the average enlisted man, a boy who is in trouble, that "You have a right to ask questions." They don't know how to ask them, in the first place, and they are too scared to ask them. So, they don't ask them. It is a right they have which is not exercised. But if a defense counsel was there at the time the investigating officer was making his report, he could carry on from there, when the witnesses were being interrogated.

Mr. VINSON. May I ask another question? After an inquiry has been made by the officer detailed to assemble all the facts, the bill before us requires that he must have a hearing within a reasonable time, approximately 8 days. Now, do you think that he should have what is equivalent in common law to the right of a commitment trial,

to ascertain all the facts, before he has a hearing before the special court or the general court?

Judge LONG. Yes, I think he is entitled to that.

Mr. VINSON. In common law, I think you have to go before a magistrate within 24 hours and the prosecutor has to disclose the grounds upon which he is asking that he be held, and to make out a prima facie case. Now, in a great many instances that have come to my attention, the accused has been arrested and kept in the brig or in the guardhouse or other confinement for at least 30 to 60 days before they were brought before a special court or a general court. Don't you think something should be done to accord him a more speedy trial, than has happened in the past?

Judge LONG. Yes, sir: I do. It has been the experience of some that they served more time awaiting trial than they received by the court at the trial. There is nothing you can do about that.

Mr. CLASON. Mr. Chairman——

Mr. ELSTON. Mr. Clason.

Mr. CLASON. I was going to ask a question along the same line, because I have been troubled in receiving letters from relatives of young soldiers and sailors, 18 and 19 years of age, who have reported that their son has been tried and found guilty and that on the advice of his counsel, who usually would be some second lieutenant or perhaps a lieutenant, junior grade, in the Navy, whatever his rank may be, he puts in no defense. Then they go to great trouble to write me four or five pages indicating what were the facts in the case and indicating that at least the evidence ought to have been presented to the court, in order that the court might have had those circumstances in mind and yet they never were presented. How would you guard against a man not being given proper consideration by the court, through the failure of his own counsel?

Judge LONG. By qualified defense counsel, sir, as we have suggested. Many of the defense counsel were not qualified defense counsel.

Mr. CLASON. For instance, I know one family hired a lawyer back home to check on certain facts for a defendant tried right here in Washington not long ago, who unearthed the fact that the sailor had had three aunts and one great-aunt in insane hospitals in Massachusetts, two of whom had died in such institutions, yet this officer who was defending the case did not offer that evidence before the court and the only reason I could learn for it was because some medical officer had said that the man could distinguish between right and wrong. Yet the nature of the case was such—involving A. W. O. L. falsification of records, and so forth—as to indicate that the man's mind may have been in some way abnormal. Therefore, this was, as I thought, evidence that should at least have been presented, even if the court gave no consideration to it.

I cannot help feeling in this case, also, that Mr. Vinson mentioned, where the man was held for weeks before trial——

Judge LONG. Yes, sir.

Mr. CLASON. He will get, ultimately, when the dust all settles, a long sentence, perhaps, and never have had a chance to present his case, due to the failure of proper consideration being given him.

Judge LONG. I think you are absolutely correct, sir. There were a lot of cases where the proper safeguards were not thrown around, as

to boys where there was an emotional instability. They went no further than a certain extent, where the psychiatrist said, "You are not crazy; you know the difference between right and wrong"—yet if you knew the boy's entire background there might be something there in mitigation. The facts of the case you mentioned would point to anyone who has had experience in that type of situation that there is certainly something there in litigation.

Mr. CLASON. The lawyer at home went to all the trouble of getting the hospital record to send them forward, and then they don't use them.

Judge LONG. They should be considered.

Mr. CLASON. It leaves the family feel that the boy has been done an injustice.

Mr. KILDAY. Mr. Chairman——

Mr. ELSTON. Mr. Kilday.

Mr. KILDAY. Judge, under existing law, when the sentence of a general court martial has been fully executed, there is no power within the Army to set it aside.

Judge LONG. I have been told two different things. I have been told they can, after it has been executed. Then, again, I was told there was no power, except a congressional act, to restore him.

Mr. KILDAY. Or by Executive clemency.

Judge LONG. Or by Executive clemency.

Mr. KILDAY. Once the full sentence has been carried out, then there is no power left to revise or correct it. This bill contains provision for a new trial within 1 year after final disposition of the case upon initial review.

Judge LONG. Yes, sir.

Mr. KILDAY. Or within 1 year after the termination of the war, as to offenses committed in World War II. I assume you endorse that provision?

Judge LONG. We endorse that. We endorse the bill as a whole.

Mr. KILDAY. In that connection, of course in the GI bill of rights we set up boards, in these separate departments, for the review of bad-conduct discharges which were not as the result of sentence of a general court martial. In those proceedings, I understand a very high percentage of the cases reviewed by those boards have been reversed and the person given an honorably discharge.

Now, I don't know how much comes within the purview of this bill, but the entire system of the issuance of bad-conduct discharges administratively is, to my mind, closely entwined with this bill because that bad-conduct discharge carries with it practically all of the forfeitures which a dishonorable discharge carries, especially as to veterans' benefits under the GI bill of rights, civil-service employment preference, and what not.

Now, did your committee go into that place which is, while not strictly, perhaps, a part of the administration of justice within the armed services?

Judge LONG. We didn't go into it particularly. We were thinking about the future structure, more than what is now being done. I think I can, however, speak for the committee, in saying that we feel, in our bad-conduct discharges—I don't know how many there are, there must be thousands of them——

Mr. KILDAY. Many thousands.

Judge LONG. There is a great injustice. For instance, in San Francisco a few days ago, there at the War Memorial Building I was shown a record of a bad-conduct discharge. Here was a boy, 20 years of age, given a bad-conduct discharge. I said, "What did he do? He got drunk. What else did he do? He cussed an officer out." Now, he has a bad-conduct discharge. Every place he goes he will be confronted with that bad-conduct discharge: "I am sorry, we don't have a job for you; there are too many boys that we can put on with honorable discharges." Now, that boy will go through life, in his search for employment as well as in his other activities, at a distinct disadvantage because he carries that bad-conduct discharge.

Mr. KILDAY. He practically has the forfeitures of a man who has been convicted of a felony, when you come right down to it.

Judge LONG. That is right.

Mr. KILDAY. He doesn't have all the rights of a citizen. Now, do you have any recommendations for that?

Judge LONG. I think that there should be machinery set up where they could be repeatedly reviewed. When you get thousands upon thousands of such cases, you are tearing right into the social structures of these boys going through life.

Mr. KILDAY. This will provide review on cases of general court-martial sentence where they have not had it in the past, but thinking of the future, would you agree—I understand that the Army violently disagrees with this, but I am just wondering what your attitude will be—that a man who serves in the Army would receive an honorable discharge unless another discharge is issued in accordanc with the sentence of a general court martial.

Judge LONG. If I understand your question, there would be an honorable discharge and any other discharge would be——

Mr. KILDAY. By sentence of a general court martial.

Judge LONG. Of a general court.

Mr. KILDAY. Yes.

Judge LONG. Of course, speaking without giving it much thought, I would be inclined to go along with you on it, but I want to reserve further study.

Mr. KILDAY. I was wondering if your committee had given it detailed consideration.

Judge LONG. No.

Mr. VINSON. In other words, every man would get an honorable discharge, unless he were convicted.

Mr. KILDAY. Yes; for instance, he may have had two left feet or have been a moral pervert. You can tell from his discharge of what he may have been guilty within those two extremes.

Judge LONG. It has a lot of merit.

Mr. ELSTON. Mr. Winstead, or Mr. Durham, have you any questions?

Mr. WINSTEAD. No.

Mr. DURHAM. No, Mr. Chairman.

Mr. ELSTON. Mr. Stone, have you anything to add to Judge Long's statement?

Mr. STONE. Except in regard to the Navy. The committee was of the opinion, in regard to the Navy, that the deck court should be abolished and the captain's mast should be expanded. One of the

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objections has been that this matter of discipline and punishment was fundamental, and we felt that command could be given all the authority necessary to punish in captain's mast, just abolishing the deck court as such and conferring this authority on the captain's mast. The captain's mast as such is not considered a court martial. We thought, by doing this, it would insure discipline within the command and still, at the same time, if the safeguards that Judge Long has spoken of in regard to the Army and courts martial generally were thrown around a man who was tried by a summary court and a general court he would be afforded greater protection.

Mr. ELSTON. Thank you Judge Long and Mr. Stone for coming here. Your testimony has been very helpful to the committee.

Judge LONG. May I thank you, gentlemen, in behalf of the Veterans of Foreign Wars for the privilege of coming here this morning.

Mr. ELSTON. Mr. Spiegelberg, will you state your full name, please, and indicate what organization you represent?

Mr. SPIEGELBERG. George A. Spiegelberg, New York County Lawyers Association, of New York, N. Y.

Mr. ELSTON. Is that the New York County Bar Association?

Mr. SPIEGELBERG. Well, its correct name, sir, is the New York County Lawyers Association. There are two chief legal associations in New York. One is the City Bar Association and the other is the New York County Lawyers Association. The former is the older and the latter is the larger of the two associations. The New York County Lawyers Association represents 6,750 lawyers and it is the second largest bar association in the United States.

Mr. ELSTON. Do you have a prepared statement?

Mr. SPIEGELBERG. I have no prepared statement. But I have submitted to the committee a report, which was unanimously adopted by the New York County Lawyers Association, which I believe is before the committee.

Mr. ELSTON. We shall be glad to make that a part of the record. I take it you don't care to read the statement, if we make it a part of the record.

Mr. SPIEGELBERG. No, I do not, sir.

(The report is as follows:)

MARCH 20, 1947.

To New York County Lawyers Association:

By letter dated December 13, 1946, the undersigned were appointed a special committee on military justice and now make this interim report:

The Secretary of War on the nomination of the American Bar Association established an advisory committee on military justice on March 25, 1946, under the chairmanship of Dean Arthur T. Vanderbilt, of Newark. It was asked to study the possibilties of improving the administration of military justice in the light of the Army's experience in World War II. It filed its report on the same day that your committee was organized, and the War Department announced its position on February 20, 1947.

In the meantime and on January 21 of this year, your committee had written the Secretary of War whose reply informed the committee that the views of the committee would have to be submitted to the War Department immediately, in order to receive consideration. As time did not allow your committee to formulate its views, present them to the association for approval and submit the views of the latter to the War Department, we have been unable in any way to attempt to influence the War Department action with respect to specific recommendations for improving the administration of military justice.

Before presenting the views of your committee, which is composed entirely of veterans of this war, three of whom have had extensive experience with the detailed operation of the existing courts-martial system, we believe it in order to present certain aspects of the problem of military justice which, as American citizens and former soldiers, we believe to be irrefutable:

Attempt is sometimes made to justify abuses in the system of military justice on the ground that they are necessary to enforce discipline. Our experience indicates that the function of discipline is, in the main, achieved when a charge has been referred for trial; that from that point on command interference except to exercise clemency, serves neither discipline nor justice.

In foreign theaters in time of actual war, there may be some justification for utilizing a legal system for the enforcement of discipline at the sacrifice of justice, although we believe a system may readily be devised to assure justice even under those conditions. In time of peace, we cannot tolerate the perversion.

Let us put the matter bluntly. Though we deny the validity of the position, it may be argued that there is justification for the wrongful execution or imprisonment of 100 or even 500 Americans if the result achieves discipline that will save a thousand or 5,000 on the battlefield. We do not believe that in time of peace wrongful imprisonment of a single individual, if avoidable, can be justified. Admitting for the sake of argument that justification may be found for the faults of the existing system in time of war, no justification can be found for their existence in peacetime in a country that since its founding 180 years ago has been at peace except for 20 years.

We are now in the threshold either of universal military training or of the maintenance of a professional army at least five times larger than that maintained before the last war. The future Army no matter how it may be raised will be composed of the physically fit youth of the country. The first contact with any judicial system for the overwhelming majority of these young men will be their experience with the administration of military justice. We believe that it is our duty, so far as lies within our power, to see that the system to which they are exposed is reasonably designed to achieve justice. The system now in effect, together with the changes recommended by the War Department, cannot guarantee the result desired.

Anyone reading the Articles of War or the Manual of Courts Martial will be impressed by the apparent fairness of those instruments of military law. What counts, however, is the practical use to which those instruments may be put and experience has demonstrated that in practice they are capable of grave abuse. If we do not correct the abuses which have been brought to light, we are derelict in our duty and rewriting the rules without affecting the basic vice of the system will do us little, if any, good. An illustration, though itself unimportant, will point the issue. The report of the Secretary of War states:

"Appropriate War Department orders will issue requiring the selection of summary courts martial from captains or officers of field grade when available and requiring that selection of inexperienced officers be avoided."

Those who have had experience will at once recognize that in the military service the words "when available" completely negative the requirement of affirmative action if one desires to avoid the issue raised by the order.

The basic fault of the proposed remedies lies in the fact that they redecorate the surface but leave the ailing heart untouched. It is essential to the achievement of justice that the appointment of judge, jury, and appellate court should not be merged in the same command that appoints the prosecutor nor should they all be appointed by the same authority. Under the existing system and under that proposed by the War Department the appointment of those who are to perform these four diverse functions is vested in the command authority in which is also vested the future career of the officers selected by command to discharge these vital judicial functions. In theory, it is too much to hope that command will not bend the views of its subordinates to meet its desires of the moment. In practice, there have been and are now such occasions and there will continue to be such occasions under the system proposed by the War Department which has elided from its advisory committee's report all suggestion of the separation of judicial power from the chain of command.

The Vanderbilt committee, according to our information, does not contain among its members any veteran of World War II. They treated the problem assigned them as experienced American lawyers and citizens. They made six specific recommendations which cover seven pages of their report. Of these six recommendations which cover seven pages of their report, "The Checking of Command Control" was recognized by them as the one outstanding vice in the

existing system, was dealt with first and covers four of the seven pages utilized by them in recommending specific changes in the existing system.

Some of us who have had first-hand experience with the system believe that the checking of command control should go further than is recommended by the Vanderbilt report. We all agree that less will not suffice. According to a press release of the Secretary of War, the War Department, in disregard of the recommendations of its own committee, opposes any effective check on command control. We believe that it is the duty of every American interested in the future welfare of this country to use every legitimate effort to insure that the Congress will in times of peace require the minimum separate of powers advocated by the Vanderbilt committee.

We submit:

1. That when command has referred a charge for trial the disciplinary function of command has been achieved. From that point on the prosecution and the administration of punishment should be a matter for justice, not discipline.

2. That, in order that justice may be swift, command should have the right to control the prosecution and to name the trial judge advocate.

3. That command as a disciplinary function should have the right "to mitigates, suspend, or set aside" a sentence.

4. That if command is permitted to go beyond this, reform of the existing system will be reform in name only.

What has been said so far is an endorsement of the Vanderbilt report on the negative side. In order that the desired result be achieved, we find ourselves in accord with the Vanderbilt report which would require:

1. That defense counsel must be a lawyer and where available a member of the Judge Advocate General's Department.

2. That the law member of the court shall be a member of the Judge Advocate General's Department and be actually present throughout the trial.

3. That the final review of all general courts-martial cases should be by the Judge Advocate General's Department, which should have the power "to review every case as to the weight of evidence, to pass upon the legal sufficiency of the record, and to mitigate or set aside the sentences and to order a new trial."

4. We believe that the members of the Judge Advocate General's Department "should be governed as to promotions, efficiency reports, and specific duty assignments by the Judge Advocate General's Department and not by the command officer of the organization in which they may be serving."

There are other sections of the Vanderbilt report, of the recommendations of the Secretary of War, and of the present system of military justice which will undoubtedly need comment and clarification. We do not make them here because we believe that the keystone of the entire structure is the matter we have dealt with. If command control of military justice is checked, the other reforms become of minor importance. If it is not checked, whatever other reforms may follow will be insignificant.

We therefore respectfully move that this association adopt a resolution which shall provide:

(*a*) Continuation of the existence of its special committee on military justice.

(*b*) That the association adopt this report as expressing the views of the association, and

(*c*) That the committee be authorized to present the views of the association to the Congress of the United States, its appropriate committees, and the War Department, and that it be further authorized to cooperate with other interested bodies in presenting the views of the association so that those views may become the military law of the land.

Respectfully submitted.

COMMITTEE ON MILITARY JUSTICE,
LOUIS C. FIELAND,
JOHN M. MURTAGH,
SIDNEY A. WOLFF,
INZER B. WYATT,
By GEORGE A. SPIEGELBERG,
Chairman.

The above report was unanimously adopted by the association at a stated meeting held March 20, 1947.

Mr. ELSTON. Now, we would like to know whether or not you have given some study to the bills pending before us this morning, particularly H. R. 2575 and H. R. 576.

Mr. SPIEGELBERG. We have studied with some care H. R. 2575, but have not seen the other bill to which the chairman refers.

Now, the remarks which I want to make this morning are addressed entirely to what the committee and the association believes to be omissions in H. R. 2575, and not criticism of what is contained in it.

Mr. ELSTON. All right; we will be glad to have you point those out to us.

STATEMENT OF GEORGE A. SPIEGELBERG, CHAIRMAN, COMMITTEE ON MILITARY JUSTICE, NEW YORK COUNTY LAWYERS ASSOCIATION

Mr. SPIEGELBERG. To be as brief as possible, our association believes that the keystone of military justice, as distinguished from military discipline, is checking of command control.

I would like briefly to refer to those authorities that have spoken on that subject in recent years, and I start with the findings or recommendations of the predecessor of this committee, being the Military Affairs Committee recommendations published in 1946, in which, concerning this subject, the committee said that—

> Provision should be made for Judge Advocate General jurisdictions to be set up throughout the Army independent of the immediate commands in which cases arise.

Mr. ELSTON. I may say to you that that report will be made a part of the record in this case, and I would point out to you that the other bill to which I referred, H. R. 576, does carry into effect the recommendation of the committee of the previous Congress to which you refer. Is that not correct, Mr. Durham?

Mr. DURHAM. That is correct.

Mr. SPIEGELBERG. Well, we are delighted to hear that.

Mr. ELSTON. Mr. Durham introduced H. R. 576 and served on that committee.

Mr. SPIEGELBERG. Yes.

To proceed with the history, this committee is of course entirely familiar with the report of the War Department's Advisory Committee on Military Justice, which is commonly known as the Vanderbilt committee. That committee made six specific recommendations, which I am sure are familiar to this committee, and of the six the first one, which was entitled "Checking Command Control," consumed four and a half of the seven pages of specific recommendations.

They said, and I beg leave to read just one paragraph, because I think the argument that they set forth is unanswerable:

> We have no fear that this arrangement—

referring to separation of the duties of military justice from command—

> will impart proper authority or influence of the commander. The absolute right to refer the charge for speedy trial and to control the prosecution will satisfy the demands of discipline. Further than that, the command should not go.

Mr. JOHNSON of California. Wasn't every other recommendation but this one accepted by the Army?

Mr. SPIEGELBERG. That is correct.

Mr. JOHNSON of California. But they omitted this one, that you consider the most important?

Mr. SPIEGLEBERG. They not only omitted it, sir; they affirmatively rejected it, in Judge Patterson's report, which was issued on the 20th of February of this year. The material to which I refer can be found on pages 6 and 7 of the press release of the War Department, which was released on February 20, and on that subject the reason, if it can be called that, given by the War Department is perhaps worth referring to very briefly. It said:

> The committee recommended that general and special courts martial—

and the committee, by the way, is the Vanderbilt committee—

> be appointed by the judge advocate or his delagees who would act as reviewing authorities independently of the normal command authority. This recommendation was disapproved for the reason that it was believed that the end of military justice would be more effectively accomplished if appointment of the courts and initial review of the cases were left in the officers exercising command.

And that is all that the War Department has to say on the subject.

Now, obviously, that is their conclusion, but we have great difficulty in following the reason behind that conclusion.

Our committee, I may say, was composed of five veterans of this war. Three of those committee members were engaged exclusively during the war in the conduct of courts martial as members of the Judge Advocate General's Department. I was not so engaged during the war, but because of the fact probably that I am a lawyer by profession I sat as trial law member on one court martial, so my direct experience is very limited—not that, however, of my fellow committeemen.

Now, again on the subject of separation of powers, I would like to call the attention of the committee to the fact that our British friends, who certainly are known for strict discipline, in the most recent report on the subject, which was issued during the last war and is entitled "Report of the Army and Air Force Courts Martial Committee," made just one specific recommendation, and I would like to take a moment of the committee's time to read that recommendation. The committee said:

> The constitution and functions of the Judge Advocate General's office must next be considered. It is a widespread belief, and we had it repeated before us again and again in memoranda and in evidence, that the persons who prepare cases for prosecution and act as prosecutors before courts martial are often the agents of the Judge Advocate General, who takes the place of a court of appeals in that he advises the Secretary of State and the Army Council upon matters of law. The argument proceeds: What is the use of a court of appeal which itself prepared and/or conducted the prosecution? In fact, this idea is totally fallacious, though it has undoubtedly been fostered by misleading expressions in the King's Regulations and the fact that in cases where legally qualified persons take part in prosecution prior to and at courts martial, they usually belong to a department which is part of the Judge Advocate General's establishment.
>
> The present constitution of the Judge Advocate General's office provides for two entirely separate departments:
>
> The military and Air Force department, consisting of serving officers with legal qualifications, whose duties consist, so far as courts martial are concerned, with the preparation of cases before trial, and the supplying where necessary of officers to conduct prosecutions.
>
> The Judge Advocate General's office proper, the staff of which consists of civil servants who are drawn from the ranks of practicing members of the bar and whose functions in relation to courts martial are confined to reviewing proceedings after trial and supplying judge advocates to act at the trial. It is an absolute rule that no one who has acted as judge advocate in any case takes part in

its review. The present establishment provides the Judge Advocate General, one deputy Judge Advocate General, two deputy judge advocates, and a legal assistant and registrar. In practice, any case under review which presents any real difficulty is reviewed ultimately by the Judge Advocate General himself.

It is obvious from the above that the responsibilities of the Judge Advocate General are very heavy, and in our opinion it is of the utmost importance, not only that his position should in fact be one of absolute independence, as in practice we are satisfied it always has been, but also that the public should not be under the apprehension that the Judge Advocate General is in any real sense a subordinate official of the War Office or Air Ministry. The great importance of avoiding public misunderstanding in this matter has also led us to recommend the complete separation of the military and Air Force departments from even the nominal control of the Judge Advocate General. These considerations have led your committee to make the following recommendations—

and I want to emphasize that these were the only recommendations made by this board—

That the Judge Advocate General should be appointed on the recommendation of, and be responsible to, some minister other than the Secretary of State for War or Air.

That the functions exercised by the military and Air Force department of the Judge Advocate General's office in connection with the conduct of prosecutions or any advice relating thereto, or any matter preliminary to trial, should be transferred to an independent directorate with a separate head (who might be termed Director of Military and Air Force Legal Services) who should have an adequate staff and a separate office, and would be responsible to the Adjutant General and air member for personnel respectively. It would be a matter for the consideration of the Army Council and Air Council whether there should be a combined directorate or a separate directorate for War and Air.

Now, I emphasize that to this committee because of known care with which the British services have always enforced discipline and in view of the fact that the only recommendation that this committee, this Army and Navy committee, made was for a separation of the judicial functions from command, I think it is of importance to this committee.

Now, in our system, as the committee knows, the commanding officer in fact controls the court martial. The report which has been submitted before you emphasizes the fact that the keystone of the structure of military justice is separation of the courts martial procedure and review from command, retaining in command those things which command needs to enforce discipline.

Now, what are they? It seems to me that command must and should refer the charges and that in addition, in order to insure a speedy trial, command should appoint the trial judge advocate and that after the court has rendered its verdict as a matter of discipline, and should be permitted to reduce or mitigate the sentence. Beyond that, it seems to me that there can be no justification, if we really are to have a system of military justice, for any further interference by command.

Mr. ELSTON. Are you referring to both general and special courts martial?

Mr. SPIEGELBERG. I am referring specifically, sir, to general courts martial.

Mr. VINSON. Restate your position.

Mr. SPIEGELBERG. That command should have the function of referring the charges?

Mr. VINSON. That is right.

Mr. SPIEGELBERG. That it should have, in order to insure a speedy trial, the right to appoint the trial judge advocate, and that after the

verdict of the court it should have as a matter of discipline the right to mitigate or suspend the sentence.

Mr. VINSON. That relates to discipline.

Mr. SPIEGELBERG. And that relates to discipline. Beyond that, command should not go, and that in the choice of the court the judge advocate general should select the court from lists prepared by commanders, and the appeal should be in a line independent from command to the judge advocate general and ultimately, in cases of sufficient importance, as provided by the proposed bill, to the President or the board appointed by him.

Mr. ELSTON. From what source would defense counsel come?

Mr. SPIEGELBERG. The defense counsel would come from the judge advocate general's office and would have to be a judge advocate or possibly, as provided in the proposed bill, a trained lawyer.

Mr. KILDAY. Mr. Chairman——

Mr. ELSTON. Mr. Kilday.

Mr. KILDAY. Who would appoint the court?

Mr. SPIEGELBERG. The court would be appointed by the judge advocate from a list prepared, and I think the gentleman who spoke before me suggested, in times of peace from the area and in times of war from the theater or smaller component.

Mr. KILDAY. When you say the judge advocate general, do you means the Judge Advocate General of the Army or within the division——

Mr. SPIEGELBERG. Of the area, sir.

Mr. KILDAY. Of the area.

Mr. SPIEGELBERG. He would be free to select, and in our opinion should select, from officers of commands other than those involved in the referral of the charges.

Mr. KILDAY. The thing I am trying to get clear is: Would this be the judge advocate who is on the staff of command?

Mr. SPIEGELBERG. No, sir.

Mr. KILDAY. How would you arrange that?

Mr. SPIEGELBERG. It would be from the area judge advocate general.

Mr. KILDAY. You are talking in time of peace now.

Mr. SPIEGELBERG. Peace.

Mr. KILDAY. He would be, then, the Army judge advocate?

Mr. SPIEGELBERG. That is right.

Mr. KILDAY. The charges would be preferred by whom, then?

Mr. SPIEGELBERG. The charges would be preferred by the commanding officer.

Mr. KILDAY. All right; who is serving under the same man that the judge advocate is serving.

Mr. SPIEGELBERG. You mean ultimately——

Mr. KILDAY. The point I am getting at is: Do you have a separate authority of appointing the court under your proposal, or is it another staff officer of the same command who is appointing the court?

Mr. SPIEGELBERG. I think I see your point. It is true that the lines would converge in Washington; that is, both the Judge Advocate General and the commander of the ground forces would be under the Chief of Staff, so your line would converge here.

Mr. KILDAY. No further down the line than here.

Mr. SPIEGELBERG. No further down the line than here. In other words, the question of the Judge Advocate General's staff would be a group separate from command channels. They would be attached to command, but not assigned to it, and for promotion and efficiency reports they would look to the Judge Advocate General and not to the commanding officer.

Mr. VINSON. In other words, you would establish in the Army area a judge advocate set-up that would be independent of the Army area?

Mr. SPIEGELBERG. Independent for purposes of command, yes, sir.

Mr. VINSON. That is right.

Mr. Chairman, right in that connection, let us apply it. How would it actually be applied? Give an illustration.

Mr. SPIEGELBERG. In time of peace or time of war, sir?

Mr. VINSON. In time of peace.

Mr. SPIEGELBERG. In time of peace, let us say in the Second Army Command, which includes New York——

Mr. KILDAY. The Second Army Command.

Mr. SPIEGELBERG. In the Second Army Command, as it is now, a commanding officer would refer a particular case for trial. He would then appoint, perhaps through his staff judge advocate, the trial judge advocate, because that is his function. The Judge Advocate General's Department in the area would be notified and would convene a court and appoint defense counsel, unless of course the defendant desired counsel of his own choosing. Then the procedure would be exactly as it is now, from that point on. I don't think, with the possible exception of those islands in the South Pacific, that this committee mentioned earlier in the morning, there is any practical difficulty to the plan. It certainly was the experience of our committee during this past war that interference by command in the administration of military justice was not occasioned.

Now, I am not suggesting that there is anything sinister about that, but it is human for an individual to carry out the ideas which he believes to be good and commanding officers necessarily influence the courts which they appoint from their command and whose future is entirely in the hands of the commanding officer.

Mr. VINSON. In other words, you are drawing a line of demarcation between military justice and military discipline.

Mr. SPIEGELBERG. I am trying to, sir.

Mr. VINSON. That is right. Military discipline is still confined and governed by the commanding officer.

Mr. SPIEGELBERG. And should be.

Mr. VINSON. And should be.

Mr. SPIEGELBERG. Yes.

Mr. VINSON. And military justice by the Judge Advocate General's Department.

Mr. SPIEGELBERG. I think that is the only place where we can look for it in the Army, sir.

Mr. VINSON. That is all.

Mr. ELSTON. Do I understand you want this procedure to apply to both general and special courts martial?

Mr. SPIEGELBERG. No; general courts martial.

Mr. ELSTON. How would you handle special courts martial?

Mr. SPIEGELBERG. I want to defend this, sir. I think it would have to apply to special, if you put it in with general. I mean, I don't think we should have two systems. When you get to summary court, I exclude that.

Mr. ELSTON. Well, of course; but special courts martial can grant a bad-conduct discharge, which is a serious sentence.

Mr. SPIEGELBERG. That is right, and falls into the same classification as general courts martial, though I directed my attention to general courts martial this morning because of the greater importance of the question to the man brought before such a court.

Mr. VINSON. That is right.

Mr. ELSTON. But you think they should both be included?

Mr. SPIEGELBERG. Undoubtedly, sir.

Mr. NORBLAD. Under your suggestion, would the Judge Advocate General's Department be part of the War Department or would you follow the British plan and make it separate, answerable only to the President or something of that nature?

Mr. SPIEGELBERG. Well, as a matter of theory, sir, I would very much like to see it separate, but, frankly, as a practical matter I don't know how that can be done now.

Mr. CLASON. Mr. Chairman, wouldn't this require a large expansion in the Judge Advocate General's Department?

Mr. SPIEGELBERG. It would, sir.

Mr. CLASON. You think it would be well worth while?

Mr. SPIEGELBERG. I certainly do.

Mr. CLASON. And it would require a separate promotion list. Insofar as these trial officers are concerned, you feel they should be younger men or not?

Mr. SPIEGELBERG. Are you speaking of the court?

Mr. CLASON. Of the courts and those who are going to act as counsel.

Mr. SPIEGELBERG. The only way I can answer that question is to say I think ability is more important than age. I have seen young officers who have great ability and not much rank and some officers who have substantial rank but not equivalent ability.

Mr. CLASON. Now, if a man has a lot of ability, would you assign him to Judge Advocate General's Department or would you think that he would be likely to be a very successful commanding officer?

Mr. SPIEGELBERG. You mean on the question of the two lines?

Mr. CLASON. Yes.

Mr. SPIEGELBERG. I assume that the Judge Advocate General's Department would be pretty well staffed with men who had legal training.

Mr. CLASON. Legal training that they get at West Point or Annapolis apparently would not be sufficient?

Mr. SPIEGELBERG. I am not sufficiently familiar with the legal training at the service academies, but I do know that a great many of the graduates of those academies attend full-time law schools after they have graduated.

Mr. CLASON. Would you suggest that as one of the requirements?

Mr. SPIEGELBERG. I certainly would. I would suggest an enlargement of a practice that is quite general now.

Mr. ELSTON. Will the gentleman yield?

Mr. CLASON. Yes.

Mr. ELSTON. In any event, you believe in the qualifications of the Judge Advocate General?

Mr. SPIEGELBERG. The qualifications of the members of the Department.

Mr. ELSTON. Yes.

Mr. SPIEGELBERG. Except I think it should be required of those who are going to be trial judge advocates and defense counsel, that they be at least holders of law-school degrees, if not members of the bar.

Mr. ELSTON. The bill before us provides they must be members of the bar.

Mr. SPIEGELBERG. Yes.

Mr. ELSTON. Of either the Federal or State courts.

Mr. SPIEGELBERG. I recognize that.

Mr. HESS. May I ask a question?

Mr. ELSTON. Yes, Mr. Hess.

Mr. HESS. In the case of the Navy, then, as I understand, you would set up a new, let us call it, Staff Corps, in the Navy. It will be a Judge Advocate Corps.

Mr. SPIEGELBERG. I am sorry, sir, but as far as the Navy is concerned I am completely uninitiated and I therefore would rather not make suggestions about the Navy, because I don't even know their system.

Mr. HESS. Well, maybe we can clear that up in a little bit. These men who would be under the Judge Advocate General, then, would never serve as a line officer aboard ship, would they?

Mr. SPIEGELBERG. In the Army, my answer to your question would be they would not serve, except in the Judge Advocate General's Department, except for the men who had graduated from the Academy and then in addition from a law school.

Mr. HESS. Could they serve for a while, then, in the Judge Advocate General's Department and probably in the line after that?

Mr. SPIEGELBERG. I don't see why not, sir.

Mr. HESS. That is all.

Mr. SPIEGELBERG. They do now.

Mr. HESS Yes; they do now.

Mr. KILDAY. Mr. Chairman—then let us get over to the Army side of it. Would you have a separate department or branch of the Judge Advocate General's Department handling military justice? As you realize, the law officers of the Army have many other duties.

Mr. SPIEGELBERG. I see no reason why they should not be rotated within the Department.

Mr. KILDAY. Then, this would be one of the functions of the Judge Advocate General?

Mr. SPIEGELBERG. Correct, sir.

Mr. KILDAY. And he would assign such officers as he desired on military justice, and still there would be the staff judge advocates, and what not, right down the command?

Mr. SPIEGELBERG. That is right. In that respect I do think, because this question was debated by the committee, there can be no doubt but the command officer should certainly at least have the right of refusal of any staff judge advocate whose assigning power rested in the Judge Advocate General.

Mr. KILDAY. Of course, he would have to have command of his staff judge advocate, wouldn't he?

Mr. SPIEGELBERG. Not for purposes of promotion.

Mr. KILDAY. Not for purposes of promotion.

Mr. SPIEGELBERG. No; he would be attached to command, but not assigned.

Mr. KILDAY. You mean, because he might be used in both, he should never have to go back under the command?

Mr. SPIEGELBERG. Right.

Mr. KILDAY. Of course, as I understand, in the Navy while there is a Judge Advocate General, there is no Judge Advocate Corps at the present time.

Admiral COLCLOUGH. We are just starting on our first program to have law specialists in the line of the Navy, that is, career lawyers.

Mr. KILDAY. That depends on the legislation that we are considering.

Admiral COLCLOUGH. That you are considering, yes, sir.

Mr. KILDAY. At the present time those men who are assigned to the Judge Advocate General in the Navy are line officers, who rotate between the two different duties?

Admiral COLCLOUGH. That is right, sir, except that my office is staffed almost completely now by career lawyers.

Mr. KILDAY. Yes; but we are attempting to set up a special duty officer within the line.

Admiral COLCLOUGH. That is right, sir.

Mr. KILDAY. Another question comes up, on the Navy, in connection with this. Even if the bill is adopted, your special officer is going to be an officer of the line.

Admiral COLCLOUGH. That is right, sir.

Mr. KILDAY. So that there will be a good many complications, in accepting this suggestion, insofar as the Navy would be concerned.

Admiral COLCLOUGH. Our engineering officers, for instance, are in the line, but they are called engineering duty only. They would perform only law duties. There is a reason aboard ship, when they go to sea, for having them in the line.

Mr. KILDAY. What I was bringing up, Admiral, is the question of relieving the Judge Advocate from control of command there, of line duty. It would be quite difficult without establishing, as Mr. Hess suggested, a new corps within the Navy outside of the line.

Admiral COLCLOUGH. Well, we have a corps in the Navy that serve under commanding officers.

Mr. KILDAY. The Civil Engineering Corps, for instance?

Admiral COLCLOUGH. The Civil Engineering Corps, the Medical Corps, the Paymaster Corps, and Supply Corps.

Mr. KILDAY. To carry out this suggestion, it would have to be comparable to that?

Admiral COLCLOUGH. It would not, in my opinion, sir.

Mr. KILDAY. It could be carried out.

Admiral COLCLOUGH. Yes, sir.

Mr. KILDAY. Even keeping the special duty officers in the line.

Admiral COLCLOUGH. Yes, sir.

Mr. JOHNSON. I wanted to ask you this question, to see how this would work out: With your provision there for defense counsel, if the suggestion you make is carried out, then you would have as many de-

fense counsel, roughly, as you have trial judge advocates, wouldn't you?

Mr. SPIEGELBERG. Well, I would make no distinction between trial judge advocates and defense counsel. In other words, they would be——

Mr. JOHNSON. I am trying to figure out how much of an increment you are going to have in the Judge Advocate General's Department. Now, you pick them out of the line officers, do you not?

Mr. SPIEGELBERG. Yes, sir.

Mr. JOHNSON. And according to the law we have, and also your proposal, they should be experienced trial lawyers?

Mr. SPIEGELBERG. Right.

Mr. JOHNSON. And we would have to develop that many somewhere along the line, so you would have, roughly, as many defense counsel as there are trial judge advocates.

Mr. SPIEGELBERG. I don't understand why you should distinguish between trial judge advocates and defense counsel. I think you would have to have enough trained lawyers in your Judge Advocate General's Department to handle the number of cases that required the judge advocates and defense counsel.

Mr. JOHNSON. Yes; but wouldn't that be, roughly, twice what you have now because now you pick your men at random out of the line?

Mr. SPIEGELBERG. Oh, it would substantially increase, sir. I can't say it would be twice as much, but I think it would be an expense that would be well worth while.

Mr. JOHNSON. I just want the record to show what it will be, as near as we can figure it out.

Mr. VINSON. May I ask a question——

Mr. JOHNSON. One more question. Do you think it is just as important for the Judge Advocate advising on contract matters, and things like that, that he be independent of the chain of command?

Mr. SPIEGELBERG. No, sir; I don't.

Mr. JOHNSON. It is only in the military justice end that you think the independence is imperative?

Mr. SPIEGELBERG. Yes; I have never seen any attempt on the part of command to interfere with the purely legal advice of the Judge Advocate General's Department—and by "purely legal advice" I am just taking the term that you used—on the question of contracts or constitutional law questions and international law questions. There it is solely advice.

Mr. JOHNSON. Well, when he is in these foreign fields, for instance, he advises on matters of international law?

Mr. SPIEGELBERG. Yes.

Mr. JOHNSON. Advisory law, that is, and not court matters or matters of military justice.

Mr. SPIEGELBERG. That is right. There the commanding officer who has no knowledge on the subject is willing to admit that he has none and is grateful for any assistance he can get, whereas in the control of courts martial the same situation does not exist.

Mr. JOHNSON. Well, the efficiency reports of that kind of officer would contain notations from commanding officers of the line and otherwise?

Mr. SPIEGELBERG. No; I don't see why they would, except in an advisory capacity, because as we envision it there will be an entirely separate chain of command in the Judge Advocate General's Department right up to the top, as I mentioned before.

Mr. JOHNSON. Yes; I got that.

Mr. SPIEGELBERG. The single commanding officer over the Judge Advocate General and the other line would be the Chief of Staff.

Mr. JOHNSON of California. Their efficiency reports would only have the comments and conclusions of the judge advocates.

Mr. SPIEGELBERG. The Judge Advocate General, plus such as he might invite from the officer to whom a staff judge advocate was assigned.

Mr. JOHNSON of California. Yes.

Mr. VINSON. This recommendation you are now addressing to the committee was approved by the American Bar Association; was it not?

Mr. SPIEGELBERG. It is substantially the same as that, sir.

Mr. VINSON. Now, have you any knowledge as to the attitude of the Judge Advocate General of the Army and the Navy with particular reference to this recommendation—any personal views in regard to it?

Mr. SPIEGELBERG. I can only assume from the report——

Mr. VINSON. I am not talking about that,

Mr. SPIEGELBERG (continuing). Of the War Department——

Mr. VINSON. I know what the report of the War Department is. I am talking about what their private views were, or their views in discussing it with your committee.

Mr. SPIEGELBERG. We have not discussed it with General Green——

Mr. VINSON. I am trying to put them on the spot as to whether they agreed with the recommendation of the Department in regard to this, or whether they have different views.

Mr. SPIEGELBERG. I can see that they would be in a somewhat difficult position.

Mr. VINSON. I know that; but when you begin to create a special corps and special opportunity for promotion for a group of officers, as a general rule you find much favor with it.

Mr. SPIEGELBERG. On the other hand, there might be a certain element of disfavor with the other branches of the Army.

Mr. VINSON. That is true; yes. All right.

Mr. ELSTON. I might say that if the witness concludes very shortly, General Green is here and we might ask him.

Mr. VINSON. Yes.

Mr. SPIEGELBERG. In conclusion, I would merely like to direct the attention of the committee to two short paragraphs in the report of the New York County Lawyers' Association.

We are now on the threshold either of universal military training or of the maintenance of a professional Army at least five times larger than that maintained before the last war. The future Army, no matter how it will be raised, will be composed of the physically fit youth of the country. The first contact with any judicial system for the overwhelming majority of these young men will be their experience with the administration of military justice. We believe that it is our duty, so far as lies within our power, to see that the system to which they are exposed is reasonably designed to achieve justice. The system now in

effect, together with the changes recommended by the War Department, cannot guarantee the result desired.

It is essential to the achievement of justice that the appointment of the judge, jury, and appellate court should not be merged in the same command that appoints the prosecutor, nor should they all be appointed by the same authority. Under the existing system and under that proposed by the War Department, the appointment of those who are to perform these four diverse functions is vested in the command authority, in which is also vested the future career of the officers selected by command to discharge these vital judicial functions. In theory it is too much to hope that command will not bend the views of its subordinates to meet its desires of the moment. In practice, there have been and are now such occasions and there will continue to be such occasions under the system proposed by the War Department which has elided from its advisory committee's report all suggestion of the separation of judicial power from the chain of command.

Mr. ELSTON. All right, Mr. Spiegelberg; thank you very much for appearing. I think your report is going to be very helpful to the committee.

Mr. SPIEGELBERG. Thank you very much for giving me this opportunity.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 11, LEGAL,
Thursday, April 17, 1947.

The subcommittee met at 10 a. m., Hon. Charles R. Clason presiding.

Mr. CLASON. I understand there are three witnesses who wish to appear here this morning and that the first one claims he will require only 5 minutes to present his arguments on the bill. I would ask, therefore, that Mr. Frank M. Ludwick come forward.

STATEMENT OF FRANK M. LUDWICK, SUPREME JUSTICE, PHI ALPHA DELTA LAW FRATERNITY

Mr. LUDWICK. Mr. Chairman and gentlemen, my name is Frank M. Ludwick. I am the supreme justice of the Phi Alpha Delta law fraternity. This fraternity is composed of some 17,000 lawyers and law students throughout the country.

We held our postwar convention in Kansas City, Mo., during Christmas week. All the delegates who were in attendance were ex-servicemen. They ranked from privates to major generals and from seamen to commanders.

During the course of our conferences, a considerable period of time was given over to the discussion of needs of changes and improvements in court-martial law.

I might say that there were some shocking instances of injustices presented by these delegates, who are now back in private life.

One rather amusing incident occurred when the men of the two branches of service got into somewhat of an argument as to which was the worst, the Army or the Navy. The ex-Army men contended that the Army was the worst and the ex-Navy men contended that their branch was.

As a result of these discussions, a resolution was adopted, which I have filed with this committee and of which I ask your consideration.

(The resolution is as follows:)

RESOLUTION

Whereas there are widely recognized deficiencies in the administration of military justice within the armed forces, the most common of which as found by the Vanderbilt committee appointed by the Secretary of War to investigate military justice are as follows:

1. There was an absence of sufficient attention to and emphasis upon the military, justice system, and lack of preliminary planning for it;

2. There was a serious deficiency of sufficiently qualified and trained men to act as members of the court or as officers of the court;

3. The command frequently dominated the courts in the rendition of their judgment;

4. Defense counsel were often ineffective because of (*a*) lack of experience and knowledge or (*b*) lack of a vigorous defense attitude;

5. The sentences originally imposed were frequently excessively severe and sometimes fantastically so;

6. There was some discrimination between officers and enlisted men, both as to the bringing of charges and as to convictions and sentences;

7. Investigations, before referring cases to trial, were frequently inefficient or inadequate;

Whereas the reasons for these deficiencies are (*a*) the lack of independence of present courts martial from command, and (*b*) the dominant role played by untrained personnel in the functioning of such courts martial;

Whereas this legal organization is composed in large part of veterans of the armed forces, who have had unusual opportunities to participate in the administration of military justice or to personally observe its deficiencies;

Whereas the members of this legal organization are professionally and personally interested in the promotion of equal justice for all: Therefore be it

Resolved, That Phi Alpha Delta law fraternity bring this matter to the attention of the Congres of the United States and the public generally to insure legislation to correct the above-named deficiencies;

That such legislation be specifically directed toward (*a*) divorcing military courts from command responsibility, except for minor offenses against military discipline, and (*b*) providing an enlarged Judge Advocate General Department in order that legally trained personnel may be available to staff all courts martial, and that only such personnel be permitted to serve on courts martial; be it further

Resolved, That the national officers of Phi Alpha Delta law fraternity be directed to bring this resolution before the subcommittees of the Military Affairs Committees and Naval Affairs Committees of Congress which are now investigating military justice, and that each chapter be requested to bring this resolution to the attention of its Congressmen and of the public in its respective locality.

Mr. LUDWICK. I do not wish to discuss the merits of the proposed bill. I merely wish to present this resolution to you for your consideration.

I would also like to have permission to file with you some copies of the Wisconsin Law Review, in which this subject has been discussed very thoroughly and I think very well.

I thank you.

Mr. CLASON. Does anyone wish to ask any questions?

Mr. JOHNSON of California. I would like to ask one question.

Mr. CLASON. Mr. Johnson.

Mr. JOHNSON of California. Do you wish us to reprint what is in that law review?

Mr. LUDWICK. No.

Mr. JOHNSON of California. I happen to be a graduate of the University of Wisconsin, so I would like to help you.

Mr. LUDWICK. I certainly have no objection.

Mr. CLASON. Mr. Rivers has a question.

Mr. LUDWICK. Yes, sir.

Mr. RIVERS. Did your organization discuss the placing of enlisted men on all courts martial?

Mr. LUDWICK. Yes; they discussed that and favored it.

Mr. RIVERS. They wanted them to sit in on the trial of both officers and enlisted men?

Mr. LUDWICK. I don't believe that particular question arose.

Mr. RIVERS. I bring that up because I asked another witness here yesterday, who represented—who did the Judge represent?

Mr. SMART. The VFW.

Mr. RIVERS. Judge Long, I believe it was, from the VFW, who said they discussed it very fully, and I wondered if your organization discussed that question.

Mr. LUDWICK. No.

Mr. RIVERS. But you did discuss which branch of the service had the worst record.

Mr. LUDWICK. Yes.

Mr. RIVERS. Thank you.

Mr. CLASON. Thank you very much, sir.

Mr. LUDWICK. You are very welcome.

Mr. CLASON. Is Mr. Arthur E. Farmer here?

Mr. FARMER. Yes, sir.

STATEMENT OF ARTHUR E. FARMER, CHAIRMAN, COMMITTEE ON MILITARY LAW, WAR VETERANS BAR ASSOCIATION

Mr. FARMER. My name is Arthur E. Farmer. I appear here as chairman of the military law committee of the War Veterans' Bar Association. That is a comparatively new and growing organization, consisting of about 300 lawyers who are veterans of World War II. At the present time it has its chapter in New York City.

I would like to say something about my own personal background, because part of that I will say is based upon my own experience and I think it might be of aid to the committee.

I served as an enlisted man both in the United States and in New Guinea, from June of 1943 until March of 1945, serving as chief of section of an "ack-ack" outfit and then in the Chemical Warfare Service. I was returned from New Guinea with a tropical skin disease condition and thereafter attended the Judge Advocate General's School, being commissioned a second lieutenant in March of 1945. Thereafter I was promoted to first lieutenant. I separated from the service in April of 1946.

My entire experience as a judge advocate was in the field of military justice, serving in various training camps throughout the South. However, in addition to that, while in New Guinea I was attached to the judge advocate's office at the base at Finchhaven, and there I assisted the trial judge advocate of the general court martial both in the preparation and trial of his cases and also performed the usual functions in military justice in the office of the staff judge advocate of that base.

Turning to the report of the committee, I will ask leave of the committee to file my report with it. I will not read it because it is too long, but I would like to go down the line on the specific recom-

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mendations and the reason for it, and then afterward make a few comments upon the specific bill 2575 now before this committee.

Mr. CLASON. Just a second. Would you like to have that incorporated at this point in your remarks, have it printed with your remarks?

Mr. FARMER. If you will, sir. I already have given copies to Mr. Smart.

Mr. CLASON. All right.

(The report of the committee on military law of the War Veterans Bar Association is as follows:)

REPORT OF THE COMMITTEE ON MILITARY LAW OF THE WAR VETERANS BAR ASSOCIATION

In the opinion of this committee, the present resentment against the administration of military justice in the Army of the United States, is a direct result of the misapplication by command of the familiar Army maxim "Discipline is a function of command." Interference by command with the functioning of the military course, the imposition of excessive sentences, inadequate representation of the accused, and discrimination in favor of officers as against enlisted men who have committed the same offenses, have all resulted from a misunderstanding or willful abuse of the implications of this maxim.

In reaching this conclusion we rely not only upon the personal experiences and independent research of the members of the committee, all of whom served in various capacities in Army courts martial, and two of whom were members of the Judge Advocate General's Department, but also upon the extremely thorough and well documented report of the War Department Advisory Committee on Military Justice. We have further considered the report of the House Committee on Military Affairs, the report of the special committee on the administration of military justice of the New York State Bar Association, and so much of the still unofficial recommendations of the War Department as the Secretary of War has released to the newspapers.

It is our belief that the maxim "Discipline is a function of command," does not require that injustice be condoned. It is our further belief that although in the great majority of cases the Army courts martial system functioned well during World War II, the record of abuses and injustices is not so meager as to permit them to be passed off as mere unimportant incidentals inherent in the waging of war. In general, this committee finds itself in hearty concurrence with the recommendations of the War Department Advisory Committee on Military Justice, more familiarly known as the Vanderbilt committee. This necessarily follows from our belief, as we have stated before, that the principal evils in the administration of military justice were the interference of command in the functioning of the courts, lack of adequate defense counsel, disparate sentences, and discrimination in favor of officers as against enlisted men charged with similar offenses.

We see no advantage at this time in restating the evidence supporting these criticisms of military justice. We will therefore proceed directly to our recommendations for revisions in the Articles of War and the Manual for Courts Martial.

A. THE COURT-MARTIAL SYSTEM SHOULD BE PLACED IN THE HANDS OF AN INDEPENDENT JUDGE ADVOCATE GENERAL'S DEPARTMENT FREE FROM INTERFERENCE OF LOCAL COMMANDERS BUT TRAINED TO COOPERATE WITH THEM TO THE END THAT MILITARY JUSTICE MAY BE NOT ONLY A METHOD OF ENFORCING DISCIPLINE BUT MAY ALSO BE FREE FROM THE ABUSES WHICH HAVE BEEN TOO FREQUENT IN THE PAST

It would seem almost self-evident that the administration of military justice should be in the hands of men professionally trained in the law. But it is not sufficient that the mere mechanics of the system be placed in their hands if their judgment and decisions are to be overruled by those unfamiliar with the judicial process. It is common knowledge, as was brought out by the testimony of innumerable witnesses before the Vanderbilt committee, that the officers who had the power to appoint the courts frequently sought to control their decisions. This was accomplished in a number of ways. In many commands they were told that it was their duty in every case to impose the maximum permissible sentence,

and that clemency was the function of the reviewing authority. In other cases the appointing authority let it be known that he felt that it was necessary to the maintenance of discipline that an example be made of the accused. Reprimand of the court by appointing authorities who disagreed with the findings or sentence, was common.

The staff judge advocates were powerless to prevent this. They might, and for the most part did, advise the commanding general that his action was not consistent with the principles of military justice. On occasion, some would go to the length of remonstrating with him, but the final word was always his. It is obvious that if members of the Judge Advocate General's Department are to function efficiently, they must be independent of command and be vested with the power to make the decisions. Neither their promotions, their leaves, nor their duties, should be dependent upon the favor of a superior whom it may be their duty to oppose.

(1) The first recommendation of this committee is, therefore, that the Judge Advocate General's Department be placed in sole control of the Army courts-martial system, and that officers of the Department be answerable only to their superiors in the Department, and through the Judge Advocate General to the Secretary of War. As a corollary it follows that the Judge Advocate General's Department should be enlarged and be supplied with enlisted personnel to act as court reporters, and as administrative and clerical assistants.

(2) The Articles of War should be amended to provide that the trial judge advocate, defense counsel and law member, shall all be members of the Judge Advocate General's Department.

(*a*) In recommending that the trial judge advocate be required to be a member of the Judge Advocate General's Department, we concur with the report of the House Military Affairs Committee and disagree with the recommendation of the Vanderbilt committee which would make the trial judge advocate the arm of the commanding general. Our reasons are as follows:

The theory of military justice is that it is not the function of the prosecution to convict, nor of the defense counsel to procure an acquittal by dishonorable or unethical means, but that it is the duty of the trial judge advocate to refrain from doing any act inconsistent with a genuine desire to have the whole truth revealed, while defense counsel is required to guard the interests of the accused by all honorable and legitimate means known to the law (Manual for Courts-Martial, 1928, pages 32 and 35). For these reasons, it has been considered an ethical duty of the trial judge advocate to inform the defense counsel of any facts favorable to the defense of which he may have knowledge. However, respecting the concept that an accused person should always be free to consult his counsel in full confidence, defense counsel has been held to a strict duty to keep the confidence of the accused.

Should the trial judge advocate be appointed by the commanding general, it is fair to assume that in most instances he would be judged by his record of convictions, and every incentive would exist for him to procure the conviction of the accused, even though it might include the withholding from the defense of evidence which might favor the accused. As his assignments, promotions and leaves would all depend upon the favor of his commanding general, it would be too much to expect that self-interest would not influence his sense of justice and fair play. In any event the right of the accused to a fair trial should not depend upon the strength of character of the trial judge advocate. Furthermore, should the record of convictions of the trial judge advocate not satisfy the commanding general, he would be subject to replacement.

Moreover, the appointment of the trial judge advocate by the commanding general would in fact create two camps—the commanding general on one side, and the Judge Advocate General's Department on the other. In the interest of cooperation, and the smooth functioning of the system of military justice, this should be avoided. An additional reason for avoiding such a decision is the fact that the staff judge advocate, who would review the case, should not be more allied with defense counsel than with the trial judge advocate if even-handed justice is to be expected.

(*b*) Under the present system, the accused has the right to select his own defense counsel provided his designee is declared available by the latter's commanding officer. This right should be retained together with the right of the accused to elect whether defense counsel selected by him shall act in place of, or in cooperation with, the regularly appointed defense counsel. An additional safeguard should be prescribed. One of the great difficulties of insuring a proper defense to the accused, has been that defense counsel has been given insufficient

time and opportunity to confer with the accused, interview witnesses, and prepare the case for trial. The Manual for Courts Martial should be amended to provide that defense counsel selected by the accused shall, when declared available by the latter's commanding officer, be relieved of other duties to the extent necessary to enable him to prepare the defense for trial.

(3) Members of courts martial should be selected by the staff judge advocate from a panel of officers appointed by the commanding general. While practical military considerations require that the commanding general decide which officers are available to serve on courts martial, his influence over the court should be minimized. .The placing of the power of ultimate selection in the hands of the staff judge advocate is an appropriate method of accomplishing this purpose.

In the past, difficulty has been encountered arising out of the fact that the members of a court appointed to try the accused, have, in many instances, been members of the same battalion or regiment as the accused. Frequently these members have been exposed to comments of other officers of the unit concerning the alleged offense, and their expressed convictions as to the merits of the case. The Manual for Courts Martial should therefore be amended to provide that the commanding general in selecting the panel from which courts shall be drawn, shall, to the extent compatible with the demands of his command, designate the officers selected by him proportionately from among the various units.

(4) The law member should be required to be present during all trials and should be vested with the power to decide all questions of law except the sufficiency of the evidence, and all matters pertaining to the conduct of the trial, such as challenges the granting of adjournments, requiring the presence of certain witnesses in lieu of stipulations of fact, etc.

(5) The functions of the law member and the other members of courts martial, should be assimilated to those of the judge and jury in a criminal trial by a civil court, and to this end we concur in the recommendation of the House Committee on Military Affairs that the law member shall not vote on the findings or sentence. On the other hand, we believe that the law member should be present during the deliberations of the court on findings and sentence, and should instruct the court on all questions of law, and of relevant War Department policy.

This brings us to a vitally important point—the matter of excessive and disparate sentences. During World War II a series of confidential letters were forwarded by the War Department suggesting maximum punishments for offenses with respect to which the table of maximum punishments had been suspended by the President for the duration. In many commands these suggested maximums were wholly disregarded, and where the suggested maximum was set at 5 years, sentences of 10 to 30 years were frequently imposed without any special facts being present to justify such action. In other commands, the appointing authority would instruct the court that in every instance the maximum sentence was to be imposed leaving it to him to reduce the sentence to one which he believed to be commensurate with the offense. Frequent "skin letters" from the office of the Judge Advocate General had little effect, and the abuses became so widespread that Maj. Gen. Myron C. Cramer, the Judge Advocate General, found it necessary to take official notice of the flagrant disregard of War Department policy and the failure of courts martial, to perform their duty under the Manual for Courts Martial to impose fair and equitable sentences. In an address delivered at the Judge Advocate General's conference in May 1945, General Cramer said:*

"In a recent case passing through my office a soldier, 18 years of age, in the 5th week of his basic training in this country, was convicted of willful disobedience of the lawful command of his superior officer. He was sentenced to confinement for 55 years. Let me read you what I wrote to the commanding general exercising general court-martial jurisdiction over that command:

" 'For the penalty of willful disobedience of a lawful command of his superior officer, he was sentenced by a general court martial, composed of one colonel, two lieutenant colonels, and five majors to dishonorable discharge, total forfeitures, and confinement at hard labor for 55 years. The members of the trial court not only deliberately disregarded the specific provisions of the War Department policy with respect to uniformity of sentences published generally to the Army on March 5, 1943, but they displayed a complete disregard of good judgment and common sense in imposing such an excessive sentence of confinement. Sentences of this nature imposed on a very young soldier who is not in the presence of the enemy, but in a training camp in the country, not only

*Quoted from the Judge Advocate Journal, vol. 11, No. 2, p. 7.

stir up the enmity of other soldiers in the same command, but subject the entire court-martial system of the Army to the indignant and justifiable criticism of Congress and public opinion. The officers who composed the court and who imposed this sentence should be instructed in the matter of the appropriateness and adequacy of the sentences which they vote to impose, and whether or not it is justified by the necessities of justice and military discipline.'

"How can the sentence in the above-mentioned case be defended, especially in view of the age of the accused and the short period of his service? You can see for yourselves that the best way that this court could be sure that the sentence would be reasonably equal to sentences in other commands would be to impose a fair and just sentence in the first instance.

"All of this brings up another point. You are familiar with the War Department policy of uniformity of sentences. I want to emphasize that this policy applies to courts when they are imposing sentences as well as to reviewing authorities when they are reviewing the sentence. The theory that a court authority to reduce the sentence is all wrong and contrary to the plain provisions of paragraph 80, page 67, of the Manual for Courts Martial, which provides that the sentences initially shall be legal, appropriate, and adequate."

The criticism levelled by the special committee of the New York State Bar Association at the recommendation of the Vanderbilt committee that the Judge Advocate General's Department become the appointing and reviewing authority independent of command, will undoubtedly be urged even more strongly against our recommendation that the law member advise the court concerning War Department policy in considering the imposition of sentence. The State bar committee argues that the effect of such a change in the court-martial system would be to nullify the attempt of the military court to decide each case for itself on its own evidence. We believe that this criticism is unwarranted and unsound. The suggested changes do no more than place in the hands of the new reviewing authority, the Board of Review, the same power as is now vested in the commanding general. The court martial has the power and duty to impose a fair and equitable sentence. The commanding general has the power to vacate, mitigate, or suspend that sentence. The same powers would be lodged in the Board of Review by the suggested revision. However, as it has been generally recognized that a very large number of the sentences imposed have been severe beyond all reason and justification—to such an extent, indeed, that a special Clemency Board has been set up to rectify these abuses—it is our recommendation that the court martial be instructed by the law member concerning current War Department policy, so that the members may, in the interest of uniformity of sentences for like offenses, at least be aware of that policy even though they cannot be compelled to follow it.

We wish to point out that under the system suggested, it is not the Judge Advocate General's Department which will set War Department policy as to sentences, but the Secretary of War, guided by the Chief of Staff and such other officers as he may select. The Judge Advocate General's Department would not be withdrawn from the Army—as one would almost think from the writings of certain critics of the Vanderbilt committee report—but would exist within the framework of the Army in the same manner that the Surgeon General's Department now functions.

(6) The power to refer any case to trial should remain in the commanding general. He should have the right, as his is the responsibility for discipline, to decide when an accused person should be tried by court martial. We distinguish carefully between the right to order an accused to trial, and the right or power to influence the court in determining the accused's guilt or innocence, and the sentence which should be imposed upon him.

(7) After trial, the record should be submitted to the commanding general for his recommendations as to the approval, mitigation, or suspension of the whole or any part of the findings and sentence. He should have the right and duty to state his reasons for his recommendations, and where circumstances peculiar to the command exist he should invite the attention of the reviewing authorities to these circumstances.

(8) The record should then be reviewed by the staff judge advocate at division level, in like manner as at present, and be forwarded with the commanding general's recommendations and the staff judge advocate's recommendations and review to a Board of Review, which would have the final reviewing power.

(9) The Board of Review should have power not only to disapprove the sentence because of prejudicial error or insufficiency of evidence, but it should also have the power to disapprove the sentence if it is against the weight of the

evidence. In the event that the Board of Review disapproves the sentence, it should have the power to return the case for rehearing. The special committee of the New York State Bar Association has opposed such a power on the ground that the power "to order a case retried de novo would carry us back to the conditions before 1921." This statement obviously is not correct. The power to order a rehearing upon disapproval of the sentence is now vested in the commanding general as reviewing authority. Having shifted the power to review from the commanding general to the Board of Review, the latter should have the same power to order a rehearing as the commanding general now has.

(10) The Manual for Courts Martial should provide that it shall be unlawful for any person to attempt, directly or indirectly, to influence the action of any member of a court martial, or by any appointing or reviewing authority, except in the course of court-martial proceedings as prescribed by the Manual for Courts Martial and the Articles of War. It should further provide that it shall be unlawful for any officer to reprimand or commend a court martial or any of its members for the action of the court in any case.

This prohibition is wider in scope than those recommended by other committees. We feel that the breadth of the prohibition is necessary. The reprimand of a member of the court by his battalion or regimental commander, even though the latter may not be appointing authority, may have the same effect on future action of the member of the court as a reprimand given by the commanding general. It is clear further that the wishes of command with respect to the actions of a court martial may be as easily expressed by commending the court's actions in certain cases and withholding such commendation in other cases, as by reprimanding the court when its findings and sentences run counter to the wishes of the commanding general.

(11) We concur in the recommendation of the Vanderbilt committee that "special courts martial should be governed as far as practicable by the same requirements as general courts martial." In any event, the appointment and presence of a law member who shall be a member of the Judge Advocate General's Department throughout all trials by special courts martial, and the appointment of a member of the Judge Advocate General's Department as defense counsel should be mandatory.

B. ENLISTED MEN SHOULD NOT BE MADE ELIGIBLE TO BECOME MEMBERS OF COURTS MARTIAL

This committee does not favor placing enlisted men on courts because it believes that such action will not tend to safeguard the rights of the accused, but, on the contrary, will, in practice, militate against them. It has somehow become an accepted conclusion that it is unfair to an accused enlisted man to be tried by a court which does not include enlisted men as members. We believe that this conclusion is the result of confused thinking and false analogy. Our objections to authorizing service of enlisted men on courts martial are practical. They are the following:

(1) The enlisted men would be peculiarly susceptible to pressure by the officers on the court. Anyone who has sat on military courts is quite aware that it takes a strong-minded second lieutenant to buck the colonel-president of a court martial. The exercise of influence upon junior officers is frequently unintentional and arises from the relationship which carries over from the day-to-day official contacts of the junior and senior officer. Substitute the enlisted man for the second lieutenant and the pressure will necessarily be multiplied many times. Such a situation would be most unsatisfactory.

(2) It must be expected that the court will tend to divide, officers against enlisted men, in cases where the offense charged involves the relationship between officers and enlisted men, such as violations of Articles of War 63 and 64 (disrespect toward a superior officer and willful disobedience of a superior officer). The sharp distinction between officers and enlisted men which still marks the official policy of the War Department makes a division of the court almost inevitable. Such a split is not compatible with unbiased justice, nor will it further the relationships between officers and enlisted men. The attempt to put enlisted men upon a court, before the barrier between them has been broken down, we believe to be unwise.

(3) The enlisted members of a court will be subject to tremendous pressure from other enlisted men. For example, time and again unfortunate situations have arisen where, either through a failure on the part of enlisted men to under-

stand the situation or because of a lack of understanding leadership on the part of officers, a unit has found itself with its enlisted men arrayed solidly against its officers. Breaches of discipline resulting in trials by courts martial necessarily follow. The enlisted man who was appointed to sit upon the trial of an accused in such a case, even though he were from a different unit, would surely be high-pressured by other enlisted men in an effort to influence his vote. He could not be unmindful of the possibilities of retaliation should he vote to convict. No enlisted man should be placed in such a situation, nor is it in the interest of the Army that members of its courts be influenced by considerations wholly apart from the evidence.

We wish it to be clearly understood that we do not fear that the quality of courts martial will deteriorate if enlisted men be appointed to serve. The qualifications of the enlisted men will be decided by the appointing authority, and we are not among those who believe that all able, thinking, and conscientious Army personnel become officers. Our objection to the proposed innovation is based solely upon the fact that so long as the status of officers and enlisted men remain as sharply differentiated as they are at present, it would be unjust both to the accused and to the enlisted men, as well as to the Army from a morale viewpoint, to appoint enlisted men to sit on courts martial.

C. OFFICERS SHOULD BE SUBJECT TO TRIAL BY SPECIAL COURTS MARTIAL, AND THE PROVISIONS OF ARTICLE OF WAR 104 SHOULD BE BROADENED, AS AN AID TO THE ELIMINATION OF THE DISPARITY BETWEEN THE PUNISHMENTS OF OFFICERS AND ENLISTED MEN

We believe that the observation of the Vanderbilt committee that the disparity between the handling of offenses committed by officers and by enlisted men was foundation for complaint, was a general source of criticism among the troops, and seriously impaired their morale, is well founded. We concur wholeheartedly in its recommendations to mitigate this condition, as follows:

"1. Article of War 104 should be amended to provide: (*a*) that warrant officers, flight officers, and field officers shall be punishable thereunder; (*b*) that the punishment shall be imposed by an officer with the rank not less than that of brigadier general or by an officer who has general court-martial jurisdiction under Article of War 8; (*c*) that the maximum fine be increased to one-half month's pay for each of 3 months.

"The right of the officer to demand a court martial and to appeal to the next higher commander should, of course, be preserved.

"2. The trial of officers by special courts should be authorized in order to bridge the gap between punishment under Article 104 and punishment by a general court."

The recommendation that officers be tried by special courts is not novel. As a matter of fact, Articles of War 13 and 18 provide for the trial of officers by special courts martial. It is only because the President has exempted officers from trial by special courts, under the provisions of Article of War 13, that they may now be tried only by general courts martial.

The Vanderbilt committee further recommends that in time of war a general court martial should be authorized in its discretion to inflict as officer punishment, loss of commission and reduction to the ranks. It further recommends that mandatory dismissal of an officer for drunkenness on duty in time of war be eliminated, and that the relevant Article of War 85 be amended to provide that any person subject to military law who is found drunk on duty shall be punished as a court martial may direct. We approve these recommendations. The reason for the suggested amendment to Article of War 85 is that the penalty for conviction under this article is so severe that commanding generals are extremely loathe to order the trial of an officer on this charge, and courts martial are most unlikely to convict.

It should not be expected, however, that the amendments recommended will, of themselves, assure like treatment of officers and enlisted men. No legislation can compel a commanding general to refer the case of an officer to trial, nor prevent a superior officer from "covering up" the offenses of his junior officers. Only education by directive, instruction, and example, from the higher levels of command, can work the change in attitude necessary to the elimination of disparities between the handling of the cases of officers and enlisted men.

D. The recommendations of the Vanderbilt committee included in subdivisions D, E, and F, of III, and IV, of its report, are seconded by this committee. We do not discuss them at length, because this report is already sufficiently long. Furthermore, to use a military phrase, we do not believe in scattering our fire.

The report of the special committee of the New York State Bar Association, which seems to have formed the pattern for the recommendations of the Secretary of War, although it acknowledges the faults of the present system repudiates the basic reform recommended by the Vanderbilt committee. It is indeed surprising that the Secretary of War should disregard the considered recommendations of the outstanding lawyers and jurists appointed by him. In our opinion, there are two major reforms without which the present inadequacies of the court-martial system cannot be remedied. The first is the freeing of military justice from the arbitrariness of command, and the second is assuring the accused of an adequate defense by making mandatory the appointment of experienced lawyers, specially trained in court-martial procedure, as defense counsel. Both these reforms, advocated by the Vanderbilt committee, have been disapproved by the New York State Bar Association committee and the War Department. Without them, any talk of reforming the court-martial system, is farcical. We do not know the basis for the recommendations of the Secretary of War as he has not given his reasons. We do know that the report of the special committee of the New York State Bar Association disapproves these basic recommendations on three grounds: (1) that the present system has existed in essentials for nearly 160 years; (2) that to win a war, the military commander must remain supreme under the chief civilian executive as commander in chief; (3) that the reforms proposed would result in the domination of the courts by the Army's office lawyers."

We can see no merit in the argument that because the court-martial system has remained essentially unchanged for 160 years it should not be changed now. As the State bar committee itself says: "The public has always growled a bit; it has often bitterly complained, especially after the wars." We believe that the public and the soldier, both, have justifiable grounds for complaint, and that it is time after 160 years to do something to remedy the deficiencies of the court-martial system.

The second reason advanced by the State bar committee—that the military commander must remain supreme—has no relevancy unless this committee is to be understood to advocate the substitution of arbitrary findings and sentences for a system of justice in the Army.

The Articles of War and the Manual for Courts Martial do not now give the commanding general control of the courts, if by "control" is meant the right to dictate their decision. It has been the assumption of such authority by officers who have refused to abide by law and the directives of their superiors which makes revision of the court-martial system imperative.

No case has been made out for the proposition that a war will be less efficiently fought if military justice be administered by a branch of the Army specially qualified and trained in its duties than if it be left within the control of a division commander to whom it is of minor importance in comparison with his other duties.

As to the third objection stated—that the reforms proposed would result in the domination of the courts by "the Army's office lawyers"—it seems strange that a committee which in one part of its report deplores the lack of prestige given to the Judge Advocate General's Department by the Army should later in this same report follow the Army's example by making a slighting reference to the department as "the Army's office lawyers." Hundreds of officers of the Judge Advocate General's Department served honorably and well under combat conditions, and few persons would care to characterize the present Secretary of State as an "office commander" merely because the military duties which he performed during World War II required his presence away from combat areas. However, addressing ourselves directly to the issue, we have no hestitancy in expressing our firm belief that administration of military justice should be placed in sole charge of the Army's legal department. There is no more justification for permitting the court-martial system to be dominated by command than there would be for permitting a commanding general to prescribe the type of surgery to be employed in the treatment of a wounded soldier.

For some reason there appears to be an underlying assumption in the report of the special committee of the New York State Bar Association, and such critics of the Vanderbilt committee report as Col. Frederick Bernays Wiener (Infantry Journal, issues of January and February 1947) that the Judge Advocate General's Department will be less able or willing to maintain military courts at a high level of efficiency than has been the case under the aegis of various commanding generals. It also appears to be assumed that the members of the Judge

Advocate General's Department will not cooperate with line commanders to maintain discipline. If they fear that the members of this department will not cooperate with command to the extent of perverting military justice, we trust that they are correct. For any other distrust of the effects of the proposed revision of the courts-martial system, we see no basis.

Respectfully submitted.

ARTHUR E. FARMER, *Chairman.*
WILLIAM P. CLARK.
ALAN D. MARCUS.
HENRY J. ROSHWALD.
ORLANDO J. RUDSER.
MILTON G. TUNICK.

Mr. FARMER. In the first place the committee believes that there are two fundamental changes that must be made in the system of military justice if reform is to mean anything at all. Those changes are: The creation of a completely independent Judge Advocate General's Department, the members of which shall be responsible only to superior officers in that department and through the Judge Advocate General to the Secretary of War. There must be a complete divorcement of the Judge Advocate General's Department from the chain of command. Without that reform is rather idle. It will merely mean trimming and not fundamentals. The second thing is there must be adequately trained personnel to take care of the military justice system. The trial judge advocate, the defense counsel, and the law member of every general and special court martial must be a member of the Judge Advocate General's Department so that they will not be subject to the influence of the line of command and the wish of command with respect to the disposition of particular cases.

Now, those are the two things that my committee and my organization feel are absolutely essential and which have not been placed in the present War Department bill.

Mr. JOHNSON of California. Mr. Chairman, may I ask a question right there?

Mr. CLASON. Yes.

Mr. JOHNSON of California. Based on your experience, which was somewhat limited, did you find or come to the conclusion that there was inadequate personnel in the handling of these various matters?

Mr. FARMER. Absolutely, sir. I can give you one specific example, which is outstanding. In that New Guinea assignment of which I was speaking, we had a general court martial out there in which the trial judge advocate was not a lawyer and had no legal training whatever. He was a very capable individual, but not having legal training it was necessary to get a lawyer to help him to prosecute his cases and I was the one selected. It was necessary for me, in the trial of the cases, to sit with him at the council table and aid him with respect to the questioning and the preparation of summation and legal arguments.

In addition to that, there was a period over there, which I remember very distinctly, where we had men in the post stockade and we couldn't try them for three and a half weeks because we couldn't find anyone who was adequately qualified to sit as a law member. Among the other reasons for that was the fact that we had a capital case, a man up on a charge of premeditated murder.

Mr. JOHNSON of California. Could I ask you one other personal question? What has been your experience, briefly, in the practice of law?

Mr. FARMER. I was admitted to the bar of New York State in 1929. I have been a practicing attorney since that time. I have done not only the usual office work but I have done a good deal of trial work, having served as trial and appellate counsel in the Federal and State courts. I am admitted to a number of Federal courts throughout the country.

Mr. JOHNSON of California. Now, in addition to the two cases you mentioned, do you know others? You don't need to relate them, but do you know of other cases where you feel that the man who handled law problems was not properly trained for the job?

Mr. FARMER. Absolutely, sir. I only mentioned those as outstanding examples. We had to do the best that we could, for instance, down in Fort McClellan, where the man hadn't even graduated from college—we tried to teach him what the fundamentals were, to allow him to act as defense counsel—but he was the best trained man we could get for the job.

Mr. JOHNSON of California. Do you think that the training that they give at West Point during the senior year there in law prepares a man in any way to handle JA problems?

Mr. FARMER. No, sir; I do not. All that it does is give him a survey, so that he has some idea, if he walks into a court martial, that this is a court martial.

Mr. CLASON. Mr. Hess.

Mr. HESS. Mr. Farmer, did I understand you to say that you feel the defense counsel must be a member of the Judge Advocate General's staff?

Mr. FARMER. Yes, sir. I didn't want to go into my personal experiences, preferring rather to rely upon the vast amount of testimony taken by the Vanderbilt committee which bears out this point, that defense counsel and trial judge advocates are too much amenable to the chain of command. I have personally known of instances where the defense counsel, upon being a little bit too successful, was made trial judge advocate and somebody put in who was not so successful as defense counsel.

Mr. JOHNSON of California. Would you preclude the defendant from having outside counsel?

Mr. FARMER. By no means. That right should be preserved to him, and also the right should be preserved to him to say whether or not the outside counsel should serve with the regularly appointed defense counsel or without the regularly appointed defense counsel.

Mr. JOHNSON of California. Don't you think the defendant should have the right to select a defense counsel who would not be a member of the Judge Advocate General's staff?

Mr. FARMER. Yes; but what I am talking about now is the personnel of the court as it is appointed. When you appoint the court, you appoint the members, the trial judge advocate, the defense counsel, and the law member. Those individuals should be members of the Judge Advocate General's Department. That would not in any way prevent the accused from selecting counsel, even if the counsel was a buck private.

Mr. JOHNSON of California. That is all.

Mr. FARMER. That would be up to him.

Mr. CLASON. How many troops were there at New Guinea, when you were serving there?

Mr. FARMER. In this particular base, the troops were between 30,000 and 60,000.

Mr. CLASON. And they couldn't find enough lawyers in that group to properly take care of the defendants so they were kept in stockades for 3 weeks.

Mr. FARMER. They couldn't find enough officer lawyers, sir. There were many enlisted men who were lawyers, but enlisted men were not eligible to serve. And I know that the staff judge advocate did everything possible, including radioing down the line to Milne Bay to get a qualified law member.

Mr. CLASON. Well, if in a group of from 30,000 to 60,000 men and officers there are not enough officers to handle the defense in courts martial, then in the Pacific area where they have troops on a great many different islands, perhaps the difficulty must become even greater for the defendants and they are going to stay in stockades longer.

Mr. FARMER. It wouldn't happen, sir, if the Judge Advocate General's Department was reorganized and a sufficient number of officers added to it.

In the north African theater, they surmounted that problem very handily by having traveling groups. The groups consisted of a law member, a defense counsel, and a trial judge advocate. These men traveled from coast to coast. The other members of the court were selected from among the officers in the command. They found that they actually disposed of the cases more expeditiously that way than under the old system, because these men were trained to handle the situation and knew what they were about.

Mr. RIVERS. May I ask him one question?

Mr. CLASON. Yes.

Mr. RIVERS. Did you hear the testimony of tne VFW, or have you read the testimony, Mr. Farmer?

Mr. FARMER. I have not, sir.

Mr. RIVERS. Among other things, they recommended that they have available a pool of lawyers and also a pool of stenographers to keep a transcript. How does that sound to you?

Mr. FARMER. Providing the lawyers were members of the Judge Advocate General's Department, I think it would be a very fine idea, particularly in scattered areas like the southwest Pacific, as the chairman has mentioned.

Mr. RIVERS. And then the defendant would have a chance to select counsel, that is, have more selection of counsel.

Mr. FARMER. I don't think it would work out that way, sir, actually, because the court would be appointed by a judge advocate, under the system which I will go into later when I get down to it, but he could request anybody whom he desired to serve as his counsel.

Mr. RIVERS. Then you think, as a matter of fact, what you recommend and what many other people recommend, and that is to give the Judge Advocate more autonomy, more independence, and more help, would probably be welcomed by both the Army and the Navy.

Mr. FARMER. I think it should be, sir. I don't know whether it would be. But the essence of the situation is that I would divorce the Judge Advocate General's Department from the chain of command so that we would have the Judge Advocate General's Department making the decisions and not acting merely in an advisory capacity, where he could be overruled and frequently was.

Mr. RIVERS. I assumed that you have the same complaint that we have heard, that there have been instances where the commanding officer injected his own personality, as a result of a decision.

Mr. FARMER. I think there can be no doubt about that, sir. In fact, the very first day I sat on a court as a law member we had that situation.

Mr. RIVERS. And you think the only way to divorce that possibility is to make the Judge Advocate General absolutely independent of the chain of command.

Mr. FARMER. I do, sir. I think putting into the Articles of War a statement, or even having a separate Article of War saying that it shall be an offense for any officer to attempt to influence a decision of a court, is completely worthless. The ways in which courts may be made aware of the wishes of the commanding general are practically infinite. It need not be done by a writing or by a specific statement. In fact, it usually was not done that way. The chances of any conviction under those circumstances are practically nil.

In addition to that, I would like to ask the gentlemen: Who would be the one to prefer the charge against his commanding general?

Mr. RIVERS. What have you to suggest, sir—like the chairman brought out so aptly—to prevent a man from being incarcerated indefinitely?

Mr. FARMER. Simply that there be in the first place a sufficient number of judge advocates appointed so that there will be enough on hand to take care of the normal situations.

Now, traveling units, as I mentioned, which were used in the north African theater and which were also used in the Sixth Service Command, is one solution. In the Sixth Service Command they had a general court martial set up and there they frequently brought the accused and the witnesses to the court. That may not always be feasible, but it is one solution in certain instances.

The other thing, as I mentioned, is traveling teams.

In addition to that there is no necessity of having separate staffs set up for each court. For example, at a training camp in the South, we will say, one that I am familiar with, you would have one team. That team would take care of one or more general courts martial and could also take care of the special courts martial so that you would not have members of the Department sitting around doing nothing at a great waste of the Government's money, and time of the Army personnel.

Mr. RIVERS. Would you have an enlisted man sitting on both special and general courts martial?

Mr. FARMER. The—in this I speak only for the committee, as we are conducting a pool of the organization and it hasn't been completed—commitee would not, and the reasons why we would not are entirely practical—nothing theoretical. Theoretically we all see the justice of having enlisted men sitting on courts when enlisted men are being tried. However, there are these practical considerations. We all know, at least all of us who have sat on courts, of the influence that a colonel may have on a first or a second lieutenant who is also a member of the court. Now, the colonel expresses himself very clearly as to his views and although it is presumably a secret ballot nevertheless the influence that he exerts upon the junior officers is very

great. He has ways to make his opinion stick, in the event that the junior officers do not conform. He may not be their colonel, but he knows their superior officers and indirectly comments have quite an effect on the carrer of a man in military life.

Bearing that in mind, I ask you to imagine the weight that a colonel can throw against enlisted men on the court in the ordinary case. Enlisted men shouldn't be put in that position. I don't think it is healthy for either the enlisted men on the court or for the accused. That would be the general situation.

However, there are specific situations where you would have an entirely different split. You take a violation, for example, of the sixty-third or sixty-fourth article of war: Disrespect to a superior officer or offering violence or willfully disobeying the commands of a superior officer. There you are very likely to find the exact opposite reaction. The enlisted man being very sympathetic to his fellow enlisted man would be inclined to say, "Well, after all, this officer who gave him the order knew he wasn't going to obey it and he did it just to catch him, or it is nothing but a bunch of chicken," and the usual Army terms. On the other side, you will find the officers feeling that they must uphold the authority of their brother officers, if discipline is to be preserved. Therefore you must expect to find a split between your enlisted men and your commissioned officers, based not only upon the evidence in the court but upon the unfortunate distinction between the officers and the enlisted men, which to a certain extent must exist to preserve discipline but which doesn't work well if you are thinking of putting enlisted men and officers on a single court.

The third reason I am against it is this: If you are an enlisted man and it becomes known that you are to sit on a court trying a certain accused, you have got to expect that friends of the accused in his unit are going to put pressure on you. When you come off the court, if the man has been convicted, there are very likely to be small vendettas carried out, and there again I think we would not have a healthy condition and I don't think such a condition would be conducive to morale.

At such time as you had a better understanding between the officers and the enlisted men and at such time as some of this distinction were worn down and we followed more the leadership principle than the domination principle, then I think we would be prepared to put enlisted men on the courts.

My objection isn't based on the fact that you can't find qualified enlisted men, you certainly can; but I am afraid of that set-up.

Mr. RIVERS. Well, then, it could possibly follow, if you do have the autonomy vested in the Judge Advocate General's Office——

Mr. FARMER. I still think you would have that same problem, sir.

Mr. RIVERS. Divorced from the chain of command——

Mr. FARMER. Even if you did have that, sir——

Mr. RIVERS. What I want to say is this: The result in most cases would be more advantageous to the accused and help the morale, than the risk you take in putting an enlisted man on the court.

Mr. FARMER. Precisely, sir. I think the enlisted man would be adequately taken care of if the courts were constituted as you have suggested, with an independent Judge Advocate General's Department.

Mr. CLASON. I suggest you go ahead with your statement, because otherwise I don't think you will ever complete it.

Mr. FARMER. I will be very glad to, sir.

Mr. CLASON. All right.

Mr. FARMER. I have already covered the point that the Articles of War should be amended so the trial judge advocate, defense counsel, and law member must be members of the Judge Advocate General's Department.

Now, in one respect this differs from the report of the Vanderbilt committee. The Vanderbilt committee suggests that the prosecution be left to the appointment of the commanding general. I think that is bad, and I think it is bad for these reasons: In the first place, it seems to me that the whole judicial system of the Army should be placed in the hands of trained officers, men whose sole duty is to administer the court-martial system. In the second place, you are getting right back again, if your trial judge advocate is appointed by the commanding general, to having your court under the influence of the commanding general, in this respect: It is provided by the Manual for Court Martial that the duty of the trial judge advocate is not just to convict but also to see that justice is done, and in the event that any evidence should come into his hands which might be favorable to the accused it is his duty to turn it over to the accused. Now, if you are going to have a trial judge advocate who belongs in another camp appointed by the commanding general, whose promotions, duties, ratings, and all the rest of it depend upon the commanding general, I see that there will be a great pressure upon that trial judge advocate to try and get convictions rather than to try and see, as a judicial officer, that justice is accomplished.

In addition to that, if you do establish your separate Judge Advocate General's Department, then if your TJA comes from the line of command and your defense counsel comes from your Judge Advocate General's Department, you are going to have a sort of opposition camp there which I think would be unhealthy. Your reviewing authority who would be in the Judge Advocate General's Department, would be morally with the defense, than he would be with the prosecution.

There is the further fact that your defense counsel probably would be better qualified than any trial judge advocate, because your defense counsel would be a trained judge advocate whereas your trial judge advocate would probably not be equally well trained. The general would have to depend upon such other attorneys as were available to him in his command.

The third point is, I think, the personnel of court martial should be selected by the staff judge advocate from a panel which would be appointed by the commanding general. And in order that there may not be a mockery made of that, I would say that the Articles of War should be amended to provide that that panel should consist of at least twice the minimum number required to constitute the court, so that there would be some freedom of choice by the judge advocate appointing.

The law member should be required to be present during all trials and he should be vested with complete power to rule on questions of law, including challenges. The present bill does not provide for challenges. Now, of course, as to challenges of the law member, it would

have to be provided that the other members of the court, by majority vote, would decide that question, but it is essentially a judicial function and it should be decided by the law member, when other members of the court are challenged. In other words, my theory is this: You should try so far as possible to divide the court into two parts: One the judge, that is, the law member; and, second, the jury who are the other members of the court. I think that is the best way of getting a fair trial and a fair determination.

Mr. KILDAY. Mr. Chairman—you would still leave it to the individual member of a court who was challenged to disqualify himself, even though the law member doesn't make the decision.

Mr. FARMER. Yes, sir.

Now, the power to refer any case to trial must be left in the hands of command. After all, they are responsible for discipline and if they see something that they believe is an offense they should have the right to say that this man shall be tried. I would not take that power away, but I think that when they say that this man shall be tried and presented to the judicial arm of the Army, that is the point at which their influence should stop.

After trial, the record—I am talking now generally about the general courts martial—should be submitted to the commanding general only for the purposes of recommendation, and the reason why he should have the power of recommendation is that there may be problems peculiar to his command which should take a part in deciding what the sentence should be. In that case his recommendation would undoubtedly have a considerable influence upon the judge advocate, but it should be the judge advocate who appointed the court from the panel who should in the first instance review the record. From there the record should be sent up to a board of review. That should be the final board and only after action by that board should the sentence be ordered executed, if it is approved. That board should further have additional powers which the present boards do not have, of weighing the evidence and setting aside any finding which is against the weight of the evidence and sending it back for a new trial.

Mr. KILDAY. Is it your view that all records should go up for review?

Mr. FARMER. All records of general courts martial, I believe, should go up for review, sir.

Mr. KILDAY. I believe at the present time, if the dishonorable-discharge phase of the penalty is suspended, it is not essential that it go to the board of review.

Mr. FARMER. It does go to the board of review, sir, but it may be ordered executed by the commanding general before it goes to the board of review.

Mr. KILDAY. Yes.

Mr. FARMER. The board of review may then vacate the whole thing on the basis of prejudice to the accused or other legal error.

Mr. KILDAY. Isn't it true now that if the dishonorable discharge portion is suspended—that is, the execution of it—it does not necessarily go to the board of review? Then, after it has been approved by the judge advocate, they could carry out the dishonorable discharge penalty at any time, so that it is now possible under the law to bypass the board of review.

Mr. FARMER. That is absolutely true.

Mr. KILDAY. You don't think that should be the case.

Mr. FARMER. No, sir. I will come to that in a minute. That has to do with vacating suspended sentences, too, which I have seen very gravely abused.

The Manual for Courts Martial should further provide that it shall be unlawful for any persons to attempt to directly or indirectly influence the members of any court.

Now, in addition to that, I think there should be a specific provision in there that it shall be unlawful for any officer to reprimand or commend any court martial for its action, because it is perfectly obvious that even if you prevent them reprimanding a court martial, by selecting the types of sentences which are commended you indicate very clearly to the members of the court what the wishes of the commanding general may be. I think one is as bad as the other.

Mr. NORBLAD. You think that should be in the manual or the Articles of War?

Mr. FARMER. Did I say the manual?

Mr. NORBLAD. Yes.

Mr. FARMER. I am sorry; I should have said the Articles of War.

Mr. NORBLAD. I agree with you very thoroughly on that point.

Mr. FARMER. I think it should be in the Articles of War.

Now, the special court martial should be governed in the same way that general courts martial are, particularly in view of the fact that the special court martial is now to be given, and I think properly so, the power to adjudge a bad-conduct discharge.

The one distinction I would like to make is this: On the review of special court-martial findings and sentences, where no bad-conduct discharge is involved, the review by the judge advocate who appointed the court should be final. I see no necessity for processing that vast volume of cases up through the boards of review. Where a bad-conduct discharge is adjudged, however, whether it be suspended or executed, that case should be processed through the board of review, in like manner as a general-court-martial case.

I have already mentioned that we do not believe that enlisted men should serve on courts martial, so I won't touch that again. However, with respect to the disparity of sentences, which has been one of the notable complaints against the court-martial system, it seems to me that making the boards of review the final authority will tend to cut down those disparities. You will have a rather limited number of boards of review. They will be in direct contact with the Judge Advocate General and with the Secretary of War. They will be in a position to enforce general policies of the War Department and to see that these sentences don't get out of hand.

Now, that doesn't mean that you are taking away from the courts the right to adjudge an appropriate sentence. Courts can adjudge an appropriate sentence and the board of review cannot increase it; but if a court gave a 50-year sentence for something that shuld get a 5-year sentence, you would be sure, by putting the control in the board of review, that the sentence could be cut down to a proper length.

Mr. KILDAY. Isn't that possible now?

Mr. FARMER. Pardon me, sir.

Mr. KILDAY. That is possible now; isn't it?

Mr. FARMER. It is only possible indirectly now. It is possible in this way: Where the dishonorable discharge has been suspended, the board of review can only recommend that the commanding general cut down the sentence or remit part of it. The commanding general is not bound to follow that recommendation, and in two cases that I personally know of the commanding general wrote back to the chief of the Military Justice Division of the Judge Advocate General's Department that notwithstanding the recommendation he felt that his original disposition of the case was correct, and he refused to follow the recommendation. In that event it would have to be handled at the other end, through a clemency board or through some other such process.

Mr. KILDAY. So long as this dishonorable discharge is suspended the War Department still has complete authority to review the record and mitigate the penalty, or restore the man to duty, or take whatever administrative action they desire to take.

Mr. FARMER. It would have to be done indirectly, though, sir. It could not be done as part of this process. It certainly is bad for morale to find a 50-year sentence going in, because the members of the command know about that 50-year sentence. It is ordered executed. It isn't until months afterwards, when the accused has been removed maybe to a rehabilitation center or a disciplinary barracks, that that sentence is cut down. But the boys back in the accused's unit don't know anything about that.

Mr. JOHNSON of California. Mr. Chairman, could I ask a question?

Mr CLASON. Yes.

Mr. JOHNSON of California. I wonder if your group gave any thought to this idea: In my State we have what is known as the indeterminate sentence law. If a crime is punishable, say, by 1 year to 50 years, all the judge does is to confine him for the period required by law. Now, at the end of the minimum sentence a board reviews his whole record. In that way we have gotten more or less uniformity of sentence. Did your group consider anything like that?

Mr. FARMER. We didn't consider it as a group. I considered it personally, and if you will be interested in having my individual action, I would be glad to answer.

Mr. JOHNSON of California. Could you just give it to us briefly?

Mr. FARMER. I can give you it quite briefly.

Mr. JOHNSON of California. That system had merit. Could we apply it here, do you think?

Mr. FARMER. I don't think it is necessary to use that system here. In the first place, you are going to run, to a certain extent, afoul of this question of maximum sentences, but actually that is the way it works out in the Army anyhow. The man gets a 5-year sentence. He then gets sent to a rehabilitation center. At the end of 9 months or so his case is reviewed and if he can be restored to duty he is restored to duty. The balance of the sentence is suspended. So, irrespective of what you call it, that is the way it works out. Now, with respect to the difference between the handling of officers' cases and enlisted men's cases, we feel that special court martial should have the right to handle the officer cases. As the bill reads now, although they have the right, there is still the power in the President to exclude the officers from the category of those whom special courts martial may consider. And I think that in the sections relating to summary courts martial and to

special court martial, the power of the President to narrow the jurisdiction of these courts should be eliminated. The jurisdiction should be specifically defined.

I just have one or two other comments on this specific bill. Of course, the creation of an independent Judge Advocate General's Department has nothing to do with an amendment to the Articles of War. That would have to come in through a separate bill on the organization of the Army.

Now, the present bill provides that law members of general courts martial must be members of the Judge Advocate General's Department or admitted attorneys certified by the Judge Advocate General to be qualified. I don't think that the alternative should be preserved. I think that the idea is to take your law members and make them part of the judicial system. There is no reason why you can't take law members who have had the specific training required to fit them for their jobs. If you took a law member from anywhere except to Judge Advocate General's Department, you would again be placing the law member in the position where he is under the commanding general's thumb, and we are trying to get away from that completely.

Furthermore, this bill does not provide for a law member of a special court martial, and particularly where we have this problem of bad-conduct discharge I think there should be a law member. I think there should be a law member on every special court martial, irrespective of the case.

It further does not provide that the trial judge advocate and defense counsel must be members of the Department, but only if available. Now, that doesn't mean anything. We have already in the present Articles of War, article of war 8, a provision that a law member must be a member of the Judge Advocate General's Department if available, and those of us who have served know that the member of the Judge Advocate General's Department was very rarely available, even though he was there to act at times as a trial judge advocate. He was practically never sitting as a law member, where he should be, and therefore that should be made mandatary and not discretionary.

My last point has to do with the mitigation and remission of sentences and the vacating of suspended sentences. Now, the vacating of suspended sentences is now in command. What has happened in many instances is this: A man is given a 5-year sentence. He serves 9 months and the balance is suspended. He commits some comparatively trivial offense, and on the theory the man is on probation the suspension is vacated and the man is sent back to serve 4 years and 3 months, with an executed dishonorable discharge. That is something which is controlled entirely by command and is completely unfair, because I have seen it happen when a man merely went to town and got drunk and received that treatment. I think, therefore, that that power should likewise be vested in the Judge Advocate General's Department.

Mr. CLASON. I appreciate, and I am sure the committee does, your fine statement. Thank you.

Mr. FARMER. Thank you, sir.

Mr. CLASON. Will Mr. Boyd come forward?

Mr. BOYD. Yes, sir.

(Hon. Charles H. Elston, chairman, occupies chair.)

Mr. ELSTON. Mr. Boyd, will you state your full name, please, and indicate whom you represent this morning.

STATEMENT BY COL. RALPH G. BOYD, PRESIDENT OF JUDGE ADVOCATES ASSOCIATION

Mr. BOYD. I am Ralph G. Boyd, of Newton, Mass. I am a practicing lawyer, for 20 years, in Boston, a partner in a large law firm in that city.

I have had some 20 years of military service, including service in the National Guard as an enlisted man and as an officer, and many years in the Officers' Reserve Corps, the last 10 or 11 years of which have been in the Judge Advocate General's Department. During the war I served approximately 5 years on active duty, largely in the Office of the Judge Advocate General, but that service included observation of legal activities in each foreign theater of operations. I am a colonel in the Judge Advocate General's Department Reserve, and my present statement is on behalf of the Judge Advocates Association.

Mr. ELSTON. Would you state what the Judge Advocates Association is?

Mr. BOYD. I will be very happy to, sir. The Judge Advocates Association is a national organization comprising in its membership nearly 2,700 lawyers who served as officers in the Judge Advocate General's Department, most of them during World War II. We have in our membership approximately 2,200 of those 2,700 officers.

I come here at the express direction of the board of directors of that association, who desire to have their views brought to this committee's attention and who desire to assure this committee and the Congress that they wish to be of every possible assistance in improving the military justice system.

I think I should state at the outset that not all of the judge advocates are experts and specialists in military justice. Necessarily, the Department includes lawyers who were assigned to and became specialists in many fields, such as international law, claims, military reservations, patents, contracts—all sorts of fields. My own assignment for the greater part of the war happened to be as the head of the Army Claims Service.

But these judge advocates—most of them—have been students at and graduates of the Judge Advocate General's School and over this war period have lived together, eaten together, and talked together, and have each in the various fields a pretty clear understanding of the problems of the related fields in which their brothers have been operating.

We anticipated, of course, sometime ago that as of the close of the last war there would be a certain scrutiny of the operations of the military justice system during this war, with a view to improvements; and anticipating that, we caused a poll to be made of our members. A questionnaire, of which I shall be happy to furnish a copy to the committee, was sent to each of our members and somewhat over a thousand replies have been received and reflected in the tabulations which have been prepared to date. I should like, on individual questions, to advert to the results of that poll, as indicating the frame of mind and attitude on various questions.

Mr. ELSTON. Is it in typewritten form, so that it could be inserted in the record?

Mr. BOYD. Yes, sir. I will be glad to hand to the clerk a typewritten copy of my entire statement, including a tabulation of that type, which may be inserted in the record.

(The questionnaire is as follows:)

JUDGE ADVOCATES ASSOCIATION

WASHINGTON 5, D. C.

DEAR MEMBER: The present Congress is expected to consider revision of the Articles of War and court-martial procedure, and this association will, no doubt, be asked for its views. To that end, the board of directors has formulated the following questions with a view to polling the membership on the more important criticisms and suggestions contained in the report of the American Bar Association committee on military justice, dated December 13, 1946. Yes and no answers may be made, but since some of the questions are double-barrelled, the board welcomes the fullest possible expression of views.

RECOMMENDATIONS OF AMERICAN BAR ASSOCIATION COMMITTEE

1. Total separation of appointing and reviewing authority from command. JAG or officer deputized by him at Army or lower level to appoint general and special courts. Power of commanding officer limited to appoint TJA and to refer charges for trial; with power to disapprove findings and sentence, or mitigate; no power to order executed prior to approval by JAGD. Yes, 703; no, 71.

2. All general and special records to be reviewed by JAG or boards of review or JA at Army or lower level, with power to weigh evidence and final power to determine legal sufficiency of record, power to set aside findings and sentence and order new trial, also power to reduce sentence. Yes, 754; no, 36.

3. TJA, defense counsel, and law member to be lawyers and detailed by the JAGD. Yes, 791; no, 19.

4. Law member must be actually present throughout trial; his rulings on legal questions except as to sufficiency of the evidence to be binding on court. Yes, 808; no, 4.

5. Substantial enlargement of JAGD. Yes, 808; no, 16.

6. Separate promotion list (as in case of Medical Corps) for JAGD. Yes, 758; no, 38.

7. Eligibility of qualified enlisted men to set on general and special courts. Yes, 563; no, 220.

8. Prohibition of reprimand in any form of members of court; making it offense to attempt to influence members of court or appointing or reviewing authority. Yes, 860; no, 82.

9. Power of general court in officer cases to adjudge loss of commission and reduction to ranks. Yes, 517; no, 268.

10. Trial of officers by special court without power of dismissal. Yes, 604; no, 199.

Space limitations have required the committee to reduce the number of questions to the above. However, members are invited to express their views on any aspect of the general problem. The above questionnaire has been adopted due to the inability of the committee to obtain for distribution sufficient copies of the American Bar committee report.

The directors are appointing a committee to evaluate the responses. Please sign and return by February 10, 1947.

SAMUEL F. BEACH, *Secretary.*

P.S.—A directory of members will be sent you around February 15, 1947. Send in your correct address.

STATEMENT BY COL. RALPH G. BOYD, PRESIDENT OF JUDGE ADVOCATES ASSOCIATION, BEFORE THE LEGAL SUBCOMMITTEE, HOUSE COMMITTEE ON ARMED FORCES

The Judge Advocates Association is a national organization comprising in its membership nearly 2,200 of the some 2,700 lawyers who served as officers in the Judge Advocate General's Department during World War II. As the president of the association I have been authorized and directed by the board

of directors to appear before this committee and here to present briefly the association's views and recommendations relative to the necessity for and the nature of legislative changes relative to the administration of military justice. I am directed to assure this committee and the Congress not only of the association's continued interest, as soldiers and lawyers, in further improving the present system but also of the association's desire to be of all possible assistance in the detailed analysis and drafting necessary to modernize the system to make it truly workable under modern changed conditions.

It should be stated at the outset that not all of the members of the association are experts in the military justice field. They are now—most of them—lawyers in civilian practice, judges and public officials. Several of them are members of the Eightieth Congress. But, while not all are experts, most of the experts are included in the association's rolls which list also most of those judge advocates who, in great part graduates of the Judge Advocate General's School, performed at one time or another during the war all manner of legal assignments. These included matters relating to claims, patents, contracts, real estate titles, military affairs, legal assistance, international law and other fields of law in which the military was concerned as well as criminal law and military justice.

Anticipating that, as after the last war, the system of military justice would no doubt be subjected to careful scrutiny by the Congress with a view to profiting by the experience of the war, the association's directors have caused its members to be polled on many of the vital aspects of the situation. Over 1,000 replies have been received. To the results of this poll I shall advert from time to time in this statement.

It would be inappropriate at this time to refer, as to the details of the amendments now proposed in the bills before this committee or otherwise to be considered, whether any particular detailed text is the best which can reasonably be devised. Whether particular text is even for detailed consideration must necessarily turn on the acceptance or rejection of certain broad proposals for changes in the existing system.

The Association has observed with interest the activities of the War Department Advisory Committee nominated by the American Bar Association and appointed in March of last year by the Secretary of War. This group of distinguished lawyers and judges, after full committee and regional public hearings and with the benefit of personal interviews and replies to questionnaires and after exhaustive studies, has filed with the War Department its carefully prepared report dated December 13, 1946. I am sure that the conclusions embodied in this most enlightening report are fully known to each member of your committee.

It is obvious that the Advisory Committee and the War Department and your committee as well as this association and all thinking citizens desire and are searching for a single result—namely, the determination of what changes in existing laws, regulations, and practices are necessary or appropriate to improve the administration of military justice in the Army. No one doubts but that some changes are necessary. The problem, all agree, is only as to what changes are to be made.

One question—and in our opinion the very heart of the whole problem—is whether military justice as hereafter administered is to remain, as historically it has developed, essentially military to achieve justice or whether it shall essentially be justice as administered within the military.

The eminent committee of the American Bar Association is of the opinion that, though the right of command to control the prosecution and to name the trial judge advocate should be retained, the Judge Advocate General's Department should become the appointing and reviewing authority independent of command. That committee felt that the authority of a division or post commander to refer charges for prompt trial to a court appointed by a judge advocate should be absolute. The need for preserving the disciplinary authority of the command and at the same time protecting the independence of the court could thus be met. It had no fear that the arrangement would impair the proper authority or influence of the commander. The absolute right to refer the charges for speedy trial and to control the prosecution would, the committee thought, satisfy the demands of discipline. "Further than that the command should not go. The present Articles of War do not contemplate that the commander shall control the action of the courts."

The committee further stated: "The need for the prompt appointment of a court and a speedy trial when the command refers a charge for trial must be recognized. Moreover, the deterrent effect of punishment must not be over-

looked and the need for severe sentences under conditions prevailing in an army in a state of war cannot be denied. But there is no reason to think that the members of the Judge Advocate General's Department will not be keenly alive to all these necessities. They will be Army men selected and trained by Army men. In time of war they will be in the field in close association with the command and cognizant of all the considerations of safety and success which influence the command itself. The time is past when a court martial might be deemed merely as an advisory council to the commander. The court martial, as conceived by the Articles of War, is an independent tribunal; and if the commander controls the prosecution, the appointment and functioning of the court may be safely left to the legal department of the Army."

It will be recalled that the House Committee on Military Affairs as early as August 1, 1946, pursuant to House Resolution 20, Seventy-ninth Congress, authorizing the committee to investigate the war effort, made certain recommendations (Rept. No. 2722) based on a careful examination of the court-martial procedure and the entire judicial system of the Army. The House committee recommended in part:

"*Recommendation 1*

"That the Judge Advocate General's Department be vested with judicial power it does not now possess;

"That, after a special or general court has been held, the findings and sentences shall pass directly to the Judge Advocate General's Department for all further actions of review, promulgation, and confirmation, except for such final appellate review as may be made by the Judge Advocate General of the Army in accordance with recommendation 2 below and such final confirmation as may legally require action on the part of the President;

"That in view of its increased responsibility the Judge Advocate General's Department be reorganized and enlarged, both as to the number and the qualifications of its personnel, provision being made for Judge Advocate General jurisdictions to be set up throughout the Army, independent of the immediate commands in which cases arise, and provision being made for higher reviewing officers of the Judge Advocate General's Department to take part in actual trials from time to time throughout their service in order to keep their judgment realistic as well as academically and legally sound;

'That officers of the Judge Advocate General's Department be made available to sit as law members, trial judge advocates, and defense counsel in all general courts martial in accordance with recommendations 4 and 6 below; and

"That the Articles of War be amended as may be necessary to give effect to the foregoing provisions of this recommendation."

The Bar Association committee felt that the commander referring the case for trial should have the power to mitigate, suspend or set aside the sentence but that such authority or power of command to act upon the sentence should be limited to the question of clemency.

Adoption of the proposal that there be a total separation of appointing and reviewing authority from command, that The Judge Advocate General or an officer deputized by him at the Army or lower level appoint general and special courts martial, that the power of the commanding officer be limited to the appointment of the trial judge advocate and to refer charges for trial with power to disapprove findings and sentence or to mitigate, but with no power to order execution of the sentence prior to approval by The Judge Advocate General or his representative, is urged by the Judge Advocates Association. Of its members affirmatively expressing an opinion on this proposal, 703 were in favor and only 71 opposed.

That courts appear to dispense justice is comparable in importance with the fact that they really do dispense justice. So long as any substantial number of commanders, judge advocates, and particularly enlisted men are of the opinion (see p. 7, Bar Association Committee Report) that courts are dominated by command, such courts are under suspicion and their findings and sentences suspect. To remove this defect would alone be a sufficient reason for legislation taking the system of military justice out of routine command channels. "These 'justice' considerations," the Bar Association committee stated, "are important to a modern peacetime army as well as to a wartime army. 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. The nearer our approach to universal military service the greater is the need to emphasize the military justice system."

This association concurs in the view of the Bar Association committee that the members of the Judge Advocate General's Department should be governed as to promotions, efficiency reports, and specific-duty assignments in the chain of command of the Judge Advocate General's Department and not by the commanding officer of the organizations in which they may be serving. It is elementary to all who have had military service that the effective performance of any function within the military is assured only if the power to promote—or to fail to promote—to rate an officer's efficiency, and to assign an officer to the locations and duties to which he is best fitted and is most needed, rests in the chain of command responsible for the particular function. It is obvious that if The Judge Advocate General is to have any reasonable chance of success in building, maintaining and operating a legal and judicial system be, and not the individual and icolated military commander, only incidentally concerned with legal activities, must be vested with the power to arrange such vital matters within his own organization subject, of course, to such broad policies and regulations as may from time to time be in force and applicable to the Army as a whole.

The House committee further recommended:

"*Recommendation 2*

"That The Judge Advocate General of the Army be vested with judicial appellate power in all general court-martial cases apart from the administrative processes of review;

"That The Judge Advocate General be empowered to consider appeals from the judgments of general courts martial both as to law and fact.

"That the Articles of War be amended as may be needed to provide that any defendant may file a petition for rehearing in appeal from the judgment of any general court martial, said petition to be addressed to The Judge Advocate General;

"That the Judge Advocate General be empowered in his judgment to retry any case de novo, to order any case retried de novo, or to void any original proceeding, or to alter any sentence, or to issue an honorable discharge in place of a dishonorable discharge, or to restore to an officer his commission or the grade of which he may have been deprived by sentence of a general court martial, or to take other action as may be required to correct any injustice and so far as possible to make whole the party or parties injured; and

"Then when, by direction of the President, as provided in article of war 50½, an office of assistant judge advocate general is established in any distant command, said assistant judge advocate general shall exercise in that command judicial powers and duties corresponding to those authorized in the foregoing paragraphs for the Judge Advocate General of the Army."

The proposal that records of all trials by general or special court martial not only be reviewed by the Judge Advocate General or boards of review or by a judge advocate at the Army or lower level but with power to weigh the evidence and with final power to determine the legal sufficiency of the record, to set aside findings and the sentence and to order new trial, and with power also to reduce the sentence, is also urged by the Judge Advocates Association as vitally necessary of adoption. As against 36 opposed, 754 judge advocates were in favor.

The bar association committee report in this regard states: "The final review of all general court-martial cases should be placed in the Department of the Judge Advocate General and every such review should be made by the Judge Advocate General or by the Assistant Judge Advocate General for a theater of operations, or by such board or boards as shall be designated by the Judge Advocate General or the Assistant. This reviewing authority shall have the power to review every case as to the weight of the evidence, to pass upon the legal sufficiency of the record and to mitigate, or set aside, the sentences and to order a new trial. This recommendation relates not only to checking command control but also importantly to the correction of excessive and fantastic sentences and to the correction of disparity between sentences. In order to make this recommendation effective, article of war 50½ should be amended. In its present fom it is almost unintelligible. It should be rewritten and the procedure prescribed should be made clearer and more definite. There seems to be no good reason my cases in which dishonorable discharge is suspended should not be reviewed in the same way as are cases in which it is not suspended."

Adoption of the foregoing recommendations would do much, in our opinion, to minimize "such disparity and severity in the impact of the system on the

guilty as to bring many military courts into disrepute both among the law-breaking and the law-abiding element."

It has been proposed that the trial judge advocate, the defense counsel, and the law member be lawyers and detailed by The Judge Advocate General or his representative. Of the judge advocates expressing an opinion, 791 are in favor as against 19 opposed. As to this the Bar Association committee was of the opinion that it should be a jurisdiction requirement that the law member and the defense counsel of a general court martial be trained lawyers and commissioned officers detailed by the Judge Advocate General's Department, though content that the trial judge advocate for the particular case be appointed by command. Some members of this association incline to the view, which was apparently also the view reflected in the House committee report, that the trial judge advocate as well as other legal personnel be appointed by the Department rather than by command. That Department alone should have the responsibility of recruiting, training, and making available legal personnel. The matter of prime importance, in the view of this association, is that the prosecutor be a lawyer and be selected from the Judge Advocate General's Department—not that in the particular prosecution he be designated by the Department.

That personnel serving on the court as law members or before the court as trial judge advocates and as defense counsel should be lawyers seems not even open to question and this was expressly recognized in the House committee report. It is pure fiction to presume that Army officers generally are sufficiently learned in the intricacies of the law to practice law in the Army. So to presume is as untenable as to hold that by virtue of his Army commission and having been exposed in a general way to the problems of command every judge advocate is presumed to be competent to have entrusted to him the direction of troops in combat.

In the report of the House committee recognition was given to the fact that officers not members of the Judge Advocate General's Department would no doubt if members of the bar of a Federal court, or of the highest court of a State or Territory, be entirely competent to serve in legal capacities within the Army. It should not be contended that legal functions must in every situation and without any exceptions be performed by judge advocates. Many thousand lawyers served in the last war in most of the arms and services. It is submitted only that assignments involving anything approaching full-time legal services should be filled by members of the Judge Advocate General's Department. Utilization of other available legal talent for the performance of legal functions in isolated cases where full-time devotion to legal matters is not feasible or desired could readily be accomplished by detailing such officers to the Department with its approval, in particular cases, as available and needed. Application of the test suggested by the House committee as to minimum qualifications in the selection of nonjudge advocate officers for such detail would greatly improve the quality of the professional duties so performed.

It is proposed by the Bar Association Committee that the law member be actually present throughout the trial and that his rulings on legal questions except as to the sufficiency of the evidence be binding on the court. Out of 812 judge advocates, 808 favor this.

A matter of vital importance, in our opinion, is the size of the Judge Advocate General's Department insofar as it is to be composed of officers of the Regular Army regularly assigned to and qualified to act as members of that Department. The American Bar Association Committee specifically recommended a substantial enlargement of the Army's legal department including an increase in the number of technicians in the administration of the Army system of justice. It stated in part: "The witnesses before our committee were almost unanimous in this general recommendation. Almost all said that they observed a real need for more lawyers in the administration of the Army system of justice. The Judge Advocate General's Department needs more lawyers, more clerks, more reporters, and more statisticians * * * we make the general recommendation for substantial enlargement of the Department." We concur in that opinion.

All but 16 of 808 judge advocates voting favor substantial enlargement of the Department. We believe that out of a total of 50,000 officers in the Regular Army 700 to 800 should by statute be members of the Judge Advocate General's Department. This number will necessarily be supplemented from time to time by AUS and Reserve officers on active duty for purposes of training and to fill obvious gaps in personnel of the Department.

We recommend also a departure from the present system in which the Department has no enlisted personnel of its own. We favor revision of the system to permit and require the establishment of a corps of enlisted specialists within the Judge Advocate General's Department. Court reporters, clerks, and many other of the enlisted personnel directly concerned in the performance of the mission of the Department require special training. To provide such training should be the Department's responsibility. And personnel so trained should remain available for disposition where they can best assist in the performance of that mission.

It is important also that the Department be so situated within the organizational scheme of the War Department and of the Army that it may effectively perform its mission. It should be responsible at most only through the Chief of Staff—and through no other officer or officers—to the Secretary, or the Under Secretary, of War. It should be headed by an officer of such rank as will be commensurate with the responsibilities properly pertaining to the chief legal and judicial officer of the War Department and of the armies in the field. It is not contended that it is feasible within the War Department and the Army to follow any system other than one in which the law department is an agency subordinate to—though advising—the Chief of Staff and his subordinates in legal matters.

It is feasible to invest The Judge Advocate General with such rank that he is not junior to the Assistant Chiefs of Staff. We recommend, accordingly, that The Judge Advocate General of the Army by statute hold the same rank as is normally accorded in peacetime and in war to the four generals on the War Department General Staff. He should in time of war be a full general; in peacetime, under present conditions, he should be a lieutenant-general.

A related, but important, problem is that as to the manner of selection and promotion of officers assigned to the Judge Advocate General's Department. We are aware that current recommendations for a new promotion law contemplate the continuance of a separate promotion list for officers of the Medical Department and for chaplains. The establishment and continuance of such separate promotion lists for medical officers and chaplains is not without good reasons. It has been stated of them that officers for these corps are all appointed from civil life. Because of the additional education required they are appointed in an advanced grade. Being specialists they cannot be used in other positions and are therefore not transferable to other branches. The Judge Advocate General's Department, too, is a corps of officers who are members of a profession requiring additional academic preparation. Although commonly in demand for administrative positions in other branches it is unusual indeed that a judge advocate is transferred to another branch, particularly to one of the arms.

The caliber of performance of the Department's mission must directly depend upon the caliber of its officers. The Department has in the past been fortunate enough to obtain and now to hold the services of some distinguished lawyers. But the difficulty of obtaining for the Regular Army lawyers in sufficient number and with proper educational background and professional ability and acumen has already become only too obvious. The monetary rewards offered by the Regular Army are to the outstanding young lawyer simply not comparable to those in private practice. There will always be a few of great ability who because of an innate desire to be of public service, or to be of the Army, can be counted upon to join and remain a part of the corps of regular judge advocates. But the Army must offer more than a degree of economic security. If the Army is to obtain and hold outstanding lawyers it must provide for a corps of officers in which advancement is dependent primarily at least on relative merit among the fellow-members of the legal profession.

The bar association committee has said on this point: "In order to overcome the difficulty of securing and holding trained lawyers in the Judge Advocate General's Department in time of peace, it is specifically recommended that they be afforded the same privileges regarding promotion as is now afforded to the other professions whose personnel are at present on a separate promotion list and that necessary legislation to effect this be initiated without delay, in order that the proposed enlargement of the Department may be coordinated with these new privileges." Of the 796 judge advocates expressing an opinion on this question 758 are in favor of, and only 38 opposed to, a separate promotion list on all terms like that available to the Medical Corps.

Another of the proposals advanced is that qualified enlisted men be eligible to membership on general and special courts martial. The House committee recommended that the Congress at least consider amendments to provide that when charges are brought against enlisted men for trial by special or general

court martial they be given the right to demand that up to one-third of the membership of the court be enlisted men and from organizations other than that of the accused and the accuser.

The bar association committee, while recognizing that there is a sharp division of opinion on the subject, was of the opinion that "Qualified enlisted men should be eligible to serve as members of general and special courts martial and should be appointed thereon to the extent that in the discretion of the appointing authority, it seems desirable to do so." It was felt that some improvement of the morale of the enlisted men might result from such an innovation. It was found that commissioned officers generally are divided as to the desirability of the proposal and that a preponderant majority of the enlisted men favor it. Opposition was based on the contention that since the movement of qualified men in the Army is upward the appointment of enlisted men will lower the quality of the courts and give rise to personal antagonism and recrimination in Army units when enlisted men participate in the conviction and sentence of their fellows. It is suggested also that under a system where military justice is dominated by command enlisted men giving thought as to the precariousness of their status as noncommissioned officers might be more prone than officers to follow the supposed wishes of their commanding officer relative to convictions and as to sentences.

Of the 783 judge advocates expressing an opinion 563 are in favor and 220 opposed, many of them vehemently. Many submitted qualified replies expressing no enthusiastic belief that placing enlisted men on courts is a panacea. The poll reflects, we think, a disposition to favor testing out, at least in a limited way, the possibilities of utilizing qualified enlisted men in enlisted men's cases if the Congress thinks favorably of the proposal. We feel that this question has been improperly confused with the claim, apparently often justified, that in the administration of the military justice system there has been discrimination in favor of officers. We feel that this latter problem is one which will fade into insignificance under a truly judicial system of Army justice. Most of the judge advocates in World War II entered this war as enlisted men. They know how enlisted men think. They doubt that enlisted men generally would prefer to be tried by other enlisted men. They feel confident that by and large trial by officers will produce a sounder and fairer result. We feel that any sentiment now current favoring enlisted men on courts stems largely from the misfortunes of enlisted men who were convicted by courts martial. As to those it is not seriously urged, we understand, that innocent men were often convicted. The real difficulty lies in the sentences which were "frequently excessively severe and sometimes fantastically so." The remedy is not so much to change the personnel of the courts as to eliminate any possibility of command domination and by the creation of a sound judicial system to keep the sentences down to a realistic plane.

Another cause of criticism of the present system is that a commanding officer may lawfully—and often does—reprimand members of a court martial. The House committee unqualifiedly recommended that amendments be adopted to prohibit the censure, reprimand, or admonishing of any member of a court martial by any authority who has appointed a general, special, or summary court with respect to the findings or sentences adjudged by such court or other exercise of his judicial responsibility. The Bar Association Committee recommends that the manual contain an express prohibition against the reprimand of the court or its members in any form. It is significant that the members of this association are of the opinion, 860 to 82, that such reprimands should be expressly prohibited.

It is also complained of that it should be an offense to attempt to influence members of a court or the appointing or reviewing authority. The Bar Association Committee, convinced that in many instances commanding officers who selected the members of the court made a deliberate attempt to influence their decisions, has correctly stated that the Courts Martial Manual should contain a statement that it is the duty of the court to exercise its own judgment in imposing sentences and that it should not pronounce sentences which it knows to be excessive, relying on the reviewing authority to reduce them. And it further correctly states that the manual "should provide that it is improper and unlawful for any person to attempt to influence the action of an appointing or reviewing authority or the action of any court martial, general, special, or summary, in reaching its verdict or pronouncing sentence, except persons connected with the work of the court, such as members of the court, attorneys, and witnesses;

and this prohibition should be made expressly applicable to the appointing or reviewing authority. It should be stated that any violation will be considered conduct of a nature to prejudice military discipline and to bring discredit upon the military service in violation of article of war ninety-six." This association. 860 to 82, agrees.

A still further proposal is that there be vested in general courts martial authority in officer cases to adjudge loss of commission and reduction to the ranks. The bar association committee recommends authorization for such action in time of war. This association, 517 to 268, concurs.

It has also been suggested that it be provided that officers may be tried by special, as well as by general, courts martial and that such special courts have power to dismiss the officer from the service. The bar association committee recommends this change. This association, 604 to 199, agrees.

The association invites this committee's special attention to the recommendation of the American Bar Association committee that a board of officers be constituted to consider other advisable changes in the Articles of War and in the Manual of Courts Martial and that such study be a continuous process so that further changes may be made as the need for them appears to develop. The law should be a living thing. The minor changes over the last quarter century failed by far to reflect the changed conditions and the new problems. This association strongly favors such continuing study with annual reports to the President and to the Congress.

The association wishes to express its appreciation for the opportunity extended to its spokesman to appear before this committee to report its views and recommendations. It will follow with interest the course of the current hearings and will study in detail the testimony presented. Now that we have reverted to civilian practice we are again a group of busy lawyers. We believe, though, that the sense of duty which prompted so many of our members, many beyond the accepted age for military service, to place their time and their talents at the country's disposal in time of war can be counted upon to the extent deemed helpful by the Congress to cooperate with this committee and to serve it in any role in the legislative process of determining first the broader questions pertinent to a decision as to the general nature of the changes now to be effected in the military justice system and then in the laborious task of devising proper text to mold the existing law into a better statutory basis for a sound system of justice for the military.

We respectfully request the opportunity of filing with the committee in writing from time to time such detailed comments and recommendations as may appear appropriate from the course of the preceding testimony and that which is to follow. In turn the association assures the committee that such know-how as its members have developed in the daily use of the present system in wartime is at the disposal of the Congress and that it will welcome the opportunity to be of service in the formulation by this committee of the much-needed changes in the present system.

Mr. BOYD. We do not propose or suggest that we outline or present at this time any detailed text for adoption. We think that the first task is the determination of what principal changes must be adopted and from a consideration of that question will come the problems of detailed drafting, which, of course, involve a great deal of labor.

We have followed closely two broad investigations into this situation. We have examined very carefully the report of the committee of the American Bar Association, which was a committee nominated by that association and appointed by the Secretary of War to make an exhaustive study of the military justice system.

We have also examined with great interest and care the report made by a special committee of the House Military Affairs Committee, in 1946, covering the same general situation.

It becomes perfectly obvious, based on their conclusions and on the results of a poll of our members, that some changes must be made and the only question as to which there can be difference of opinion I take it is as to what changes are to be made.

The first and most important question, which goes to the heart of the entire situation, is the relationship between military justice and command. The American Bar Association committee felt very strongly, and so reported, that the function of command in relation to military justice should be limited to the preferring of charges and to the designation of a prosecutor to try cases before courts. They felt definitely that the command responsibility was satisfied at that point and from that point on the problems were legal or judicial and that the entire handling of the matter from that point, except for mitigation or clemency by the appointive authority immediately after the trial, should be vested in a judicial system and that the Judge Advocate General's Department was such a judicial system, at least it was the basis of such a system if properly expanded and modified and improved to take care of the real problems.

The opinion, based on so much investigation by the American Bar Association committee, is so definite and so convincing on that that we simply refer to it.

The substance of the results of the committee's report on that all-important question and of recommendation 1 in the report of the House committee filed in 1946 is in substance the proposal No. 1 which was included in our poll and the question as put to our members on that is as to whether they did or did not favor the adoption of the proposal that there be a total separation of appointing and reviewing authority from command; that the Judge Advocate General or an officer deputized by him at the Army or lower level appoint general and special courts martial; that the power of the commanding officer be limited to the appointment of the trial judge advocate and to refer charges for trial with power to disapprove findings and sentence or to mitigate, but with no power to order execution of the sentence prior to approval by the Judge Advocate General or his representative. That was the first proposal submitted to our members.

Mr. ELSTON. And that is as to both general and special courts martial?

Mr. BOYD. As to both general and special, and I would like to make it clear that all of our comments, which might be thought to refer generally to general courts martial refer to special courts martial also. It is our view that the dividing line in military justice is not between the general and special, but between the summary and the special court martial; that the special court martial should be assimilated to the general court martial, with greater accessibility, of course, of special courts, smaller numbers, and lesser jurisdiction, but in all other respects, including the proposition that it should be a court of record and its decision subject to review, just as in the case of a general court martial——

Mr. ELSTON. You see no objection, do you, to the commanding officer having complete control over the preliminary investigation and the preparation of charges?

Mr. BOYD. No, sir. I think that is his function.

Much has been said about the necessity of the command enforcing discipline, that that is his problem. That is perfectly correct. We think that it is essential for the performance of his function, that he investigate charges and decide for himself whether he will prefer the charges and cause them to be tried, and in turn probably also at

the close of the trial to mitigate, by filing what is in effect a late nolle pros, but that it stops there.

Mr. ELSTON. You see no objection, do you, to the commanding officer appointing the trial judge advocate.

Mr. BOYD. No, sir; provided that officer is appointed from the Judge Advocate General's Department. He should be recruited, trained, and made available.

Now, on this basic proposition we had 774 clear answers yes or no. In all of our questions we had some qualified answers and some questions were not answered, but out of the replies that came in 774 officers made categorical answers and of those 774, 703 were in favor of that separation from command and only 71 opposed. In other words, approximately 10 to 1 of the judge advocates expressing a firm opinion on this matter were in favor of this proposed change.

Mr. ELSTON. Were these officers regular officers, or were they Reserve and National Guard officers?

Mr. BOYD. They are all officers who replied. I would suppose, sir, that regular officers on active duty would probably not reply to such a questionnaire. In general and because particularly of the fact that most of the 2,700 during the war were Reserve, AUS, and National Guard, necessarily that is the group that has spoken. Even at the beginning of the war, I think there were something less than 100 regular judge advocates. Hence, the very great expansion.

This association feels that to have a good military justice system it must not merely in fact be good but it must appear to really give justice, to dispense justice, and so long as any substantial number of judge advocates, commanders, and particularly enlisted men, which is a matter stressed in the bar association report—so long as it is commonly believed, whether or not justly, that courts are dominated by command and are not true judicial establishments such as the Federal civilian courts, then there must be some improvement, there must be some change, some change is vital. We believe the only way of effecting that change is the separation and at the point we have indicated, between command and judicial.

Our emphasis is on the necessity of an establishment which is a truly judicial establishment and not one which is dominated by command at any level along the way. As a part of that situation of course it is necessary that promotions, efficiency ratings, assignments, leaves, all of the problems of daily life which relate to judge advocates, must be within the control of the Judge Advocate General and those officers appointed by and operating under him. Just so long—as was the case in this last war—as the judge advocate of a particular command receives his efficiency rating and the question whether he or some other officer on the staff is going to get the next promotion, when there are only a limited number of promotions available—just so long as that situation exists and so long as we have human nature as it is, even at what we would suggest would be a very high level among our judge advocates, nevertheless those lawyers are going to be influenced to a certain extent. If they are the commander's man, if they are going to be his staff, they must to a considerable extent bend to his wishes. We do not wish to have a situation in which judge advocates must bend to the wishes of anything except their respect for the ethics of their own profession and for the broad

policies laid down by the judicial department of the Army of which they are members.

Now, the next most important point, of course, in considering changes is that set forth in the second recommendation of the House committee report and dealt with very fully in the bar association report, and that briefly is that records of all trials by general or special court martial not only be reviewed by the Judge Advocate General or boards of review or by a judge advocate at the Army or lower level but that there be power to weigh the evidence. Boards of review could not weigh the evidence in the last war. All they could do was to determine whether there was enough evidence there upon which they could uphold the findings below.

Mr. ELSTON. Do you feel it would be necessary to have a verbatim record of both a special and general courtmartial or a narrative form, such as a bill of exception, to go to the reviewing board?

Mr. BOYD. I have felt, sir, that the present system of records could be greatly improved and that there could be greater stress on the essential facts, much more like a bill of exceptions, than has been the case heretofore. There is a great deal in the record at the present time which I suspect is not as helpful as some other material which could be in. Certain parts very definitely should be verbatim.

Mr. JOHNSON of California. Do you think that a reviewing board that only read the cold record and doesn't see the witnesses and their demeanor under examination is able to as fairly and as impartially determine those factual questions?

Mr. BOYD. As whom, sir.

Mr. JOHNSON of California. What?

Mr. BOYD. Can they determine as well as what other tribunal?

Mr. JOHNSON of California. As I understand you, the reviewing authority had the right to weigh the evidence, not only to consider the matter of the sufficiency of the evidence.

Mr. BOYD. In this respect, sir. At the present time it is my understanding that if a man has been convicted and the record comes up to a board of review, the board of review will not upset the conviction if there is enough evidence on which the court below could have found the man guilty.

Mr. JOHNSON of California. Well, the theory of that in our State is this, that the jury, if it is a jury, or the trial court, if it is a court case, is in a better position to weigh the evidence, having seen and heard the witnesses, than some board sitting up here and only reading the cold record.

Mr. BOYD. That is perfectly——

Mr. JOHNSON of California. Sometimes a man's testimony when reduced to writing, in my opinion, doesn't truly reflect the convincing power that he has a witness. Now, what do you think about that. Do you think that that upper board—that is a pretty sweeping power—should have the right to weigh that testimony?

Mr. BOYD. Of course, sir, it is limited to releasing the man or reducing his penalty. It works in his favor. Most of the complaints about the present system have been that it works against a guilty man, in providing perhaps a greater sentence than was just.

Mr. JOHNSON of California. Then, your experience convinces you that that is a correct principle to lay down in our courts-martial procedure, is that correct?

I have talked with many members, through the war, of boards of review and I was very definitely aware of a feeling by them that the rule under which they could upset a case only if there was an insufficiency of evidence hampered them in accomplishing their true mission.

I would like to suggest, if I might, that we make available at a later time before this committee a member of a board of review, or one or more members, who are expert in that particular function and could give you their personal experience based on the examination of many cases.

Mr. NORBLAD. Referring back to the question asked by the chairman, Mr. Elston, I didn't quite understand your answer with reference to special courts. You said, in the case of the special court, that a least part of the evidence should be be put verbatim in the record. How are you going to find the dividing line? Won't you either have to put in all the evidence or none of it, to make up a record that a board of review could study.

Mr. BOYD. I would hesitate, impromptu, in this manner, to indicate what would seem to be the best way of handling that situation.

Mr. NORBLAD. There is——

Mr. BOYD. I do recognize that you must have a record of a special court, if there is to be a review. We do think there should be a review.

Mr. NORBLAD. There is a record at the present time, you know.

Mr. BOYD. That is correct.

Mr. NORBLAD. Very inadequate.

Mr. BOYD. That is correct, but I suggest only that that situation should be reviewed by men who have been experts in dealing with that particular phase. Some change is of course necessary.

Mr. ELSTON. Mr. Boyd, if you are going to give a reviewing court the power to set aside a conviction on the ground that it is against the weight of the evidence, the court obviously would have to have a complete record in order to make a determination.

Mr. BOYD. On that point, that is right, sir. If that were the issue, that would be so; yes, sir.

Mr. ELSTON. So that in all cases, if you are going to clothe a reviewing authority with that power you would have to provide a verbatim record of both general and special courts-martial hearings.

Mr. BOYD. That is true, where the issue is innocence or guilt. In many of the cases, of course, the problem is whether it is excessive.

Mr. JOHNSON of California. Mr. Chairman, could I make a comment there?

Mr. ELSTON. Yes.

Mr. JOHNSON of California. We have a provision out where I live which is something like this: In the event of an appeal from a police-court judgment, the judge sets out what transpired. There is no reporter present in the court. The prosecuting lawyer and the defense attorney are allowed to submit what they think is a correct statement of the facts.

Mr. BOYD. That is right, sir.

Mr. JOHNSON of California. And the judge finally resolves, from those two papers, what he thinks is a correct statement. Now, could that he handled in the judge advocate's department in the same manner?

Mr. BOYD. I think that court be done, which would avoid the necessity of transcripts in a great many cases.

Mr. KILDAY. You feel that a reviewing authority would be able to really get a correct impression of what transpired, unless he would get a Q and A transcript of the testimony.

Mr. BOYD. That is the ideal way. The only problem, I take it, is could that in any way be shortened, to decrease the amount of personnel at the lower level, particularly in the cases as to which there is no real issue.

Mr. KILDAY. We used to always send a narrative statement of the facts, in my State. Frankly, I have never been able to get much of an impression out of a narrative statement.

Mr. BOYD. That is right.

Mr. KILDAY. Whereas if the Q and A transcript goes up it would be possible, if the reviewing authority so desired, to have some unattached board reduce such portions as they wanted to a narrative, but they could always refer back to the Q and A transcript.

Mr. BOYD. With really legal personnel handling the courts, this situation I think could be simplified. The problem is accentuated by the fact that at the special court-martial level at the present time very often there are no lawyers present at all.

Mr. ELSTON. Perhaps that can be solved by providing that the defense counsel as well as the Judge Advocate would have to approve the narrative statement.

Mr. BOYD. Yes, sir.

Mr. ELSTON. If there was any objection to it, obviously a reviewing court couldn't pass on the weight of the evidence.

Mr. BOYD. That is right, sir.

Mr. KILDAY. If they had a conflict, the law member would settle it or what?

Mr. ELSTON. Perhaps in view of the conflict, the entire court might have to settle it.

Mr. BOYD. I suppose much in the way we settle bills of exception. You call the judge in as a referee, if you can't get together on it.

Under this situation you would have a law member. If you have a law member available, he is accustomed to dealing with both sides of that fence and should be able to get such a record as will prevent the question above. At least it will be a great deal more feasible than it would be at the present time, with no lawyers about the courtroom.

Mr. ELSTON. What I fear is that if you confine it to the law member he might have a different viewpoint as to the weight to be given to evidence than some of the other members of the court and there might be a divided verdict. Some members might feel that they should decide the case on certain evidence. Others might feel they wanted to decide it on other evidence. The law member himself wouldn't know what was in the mind of each member of the court, unless the entire court passed on a disputed bill of exceptions. I don't know how you would get an accurate record before a reviewing court.

Mr. BOYD. I would like to suggest, in view of the intense interest of the committee on this particular point, that we have prepared by one or more officers particularly interested and familiar with this particular aspect a supplemental report to go into your record.

Mr. ELSTON. All right. We will be glad to have it.

Mr. JOHNSON of California. Just recently the Supreme Court of the United States toyed with that question, when they had the portal-to-

portal case. Two justices took a referee's findings absolutely and the rest of the court disregarded them.

Mr. BOYD. This second proposal, of which this discussion was a part, of course goes broadly to the question of review and proposes that the authority to set aside findings and sentence and to order new trial, and also power to reduce the sentence, be vested in the Judge Advocate General or boards of review within his jurisdiction. The expression of opinion by our members on that was 754 in favor as against 36 opposed. In other words, of our officers expressing views, 20 to 1 were in favor of such a system in place of our present system, modifying the present system. I have discussed the two big points as to which there seems to be any real difference of opinion. The other points are much simpler and there could not be, it seems, great difference of opinion.

First, the trial judge advocate, the defense counsel, and the law member should be lawyers and members of the Judge Advocate General's Department. They should be provided by the legal department of the Army. Unless we have that, we simply have nothing to work with.

The law member should be present throughout the trial and his decision on all questions other than sufficiency of evidence should be binding. He should be the legal man, the lawyer, the judge on the court.

There should be and must be substantial enlargement of the Judge Advocate General's Department. If you had 2 hours, gentlemen, I could talk to you about the needs of that. I have observed that throughout the world, in every theater during the war, as well as in the office here in Washington. There just are not enough lawyers to do this job. One couldn't run a law office or the legal department of a corporation with the basis that the Army now has of obtaining lawyers of proper caliber. There must in my opinion be set up a real, honest-to-goodness law department. You have the basis of it there now. You have some fine officers in the Regular Army. You have the start to do it with. But that is being depleted. The officers are fading out of the picture, due to age, physical disability, and the greater economic awards outside. You do have, though, the nucleus with which to work. The officers now in charge of that department, if given by you the basis—it may not be a part of this bill, it may have to be worked in with other bills in which your entire committee is interested—can provide the officers to do the job. Give them proper rank. Create a separate promotion list, the same as applies to the Chaplains Corps and the Medical Corps. The situation is the same. Special civilian training is the basis of those lists. That is the basis of a separate judge advocate list. The Judge Advocate General should be responsible directly to no officer in the War Department except the Chief of Staff. He should not be subordinate in rank or position to the G's on the General Staff. He should be responsible directly to the Chief of Staff and to the Secretary or Under Secretary of War. Anything which keeps him in rank or position subordinate to them hampers that department in accomplishing its real mission.

In my opinion, the Judge Advocate General of the Army in peacetime, if the 4 G's are lieutenant generals, should be a lieutenant general. In wartime he should be a full general. He should have the rank, so

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that he can go out into the civilian law offices and bring in the lawyers whom you would like to have defend your clients' interests. You cannot do that now. It was done in wartime to a limited extent because you had the pressure of war and lawyers gave up substantial incomes to come in and do it. With very minor exceptions, you cannot do that in peacetime.

As to enlisted men on courts, let me say very briefly our association says, two to one, "Try it on, if the Congress thinks it is a good idea." We are not enthusiastic about it. We think that the emphasis of enlisted men on the courts is really because guilty men generally have received excessive sentences. If you have a judicial system which keeps their sentences within reasonable range, then the need for the alleged need of enlisted men will not be present. However, we say, "try it on, and if there is strong feeling for it," provided it is limited to qualified men. And there are qualified men. There are lots of difficulties with it. We believe it should be limited also to cases where the accused is an enlisted man and he wants enlisted men on the court. We doubt that many enlisted men will want enlisted men on the court.

We think little need be said on the question of reprimand and on influencing the court. At the present time command may and does deliberately reprimand courts. That is a shocking thing. It was a shocking thing to me when I first ran into it in the Manual for Courts Martial, when I first read it. I think it is shocking to any lawyer, that command can really tell the court by indirection what it should have done and what it must do in the next case.

As to influence of the court, nothing need be said. They should not be influenced and they can't be influenced if they are put in any separate judicial system.

Now, I appreciate your bearing with us. Our association is definitely interested in this picture. We are all back now in practice. We are busy lawyers. We are back trying to practice law for our clients. But we do have 2,000 men, over a thousand of which have been sufficiently affirmatively interested to fill out this questionnaire. Many of them were sufficiently interested to write detailed letters, in which they have many gripes about the system. They have many suggestions to make it better. We and they are proud of the Judge Advocate General's Department. We think it is an excellent department. We all went into it of our own choice. None of us were drafted into that department. We served with it. We want to make it better. We think the scale, when compared with civilian justice, is in favor of Army system, but the Army system is not good enough. It is not as good as it can be. We want to help you,. by providing men who can draft or conduct analyses or studies on any particular subjects or in any other way that we can be of assistance to you. We would like you to feel free to ask us to file any additional material which you think may be helpful to you, as time goes on.

Mr. ELSTON. Mr. Boyd, we appreciate very much your coming here and particularly appreciate the fact that you represent men who have had actual service in court-martial cases. Your statement will be of great value to the committee. If you have anything additional to add, we would be very glad to have it.

Mr. BOYD. Thank you very much for your courtesies.

Mr. KILDAY. Mr. Chairman—Mr. Boyd said that he would make available to this committee one or more men who had served on boards

of review. I think that would be very helpful to bring to our attention specific remedies. I don't think we ought to tear up the whole court-martial system. These men who have served could point out specific remedies in the application of the law.

Mr. BOYD. I may say that has been done over a period of years. Most JA's have made recommendations while they have been serving for instance as to how you could improve the manual and so on. Officers who have served for a long time on the boards of review have many definite ideas as to how it can be improved.

Mr. KILDAY. You can furnish us a few men who have served on boards of review and are now out of the service?

Mr. BOYD. Yes, sir.

Mr. ELSTON. Give their names to Mr. Smart and we will be glad to call them.

Mr. BOYD. Yes, sir.

Mr. NORBLAD. I think, Mr. Boyd, with reference to Mr. Kilday's suggestion, it would even be more helpful if we had men who served in the field as trial judge advocate and as law members of the court, as well as those who have sat on boards of review and reviewed the cases.

Mr. ELSTON. Most of the men in your association have acted in that capacity?

Mr. BOYD. We have men in our organization who have acted in all those capacities. We will be glad to see that they appear before you at any time you desire.

(The committee adjourned to meet April 18, at 10 a. m.)

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 11, LEGAL,
Friday, April 18, 1947.

The subcommittee met at 10 a. m., Hon. Charles H. Elston (chairman) presiding.

Mr. ELSTON. We will call General Hoover at this time.

General HOOVER. Yes, sir.

Mr. ELSTON. General Hoover, will you state your full name and your present position, and indicate to the committee and for the record what your experience has been with respect to court-martial cases?

General HOOVER. Brig. Gen. Hubert D. Hoover. I am now Assistant Judge Advocate General, in charge of military justice matters, in the office of the Judge Advocate General.

STATEMENT OF BRIG. GEN. HUBERT D. HOOVER, ASSISTANT JUDGE ADVOCATE GENERAL, UNITED STATES ARMY

General HOOVER. I entered the Army in 1917, in the Infantry. I was transferred in the latter part of that year to the office of the staff judge advocate of the Ninety-first Division. I served with that division throughout the war, most of the time as staff judge advocate, but part of the time in the trial of cases.

After the war, I entered the Regular Army as a member of the Judge Advocate General's Department and have served in the Department ever since.

Substantially all of my service in Washington, which covers, I should say, 14 or 15 years, has been either as a member of a board of review or working with a board of review in the preparation of opinions or passing upon the opinions.

It is my duty now to pass upon the bulk of the cases that come before the boards of review, in the office of the Judge Advocate General.

During World War II, I served, in the early days, as a member of the board of review here. I then became Assistant Judge Advocate General, in charge of the branch office of the Judge Advocate General with the north African theater of operations, and subsequently the Mediterranean theater of operations. I remained there until May of 1945, when I returned to the office of the Judge Advocate General in Washington.

Mr. ELSTON. General, you have given considerable study to H. R. 2575 and to other bills on the subject of military justice, have you not?

General HOOVER. Yes, sir.

Mr. ELSTON. I wonder if it wouldn't be well for you to proceed with H. R. 2575, section by section.

General HOOVER. Very well, sir.

Mr. ELSTON. And indicate to the committee in what respect that bill seeks to change existing law.

General HOOVER. Yes, sir.

Mr. ELSTON. And as you go along, give us your opinion concerning the various sections of the bill.

General HOOVER. Yes, sir.

The first proposed amendment is to article 1 of the Articles of War, which covers definitions. The object of the changes is to modernize the article, to take cognizance of the present inclusion of women in the Army, that is, the WAC's, and to embrace the units of the Air Forces which have developed distinctive designations.

I might say that paragraph (e) of article 1 has been added to define the word "cadet." That word historically means a cadet of the United States Military Academy. We have had some difficulty in the past because there have been efforts to construe it as including the air cadets, whom we do not think come within the meaning of the term as used in the articles.

Mr. KILDAY. Where does that leave the air cadet—as an enlisted man?

General HOOVER. Yes, sir.

Mr. KILDAY. And what about the warrant officer?

General HOOVER. We do not define the warrant officer as an officer. We leave him where he is.

Mr. KILDAY. He is, then, an enlisted man?

General HOOVER. He occupies a special position.

Mr. KILDAY. He is defined, then, in the act, is he not, that this amends?

General HOOVER. In these amendments, where we intend to include the warrant officer, he is named as a warrant officer.

Mr. ELSTON. What about the flight officer?

General HOOVER. The same thing, sir. We use that term. For instance, in the amendment to the one hundred and fourth article of war, we use the two terms specifically.

Mr. KILDAY. But where you do not use it, where does he fall—in which classification?

General HOOVER. Neither, sir.

Mr. KILDAY. So every place it is necessary to cover him he is mentioned?

General HOOVER. That is right.

To illustrate, in our provision for the participation of enlisted persons as members of courts martial, we do not include the flight officer and therefore he is not specifically mentioned.

Mr. JOHNSON of California. He isn't an enlisted man or an officer?

General HOOVER. Those terms are not all-inclusive.

Mr. JOHNSON of California. I know. But suppose we make the provision that enlisted men may serve on courts-martial. In what category would flight officers come?

General HOOVER. It is not intended that they be made eligible.

Mr. JOHNSON of California. He could never serve on one, then?

General HOOVER. That is right.

Mr. ELSTON. Why shouldn't they serve, General? If you are going to have enlisted men serve, why would you exclude warrant officers?

General HOOVER. There seems to be no particular reason why we should include them. If I may come to that in a moment, I will expand on it.

Mr. ELSTON. All right.

General HOOVER. The changes to article 2 are merely in nomenclature. We strike out the term "Army field clerks, field clerks, Quartermaster Corps," because we no longer have them, that is all. We add "flight officers."

You will see that warrant officers are included already in this article, and we add flight officers.

Those are the only changes.

That brings us to article 4: Who may serve on courts martial. The article is drafted to permit the appointment of enlisted persons, men or women, on courts martial for the trial of other enlisted persons. The apopintment is made optional with the appointing authority. The restrictions as to eligibility upon officers as they now exist are extended to enlisted persons. We have added, as the last sentence, a clause previously included in articles 8 and 9 as to the nonelibility of members when they are the accusers or witnesses for the prosecution. There is no change in sense except that any person appointed as a member, whether he is an officer or an enlisted person, would be subject to the restriction as to eligibility.

We did not include warrant officers and flight officers among those eligible as members of courts martial, for the reason that there did not seem to be any call for it.

As we conceive it, the appointment of enlisted persons is designed not to expand the groups of persons who may be eligible to serve on courts martial in order that we shall have an additional reservoir of eligibles, but, if we may put it that way, the appointment is authorized in deference to what appears to be the public demand for participation by enlisted persons in courts martial.

Mr. JOHNSON of California. Mr. Chairman, could I ask a question there?

General HOOVER. The thought being that the optional appointment of enlisted persons would serve to build up confidence in the courts.

Mr. ELSTON. Mr. Johnson wanted to ask you a question.

Mr. JOHNSON of California. I wanted to ask you this question, General: Isn't it a fact that in the Judge Advocate General's Department there are a good many warrant officers?

General HOOVER. Yes, sir.

Mr. JOHNSON of California. And is it also not a fact that many of these warrant officers are highly and well-trained specialists in procedure, at least, and in the keeping of records of the Judge Advocate General's Department?

General HOOVER. Yes; that is very true.

Mr. JOHNSON of California. Why wouldn't that be a fertile field for trained men to serve on these courts?

General HOOVER. They would be competent. We make no point about their competence. They would be competent to sit as members of courts martial.

Mr. JOHNSON of California. Well, it looks to me like, if we are going to expand the Department, this committee anticipates, or some of the members at least anticipate, that there would be a good source of material for the very specialized work in which they have been trained.

General HOOVER. I do not believe that as a rule you will find that warrant officers of the Judge Advocate General's Department are trained lawyers or graduate lawyers or lawyers admitted to practice law. They become experts in the machinery of trials, but I doubt that you can classify them or should classify them as skilled lawyers.

Mr. JOHNSON of California. Well, I was thinking about this: You and I were talking about a warrant officer whom we knew that became a colonel in this war.

General HOOVER. Yes.

Mr. JOHNSON of California. The reason he was able to do that was because he had that special training; isn't that right?

General HOOVER. He didn't become a colonel in the Judge Advocate General's Department.

Mr. JOHNSON of California. Oh, I thought he went up in that Department.

General HOOVER. It was in the line of the Army.

Now, we do have in the office of the Judge Advocate General right now an officer of the Regular Army, recently integrated, who was a former warrant officer of the Judge Advocate General's Department. He studied law while he was serving in his ordinary duties, qualified himself as a lawyer, and demonstrated his fitness, and he is now an officer in the Regular Army in the Judge Advocate General's Department, but that is exceptional, Mr. Johnson.

Mr. JOHNSON of California. Would you compare these warrant officers, then, more to the clerk of a court?

General HOOVER. Yes, sir.

Mr. JOHNSON of California. Than you would to an officer of the court?

General HOOVER. More to a clerk of the court.

Mr. ELSTON. Well, General, if we come to the place where we include enlisted men on the court, there wouldn't be any reason why you should exclude flight officers or warrant officers, would there?

General HOOVER. For the trial of persons of like grade?

Mr. ELSTON. That is what I mean.

General HOOVER. The principle would perhaps carry through to the flight officer. If he were on trial, you could have a flight officer on the court. I think, if you do that, you should also include members of the Army Nurse Corps on courts for the trial of nurses.

Mr. KILDAY. Mr. Chairman——

Mr. ELSTON. Mr. Kilday.

Mr. KILDAY. Of course, you made the point, General, that the inclusion of enlisted men was not for the purpose of expanding those eligible to serve on the court, but in response to what seems to be a public desire that they serve.

General HOOVER. Yes, sir.

Mr. KILDAY. And there hasn't been any comparable expression of desire as to warrant officers.

General HOOVER. That is correct.

Mr. KILDAY. Of course, he has a rather anomolous status in the service, being neither officer nor enlisted man.

General HOOVER. Yes; that is true.

Mr. KILDAY. He may be regarded by some enlisted man as an officer and by others as an enlisted man, so the psychological effect of putting him in there might result more in confusion than anything else.

General HOOVER. I don't believe that it would inspire confidence in the ordinary enlisted man who is being tried.

Mr. KILDAY. Because they don't associate socially with the enlisted men.

General HOOVER. The warrant officer associates with the officer, rather than the enlisted man.

Mr. KILDAY. That is all, Mr. Chairman.

General HOOVER. And I think the enlisted man would rather have what he considers a qualified officer, if membership is going to be limited, than a warrant officer.

Mr. ELSTON. General, had you completed your remarks on this section?

General HOOVER. Yes, sir.

Mr. ELSTON. One of the most controversial questions is with regard to the service of enlisted men in court-martial cases. H. R. 2575 provides that they may serve when it is deemed proper by the appointed authority. The bill introduced by Mr. Durham makes it mandatory.

Where they are appointed to the court only when deemed proper by the appointing authority, do you feel that that would be sufficient? In other words, wouldn't that more or less leave it right where it is now, that enlisted men would serve only when the commanding officer wanted them to serve? Certainly, that wouldn't satisfy the enlisted man who has been asking that enlisted men serve on the court. I would like to have you give us your opinion about handling it that way or permitting them to serve where the enlisted man wants them to serve.

General HOOVER. This bill, I think, because of its permissive character, allows an experiment of permitting enlisted men to sit on courts in the trial of other enlisted persons. We don't know, frankly, how it is going to work. The compulsory participation of enlisted persons on demand of the accused might cause trouble.

My own belief, based on my experience, is that our whole effort should be to get better material on our courts. I don't want to imply for a moment the we cannot get competent enlisted men to sit. Especially during time of war, there are any number of competent enlisted men. There is no point made there at all.

I should like to make the point that I don't believe we can be assured that those enlisted men would be better members than officers would be. So the best that we can do will be to get men who are as well qualified as those who are now qualified to sit.

Now, starting from there, I believe that in compulsory participation there is a serious danger to the morale and the discipline of the Army. The danger lies in the possibility that the compulsory inclusion of enlisted men on courts will be an implicit declaration that officers are not fair and are not competent. The natural result will be a clevage between the officer and the enlisted man on the court. If you want to put it that way, there would be a danger of an exaggeration of the so-called caste situation, which I think would be bad for everyone concerned. I don't know that that would happen. I think we can try it and see. But I think there is a serious possibility that it would happen.

Another consideration which comes to me is that the ordinary enlisted man who is selected for court-martial duty will probably be one of noncommissioned grade, because of his capacity and his experience. I think that the enlisted man who is being tried is due for a pretty serious disappointment, when he gets his sentence, because I really think that the noncommissioned officers will be harder with respect to punishment than officers will be.

Mr. ELSTON. If it is optional with the accused to either have them on the court or dispense with them, he would know that and would take that chance in asking for them.

General HOOVER. Yes, sir. As far as the severity of sentence is concerned, I think he would soon stop asking for them. I don't know, but I think it is a possibility.

Mr. ELSTON. Isn't it a fact that the caliber of the enlisted man at this time is somewhat higher than it was before the war?

General HOOVER. Oh, unquestionably. Unquestionably, the educational qualifications are higher.

Mr. ELSTON. And if we should come to the place where we have compulsory military training and persons are required to serve in the Army for a time, the caliber would perhaps be still further increased?

General HOOVER. Yes; I believe that is so.

Mr. ELSTON. And during wartime, where you have conscription, you have a great many able lawyers who are serving in an enlisted capacity who would be very useful—as members of a court.

General HOOVER. Yes, sir. I have no doubt that that is so.

Mr. ELSTON. Of course, some people believe that you enlarge upon the caste system where the court consists entirely of officers; that if you made it optional with the accused to select enlisted men—a minority always—that that would tend to correct the situation, rather than aggravate it. Do you feel it would aggravate it?

General HOOVER. We must theorize on that thought, but it is my own view that the danger of increasing the clevage, if there is one, is a real danger.

Mr. ELSTON. Did you have a question, Mr. Durham?

Mr. DURHAM. Yes.

General Hoover, you said that you had integrated a warrant officer, I believe, into your Department.

General HOOVER. Yes, sir.

Mr. DURHAM. Recently?

General HOOVER. Yes, sir.

Mr. DURHAM. You said he had qualified. How did he qualify—through his service or did he take a bar examination?

General HOOVER. He was a Regular Army warrant officer. While he was serving in the Regular Army he went to night law school, graduated, obtained a degree, and passed the bar of the State of Massachusetts. He has been on Judge Advocate General work during all of the war. He has never practiced in civil life, but during the war he has been on Judge Advocate General work.

Mr. DURHAM. That is all.

Mr. ELSTON. You may proceed, General.

Mr. SMART. Mr. Chairman, at this point I would like to offer for the record a telegram which I have received from the War Veterans' Bar Association, which was represented in yesterday's hearing by Mr. Arthur E. Farmer. I don't know how extensive a poll they have made. They have made a post-card poll of enlisted men, with the following result:

Post-card vote 4 to 1 for enlisted men eligibility.

Mr. ELSTON. All right, that will be received and placed in the record.

(The telegram referred to is as follows:)

NEW YORK, N. Y., *April 17, 1947.*

ARTHUR E. FARMER,
Care Robert W. Smart,
House Committee on Armed Services,
Washington, D. C.:

Post-card vote 4 to 1 for enlisted men eligibility.

MYRON SULZBERGER, Jr.

Mr. SMART. Mr. Chairman, I would like to make one more observation before you leave this section.

Mr. ELSTON. We will be glad to have it.

Mr. SMART. I think that the War Department is, perhaps not intentionally, asking for a great deal of trouble, with the present wording of this section, "When deemed proper by the appointing authority," concerning enlisted men on courts. If you leave that provision in there, as it now stands, every enlisted man who goes up for trial, thinking that he is entitled to have some enlisted men on the court and who are not appointed on the court, will certainly feel that he has been done an injustice. I think that the cleavage should be made clear, either that there should be an option or that the commanding general or the appointing authority has no authority to put enlisted men on.

General HOOVER. I am sure the Department contemplates that if an enlisted accused wants enlisted persons on the court, he may ask for them, and that would be one situation in which the appointing authority would appoint within his discretion.

Mr. ELSTON. It would be within the power and authority of the commanding officer to grant his request?

General HOOVER. Definitely.

Mr. ELSTON. Or refuse it.

General HOOVER. Definitely so.

Mr. SMART. And if he refused it, General Hoover, that would bring into focus the very point I make. The enlisted man would feel that he had been done a rank injustice.

General HOOVER. There is a possibility.

Mr. ELSTON. You may proceed, General, to the next section.

General HOOVER. Yes, sir.

The changes in articles 5 and 6 are to substitute the term "members" for "officers." It is nomenclature, purely.

Article 7 is not changed. It pertains to the number of members who shall constitute the courts.

That brings us to article 8, relating to the appointment——

Mr. ELSTON. General, before you get to article 8, I would like to ask you a question about section 6.

General HOOVER. Yes, sir.

Mr. ELSTON. Referring to the qualifications of the law member the bill uses these words: "Admitted to practice in a court of the judicial system of the United States." Isn't that language a little vague?

General HOOVER. I think I have perhaps confused you. I am referring to article of war 8, rather than section 8 of the bill. Article 8 is what you are referring to now?

Mr. ELSTON. Yes, that is right.

General HOOVER. Yes, sir. May I have your query again, Mr. Elston?

Mr. ELSTON. On line 22 you use the term, in referring to who shall be detailed as a law member:

> A person admitted to practice in a court of the judicial system of the United States.

General HOOVER. Yes, sir.

Mr. ELSTON. Wouldn't it be better to say, "Who is a member of the bar of the Federal court"?

General HOOVER. The reason for this wording is that a man might be admitted in the United States district court and that would make him eligible, or he might be admitted in the Supreme Court of the United States. I believe it is quite possible to be admitted to practice before the Supreme Court and not before the district court—not admitted generally.

Mr. ELSTON. Well, if we said, "a member of the bar of a Federal court——"

General HOOVER. That would be all right; yes, sir. That is what we mean.

The designations, in the amendments, of those commanders who may appoint general courts martial——

Mr. KILDAY. Mr. Chairman, at this point may I suggest that the General state for the record, so we will have it available on the floor, the distinction between general court and special court, as to its jurisdiction, power of punishment, and so on, just briefly so we will have it in the record.

General HOOVER. General courts martial are those of general jurisdiction in the Army. They are not limited in their jurisdiction with respect to persons or offenses, or with respect to punishment otherwise authorized by law. The general court martial is composed of a minimum of five members.

Mr. KILDAY. Then a general court martial is the same as a court of general jurisdiction, in civil practice?

General HOOVER. Yes, sir. It may be noted that only in general courts martial are law members appointed.

Special courts martial are courts of limited jurisdiction. The present article authorizes the President to exclude from the jurisdiction of special courts martial any classes of persons that he deems proper. He has excluded, among others, officers and some of the lower grades. The maximum punishment which a special courts martial may impose is confinement at hard labor for 6 months and forfeiture of two-thirds pay for a like period. The special court martial, in other words, may not adjudge a dishonorable discharge or a dismissal.

Mr. ELSTON. It may adjudge a bad-conduct discharge, though, may it not?

General HOOVER. We propose to amend the article to permit them to adjudge a bad-conduct discharge.

Mr. ELSTON. Now, for the sake of the record, what is the difference between a bad-conduct discharge and a dishonorable discharge?

General HOOVER. It is a little hard to define. The bad-conduct discharge idea is, frankly, taken from the Navy procedure. It is in degree of severity, we think, a step lower than a dishonorable discharge. Under the discharge review procedures authorized by statute, under the GI bill of rights, the bad-conduct discharge may be reviewed by the Secretary of War's discharge review board, whereas a dishonorable discharge cannot be. It is a matter of degree. It is a lesser punishment, as we conceive it, than a dishonorable discharge. Its usefulness would apply particularly to the military-offense type of cases, as distinguished from the felony-type cases.

Mr. ELSTON. Well, for all practical purposes, it is about the same thing as a dishonorable discharge.

General HOOVER. There isn't a tremendous amount of difference.

Mr. ELSTON. A man who has been discharged dishonorably has difficulty, when he goes out to seek a job, in getting a job; and a man who has received a bad-conduct discharge has just about the same amount of trouble.

General HOOVER. I think there may be some degree of difference, but it isn't great, as I understand it.

Mr. KILDAY. Of course, he has the same forfeiture of his rights as a veteran, does he not?

General HOOVER. I believe that is so.

Mr. KILDAY. But he forfeits his rights, say, as to civil-service preference, and so on, does he not?

General HOOVER. Yes, sir, I believe he would suffer those penalties.

Mr. CLASON. Mr. Chairman. How do you distinguish between a felony and a misdemeanor in the service?

General HOOVER. We don't attempt, to any great extent, to distinguish between a felony and a misdemeanor, but when we do we classify as a felony that offense which is punishable in a penitentiary, which means that it must be punishable by confinement for more than 1 year, that is, a year and a day at least.

Mr. CLASON. Then, a special court martial can have jurisdiction over similar cases or the same type of cases as a general court martial, except as to the limitation on the amount of sentence that is to be decreed.

General HOOVER. Yes, sir. For example, take grand larceny, which would be a felony in our system because we can give the man up to 5 years for it. The charge alleging grand larceny could be tried by a special court martial, but the punishment that could be adjudged would be limited.

Mr. CLASON. Well, excepting cases where the punishment is established by law as being life imprisonment or not less than 6 months, then you can bring the case before the special court martial.

General HOOVER. The only limitation in the statute is that you cannot bring death-penalty cases before a special court martial without the authority of the officer exercising general court-martial jurisdiction. For example, striking a superior officer, under the Articles of War is a death-penalty offense, but if the officer exercising general court-martial jurisdiction thinks that it is not a very serious incident, he can refer it, if he chooses, to a special court martial for trial, and the maximum punishment in that case would be 6 months' confinement and forfeiture of two-thirds pay.

Mr. CLASON. Well, then, he is in a position, to a certain extent, to help a defendant out by ordering a trial before a special court martial.

General HOOVER. Yes, sir. That has happened in desertion cases. Soldiers have been gone a long time. There is evidence they intended to desert when they have absented themselves without leave. There are mitigating circumstances. The officer exercising general court-martial jurisdiction refers the charges to a special court martial.

Mr. CLASON. This power has not been abused to any extent?

General HOOVER. No, sir, I think it has not. In fact, I think it has worked decidedly to the benefit of the enlisted man.

Mr. CLASON. I assumed that. I mean, favoritism hasn't been shown?

General HOOVER. No, sir. I know of no such indication.

Mr. ELSTON. At least, the enlisted men never complained about that.

General HOOVER. I haven't heard of any complaint.

Mr. ELSTON. Mr. Johnson.

Mr. JOHNSON of California. I wanted to raise this question, on the next section there, where you provide that the law member of a general court must be admitted in a Federal court, or in the highest court of a State. Now, some States have very lenient admittance requirements. Out in our part of the country we have a terrible time keeping out incompetent persons, who used to be admitted by motion. In Indiana, I understand, they could at one time practice before the courts of that State without being a lawyer, without having any law training. They had that right as a citizen. Do you think there should be some change in the wording of that particular clause, that the mere admission to practice in the highest court of a State would qualify a man for a general court martial?

Mr. ELSTON. Will the gentleman yield there?

Mr. JOHNSON of California. Certainly.

Mr. ELSTON. I am wondering if the wording at the end of the section "and certified by the Judge Advocate General to be qualified for such detail" wouldn't give the Judge Advocate General the right to exclude a lawyer whom he considers unqualified, even though he is admitted to practice in a State court.

General HOOVER. That was one of the important purposes of that particular clause. Although a man might be admitted to practice law there might be other considerations which would impel the Judge Advocate General to say that he is not on the accepted list.

Mr. JOHNSON of California. I mean, there would be no doubt about the exercise of that by the Judge Advocate?

General HOOVER. I shouldn't think so. We visualize the submission of lists of eligible officers to the Judge Advocate General, with his examination of the list in connection with the records and his determination as to whether or not the officers are qualified.

Mr. ELSTON. General, before we proceed on this subject any further, I don't believe you had completed your definition of the various types of courts martial.

General HOOVER. I think that is correct, sir.

Mr. ELSTON. Will you proceed, then, to define summary courts?

General HOOVER. I have defined special courts martial.

Summary courts martial are composed of one officer, under the present law, and we propose no change. Their jurisdiction is limited to enlisted persons. The maximum punishment that they may impose is confinement for 1 month and forfeiture of two-thirds pay for a like period.

Mr. ELSTON. Is there any appeal from the summary court conviction?

General HOOVER. A copy of the summary court record is sent to the staff judge advocate of the officer exercising general court-martial jurisdiction over the command and it is examined by the staff judge advocate there. The report of the trial does not contain any statement of the evidence. It is a statement of the charges, the pleas, the findings, the sentence, and the action of the reviewing authority.

Mr. ELSTON. And it is subject to reversal?

General HOOVER. Yes.

Mr. ELSTON. And modification?

General HOOVER. Yes, sir, by the officer exercizing general court-martial jurisdiction.

Mr. RIVERS. Will you yield there, Mr. Chairman?

Mr. ELSTON. Yes. Mr. Rivers.

Mr. RIVERS. Do you know whether or not the Navy summary court is the same as the Army?

General HOOVER. I would rather not attempt to compare the two because I am not wholly familiar with the Navy summary court.

Mr. SMART. It is not the same.

Mr. ELSTON. Now, General, referring again to article 8, it is provided that the authority appointing a general court martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Department, or an officer admitted to practice.

General HOOVER. Yes, sir.

Mr. ELSTON. In that connection, would you state what the present policy is in the Judge Advocate General's department with respect to the training of men for service in court-martial cases? Do you have a training school?

General HOOVER. We do not at present. During the war we had an officers' school, and we also had an officers' candidate school, in which

there were courses of training in these duties. We do not at present have such a school.

Mr. ELSTON. Then you have some officers as law members who have no more legal training than that which they may have received at West Point, is that correct?

General HOOVER. That is right. The post schools and the staff schools, such as the old Command and General Staff School at Leavenworth, had courses in law, but they weren't very extensive, so that it may be said that officers eligible now to serve as law members may not have any considerable legal training.

Mr. ANDREWS. Will the Chairman yield there for a moment?

Mr. ELSTON. Yes.

Mr. ANDREWS. I am rather interested in what they did in wartime overseas. I assume the commanding officers took advantage of the civilian legal training of various officers, didn't they?

General HOOVER. They did, to a very great extent, as much as they could.

Mr. ANDREWS. They knew which men were lawyers, trained in the law?

General HOOVER. Yes.

Mr. ANDREWS. And they naturally took that into consideration in the appointment of courts, I should think?

General HOOVER. I think it was the general practice to do that.

Mr. ANDREWS. They had to.

General HOOVER. I should say it was the general practice.

Mr. RIVERS. Mr. Chairman——

Mr. ELSTON. Mr. Rivers.

Mr. RIVERS. Why wouldn't it be desirable for this committee, or the War Department, or the President, or somebody to make available at some place a school for the instruction of men in this highly technical field? I think it has been testified here that the training at West Point is entirely inadequate—isn't that right? You heard people say that it is entirely inadequate, for those fortunate enough to get that training up there.

General HOOVER. You mean adequate from the legal standpoint?

Mr. RIVERS. Yes.

General HOOVER. Well, they get some training in law.

Mr. RIVERS. I mean, it isn't a very extensive course, just 1 year at most.

General HOOVER. The law course is part of the final year's instruction at West Point.

Mr. RIVERS. Don't you think there could be, without a great deal of expense, some school instituted at some place, such as Benning or some of these permanent installations?

General HOOVER. It would be possible to do it.

Mr. RIVERS. And have it as an officers' candidate school.

General HOOVER. Yes, it would be possible.

Mr. RIVERS. Wouldn't it be desirable?

General HOOVER. Yes. If the Department should be materially expanded and should we be in need of recruits for the Department other than those who come from civilian practice, we might develop such a school.

Mr. JOHNSON of California. Do you not detail men from the Army to law schools now?

General HOOVER. Yes, we do that.

Mr. JOHNSON of California. How extensive is that?

General HOOVER. I think we have eight officers now attending law school. Those men go to the law school for 3 years.

Mr. JOHNSON of California. Do they customarily take the whole course?

General HOOVER. The entire course. We have some at Harvard, at Columbia, at the University of Virginia, the University of California, and so on.

Mr. JOHNSON of California. How are the selections made?

General HOOVER. Upon application and on a competitive basis.

Mr. JOHNSON of California. What ratio is that to the number of men in the Judge Advocate General's Department? Are their appointments as line officers? I will ask that first.

General HOOVER. They are line officers. We have now in the Regular Army, including those just recently integrated, about 185 officers in the Department. We have 8 in law school. This summer we will be able to put in 7 more, making 15.

Mr. JOHNSON of California. Those men come back to the Judge Advocate General's Department, do they not, for their work?

General HOOVER. That is right.

Mr. DURHAM. Is that the full number you requested for this training, General Hoover?

General HOOVER. That is the number that we are allowed, through allocation of money for that purpose.

Mr. DURHAM. That is the point. Is that the number that you were allowed, or the number that you requested?

General HOOVER. It is the number we were allowed.

Mr. ELSTON. No legislation is needed to give you more?

General HOOVER. Oh, no. It is a question of the availability of money for school purposes.

Mr. ELSTON. I wonder if we might interrupt here for just a moment to ask Admiral Colclough, the Judge Advocate of the Navy, if the Navy has a school in which you train your law officers.

Admiral COLCLOUGH. In the field in which General Hoover is speaking we have at the present time 47 officers, I believe, in law schools. We have just completed selecting next year's class.

Now, we have a school at Port Hueneme, Calif., known as the naval school of justice, in which officers from all walks of life, so to speak, in the Navy, are sent to school for an intensive course in military law, covering 2 months. In addition to that, with each class we also send a group of enlisted men who take that part of the course which they need to take to become competent court reporters and keepers of the records. That school was started last June, sir, and it is a permanent school in the Navy's school system. The objective is not only to train those who are particularly apt to act in a trial capacity, but also to increase the level of education among officers generally to sit as members of courts martial.

Mr. ELSTON. Thank you, Admiral.

Any further questions?

Mr. RIVERS. May I ask one further question?

Mr. ELSTON. Mr. Rivers.

Mr. RIVERS. Would you need any additional legislation to set up these pools that we have heard about, if it was decided that this law should have as a part of it the pools advocated here for the court reporters as well as qualified lawyers, having a pool in each theater, like someone testified to here?

General HOOVER. I think it could be done administratively, assuming that——

Mr. RIVERS. Money were available?

General HOOVER. Money were available; yes, sir.

Mr. RIVERS. Now, how large is your postwar Army on paper today?

General HOOVER. About 1,000,000 men is the present figure, at the end of this fiscal year.

Mr. RIVERS. What is your ultimate total?

General GREEN. 1,070,000.

Mr. RIVERS. It seems to me, with that large a number, it would be desirable to set that up, so as to give you more opportunity to train them along the line of experience, something they can't get in school.

Mr. DURHAM. May I ask a question right on that point? At the present time the Navy is training 47 and you are training 8. Considering the size of the two services, there seems to be a discrepancy.

General HOOVER. I think there is an explanation for that, Mr. Durham. The Navy, as I understand it, now does not have a body of judge advocate officers, that is, of legal officers. The naval officer on legal duty is detailed for a tour of duty, from the line, in that capacity, and at the end of the tour returns to the line. With us, of course, our officers are career men. They are permanently assigned to the Judge Advocate General's Department. The result is that we have now some 185 permanently assigned and trained lawyers, whereas the Navy does not have a comparable body of judge advocates.

Mr. DURHAM. How many did you have at the beginning of this war, say, in 1939 and 1940?

General HOOVER. About 115.

Mr. JOHNSON. Mr. Chairman, may I ask a question?

Mr. ELSTON. Mr. Johnson.

Mr. JOHNSON. I wanted to ask you whether or not those that are sent to professional law schools are allowed to elect their own courses, or does the Department select a certain type of course for them?

General HOOVER. The Department passes on the courses that they are going to take, and they are required to take the regular courses.

Mr. JOHNSON of California. I know, but you know that there is quite a bit of variation in a law school's curriculum. For instance, out where you come from they have water law and mining law.

General HOOVER. Yes.

Mr. JOHNSON of California. As I get it, they elect what they wish to take and submit it to the Department, and the Department approves it.

General HOOVER. That is right.

Mr. JOHNSON of California. And makes suggestions, perhaps in specific instances.

General HOOVER. Yes, sir.

Mr. RIVERS. That would be mostly criminal law, wouldn't it?

General HOOVER. No; not mostly.

Mr. RIVERS. Because your civil law is handled by the Army engineers.

General HOOVER. No, sir. We handle a lot of civil law.

Mr. KILDAY. Of course, he is a candidate for a legal degree, when he goes to the law school and takes the course.

General HOOVER. Yes. The courses include contracts, for example, real property, and the like.

Mr. JOHNSON of California. And it is decided to train them for judge advocate work in the course that they elect and you approve.

General HOOVER. That is right.

Mr. JOHNSON of California. The one that will give them the best training for the particular work they are called upon to do later.

General HOOVER. That is right.

Mr. CLASON. Mr. Chairman——

Mr. ELSTON. Mr. Clason.

Mr. CLASON. These men that are sent to law school are usually in what grades in the Army?

General HOOVER. Most of the men we now have are captains or first lieutenants in the Regular Army.

Mr. CLASON. When you went up from 115 to 185, were these 70 men lawyers in private life?

General HOOVER. They were; yes, sir.

Mr. CLASON. And have they proven satisfactory?

General HOOVER. Yes, sir; they have proven so, to this point.

Mr. CLASON. Well, now, if the Government is going to expand this Department, assuming that it should, by taking on a considerable number of lawyers, why should the United States Government pay for 3 years at law school for a large number of line officers, who presumably haven't been to school for a considerable period of years, rather than either adopt one of two other propositions: either to go to the law schools and ask the dean for the names of the more successful students and try to persuade them to be interested in entering the Army, or else going out into the different areas and asking the bar associations to suggest the names of persons who would be good.

It seems to me, if we increase the size of this Department by two or three hundred persons and follow the idea of sending line officers to law schools, we are going to spend an awful lot of money, and we don't know what we are going to get as a result, in the shape of lawyers, because these line officers will not, all of them, prove to be successful lawyers.

General HOOVER. Well, I think that there are two things that could be said. One is that we are looking to all the sources that we can find to get suitable recruits for the Department. The reservoir at this time of civilian lawyers who are eligible and who wish to come in isn't too big. The other consideration, which I think is the compelling one, is that the line experience of these officers who are sent to law school, is very valuable to the Department in later years. It coordinates the Department with the rest of the Army. It integrates the Department with the rest of the Army. Our officers work better, in the Army team, if we get at least some of these people from the line.

Mr. CLASON. I think you are right as to that, but if you are going into it on a large scale—you have already taken on 70.

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General HOOVER. Yes, sir; we can't go into it too deeply. To illustrate, we have just passed on applications for law school for next fall. We had, I think it was, 27 applications and there were only 7 that we specially wanted.

Mr. CLASON. Tell me this—we have been talking an awful lot about criminal law here. I had assumed that the Judge Advocate General's business was to a small extent in ordinary times concerned with criminal law; that the large extent of matters that you passed on had to do with very important matters other than criminal law. I am wondering to what extent the time of the Judge Advocate General's Department is given over to these criminal cases.

General HOOVER. In the office of the Judge Advocate General in Washington, I should say that the work devoted to military justice is from a third to a fourth of the total, not in excess of that. The rest of it is work on procurement law, real-estate law, patents, claims, military administration, and the like. In the field of the Army, however, where normally more than half of our officers in the Department are stationed, the proportion of military justice work is much greater. It probably runs as much as 90 percent.

Mr. CLASON. In order to have a department which was perfectly capable within its own membership of taking care of general, special, and summary courts martial, how many officers would you have to have?

General HOOVER. Well, it depends on what we are required to do, of course. We have submitted, it seems to me, an estimate of 582, and another estimate submitted was 1.2 percent of the total commissioned strength, which on the authorized basis now would work out to be around 600, so it is somewhere around that figure, assuming the duties discussed here.

Mr. ELSTON. Was that predicated on the proposition that you would have this pool of officers?

General HOOVER. Yes, sir.

Mr. ELSTON. That was contemplated in the plan that was given to the committee yesterday?

General HOOVER. Yes, sir; it was based, to some extent, on the proposed amendments that we have before us now.

Mr. CLASON. If we are going to put this bill into effect, you certainly couldn't hope to send them to college fast enough and get them trained well enough, to fill up that pool in the course of the next 5 or 6 years.

General HOOVER. The Department would like very, very much to be allowed to go to the law schools and induce the young graduate, as you suggest, to come into the Department.

Mr. CLASON. I have no further questions.

Mr. ELSTON. Wouldn't that take some legislation?

General HOOVER. That would take some legislation.

Mr. JOHNSON of California. Would there be any merit to looking over the aptitude of your cadets at West Point to see if in that group there were some who had the natural aptitude for that type of work and then steer them, maybe by a little additional education at the time they were very young, into your Department?

General HOOVER. Yes; we think, at least for some proportion, that is a very valuable source of material.

Mr. JOHNSON of California. Well, in your experience at the Academy there, didn't you find that there were in your classes certain ones that you knew would be highly successful judge advocates?

General HOOVER. Yes, sir.

Mr. JOHNSON of California. Not only for advisory work, but for trial work as well?

General HOOVER. Yes, sir.

Mr. JOHNSON of California. Why wouldn't it be possible to try to get that group to enter your Department early?

General HOOVER. Well, it would be. As the matter now stands, however, we can't have any officer in our Department below the grade of captain. It takes a West Point graduate 10 years to be a captain, so the way it works out is that we have to wait until he has had about 6 or 7 years of service before we can send him to law school.

Mr. JOHNSON of California. Couldn't you revamp that?

General HOOVER. Yes; by legislation.

Mr. JOHNSON of California. And permit second and first lieutenants?

General HOOVER. That would require legislation.

Mr. JOHNSON of California. So that by the time they got to be captains, they would be experienced judge advocates.

General HOOVER. Yes; we think they should be.

Mr. CLASON. Mr. Chairman, in peacetime can you get civilian lawyers to come in with the rank of captain? I mean, can you do that by law?

General HOOVER. Yes, we can, now.

Mr. CLASON. That is what I thought.

General HOOVER. Between the ages of 30 and 36 years.

Mr. CLASON. If we were to give them a captain's pay it seems to me there would be quite a few lawyers, or likely to be in the near future, who would be interested in it.

Mr. ELSTON. General, if you provided that West Point graduates might be sent on to law schools and given legal training, don't you think there would have to be some safeguard against their going through West Point, going through law school, and then resigning to go out and start a practice at the expense of the Government?

General HOOVER. There is a possibility. I may say, just before the war and during the early part of the war we appointed 18 reserve officers from civil life as captains in our Department, and we have 8 left. The rest have gone out to greener pastures.

Mr. CLASON. Mr. Chairman, I think you have just brought out a very strong argument for taking them in from civil life, because, in taking them in from civil life, after they have paid for their own education, certainly the taxpayer hasn't lost so much if they decide, after they have been in the Judge Advocate General's Office for a while, that they would rather return to civil life.

General HOOVER. We should like to get these officers.

Mr. DURHAM. Certainly it is desirable to have young men in the Judge Advocate General's Department.

General HOOVER. Yes.

Mr. DURHAM. At the present time what is your average age?

General HOOVER. Of course, we have many senior officers now who are older men, but the average age is getting down towards the 30's with our integrations.

Mr. DURHAM. You can't take them in unless they are 30 years of age, can you?

General HOOVER. Thirty years is the minimum.

Mr. CLASON. Why do you require them to be 30 years of age? There are a lot of good lawyers around 24 or 25 years of age.

General HOOVER. It is because of the statute.

Mr. CLASON. The lowest grade you can take them in is captain?

General HOOVER. That is right, and 30 years of age is the minimum statutory age for appointment from civil life.

Mr. CLASON. If you reduced it to second lieutenant and first lieutenant, then you could get younger men?

General HOOVER. Yes, sir; we should like to do that.

Mr. CLASON. That is one thing we should consider, then.

General HOOVER. I think so.

Mr. RIVERS. Mr. Chairman, may I just make this observation? I am familiar with the Navy set-up. I know they have taken in a lot of these reserves who, as Mr. Clason has said, have had this training. In addition to that, they run them through this school that they have out on the West Coast, at Port Hueneme. They seem to be doing pretty well. They are going to make career people out of them. Of course, their set-up is a little different from yours. You go to the Chief of Staff and they go direct to the Secretary.

Maybe it wouldn't be bad if we were to divorce you from the Chief of Staff and let you go straight to the Secretary, not having anybody else over you. Then you would have autonomy. If they give you the latitude, I am sure you can do a good job, because you have sense enough to do it. I am not saying you are not doing a good job, but I think this should be divorced from the chain of command, letting you go straight to the man who is in charge. Of course, I am not asking you to state your opinion on it.

General HOOVER. We should like as much specialized education for our officers as we can get.

Now, we should like to give these men that we might get from the law schools a practical course, on the civil side, through sending them to the Office of the Attorney General for a year and possibly to leading law firms, if that could be done. We should like to utilize any avenue along this line that would increase their breadth as lawyers.

Mr. RIVERS. Do you know whether or not—I won't ask you your opinion—the War Department will object if this committee would decide to make you come directly under the Secretary of War, rather than the Chief of Staff? Do you know whether any objection would be interposed? I am not asking for your opinion.

General HOOVER. I don't know the answer to that. We are not in that position now.

Mr. RIVERS. If you were in that position, divorced from the General Staff, would it require a statutory expression? Or could it be done administratively?

General HOOVER. I should say it could be done administratively.

Mr. RIVERS. That is all.

Mr. ELSTON. General, if you have concluded your remarks on this article, you may proceed to the next subject.

General HOOVER. The next is article of war nine, on special courts martial. It brings us up to date, so to speak, on the officers who would

have authority to appoint special courts martial. There is no significance, in appointing principle, in these changes. They merely make the system a little more workable.

Mr. ELSTON. General, in that connection, the appointing authority may extend down as far as the commanding officer of a detached battalion or similar detached unit, may it not?

General HOOVER. Yes, sir.

Mr. ELSTON. And as a general rule the appointing authority of special courts martial extends down as far as a regiment, doesn't it?

General HOOVER. Yes, sir; as far as a detached battalion. The important change here, if you will notice, is to extend the appointing power to the "corresponding unit of the ground or air forces." The idea is that we do not at present have any express authority for the commanding officer of a detached air corps squadron, for example, to appoint the courts. We think that any unit that would correspond to the detached battalion should have that authority. We tried to write in specific references to the Air Force units, but the nomenclature is in a state of flux and it appeared preferable to put it in this general form.

Mr. ELSTON. Isn't it rather dangerous to make it possible for a court to be selected from a small group of officers, say within a battalion?

General HOOVER. I shouldn't think so. This is what we are actually doing now.

Mr. ELSTON. If there is any likelihood of influence, they being closely associated together, there would be more of a possibility of influence than if the selection was made higher up, wouldn't there?

General HOOVER. Yes. The suggestion has been made that general courts should only be appointed at the level of the Army commander, for example, and you could apply the same reasoning here. There is a distinct advantage, though, in having the power of appointment in the immediate commander, from the standpoint of expedition, of getting the case settled.

Mr. ELSTON. But from the standpoint of removing command influence, don't you think it would be better that the appointments are made at some higher command?

General HOOVER. It could be done that way.

Mr. SMART. Mr. Chairman, right in connection with that and as a further argument for either removing the appointing authority to a higher authority than the regiment or detached battalion or divorcing the Judge Advocate General's Department completely from the line, I would like to add that during the war I served as defense counsel in a detached unit similar to a detached battalion, and on every single case that was tried the president of the court was the executive officer of this unit. He was a friend of mine, and he told me before the trial of each case the sentence that the appointing authority and our commanding officer had instructed him to give the defendant, and that sentence was given in each case. That is concrete proof as to what can happen under the existing provisions of the law.

Mr. ELSTON. I think that illustrates the point that we were making, that the appointing authority should be higher than the regimental commander, or the commander of even smaller units.

Mr. RIVERS. A thing like that couldn't happen if they were a separate organization.

Mr. SMART. That is right. It could not happen if the appointing authority were removed.

Mr. RIVERS. If it were out from under the chain of command it couldn't happen, could it, General? I will testify that it couldn't happen. I will answer it.

Mr. SMART. I would like to say, Mr. Chairman, that my remarks are certainly no reflection on the Judge Advocate General's Department. They couldn't possibly have had anything to do with those cases.

Mr. ELSTON. No. If the appointment had been made by the Judge Advocate General's Department, as contemplated in some of these plans that have been outlined to the committee, it wouldn't be possible for that influence to be asserted.

General, had you completed your remarks on this section?

General HOOVER. Yes, sir.

Mr. ELSTON. You may proceed to the next one.

General HOOVER. The next is Article of War 11: The appointment of trial judge advocates and counsel. The proposed amendments provide for the appointment as trial judge advocates and defense counsel of members of the Judge Advocate General's Department or, in the formula of Article 8, practicing lawyers approved by the Judge Advocate General. It is not, however, compulsory.

As I understand the War Department's view on this provision, the War Department recognizes the desirability of trained personnel as trial judge advocates and as defense counsel, but feels that if the utilization of such personnel in all cases were required, there would be a very difficult personnel problem, in other words, that there wouldn't be enough lawyers to go around.

It is provided, however, to insure fairness, that if the trial judge advocate is a trained lawyer or a member of the Judge Advocate General's Department, the defense counsel must also be a lawyer.

The article also provides for the optional selection by an accused of counsel of his own choice, in lieu of the counsel regularly appointed.

Mr. ELSTON. General, at the bottom of page 6, where you have the provision as to who shall not subsequently act as a staff judge advocate to the reviewing or confirming authority upon the same case, I am wondering if it wouldn't be well to also provide that no officer who has acted as defense counsel or assistant defense counsel in any case or any investigating officer who has recommended trial as a result of his investigation should subsequently act or serve in any additional capacity, other than perhaps as a witness in the same case

General HOOVER. We had not included investigating officers. They could be included; yes, sir.

Mr. ELSTON. Don't you think it would be rather wise to do it?

General HOOVER. Well, it is a limiting clause. My experience has been that the ordinary investigating officer can investigate the case and still act intelligently and fairly thereafter. I realize that there is an argument that applies to these other categories which might apply to him—that he might be prejdiced, that his mind might not be resilient.

Mr. ELSTON. He might have the attitude of prosecutor.

General HOOVER. Yes, it is possible.

Mr. ELSTON. Now, for the record, General, I wonder if you wouldn't define the duties of the members of a court. For instance, what are the duties of the law member at the present time, as distinguished from the duties of other members of the court?

General HOOVER. The law member is a member of the court. He has all of the duties of any other member. In addition, it is his duty to pass upon interlocutory legal questions, that is, questions arising during the course of the trial.

Mr. ELSTON. Is his judgment final on those?

General HOOVER. On some of them it is. On the admission of evidence, it is now final as far as that court is concerned. There are some exclusions. For example, he is not allowed to pass on challenges. That is done by the entire court. He does not ordinarily pass on special pleas. His ruling on a special plea, for example, on the statute of limitations, would not be binding on the court. The statute lists a number of questions excluded from his power of final determination.

Mr. JOHNSON of California. Isn't the matter of passing on challenges really a legal problem, being definitely a legal problem, as to the interpretation of the provisions?

General HOOVER. I think the reason that he is excluded from passing on challenges is that he must continue to sit as a member of the court. It might be embarrassing to him or other members of the court if he had previously ruled on a challenge which the court didn't like.

Then there is the further consideration that the challenge is a matter of common sense and fairness which the ordinary line officer who is a member of a court is perfectly competent to pass on. It is perhaps an advantage to the accused to let all the members function on it.

Mr. ELSTON. General, what are the duties of a trial judge advocate?

General HOOVER. The duty of the trial judge advocate is to prosecute the case.

Mr. ELSTON. He does not sit as a member of the court?

General HOOVER. He does not sit as a member of the court. He does not sit in the closed sessions of the court. He is simply an officer of the court, for the purposes of prosecution.

Mr. ELSTON. And has no more duties than defense counsel, though they are of a different type?

General HOOVER. They are of a different type, but of similar scope.

The trial judge advocate, in addition, prepares the record of trial. He attends to the machinery of the trial, such as finding a place to sit, and so on. He subpenas witnesses.

Mr. ELSTON. You may proceed, now.

General HOOVER. That brings us to article of war 12. The principal change here relates to the power of a general court martial to adjudge a bad conduct discharge. At present there is no specific authority in a general court martial to adjudge any particular sentence, so rather than let there be a specialized authorization with respect to bad conduct discharges, we have written a clause which gives the general court martial power to adjudge any punishment authorized by law or the custom of the service, including a bad conduct discharge. The amendment would not have been suggested if it had not been deemed desirable to give the court authority to adjudge a bad conduct discharge.

Mr. ELSTON. I wonder if you could enlarge on what is meant by the term "or the custom of the service"?

General HOOVER. That is meant to cover the types of punishment that are customarily used by court martial, but are not expressly authorized by the Articles of War. For example, a dishonorable discharge is not expressly authorized by the Articles of War, nor is detention of pay, reprimand, or admonition. The thought is that the term "custom of the service" will authorize those punishments which are now recognized by the Manual for Courts Martial. The only limitation that we have in the Articles of War is with respect to cruel and unusual punishments. Of course, that limitation would remain.

Mr. ELSTON. General, is it the intention, in providing for a bad conduct discharge, to dispense with the blue discharges?

General HOOVER. No, sir. Blue discharges are not adjudged by courts martial. They are purely administrative, and it was thought desirable to keep them so.

Mr. JOHNSON of California. May I ask a question?

Mr. ELSTON. Yes.

Mr. JOHNSON of California. Is it customary to offer positive proof as to what the custom of the service is, or are the officers to independently determine what is the custom of the service?

General HOOVER. It is not customary to offer evidence on the subject. The courts simply go to the Manual for Courts Martial to see whether the matter is there recognized.

Mr. JOHNSON of California. Of course, that means it is subject to continual change from time to time?

General HOOVER. There is very, very little change.

Mr. JOHNSON of California. You mean those customs have been adhered to substantially, say, for 50 years?

General HOOVER. Yes, sir, and longer than that.

I might say that the provisions of the Manual for Courts Martial on that sort of a subject are supplemented by a work on military law which is almost a classic with us, that is, "Winthrop's Military Law and Precedents", which surveys military law and the administration of military justice since the beginning of the national government. There is no marked divergence between the two. Some customs of the service do change. For instance, in the early days they used to drum an officer out of camp when he had been cashiered, or dismissed. They literally drummed him out. They gave him quite a send-off. Well, by the custom of the service, that punishment has been eliminated.

I can safely say that unless a punishment is now recognized by the Manual for Courts Martial, it does not come within the custom of the service.

Mr. ELSTON. General, when you provide for a bad conduct discharge, is it hoped that that will take the place of some of the blue discharges now being granted?

General HOOVER. No. It is hoped, I should say, that it will take the place of some of the dishonorable discharges. It is not intended to make a more severe punishment out of the separation from the service. It is meant to reduce the punishment of punitive separation.

Mr. ELSTON. You don't feel that conduct which at the present time would warrant a blue discharge should be reviewed judicially?

General HOOVER. No, sir; I think not. I think that there is adequate machinery now to review the administrative discharge.

Mr. ELSTON. What is that machinery?

General HOOVER. It is the Secretary of War's discharge review board. It is authorized by the GI bill of rights.

Mr. KILDAY. That is right. Isn't that limited in its duration, General? I don't remember.

General HOOVER. I shouldn't want to say right now. There may be some limitation.

Mr. KILDAY. It was set up to review those blue discharges issued during the war, so that a man may qualify under the GI bill of rights and of course for other purposes.

General HOOVER. Yes, sir. We go back further than that. I think we go back almost any distance, under the present system, to review those discharges.

Mr. KILDAY. How about the Congressional Reorganization Act, under which you are permitted to set up boards to correct military records, and what not? That gives you an additional power.

General HOOVER. That gives us an additional power. I don't know that it is to be applied, however, where the Secretary of War's Discharge Review Board applies; but it does give some additional power with respect to dishonorable discharges.

Mr. RIVERS. Wouldn't that make the time unlimited for review?

General HOOVER. Under the reorganization act, sir?

Mr. RIVERS. Yes, sir.

General HOOVER. Yes, that is unlimited as to time.

Mr. RIVERS. So if anybody wanted to have his record reviewed, they couldn't say, "The statute of limitations has run against you"?

General HOOVER. There is no statute of limitations involved.

Mr. KILDAY. I think that was designed to take care of many of the special bills that we have had here, going back, some of them, to the Indian wars.

General HOOVER. Yes, sir; to relieve the Congress of considering those special bills, as I understand it.

Mr. RIVERS. Of course, we had another thing in mind, and that was our desire to get some results. We would like to have some results.

Mr. KILDAY. The operators of the Secretary of War's discharge review board have done some very highly satisfactory work. I think they did a fine job.

General HOOVER. Yes, sir.

Mr. ELSTON. All right, you may proceed to the next section, General.

General HOOVER. The next is article of war 13. The first change in this article is the carrying over from the old article of a clause, which I spoke about a few minutes ago, authorizing an officer exercising general courts martial jurisdiction to refer general court martial cases to special courts martial. The clause itself is not changed.

Then there is an additional change relating to the bad conduct discharge. This is a point at which we require the sentence of a special court martial involving a bad conduct discharge to be approved by the officer exercising general court martial jurisdiction and to be reviewed by the Judge Advocate General.

Mr. ELSTON. In other words, as to a bad-conduct discharge, all rights of appeal and review exist, the same as if the case had proceeded under a general court-martial hearing?

General HOOVER. Yes, sir; as if it were a dishonorable discharge.

Mr. KILDAY. Now, does the previous section guarantee review of all cases of dishonorable discharge, even though the execution of that portion of the sentence is suspended?

General HOOVER. Yes, sir; the proposed amendments do. The requirements are expanded. At present the only requirement for review under article of war 50½, in the suspended discharge case, is that it be examined in the office of the Judge Advocate General. If they find it legally insufficient, the Judge Advocate General can send it to a board of review. Under this bill those cases will all go directly to a board of review.

Mr. KILDAY. It is no longer possible, then, to suspend the execution of the dishonorable discharge and thereby eliminate the mandatory requirement of 50½ that it go to a board of review.

General HOOVER. It will eliminate that possibility.

Mr. KILDAY. That is possible under existing law, isn't it?

General HOOVER. Yes, sir; it is.

Mr. KILDAY. Notwithstanding article of war 50½, if the dishonorable discharge is suspended, after its approval by the Judge Advocate General the suspension can be revoked and the discharge carried out under existing law.

General HOOVER. Yes, sir.

Mr. KILDAY. We are eliminating that now.

General HOOVER. We eliminate the possibility of short circuiting a complete automatic appeal.

Mr. ELSTON. General, I see you still retain the provision that the President may by regulations except from the jurisdiction of special courts martial any class or classes of persons subject to military law. It is under that proviso that officers are now excepted from prosecution under special courts martial.

General HOOVER. Yes, sir.

Mr. ELSTON. Do you think it necessary that that provision be retained?

General HOOVER. I don't think it makes very much difference. We propose, as Mr. Royall told you, to have the Executive order amended and incorporate, in the Manual for Courts Martial, the authority to permit trial of officers by special courts martial.

Mr. ELSTON. Well, if you simply left this provision out it would happen then as a matter of law.

General HOOVER. Yes.

Mr. ELSTON. Rather than regulation.

General HOOVER. That is right.

Mr. KILDAY. Is there any other class of cases that the President has ever excepted under the power that he has here, or is that the only one—that officers be not tried by special courts martial?

General HOOVER. That is the only class of cases excepted.

Mr. KILDAY. Do you know of any class of persons that might make it desirable at times for the President to have that power? In other words, what was the real reason for having it incorporated in the Articles of War.

General HOOVER. I think the real reason for incorporating it was to make the authority flexible, a matter for executive determination.

Mr. KILDAY. In the past it has been regarded as desirable not to try officers by special courts martial?

General HOOVER. Yes.

Mr. KILDAY. But that is no longer the view of the Department?

General HOOVER. The War Department view, as I understand it, is that it would be desirable to try officers by special courts martial, in order that trial by general courts martial might be avoided in cases in which only moderate punishment seems appropriate.

Mr. KILDAY. If that was the only purpose for the provision, then there would be no objection to its elimination?

General HOOVER. I think there would be no particular objection to its elimination.

Mr. RIVERS. He would be tried by special courts martial for all offenses.

General HOOVER. Subject to the general limitation that he couldn't be tried for an offense involving the death penalty.

Mr. RIVERS. I mean with that exception.

General HOOVER. Yes, sir.

Mr. DURHAM. Was this provision put in in 1917, when the Articles of War were at that time improved on?

General HOOVER. My recollection is that it was added in the act of 1920.

Mr. DURHAM. 1920.

General HOOVER. In the general amendment of the articles.

Mr. DURHAM. But it never existed up to that time?

General HOOVER. No, sir.

That brings us to article of war 14. Here, again, we add the flight officer and eliminate some of the obsolete descriptions of classes, such as Army field clerks. There is a change in the first proviso. It is now provided that a noncommissioned officer shall not, if he objects thereto, be brought to trial before a summary court martial without the authority of the officer competent to bring him to trial before a general court martial. The latter has been changed to read, "special court martial" because we are talking about trials by special courts martial and it would appear to be more appropriate to let the officer exercising special court martial jurisdiction to make the decision than to carry it up to the officer exercising general court martial jurisdiction

Article of war 16 involves a change in nomenclature, plus the proviso with respect to the participation of an enlisted person in the trial of another enlisted person assigned to the same company or corresponding unit. It was thought that the limitation here contemplated would prevent ill feeling in units and would be a protection tc both the members and to the accused.

Article 22 contains a change in the last sentence, designed to insure that accused persons shall have the same facilities for securing subpenas for witnesses that the trial judge advocate has. We think that he already has these facilities under the law, but that it is advantageous to write the requirement expressly into the law.

Mr. ELSTON. Who would have authority to issue these subpenas?

General HOOVER. It would be the trial judge advocate. The trial judge advocate carries the ordinary duties of the clerks of the court.

Mr. JOHNSON. Well, is that an unlimited right of a defense counsel?

General HOOVER. Yes.

Mr. JOHNSON of California. Just like in the civil courts. If he goes to the clerk and asks for a subpena, he can get one.

Now, what about subpena of records and documents, and things of that sort? In some civil courts that I am familiar with you have to make affidavit showing their pertinency, and the like.

General HOOVER. No; the equivalent of the subpena duces tecum in the Army is a letter to the officer in custody of the records asking for them.

Mr. JOHNSON of California. But does the defense counsel have the unlimited right to make a demand for any record that he wants?

General HOOVER. Yes.

Mr. JOHNSON of California. And the judge advocate can't question his right to taking what he thinks are improper records.

General HOOVER. The trial judge advocate has no right in his own discretion to refuse a subpena duces tecum or an ordinary subpena. Sometimes, though, he will refer the request to higher authority.

For example, if a defense counsel or a trial judge advocate for that matter, sitting in Europe should want a witness from the United States, he wouldn't ordinarily issue a subpena. He would lay the facts before the officer exercising court martial jurisdiction and request his action, because it would involve travel.

Mr. JOHNSON of California. Well, suppose he should want a record from the United States?

General HOOVER. That would be much simpler, but he would probably do it in the same way. He would have the letter sent up through channels.

Mr. JOHNSON of California. Well, I want to see if there are any limitations at all. Suppose he wanted a confidential record from the State Department that he thought bore on the question. Could he get that?

General HOOVER. There is the element there of the confidential public record. Probably the way it would work out would be that the trial judge advocate would ask for the paper and then the State Department would decide whether it would furnish it.

Mr. RIVERS. Then, your subpena duces tecum is limited?

General HOOVER. No; except by the general governmental principles with respect to public records.

Mr. RIVERS. For instance, if a grand jury issues a subpena duces tecum, it is not circumscribed at all.

Mr. KILDAY. It is circumscribed if you try to get into the State Department.

Mr. RIVERS. I mean, this is the military.

General HOOVER. There is a practical limitation.

Mr. RIVERS. They have something to say about it, too.

General HOOVER. If, say the United States district court here tried to get some FBI records, the court wouldn't get them.

Mr. KILDAY. It gets down to the question of the three coordinate branches of the Government; executive, judicial, and legislative, which question was settled way back at the time of the Hay Treaty in Washington.

General HOOVER. That is right; it is a pretty well-defined principle that applies there.

Mr. CLASON. Mr. Chairman——

Mr. ELSTON. Mr. Clason.

Mr. CLASON. How do you secure the attendance of civilians and require them to bring in letters? You have the right to issue a a subpena to them, I suppose, just the same as any other court?

General HOOVER. Yes.

Mr. ELSTON. You think this section gives to the accused and to the prosecution equal rights of subpena?

General HOOVER. Yes, sir; I think so.

Mr. SMART. A question, Mr. Chairman.

Mr. ELSTON. Mr. Smart.

Mr. SMART. Under the present provisions of law, General Hoover, in the event a defense counsel subpenas a witness and the trial judge advocate disagrees, that disagreement is then submitted to the appointing authority; is that not true?

General HOOVER. Yes.

Mr. SMART. And his ruling is final on the matter. So that if a defense counsel wants witnesses and the disagreement is resolved in favor of the trial judge advocate, the defendant is really denied the right of witnesses.

Now, of course, if you separate and divorce the Judge Advocate from the line of command and that same disagreement should arise, who then would resolve the difference?

General HOOVER. Well, I think you have to leave the final authority where it is, that is, in the appointing authority, because you usually have the question of travel involved. Many times in the Army I have seen cases where everyone would have liked to have the witness before the court, but we didn't have the money to bring him. Now, the only man who can decide the availability of funds is the appointing authority, because he is the only one that has disposition of the appropriated funds.

Mr. SMART. Then, in the event of divorcement of the Judge Advocate General from the line of command, the Judge Advocate appointing authority would rule upon that question.

General HOOVER. Well, he would if he had the money, and I suppose if there should be such a divorcement there would be appropriations at his disposition for that purpose.

Mr. JOHNSON of California. Of course, you have the right of taking his deposition.

General HOOVER. Oh, yes.

Mr. JOHNSON of California. So witnesses in other parts of the country or the world could give their deposition, with the giving of appropriate notice, and so forth.

General HOOVER. Yes, sir.

Mr. RIVERS. Of course, there you run into cross-examination.

Mr. ELSTON. Proceed, General.

General HOOVER. Article 24 is amended to prohibit expressly coercion or unlawful influence in the obtaining of confessions or admissions or self-incriminating statements.

Now, under the present Manual for Courts Martial no confession is admissible unless voluntary. We have a little difficulty, especially during wartime, when the Army is big, in preventing zealous investigators from getting confessions by third degree or other so-called police methods.

We are here trying to put a stop to it.

Mr. KILDAY. What is the penalty?

General HOOVER. There is no specific penalty prescribed, but it would fall under the ninety-sixth article of war. We might put a limitation of punishment in the table of punishments.

Mr. KILDAY. You say "shall be deemed to be conduct to the prejudice of good order and military discipline."

General HOOVER. Yes, sir; that would bring it under the ninety-sixth article of war.

Mr. RIVERS. Wouldn't that be the same as a law passed by Congress which had all its teeth pulled out?

General HOOVER. This has teeth in it.

Mr. KILDAY. It is the same as in the civil court. If the district attorney is using a forced confession, he wouldn't prosecute the man from whom he got it. That is all you can do by legislation, to make it a punishable offense.

General HOOVER. We could punish that sort of an act severely.

Mr. RIVERS. Under your present set-up?

General HOOVER. Yes, sir; by trial.

Mr. RIVERS. I see.

Mr. JOHNSON of California. And before the confession is admitted, there must be positive proof that no coercion was practiced?

General HOOVER. That is right. That is our present rule in substance, but it isn't quite that strong, Mr. Johnson. The present rule is that a confession must be voluntary. There are some cases where you can accept a confession, however, if there is no suggestion whatever of involuntary action. If a soldier comes into his orderly room and says he wants to see the captain, and he sees the captain and says spontaneously, "I have a statement to make," with no suggestion whatever of coercion, that confession would probably be admissible.

Mr. JOHNSON of California. I know, but before you put in the confession, you outline in detail the circumstances under which it was taken.

General HOOVER. That is right.

Mr. JOHNSON. So the court can gather whether any coercion was practiced.

General HOOVER. Yes; that is correct.

Mr. CLASON. What does this change accomplish, then?

General HOOVER. This makes it a criminal offense for the investigator to exercise coercion.

Mr. CLASON. That is going to put him kind of in a hole, isn't it?

General HOOVER. Well, we want him to be in somewhat of a hole on it, because we think it is a protection to accused persons that they are entitled to.

Mr. CLASON. I don't know. If an officer goes out and he isn't trained in the law, he may find himself guilty of a crime that would require a lawyer to have told him in advance whether the thing he said or did was going to make him guilty. I think that is going to be a pretty stiff proposition. You start out to correct one crime and end up with two or three more.

General HOOVER. I think the officers of the Army understand very clearly that they are expected not to use so-called police methods in getting confessions in the Army.

Mr. KILDAY. That is an amendment to the Articles of War, isn't it?

General HOOVER. Yes, sir.

Mr. KILDAY. And you have to presume that every officer knows the Articles of War.

General HOOVER. Well, I think they will soon get acquainted with them.

Mr. JOHNSON of California. What has been your experience in places where confessions have been repudiated?

Well, have you had in your experience any situations where a purported confession is later repudiated by the man who gave it?

General HOOVER. Oh, yes. That is not uncommon.

Mr. JOHNSON of California. That happened over there the other day, in the jewel case.

General HOOVER. I don't know.

Mr. JOHNSON of California. I just read the newspapers about it.

General HOOVER. I don't know.

Mr. JOHNSON of California. In the civil courts that happen all the time, and the judge then has to pass on it.

General HOOVER. We have it. If the original confession was voluntary, we admit it, though it was later repudiated.

Mr. CLASON. Is there any such provision as that in any State or Federal law at the present time?

General HOOVER. I do not know as to the State law.

Mr. CLASON. What is the background, in your asking for this prohibition?

Mr. ELSTON. Will the gentleman yield?

Mr. CLASON. Yes.

Mr. ELSTON. It is in the Constitution. You cannot compel any person to give evidence against himself.

Mr. RIVERS. Mr. Chairman, in the Department of Justice they have a special division of civil liberties, where they go out and prosecute people for those things you are talking about, where confessions have been gotten by beating you over the head with a hose.

Mr. CLASON. Yes, but I don't see why you have to put him in a hole.

General HOOVER. I might say, Mr. Clason, that this clause is taken from Mr. Durham's bill.

Mr. CLASON. Then perhaps he can tell us about that.

General HOOVER. We thought it was a good idea. We thought there was occasion for it.

Mr. ELSTON. You are giving to accused persons in a court-martial trial the same protection he gets under the Constitution in a civil trial.

General HOOVER. That is right, and we are putting some teeth in it.

Mr. DURHAM. That came about from some of the experiences we had during this war.

Mr. RIVERS. I think, though, Mr. Chairman, we heard less criticism of the MP's in this war than we did during the first war, because the MP's were segregated in their training and had more technical and specialized training, which wasn't the case in the first war.

General HOOVER. I think that is very true. As a general rule, in this war our military policemen, the CID's, and so forth, behaved themselves very well.

Mr. RIVERS. And they didn't abuse a man who was not able to take care of himself because of liquor, or what not. They took pretty good care of them.

General HOOVER. Yes, sir; certainly as a rule.

Mr. KILDAY. General, on this matter of self-incrimination, I don't like to go by the newspapers on what may have happened in a trial, but I just wanted to know if this would cover the incident that was reported in connection with the trial of Colonel Durant, in which the trial judge advocate contended that his brother, Durant's brother, under the evidence submitted, was a principal in the commission of the offense. He laid that as a predicate to admit the brother's statements outside of the presence of the defendant. Later he put the brother's wife on the stand and attempted to compel her to testify to matters incriminating her husband, which she refused to do. I don't know that there was ever anything further done about it. But is this sufficient to take care of that, where she would have been an incompetent witness had her husband as a civilian been tried in a civil court? An attempt was made, lasting over a period of a day or more, to compel her to testify to matters that might be admissible, if not otherwise, as impeachment should her husband have been tried in a civil court.

General HOOVER. You are speaking now of the actions of the trial judge advocate?

Mr. KILDAY. Yes.

General HOOVER. On the face of your statement I believe all he may have been doing was urging the competency of that testimony and the competency of the witness. I could not say definitely.

Mr. KILDAY. The way the papers reported his conduct there—the court finally rebuked him for it—was that he insisted on asking a long series of questions and compelling her to individually refuse to answer those questions on the ground that they might incriminate her husband.

Mr. ELSTON. The committee will recess until 10 o'clock Monday morning.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 11, LEGAL,
Monday, April 21, 1947.

The subcommittee met at 10 a. m., Hon. Charles H. Elston (chairman) presiding.

Mr. ELSTON. General Hoover, will you take the witness stand again, please?

General HOOVER. The first proposed change in article 25 relates to the taking of depositions in foreign places. It is provided that in foreign places, because of nonamenability to process, a deposition may be taken if the witness refuses to testify. The reason for the change is that it was found in some of the foreign theaters witnesses from the local population refused to appear before courts martial. There was no means of compelling their attendance. However, it was found in many cases that if it had been legally possible depositions could have been taken. Under the article as it then stood the depositions were not admissible because of distance or other limitations.

Mr. JOHNSON. General, would that apply only to occupied areas, or would that apply to any place in the world?

General HOOVER. It would apply to any place in a foreign country where our troops might be.

Mr. JOHNSON. Like Australia?

General HOOVER. Yes. The difficulties were encountered principally in England.

A proviso is added making it permissible for the prosecution to use depositions in what might be called nominal death cases. The defense can introduce depositions now in death penalty cases, but the prosecution may not do so. Many of the death cases are only nominal, that is to say, the death penalty is authorized for the offense such as desertion, willful disobedience, and the like, whereas that penalty is practically never imposed.

There doesn't seem to be any reason why depositions should not be used in these cases, so we have provided that where the appointing authority directs that depositions be taken and that a case be treated as noncapital, depositions may be produced for the prosecution.

Mr. ELSTON. General, I am wondering if it wouldn't be a good idea to also provide that depositions may be taken by stipulation of the parties, in order to prevent the return of witnesses from great distances?

General HOOVER. Yes, sir.

Mr. ELSTON. When both parties are willing that the testimony be taken by deposition.

General HOOVER. There would be no objection to putting it in the article, but it is done now. It is done as a matter of practice. If the parties agree beforehand, the depositions are used. It is quite frequently done, but there would be no objection to putting a specific authorization in the article.

Mr. ELSTON. The section doesn't seem to provide as to who shall take the depositions. Do you think it is sufficient the way it is written, without some safeguard? In other words, should the deposition be taken by some person competent to pass on the competency and the relevancy of testimony and evidence?

General HOOVER. The system as prescribed by the manual contemplates written interrogatories, as a rule. It also permits oral interrogatories, if desired. It contemplates, also, the answer to the question, ordinarily at least, subject to objection when it is placed before the court. The system has its advantages, because of its simplicity. If the defense wants a deposition taken he simply submits his interrogatories to the trial judge advocate who submits his cross-interrogatories, or vice versa, and the interrogatories are then sent to some officer who is authorized to administer the oath. The answers are made, written into the deposition form, and the objections to admissibility are made when the deposition is offered before the court.

I think it works very well.

Mr. ELSTON. Objections may be made regardless of whether the objections were made at the time the witness answered.

General HOOVER. That is correct.

The next proviso added to this article is one to provide for the preservation of testimony. It sometimes occurs under present procedure that when it comes time to take a deposition so much time has

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elapsed that the witnesses are gone or perhaps have forgotten the facts. We provide here that at any time after charges are filed, but before they are referred for trial, which is the point now at which a deposition can be taken, the appointing authority may designate officers to represent the prosecution and the defense and upon due notice take a deposition. Then, when the time comes, it can be introduced in evidence, as any other deposition.

Mr. ELSTON. What would be the situation if the defense took a deposition and didn't want to introduce it in evidence, but the prosecution did?

General HOOVER. The prosecution can ordinarily offer it to the court.

Mr. ELSTON. Or vice versa.

General HOOVER. Or vice versa; yes, sir.

Mr. ELSTON. There is no prohibition against that?

General HOOVER. No, sir, not under the present procedure.

Mr. ELSTON. In other words, if a deposition is taken and the testimony is unfavorable to the party taking the deposition, the other party could offer it.

General HOOVER. That is right, yes.

Mr. ELSTON. All right, you may proceed.

General HOOVER. Yes, sir.

The next article in which changes are proposed is article of war 31. The effect of the amendments is to make the rulings of the law member in a general court martial upon all interlocutory questions final as far as the court is concerned. Under the present article a good many exceptions are made to the categories of questions which the law member may finally determine. The effect of the changes in this article will be to clothe the law member with considerable authority that he does not now have. The only things which are reserved from his control are questions bearing upon guilt or innocence or upon challenges or questions of sanity.

The next article to be amended is article of war 36. The changes here are of a procedural nature. It is provided that the records of special and summary courts martial shall go directly to the officer exercising general court-martial jurisdiction. That is done because the officer exercising general court-martial jurisdiction over the command is the one who examines these records of trial in a reviewing capacity. It is also provided that records of trial by special court martial which involve bad-conduct discharges shall after approval be forwarded to the officer exercising general court-martial jurisdiction and by him to the Judge Advocate General for review. The same thing is covered elsewhere in the proposed changes. The purpose, of course, is to implement the appellate review in the office of the Judge Advocate General of this type of records of trial by special court martial.

Mr. JOHNSON of California. This provision in section 17 is simply the old method of handling it, isn't it, that we have had for years?

General HOOVER. As far as the depositary of special and summary courts goes, yes, sir.

Mr. JOHNSON of California. If we wanted to change that and adopt a different method, we would have to drop this and adopt another one.

General HOOVER. Yes, sir.

Mr. JOHNSON of California. If you wanted to have the Judge Advocate General handle the whole thing through his department.

General HOOVER. That is correct.

Mr. JOHNSON of California. This is the one, is it not, on which the War Department disagreed with the American Bar Association committee?

General HOOVER. I believe the American Bar Association committee proposed that the special court-martial records go to the Judge Advocate General. At least, they made a general recommendation to the effect that so far as feasible the records of trial by special courts martial be treated the same as the records of trial by general courts martial, and, of course, the records of trial of general courts martial go directly to the Judge Advocate General.

Mr. ELSTON. General, H. R. 576 provides that the prosecuting officer of each general and special court martial shall forward directly to the Judge Advocate General or to such officer as the Judge Advocate General may select the original record of the proceedings in such cases.

General HOOVER. Yes, sir. The bill we are considering does not follow that suggestion.

Mr. ELSTON. Yes, I realize it doesn't, but I am wondering if you can give us some idea of the amount of work that would be involved if all those records had to be forwarded directly to the Judge Advocate General.

General HOOVER. Well, it would require considerable additional work. Those records are now examined in the office of the staff judge advocate of the officer exercising general court martial jurisdiction. The work would have to be done, under the Durham bill, in the office of the Judge Advocate General, or in some office set up for the purpose by the Judge Advocate General. I say that it would involve some additional work, because I think the Durham bill envisages a more complete review and greater power to take corrective action than are now given to this class of records. Much would depend, of course, upon whether changes were made, as has been suggested here, in the form of records of trial by special courts martial. If they should become verbatim reports of the proceedings, the volume of work involved in the examination would be considerably increased.

Mr. ELSTON. If it is provided that there shall be a complete review of every special court martial case, then this section would have to be revised.

General HOOVER. Yes, sir; it would be necessary to revise it.

Mr. ELSTON. Under this section, unless the commanding officer should change the record and stipulate that there should not be a bad-conduct discharge, a special court-martial record which would require a bad-conduct discharge would be reviewed by the Judge Advocate General.

General HOOVER. That is right; yes, sir. It would be treated as would a record of trial by general court martial. It would receive exactly the same treatment.

Mr. ELSTON. As to everything else included in a special court martial, the commanding officer is the final authority.

General HOOVER. I would say the officer exercising general court-martial jurisdiction is the final authority.

Mr. ELSTON. And that is usually the commanding offcer, is it not, or somebody whom he designates?

General HOOVER. The special court martial may come from the regiment, from the battalion, or from the post. The officer who appoints the court and acts upon the sentence may be a subordinate commander, but the record goes on up to the officer exrcising general court-martial jurisdiction. The latter would occupy a position such as that of a divsion commander or an area commander.

Mr. ELSTON. And would be the person designated by the Judge Advocate General, if we write into this bill that he makes the appointment of all persons serving on a general court martial?

General HOOVER. That is probably the way it would work out; yes, sir.

Mr. JOHNSON of California. When a record of a general court martial comes up there with a certain type of sentence, as a practical matter, does the commanding general talk to the Judge Advocate regarding the sentence provisions of it, whether it is big enough, small enough, or it should be modified?

General HOOVER. I think generally the answer is yes.

Mr. JOHNSON of California. Of course, there is no compulsion on his part to do that?

General HOOVER. No, sir.

Mr. JOHNSON of California. He may sit down in his own office and make up his mind to double the sentence, or change it any other way, without any consideration of what might be the views of the Judge Advocate General's Department?

General HOOVER. The Articles of War require the officer—the general, who is going to act on the sentence to refer the matter to his staff judge advocate for comment, before the general acts.

Mr. JOHNSON of California. Well, in your experience, which is rather widespread, has it been their policy or procedure to submit an inquiry to you and say, "What has been the universal sentence in this type of case?"

General HOOVER. The practice varies. In some cases, I think the majority of cases, the reviewing authority takes the advice of his staff judge advocate and does discuss the matter with him before he acts.

Mr. JOHNSON of California. Well, does he try to integrate that into a sort of a pattern for different types of cases?

General HOOVER. Yes; an effort is made to do just that.

Mr. JOHNSON of California. But some of them don't follow that practice?

General HOOVER. It is not universal.

Mr. SMART. Mr. Chairman, I would like to say to Mr. Johnson that tomorrow there will be a witness here, Colonel McElwee, who was formerly staff judge advocate of the Seventh Army, under General Patch. He has had wide field experience in courts martial. He has informed me, and will so testify before this committee tomorrow, that every time he would recommend a reduction in sentence and was able to get to the commanding officer, the reduction was made, but that a great majority of the time the Chief of Staff forbade him to talk to the commanding general and the sentence would stand regardless of his recommendations. I think that is the answer to your question. It comes back eventually to the personal opinion and desires of the G–1, the Chief of Staff and the commanding general.

Mr. JOHNSON of California. Well, it amounts to this, that it is possible and probable in some cases that nonlegal officers can determine these legal matters of sentence and other things.

Mr. SMART. That is quite true. They determine them on the basis, I would say, of personality and personal desire rather than the law which is involved in the case.

Mr. JOHNSON of California. Of course, I don't want this to be any undue criticism of line officers, I don't mean to do that, but I feel they are not properly qualified perhaps to pass on these things and too much of the personality and the personal experience of the line officer might be injected into the judgment there.

General HOOVER. I may say that the proposed amendments under article 47 touch on that subject.

Mr. ELSTON. General, are there any circumstances at all under which a person can be given a bad-conduct discharge other than by a finding of a general or special court martial?

General HOOVER. No, sir.

Mr. ELSTON. Are there any cases under which a person's conviction before any form of courts martial have been made the basis of a blue discharge?

General HOOVER. No, sir. A blue discharge is purely administrative in its genesis and in its execution. It is not given as a punishment, as a result of a sentence by court martial.

Mr. ELSTON. Is that taken into consideration at any time, that is, convictions before either summary or special courts martial?

General HOOVER. Yes; I think so. If a man demonstrated his unworthiness by frequent offenses for which he is tried by inferior courts martial, for example, it might result in a blue discharge after a hearing before a board of officers.

This brings us to the proposed amendments to article 38. The changes are of a minor nature. The present article requires that the rules made pursuant to article 38, that is, by the President, shall be laid before the Congress annually. Now, as a matter of practice, these rules are incorporated in the Manual for Courts Martial, which is only changed at considerable intervals. The present Manual for Courts Martial was prescribed in 1928 and there have been but few changes. The proposal is that the rules and regulations made pursuant to the article shall be laid before the Congress, omitting the word "annually."

That brings us to article 39, which is the statute of limitations upon punishments under the Articles of War. The first change, one of some importance, excepts from the statute of limitations the offense of absence without leave committed in time of war. Under the present statute, desertion in time of war is excepted from the bar of the statute, so that we can try a man for desertion in time of war at any time after he is appprehended. The effect of the amendment is to put absence without leave on the same basis.

Mr. ELSTON. General, as I read this section, with those exceptions, any crime is outlawed within 2 or 3 years under certain circumstances, regardless of how serious it might be.

General HOOVER. Yes, sir.

Mr. ELSTON. For example, the crime of rape would be outlawed in 2 years.

General HOOVER. Yes, sir.

Mr. ELSTON. The accused might commit the crime of rape, willfully absent himself from the jurisdiction, then, after a period of 2 years or 3 years he is apprehended and is subject to be dismissed under the bar of statute.

General HOOVER. That is right.

Mr. ELSTON. Without any trial.

General HOOVER. The only exceptions at present are mutiny, murder, and desertion in time of war.

Mr. ELSTON. Why should there be a statute of limitations as to felonies? There is no statute of limitations ordinarily in the States as to felonies.

General HOOVER. I wonder if that is correct, Mr. Chairman. I understand that there is a Federal statute of limitations applying generally to felonies.

Mr. ELSTON. There may be, but in most States there are no statutes of limitations as to the more serious felonies.

General HOOVER. It is a matter of national policy, of course, as to whether we should put a limitation upon an offense like rape.

Mr. BROOKS. Will the gentleman yield?

Mr. ELSTON. Yes.

Mr. BROOKS. They can interrupt those by filing some sort of a bill of information or by obtaining an indictment. Where no apprehension can be made during the period prescribed, it can be interrupted by the filing of an indictment or a bill of information.

General HOOVER. Yes. We can interrupt the statute by preferring charges and arraigning.

Mr. ELSTON. Is that what this bill says? It uses these words: "Except for desertion or absence without leave.committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court martial for any crime or offense committed more than 2 years before arraignment of such person."

General HOOVER. Yes, sir.

Mr. ELSTON. That would seem to release the accused completely, even though he may have been charged before the 2-year period.

General HOOVER. That is right, unless we can get hold of him and arraign him. It differs from the situation suggested by Mr. Brooks.

Mr. BROOKS. Why is that?

General HOOVER. That is the way the law is at present. The object of it, of course, is to still the prosecutions. It is a matter of legislative policy. We have the provision with respect to manifest impediment. For example, if a man were in a State prison, the statute would not run during that period because the Federal authorities would have no power to get hold of him.

Mr. JOHNSON. Yes, but isn't the weakness of your provision here that you have to actually get him in custody and bring him before a court?

General HOOVER. That is the present law.

Mr. JOHNSON of California. In an ordinary case all you do is file a charge against him, either an indictment or a bill of information, and the statute stops running.

General HOOVER. This is in favor of the accused person. There is no question about that.

Mr. JOHNSON of California. What has been the result of that? Have any gotten away?

General HOOVER. Yes, sir.

Mr. JOHNSON of California. Do you know of any cases where they have gotten away?

General HOOVER. Yes, sir; we have them now and then.

Mr. JOHNSON of California. Would as many as 1 percent get away?

General HOOVER. No, sir.

Mr. JOHNSON of California. It would usually be confined to the higher crimes, wouldn't it?

General HOOVER. Well, we have had some absence-without-leave cases in this war where the statute of limitations has run. A man has been gone more than 2 years——

Mr. NORBLAD. Well, after 2 years it would certainly be desertion, wouldn't it, and covered by your original article.

General HOOVER. The War Department abandoned the practice of dropping these men as deserters, dropping them administratively as deserters during this war, so that a great many of the men were carried as absentees, not as deserters, and when they were brought to trial they were brought to trial for absence without leave.

It would have been possible in every one of those cases to charge them with desertion, of course, and if they had been found guilty of desertion the statute would not have run.

Mr. ELSTON. You may have a case where a man has been discharged from the service, his period of enlistment may have run out or he may be otherwise discharged from the service and still be amenable to military law because he committed some offense while he was a soldier but the circumstances may not have been developed at the time he left. It may not have been known at the time he left that he was to be accused. If so, he would not be guilty of desertion, he would not be guilty of AWOL, but still he might be subject to punishment.

General HOOVER. An illustration of that situation I think would lie in embezzlement of Government property. A man might be discharged after his offense and under the present ninety-fourth article of war we could bring the man back despite a discharge and try him. But the statute of limitations would continue to run under our present procedure.

Mr. ELSTON. But, General, do you think it would be better if we provided in article 39 that the statute of limitations would not run as to the accused person provided an accusation was made within the 2-year period?

General HOOVER. It could be done. I personally feel the present provision is in favor of accused persons. It quiets prosecutions. Nothing particularly is to be gained by the Government in resurrecting these old cases and bringing the men to trial.

Mr. ELSTON. No, but you encourage an offender to become a fugitive. All he has to do is stay away for 2 years and his crime or offenses, except desertion or a. w. o. l. during war, are canceled.

General HOOVER. Yes, that is true. But I think there is no practical problem of any great moment.

Mr. BROOKS. Will the gentleman yield?

Mr. ELSTON. Yes.

Mr. BROOKS. General, don't you go back to the situation I mentioned before? After 2 years, you have got to go into a civilian court on a lot of these cases.

General HOOVER. Yes, sir. We are barred.

Mr. BROOKS. For instance, a man leaves the service and the crime is outlawed by limitations, as with manslaughter, but you could still go into the civilian courts when you do have a system of comity between the military and civilian courts.

General HOOVER. Yes, sir.

Mr. BROOKS. And when the crime is committed in the continental United States, doesn't it give strength to the argument that perhaps most of these things ought to be prosecuted in the local civilian courts?

General HOOVER. I don't believe that our statute would prevent prosecution in the local courts.

Mr. BROOKS. It wouldn't quiet the prosecution of the crime.

Mr. ELSTON. Will the gentleman yield?

Mr. BROOKS. Yes.

Mr. ELSTON. Suppose the crime were committed in Korea or Japan or Germany.

General HOOVER. Then there would be no remedy except through our military courts, of course.

Mr. JOHNSON of California. Or at the Presidio, in San Francisco. Suppose it was committed there.

General HOOVER. You might have Federal civil jurisdiction there.

I think the fact that the Army is not interested in prosecuting these cases from the standpoint of law enforcement as much as it is from the standpoint of maintaining standards in the Army has something to do with it. If you bring to trial an old case, none of the members of the Army locally know anything about it, it doesn't mean anything to them, and we aren't accomplishing very much by trying that case. When we try a recent case we are bringing home to the rest of the Army the theory that crime does not pay.

Perhaps our position is somewhat different from that of the local prosecuting systems.

Mr. ELSTON. Of course, General, you can always dismiss a case if you don't want to proceed with prosecution.

General HOOVER. Yes, sir.

Mr. ELSTON. But you might have a very serious case that you did want to prosecute and couldn't do so if you made your statute of limitations run as it is provided for in this section. So wouldn't it be better to stipulate that the statute begins to run or runs only in the event no accusation is made within 2 years. Then if the accused is apprehended and you don't want to try him, you can always dismiss the case.

General HOOVER. Well, it could be done.

Mr. JOHNSON of California. It seems it would bring it home much better to those that were inclined to commit crime, because they would know then that no matter how much time had elapsed if an accusation were made they would still have to face it. That is the way it impresses me.

General HOOVER. Perhaps so.

I must say that the Army is reluctant to try criminal cases. The Army is reluctant to try cases unless it can see a real object in doing so, a real result to be attained.

Mr. BROOKS. That is more the principle of the French Foreign Legion, isn't it, to forget what has been done and go ahead.

General HOOVER. Yes. It is all in favor of accused persons.

Mr. ELSTON. But it might be rather tough on a person who has been the victim of a rape.

General HOOVER. That is right. We recognize the principle that you are speaking of, Mr. Chairman, when we do except certain classes of cases from the running of the statute, such as murder or mutiny or desertion in time of war. The importance of them is deemed to be such that the statute should not apply.

Mr. NORBLAD. In other words, are we getting back to the old premise that the Army does not punish crime for the sake of punishing crime, but for the sake of discipline alone.

General HOOVER. Well, I think you can't entirely get away from the thought that one of the important objects of punishment is to maintain discipline.

Mr. ELSTON. All right, you may go on with the next section, then.

General HOOVER. We propose to add a proviso to article 39 covering cases involving security considerations. This was a clause drafted during the war, some months ago, to cover the case where a trial would involve disclosure of information which might be of value to the enemy. Those cases are excepted from the running of the statute, until 6 months after the end of the war.

Mr. NORBLAD. Well, any crime would be detrimental to the prosecution of the war, whether it were a minor AWOL or a manslaughter or the giving away of national secrets, wouldn't it? That seems awfully broad to me.

General HOOVER. The discretion is broad, but I do not believe there would be abuse of it. The secret would have to be something of a public nature, I should say.

Mr. JOHNSON of California. Could I ask another question about this limitation problem, Mr. Chairman?

Mr. ELSTON. Surely.

Mr. JOHNSON of California. Will that 2-year provision have the effect of letting off a good many of these soldiers that stole property over in France?

General HOOVER. Yes, sir, it may have that effect.

Mr. JOHNSON of California. The records seem to indicate that there was a wholesale stealing of property and black marketeering, and things like that. Now, all those men will probably get off, on this 2-year provision.

General HOOVER. Yes, some will probably escape punishment. The period during which they are in a foreign country, of course, beyond the reach of our process, will be excepted from the running of the statute. You may have in mind those men who come back to this country?

Mr. JOHNSON of California. Yes.

General HOOVER. The statute would commence to run in those cases upon return.

The next proposed changes are in article 43 with respect to the votes on findings and sentences. Some confusion arose during the war as to the meaning of this article. There was a specific case in which a man was found guilty of murder by a two-thirds vote of the court, as

was authorized by this article, but he was sentenced to death. The sentence to death required a unanimous vote. It was contended, in a United States court, successfully, for the time being, that if the punishment of death must be adjudged by a unanimous vote, Congress must have intended that the conviction of the offense on which the sentence was based would also require a unanimous vote. A writ of habeas corpus was issued in that case. An appeal was taken to the United States Circuit Court of Appeals, where it was decided that the article provided that any finding of guilty, except for an offense for which the death penalty is made mandatory, might be reached by a two-thirds vote.

The changes that are now proposed in the article are intended to clarify the wording of the article, but not to change the sense of it. The result will be that we will be able to convict a man of murder by a two-thirds vote, but if we want to sentence him to death there must be a unanimous vote.

The next change is in article 44. The present article 44 is an old one which provides that when an officer is dismissed from the service for cowardice or fraud, the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp and in the State from which the offender came or where he usually resides, and that after such publication it shall be scandalous for any other officer to associate with him. The American Bar Association committee recommended, and I believe the Durham bill contemplated, the elimination of that clause as being unnecessarily harsh and obsolete as well. It has not, in fact, been put into operation during recent years. So the old article has been stricken out entirely and we have inserted in lieu of it an authorization for reduction to the ranks of an officer when tried by general court martial in a case in which a sentence of dismissal may lawfully be authorized.

Mr. ELSTON. I notice it is only in time of war.

General HOOVER. Only in time of war; yes, sir. There are some reasons for that limitation. One of them is that ordinarily in peacetime there will be no machinery whereby you can require the man to serve as an enlisted man. In time of war you will have some form of the selective service or draft which can be applied to induct the men as a class. Now, in time of peace ordinarily an enlisted man can become such only by voluntary enlistment, so there is a practical consideration from the constitutional or legal standpoint. Also, there doesn't seem to be any particular object in requiring officers in time of peace to serve as enlisted men after their dismissal or after their reduction. There is no manpower question involved. The punishment of dismissal, of course, is serious.

Mr. ELSTON. General, it seems to me that the severity of the punishment is the dismissal.

General HOOVER. Yes, sir.

Mr. ELSTON. Don't you think, so far as reduction to the rank of a private is concerned, that should be optional with the accused? For example, suppose you have a man that has a large family who couldn't live on the pay of a private.

General HOOVER. I think there would be cases in which it would be appropriate to permit the dismissed officer to enlist in the Army. I do not know how you can make it a form of punishment, however, as 'ong as there is a voluntary act on his part required.

Mr. ELSTON. This section would make it mandatory to be reduced to the rank of a private, and of course he would have to serve for some considerable period of time.

General HOOVER. The requirement of service would be premised on the theory that in time of war you would have the machinery to do it, that is, the constitutional machinery of the draft.

Mr. ELSTON. Well, you may be able to draft a person within certain age limits, but this section would permit you to reduce to the grade of a private an officer who was beyond the age for induction.

General HOOVER. No, sir; we wouldn't apply it in those cases. To cover the situation we provide that the punishment may be imposed under such regulations as the President may prescribe, the idea being that the President would utilize whatever draft law we might have at the time to bring these men in. If they were above the age limit we couldn't use the punishment.

Mr. ELSTON. Well, you could, unless the President prescribed otherwise.

General HOOVER. If there should be any way to accomplish it. What we should do here, Mr. Chairman, would be to induct the man into the service as an enlisted man. We must have some general provision of law, in conformity with constitutional principles of class treatment, on which to base the proposed punishment.

Mr. ELSTON. You can do it anyway.

General HOOVER. I say if you can do it legally, it is all right.

Mr. ELSTON. Suppose he is just dismissed from the service. He can still be inducted, if he is subject to the conscription act.

General HOOVER. That is right, and it was our thought that this clause would apply where the man is subject to the draft; but if he is not subject to the draft the President in his regulations would probably exclude that case from the operation of the article.

Mr. ELSTON. Well, I suppose this section was drafted for the purpose of taking care of the man who is willing to serve as a private or who if he went home could be drafted.

General HOOVER. Yes, sir.

Mr. ELSTON. He might go home and wait a number of months before he would be drafted, but under this section he could start his service immediately.

General HOOVER. Yes, sir; and we think it would be a wholesome thing. It would save the man from the stigma of a straight dismissal. It would save the young officer who is rather irresponsible, though perhaps a fine soldier essentially, who gets dismissed for, we will say, disorderly conduct which reflects upon the uniform he wears. There would not seem to be any reason why he should not be put in the ranks in time of war, not only to get his services but also to save face for him to that extent.

Mr. ELSTON. I see a lot of virtue in the section, provided the regulations prescribed by the President are proper.

General HOOVER. I believe there is substantial virtue.

Mr. NORBLAD. May I ask a question? I am quite interested in this section because I happen to have seen a case where two bomber pilots, who were part of a group I was with, were getting ready to go overseas and they immediately had themselves court-martialed on every kind of a charge they could think of. They were subsequently dismissed

from the service, which was proper. Then they went home and the last thing I heard, or at least any of my friends heard, was that they had gone to work in a factory and were occupationally deferred, staying out of the service throughout the war, whereas their friends went on and served overseas, some of whom were killed. Now, under this section, what would have been the outcome of a case like that?

General HOOVER. Under this section we would have been able to have reduced them to the ranks and to have compelled them to have carried on through and have done their duty, like the rest.

Mr. NORBLAD. They seemed to be very happy upon their return to civil life.

Mr. BROOKS. In reference to the publication of notice in the local press, General, will the rules be the same for the enlisted men?

General HOOVER. We are eliminating those provisions.

Mr. BROOKS. And the eliminations will cover the enlisted men?

General HOOVER. Yes, sir.

Mr. BROOKS. Now, I notice during the war you did publish those offenses in the press as to enlisted men.

General HOOVER. There was no requirement by statute that we do it except locally. I suppose that what you refer to was done from a general publicity angle. I do not know the circumstances.

Mr. BROOKS. I know a case of an enlisted man who apparently committed an offense. It was all published. Later he was put in a special unit and made good. He received a very fine discharge.

General HOOVER. Yes, sir.

Mr. BROOKS. Of course, that publication has done him irreparable harm, that even the honorable discharge can't eliminate.

General HOOVER. It seems to me that the sort of procedure to which you refer may carry punishment too far and be unnecessary.

This brings us to article 46. From articles 46 to 53, inclusive, there has been a rearrangement of subjects covered. The proposed amendments to article 46 contain the provisions with respect to the preferring and investigation of charges which are now contained in the seventieth article of war. The reason we brought them to this position in the structure of the articles is that the present seventieth article of war is among the punitive articles and article 46 is an administrative article. The provisions with respect to charges and pretrial investigations as incorporated in the proposed article 46 do not differ from those in the present article 70 except that the punitive provisions now existing are retained in article 70. I may say that the War Department feels that the pretrial investigation as at present required by article 70, and which is to be carried on by the new article 46, has been of inestimable value in the administration of military justice. To make a long story short, it eliminates most of the errors possible in preferring and disposing of charges. It prevents a great many trials and results in trials by inferior courts in a great many cases where the men might otherwise be tried by general courts martial.

Mr. NORBLAD. May I ask a question regarding this section?

Mr. ELSTON. Yes, sir.

Mr. NORBLAD. You heard the witnesses who testified before you, I believe, didn't you?

General HOOVER. Yes, sir.

Mr. NORBLAD. As I recall, a lot of them testified that they felt it proper that the accused should have the right to defense counsel during the time of the investigation of charges and that is not in the particular amendment which the War Department has submitted, is that correct, sir?

General HOOVER. That is correct.

Mr. NORBLAD. And the House Military Affairs Committee, I believe, also recommended at the last session of Congress that the accused should have the right to defense counsel at the preliminary investigation.

General HOOVER. The feeling is that there is no objection to counsel appearing at this stage of the case, that is, in the course of the pretrial investigation. As a matter of practice counsel is allowed, to my knowledge, where it is asked for. But a great many of these cases are of a routine nature; that is, the character of the offense is such that there isn't anything complicated about the case, and counsel is not desired. The ordinary absent-without-leave charge simply involves the question as to whether the man absented himself without leave and whether he stayed away during the time alleged. It would seem to be unnecessary to require counsel to appear in that type of case. Furthermore, the investigating officer is expected to and does act in a judicial capacity. He is supposed to advise the appointing authority on the merits, and I think he does so with remarkable fidelity. I suppose there are exceptions, but the exceptions are not predominant, by any means. Again, this pretrial investigation is much like the grand jury inquiry made in civil courts, where counsel is not habitually provided.

Mr. ELSTON. General, would you consider it jurisdictional error if this section were not complied with?

General HOOVER. No, sir; if it were made jurisdictional error, we would inject into our trial procedure a difficult and highly technical situation. We think that the guilt or innocence of the man ought to be determined at the trial. If we inquire into what was done before the trial from the standpoint of the comission of error, we are just asking for trouble. I should like to say, in that connection, that in my experience I have not seen more than a half dozen cases in which there has not been a reported investigation or an investigation in fact. Some of the investigations are done better than others and some of them aren't done well, we must concede that. But the object of the investigation is normally fully served before the man goes to trial. If he goes to trial in a case in which a better investigation might have prevented trial, and possible injustice can be prevented at the trial and by action after the trial.

Mr. ELSTON. General, suppose you have the case where a commanding officer does not comply with this section. He doesn't permit the accused to examine witnesses at the preliminary hearing and arbitrarily files a charge and presents it to a general court martial for hearing. What if anything can be done about it, if it isn't a jurisdictional error to so act?

General HOOVER. If it appeared in the Office of the Judge Advocate General that the man had been deprived of any substantial right, such as the presentation of testimony in his own behalf, or something of that kind, it would be possible for us to say that the error injuriously

affected the rights of the accused and that the sentence should therefore be vacated. The case of real injury would be rare. Ordinarily guilt or innocence is and should be determined at the trial and not by what occurred prior to the trial.

Mr. ELSTON. A great many things can be developed at a preliminary investigation, if the accused is given the means and the opportunity to present and examine witnesses.

General HOOVER. Yes, sir.

Mr. ELSTON. And insist upon the presentation of certain facts.

General HOOVER. Yes, sir.

Mr. ELSTON. If he is deprived of that opportunity, I don't know why it shouldn't be jurisdictional error.

General HOOVER. We would be considering as jurisdictional error something that happened beforehand and that really had no bearing on the man's guilt or innocence. The accused has a complete opportunity to meet the issue of guilt or innocence at the time of the trial.

Mr. ELSTON. If you don't make it jurisdictional error, then this section is meaningless. It is not mandatory.

General HOOVER. It is not mandatory, but I think it is far from meaningless, Mr. Elston, because it has been most effectively used in the Army.

Mr. ELSTON. But it is purely directory.

General HOOVER. It is directory as it stands, but as a directory provision I think it has been extremely useful in advancing justice, in expediting trials, and in preventing unnecessary trials.

Mr. ELSTON. I don't doubt that for a moment, but I can see where an accused person would lose some of his very substantial rights if he were not given the opportunity to appear, to examine witnesses, to insist on the presentation of certain facts, and to be fully protected, the same as he would be at any preliminary hearing in a court of law. If you simply make it permissive it may be that you haven't gone far enough.

General HOOVER. Well, if the failure to conduct the investigation in the manner required——

Mr. ELSTON. How are you going to determine whether or not substantial justice had been done? Suppose he were insisting, for example, that certain testimony if presented would have absolved him and nothing was done about it. How is a reviewing court going to know what would have happened had that evidence been presented?

General HOOVER. We would have to go to the report of investigation or to anything that he might present in connection with it at the trial. We have had these attacks made in the course of the trial by the accused persons upon the investigations. I think the facts are usually developed. And I think we must come back, in defending the directory nature of it, to the fact that guilt or innocence is to be determined at the trial and that the accused is there afforded every opportunity to meet the issues.

Mr. BROOKS. General, what would you do if you had a commanding officer who just customarily ignored the requirements of preliminary examination?

General HOOVER. I have in my experience never known one to do so. I think he would be brought to account very quickly if that were discovered.

Mr. BROOKS. Well, does the Judge Advocate General's Department have authority over an officer of that character?

General HOOVER. We would have no direct authority. We would have to bring the matter to the attention of the responsible officer in command channels.

Mr. BROOKS. You would consider it a violation of the rules and regulations of the Army?

General HOOVER. Yes, sir; we would bring it to the attention of the general commanding.

Mr. BROOKS. Now, in civilian life, of course, if a man in the Federal court is indicted he is not entitled to any preliminary examination, but if it is on a bill of information he is entitled to appear and examine witnesses, as I understand the law. You would consider every complaint in the Army an indictment, so to speak, for that purpose?

General HOOVER. Yes, sir; every set of charges. Of course, it is contemplated that the man will be afforded an opportunity to cross-examine the witnesses, and to call any witnesses——

Mr. BROOKS. That is on trial, but not in a preliminary examination.

General HOOVER. On both occasions. I should like to correct any impression that the present article of war seventy is not followed generally. It is followed generally.

Mr. ELSTON. Well, General, if it is followed generally, then I don't see what you have to worry about, if it is made jurisdictional error not to follow it.

General HOOVER. We don't consider it a jurisdictional matter. We look at the substance, rather than the form, that is all. We should gain nothing of substance if the law were treated as mandatory.

Mr. JOHNSON. The administration is what does that, not the law. The law is absolutely mandatory, I think, the way it reads. The word "shall" means exactly that. So the way you handle it, by administrative decree, you declare that to be only a directory provision of the article.

General HOOVER. The present interpretation of the article making it directory only is based on an opinion of the Board of Review, with which I personally had something to do. It is based on the practice in the Federal courts. It follows the decisions of the Federal judiciary. And I think it is sound from the legal standpoint. I think we would consider it as error, all right, if there were a failure to comply with the article, but there is a difference between treating it as error and treating it as jurisdictional error.

Mr. BROOKS. That is right.

General HOOVER. And that is what we are trying to avoid, and what we tried to avoid in handing down that opinion.

Mr. JOHNSON of California. Well, is it your opinion, based on your experience, that the subsequent trial corrects the violation of this provision?

General HOOVER. Yes, in the normal case.

Mr. JOHNSON of California. Because he has a chance to present his entire case.

General HOOVER. Yes. If he had anything that he wants to present, he can present it at the trial. If he is prevented from presenting it at the trial, then it is error on the trial, which we can certainly consider.

Mr. ELSTON. Will the gentleman yield?

Mr. JOHNSON of California. Certainly.

Mr. ELSTON. I don't suppose there is a member of Congress who has not received complaints from persons who have been court martialled who claim they didn't have the opportunity to present their cases before the charge was made against them; that if they had had the opportunity the charges in some cases would not have been made. We appreciate, of course, that there is no merit to many of those contentions, but on the other hand there might be as to some cases.

General HOOVER. Yes, sir.

Mr. ELSTON. And if you don't have a full and complete preliminary investigation, you might have charges filed against a person that are wholly unwarranted. The mere filing of charges doesn't do the man in the service any good, any more than it does a man any good to be indicted, even though he is subsequently acquitted. I have always felt that a preliminary investigation was almost as important as the trial itself, because evidence may get away if the accused doesn't have the opportunity to insist on its presentation at the early stage.

A man might be a witness and be killed before trial. Then his testimony wouldn't be obtainable at all. So it seems to me that you haven't gone far enough in safeguarding the rights of the accused at a preliminary hearing.

Mr. NORBLAD. Mr. Chairman——

Mr. ELSTON. Yes.

Mr. NORBLAD. With reference to the matter of the right of the accused to cross examine which has been brought up by the members of the committee and yourself, General, with all respect to your examination of those at the command level, during the war I investigated, I judge off-hand, probably 40 or 50 cases, where I was the investigating officer, and I always told the accused that he had the right to cross examine witnesses, but none of them had the slightest idea how to go about it. I only had one case where a man ever even as much as attempted to ask a question of one of the witnesses. Now, it is my feeling that if he had the right to have an attorney appointed the witnesses would be examined in fact, rather than it just being a part of an article of war, in written form, where it is meaningless. I know, as investigating officer, many times I would have welcomed having an attorney representing the accused there to cross examine, in an effort to clear up some of the smoke that may have surrounded the case. As I say, that is from the level of one who did a lot of investigating of the actual men themselves.

Mr. THOMASON. Was the accused advised that he could have counsel if he wanted to?

Mr. NORBLAD. The accused was always advised that he had the right to cross examine witnesses. It was my understanding that there was not—nor is there under the proposed War Department bill—the right of the accused to have counsel at a preliminary investigation. The point I raise is that the accused should have that right at a preliminary investigation. The War Department takes the other view.

Mr. THOMASON. I agree with the gentleman.

Mr. ELSTON. A private would be somewhat hesitant about cross examining a high ranking officer who is making the accusation.

Mr. NORBLAD. That is right. They didn't know how to go about it. They understood they had the right, but they just shrugged their

shoulders. As the chairman suggested, they were afraid to do it, or you had some 19- or 20-year old who was in a jam away from home for the first time and he didn't have the slightest idea of his rights, so far as cross examination of witnesses was concerned. All I could do was to try to explain the law to him. However, as I say, I only had one man who tried to do that, out of the large number of cases I investigated. Now, if an attorney were appointed, I think we could obviate that.

May I further say that I concur in the statement that a lot of the charges are minor, such as one day A. W. O. L. or other petty charges, just as in civilian life some of your charges are for traffic violations, but there are always some charges where I think it should be mandatory to have an attorney appointed at a preliminary investigation or the accused advised that he has the right to have an attorney.

Could I get your personal reaction to that, sir?

General HOOVER. Well, I am sure that when you were acting as investigaitng officer you were representing the accused about as much as you were the Government.

Mr. NORBLAD. Trying to.

General HOOVER. You were trying to. There really wasn't much occasion for cross examination.

Mr. NORBLAD. As much or more than there was on the trial, I believe, sir.

General HOOVER. Well, was there, in view of your position as investigating officer?

Mr. NORBLAD. I tried to bring out as much as possible. Now, had I had a man there representing the accused, with his sole interest in mind and from his viewpoint, I think we might have brought out a lot more facts.

General HOOVER. My conception of it was that you were sitting there in a judicial capacity. You weren't trying to convict the man. You weren't trying to absolve him. You were trying to develop the facts. I think that is the conception of the whole system.

Mr. NORBLAD. However, the man undoubtedly would not take me into his confidence where I came as an investigating officer, as he would a defense attorney to whom he could tell his story. The defense attorney is in a better position then to cross examine, knowing actually what the accused told him.

General HOOVER. I think there are cases where that is true.

Mr. NORBLAD. Just as in civil life, a man wouldn't hire an attorney where he has a traffic ticket for some slight charge against him, I think the same thing would work out in military life, but if it were a serious charge I think he should have the right to have an attorney.

Mr. BROOKS. Mr. Chairman, in the Federal court, as I see it, you do have a right to a preliminary examination immediately. You have the trial subsequently. The Articles of War completely eliminate that right of preliminary examination and put the case on the same basis of a traffic violation, where there is no right of preliminary examination, isn't that right?

General HOOVER. No, sir. I think the old article 70 takes the place of the preliminary examination.

Mr. BROOKS. That is for a pretrial investigation?

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General HOOVER. Yes, sir.

Mr. BROOKS. But, of course, before a bill of information or an indictment issues in a Federal case you have a pretrial investigation. Then the bill of information follows the pretrial investigation.

General HOOVER. We investigate the charges after they are preferred. I get your point, but I think we do have a judicial inquiry into the merits of the charges.

Mr. BROOKS. Who makes the judicial inquiry?

General HOOVER. The investigating officer, plus the appointing authority.

Mr. BROOKS. But there is no hearing at all.

General HOOVER. Oh, yes. A hearing is required.

Mr. BROOKS. You can't have a hearing in a criminal case without the defendant being present and having an opportunity to cross examine, can you?

General HOOVER. The accused is present at our investigation, is afforded an opportunity to cross examine, and has the right to produce any witnesses he wishes. I think it is quite common—and I think Mr. Norblad will bear me out—for the investigating officer to ask the accused soldier, "Do you have anybody who knows anything about your contention, who could support you?" He will mention someone, and the investigating officer brings in this witness that accused mentions. It is quite a common occurrence for the accused to ask for witnesses and to have them brought in by the investigating officer, especially in such cases as might involve an alibi, or something of that sort. It is an informal inquiry, but it is a real one.

Mr. NORBLAD. Will the gentleman yield?

Mr. BROOKS. I yield.

Mr. NORBLAD. It is an inquiry made by an officer of the command that has presented the charges against the man. The commanding officer points to one of his officers and says, "You go investigate this particular case." That is the way it is applied.

General HOOVER. Yes.

Mr. NORBLAD. But the point I make is that the accused doesn't have the slightest idea how to go about cross examining and in 99 percent of the cases does nothing but sit there perfectly dumb because he doesn't know.

Mr. BROOKS. Of course, in a Federal court you have a committing magistrate there that goes into those questions.

Mr. JOHNSON of California. In our State, after we had a good many technical reversals in the appellate courts, we wrote a provision in the constitution that the appellate court, when they review the whole case, can still sustain the trial court, even though there were some technical flaws in the record, if they conclude that substantial justice had been done. Now, would something like that be advisable in the Articles of War?

General HOOVER. I think that is what we have now.

Mr. JOHNSON of California. That is what you do, but the way I look at it you have taken this law, which I think is mandatory in its phrasing, and have gotten around it in the way you administer it and the way you have handled it.

Now, if you had a clause like that in there, to sustain by legal phrasing and by an actual statute what you do, I think it would be much better.

General HOOVER. Well, if we make it mandatory, Mr. Johnson, then we get away from the substantial justice principle.

Mr. JOHNSON of California. No. What I am asking you is this: If you had a clause similar to the provisions in our Constitution, that the reviewing board, or in our State the appellate court, after reviewing the entire record and even despite the alleged technical violations of the defendant's right they can still sustain the trial court if they find substantial justice has been afforded him, it might be advisable. That is what they do out there to handle the situation.

General HOOVER. That is what we do. Substantiality of justice is the argument in support of our interpretation of this clause.

Mr. JOHNSON. Yes, but there is no statutory authority for you to do that, as I see it. To overcome this specific provision of the article.

General HOOVER. We thought that Congress intended that it should be directory and not mandatory. Possibly we were wrong.

Mr. JOHNSON. If we made it jurisdictional error not to comply with the provisions of the statute it would be mandatory, wouldn't it?

General HOOVER. Then it would be mandatory, and if the investigation were not made, at least in substantial conformity with the requirements, we would have to set aside the sentence although the man came in and pleaded guilty. That illustrates the point. It is an extreme case, of course.

Mr. NORBLAD. Just one more question. I am reading from H. R. 576, page 16, beginning at the end of line 14:

> At such investigation full opportunity shall be given to the accused: (1) To be represented by counsel of his own selection, civil counsel, if he so provides, or military if such counsel be reasonably available; otherwise by counsel appointed by an authority competent to appoint general courts martial.

May I ask, sir, whether you are opposed to that particular clause being inserted in the bill we are considering?

General HOOVER. I think I must say that the War Department does not consider it advisable.

Mr. NORBLAD. That is all, Mr. Chairman.

Mr. ELSTON. Any other questions on this section?

(No response.)

All right, General, you may proceed with the next section.

General HOOVER. Yes, sir; article of war 47. Subsection (a) of this proposed change is new and of some importance. It provides that the Judge Advocate General shall have authority to assign the members of his department, after consultation with the commanders on whose staffs they may serve. This is designed to enable the Judge Advocate General to see to it that the judge advocates best qualified for any particular duty may be assigned where they can do the most good. It is also provided that the Judge Advocate General, or senior member of his staff, will make frequent inspections in the field in the supervision of administration of military justice. This implies an element of instruction, at least, if not control, over the staff judge advocate in the field.

Mr. ELSTON. Why do you use the word "will" instead of "shall"?

General HOOVER. There is no particular significance intended.

Mr. ELSTON. Except that "shall" makes it more mandatory.

General HOOVER. It is intended to be mandatory; it is to be followed.

Mr. NORBLAD. In line 3, why do you set forth there "shall be consultation between the commanders and the judge advocates"? If we

are going to have the judge advocate independent of command, you are abrogating that idea, it would seem to me, by providing for consultation between the commander and the judge advocate as to who shall be assigned to him.

General HOOVER. This clause is designed to coordinate the work of the Department with that of the commander in the field.

Mr. JOHNSON of California. Put it in the reverse, though——

General HOOVER. If you put a member of the Judge Advocate General's Department on a commander's staff in whom the commander has no confidence, the results will be bad.

Mr. JOHNSON of California. Take the reverse: Instead of having this law based on the theory that the line officers will be the ones that will review the records, suppose we have the reverse and it is all in the hands of the Judge Advocate General's Department. As a matter of practice, when the headman assigns officers to the various commands wouldn't he consult with them to see that the man he had in mind for an assignment to the Presidio, for instance, would be the kind and the type of man that would fit into the situation there?

General HOOVER. Well, yes, I think so.

Mr. JOHNSON of California. That is only common sense, that you would want to send somebody out that would work with the people that he had to live and work with.

General HOOVER. That is the idea of it. If, as has been suggested here, and assuming for the purpose of theorizing, that much of the control of cases in the field should be placed exclusively in the hands of the Judge Advocate General's Department, I would take it that the officers carrying out those duties would not be on the staffs of any particular officers in the field. They would really be parts of the staff of the Judge Advocate General.

But these other men will be on the staffs of the commanding officers.

Mr. JOHNSON of California. I understand that, but if we have it independent you would still try to put officers into the appropriate situations.

General HOOVER. Yes, sir.

Mr. JOHNSON of California. To fit in with the appropriate situations.

General HOOVER. Exactly, and this consultation, it seems to me, insures the field commander that he won't be ignored in the operation of military justice within his jurisdiction.

Mr. JOHNSON of California. You wouldn't force a man to go out and work with him, even if he wasn't in his command, who had had a fight with that particular commander?

General HOOVER. That is right. There is an additional requirement that staff judge advocates may communicate directly with the convening authorities, or, to put it the other way, that the convening authorities will at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice. This is to prevent the intervention of nonlegal officers in military justice matters. It sometimes occurs that staff judge advocates will present their advice in writing to their commanding generals through other nonlegal staff officers. The result is that the commanding general does not talk to his staff judge advocate, but talks to his chief of staff or to his G–1 or to some other officer. I think the ends of justice will be served if the staff judge advocate is insured personal contact with his commanding general.

Mr. ELSTON. General, subsection (d) referring to approval, means that there has to be some approval in addition to the convening authority, does it not?

General HOOVER. This is the approval required by the officer who appointed the court.

Mr. ELSTON. Don't you think that the words "in addition to the approval of the convening authority" should be added in there, say line 13, after the word "until"? The way it reads now, it might mean simply that the convening authority approved.

General HOOVER. It is contemplated that there will be two actions on a record of trial by special court martial involving a bad-conduct discharge.

Mr. ELSTON. It doesn't say so. The addition of those words would be helpful.

General HOOVER. There would be no objection to it, because it is intended that there be two actions: One by the officer who appointed the court and one by the officer exercising general court-martial jurisdiction.

(e) Of article 47: This proposal involves a change to cover the situation where the officer who appointed the court and who would normally act on the sentence is unable to do so because he is relieved from command or because the command is changed or dissolved or for like reason. It is proposed that the action on the sentence may be taken by any officer who exercises similar jurisdiction.

Paragraph (f) carries without material change the present provisions of article 47.

Article 48 carries some important changes with respect to the power of confirmation. Under the present forty-eighth article of war no sentence involving a sentence to death, a sentence involving a general officer, the dismissal of an officer, or the dismissal or suspension of a cadet, may be carried into execution until the President has confirmed the sentence. The article also provides that in time of war the commanding general of the Army in the field may exercise the same power.

The result has been that during the past war the various theater commanders exercised this confirming power, which extended to the dismissal of officers and the execution of the death sentence. The confirming power is of the greatest importance because it is a discretionary power, as distinguished from a mere exercise of legal judgment. When the President confirms a sentence or disapproves it or commutes it, that is, changes the form of it, he does with the sentence when he thinks ought to be done as distinguished from what he is required by law to do. The significance of the discretion, of course, lies in the fact that in the exercise of the power he can reduce sentences, change the form of them, and generally favor the accused persons. During the war, in Washington, the confirming power with respect to dismissal of officers has been delegated to the Secretary of War and in turn to the Under Secretary of War and is at present exercised by the Under Secretary of War.

Under the changes here proposed, the power of confirmation in all except death cases and those involving general officers will be lodged in the office of the Judge Advocate General, and will be exercised through a group which has been designated in the amendments as the judicial council.

Mr. THOMASON. Is that procedure now, General?

General HOOVER. No, sir. The action, in confirmation, in dismissal cases, must be taken by the Under Secretary of War. Under this amendment it would be taken by the judicial council, in some cases without the concurrence of the Judge Advocate General and in other cases with the concurrence of the Judge Advocate General. But confirming action would stop at that point.

All death sentences, however, would remain under the control of the President alone; an effect of this article is to repeal the present authorization for the commanding generals of the armies in the field to exercise the confirming power.

Mr. CLASON. What is the reason for that change? Hasn't it been satisfactory during the war?

General HOOVER. The change is designed to bring greater opportunity to the Judge Advocate General and agencies in his office to regulate, make uniform, and make more judicial the exercise of the confirming power.

Mr. CLASON. Well, have there been any instances that you know of during the present war that the overseas commanders——

General HOOVER. No; the change does not involve any criticism of what has been done during the war. The work connected with confirmation now is done in the office of the Judge Advocate General, however, in all cases.

Mr. CLASON. Well, as I recall it, on some of these important cases overseas, if you got in touch with the Judge Advocate General's office down here they wouldn't have any information.

General HOOVER. That is possible.

Mr. CLASON. The report wouldn't be here; for the action would be taken overseas?

General HOOVER. That is possible.

Mr. CLASON. The effect of this provision, then, will be to slow down the decision in the case, because you still would be waiting for that report.

General HOOVER. No, I think not, because in time of hostilities we are going to have branch offices of the Judge Advocate General in the foreign theaters, which will dispose of the cases more quickly than can be done under the present procedure.

I may state that the proposals concerning the confirming powers were involved in the Durham report and in the report of the American Bar Association Committee, both of them, recommending that final review of all cases be placed in the Judge Advocate General.

We have departed from the recommendations of those committees to the extent that we are having the death cases, and the cases of general officers, of which there are very, very few, taken care of by the President, where they are now handled.

Mr. CLASON. What is going to be the jurisdiction of this overseas office of the Judge Advocate General?

General HOOVER. Substantially the same as that of the office of the Judge Advocate General here, with respect to the cases it normally receives.

Mr. ELSTON. Then what he is going to do is delegate this authority to some other person or various persons in the different theaters, such as Korea, Japan, or Germany.

General HOOVER. That is right. He did that in this war. He established branch offices during this current war.

Mr. CLASON. You are going to give to that subordinate officer of the Judge Advocate General the power now exercised by the commanding general in the theater?

General HOOVER. Yes, sir.

Mr. CLASON. What will be the rank of these people that go overseas and will be using this delegation of authority?

General HOOVER. Well, it is presumed they will be general officers. Most of them were during the war.

Mr. JOHNSON. You say most of them?

General GREEN. Yes.

Mr. CLASON. How many generals are there in the Judge Advocate General's Department at present? And are you going to have them all overseas?

General HOOVER. Correct me if I am wrong—I think there are three of them right now.

Mr. CLASON. Then I don't see your statement——

General HOOVER. During the war we had several brigadier generals.

Mr. CLASON. I see. Well, now, in peacetime how are you going to do? Are you going to send the three generals around?

General HOOVER. No, sir.

Mr. CLASON. Commuting back and forth.

General HOOVER. No; in peacetime we won't have branch offices abroad. We will let the cases come here.

Mr. ELSTON. You won't have the cases, either—that is, as many cases.

General HOOVER. We won't have the number of cases, of course.

General GREEN. We shouldn't, but we still do.

General HOOVER. Yes; there are a good many coming in still.

Mr. NORBLAD. If the Judge Advocate General's Department has cut down on its number of generals, it is the only one in the Army that has, and it is to be complimented.

General HOOVER. I want to mention something else about the confirming power. It is the theory of article 48 and of article 50 that every case of a general court martial and every special court-martial case involving bad conduct discharge shall come under this confirming power. When you exercise the confirming power, you have the power to correct injustices that appear from any source. You can disapprove a sentence merely by the exercise of the discretionary power. As the law now stands, under article of war 50½, in the ordinary case of the dishonorable discharge or penitentiary confinement, the boards of review are limited to legal considerations. Under the proposed amendments, the judicial council may be called upon to act upon any of the cases mentioned which, though they may be legally sufficient, apparently involve miscarriages of justice in any form.

Now, that is a very heavy and a very serious power. But no one can sit on a board of review or in any other place of authority in the office of the Judge Advocate General and fail occasionally to observe cases in which, although the sentences are legally supported by the records, it appears that the sentences are too harsh or that they are unjust. Under the amendments proposed here, there would be a power in a judicial body, free of control by the command power or any other power, to take corrective action.

Mr. ELSTON. And guilt would have t obe shown beyond a reasonable doubt, would it not?

General HOOVER. It would have to be shown beyond reasonable doubt. One of the proposals is that the boards of review and the judicial council be authorized to weigh the evidence.

Mr. ELSTON. Under no circumstances, General, could a sentence be increased.

General HOOVER. Under no circumstances could it be increased. It could be commuted, but commuting means to change to a different form of punishment of lesser severity. That is, a dismissal could be commuted to a reprimand, a different but lesser form of punishment. A dishonorable discharge could be commuted to a forfeiture of pay or a reprimand, for example.

Mr. LEROY JOHNSON. Could you commute a sentence to the time served if a portion had been served, say it was a 5-year sentence and 3 years were served?

General HOOVER. Yes; you could reduce the sentecne. I think that the importance of the lodging of this power in the Judge Advocate General cannot very well be exaggerated.

Article of war 49 as changed defines the powers incident to the power to confirm and does not differ materially from the present provisions of same article.

Article 50 takes the place of the present article of war 50½. The American Bar Association committee report suggested that article of war 50½ was somewhat unintelligible. An effort has been made to clarify it. Article 50 starts out by authorizing the creation of the boards of review and of the judicial council. It provides for additional boards and councils where made necessary by the load of work. It provides for the establishment of the branch offices in foreign places, as referred to a few moments ago. It defines specifically the action to be taken by the boards of review in all types of cases. The action of the boards of review will be taken primarily from the legal standpoint. It is not intended that the confirming power be exercised by these boards of review. It is too heavy a responsibility. The confirming power must be lodged in a small body which can be made responsible for what it does. The boards of review as well as the judicial council are given the authority to weigh evidence. It is provided that in the appellate review of records of trial by court martial the Judge Advocate General and all appellate agencies in his office shall have the power to weigh evidence, judge the credibility of the witnesses and determine controverted questions of fact. The power to weigh evidence was endorsed and emphasized in the American Bar Association committee report, and I believe it is involved also in the Durham bill.

Mr. ELSTON. General, is it contemplated your board of review as well as your judicial council will be composed of general officers?

General HOOVER. No, sir; not the boards of review; only the judicial council.

Mr. ELSTON. And that would involve how many new generals?

General HOOVER. Three all told; that is, the council would consist of three or more. It is not contemplated having more than three.

Mr. CLASON. Can that handle any kind of a case? What is the jurisdiction going to be of this council, that is, as to the smallness of the case that they would consider.

General HOOVER. All general court-martial cases may be reached.

Mr. CLASON. Just general court-martial cases.

General HOOVER. All general court-martial cases and all special court-martial cases that involve a bad-conduct discharge.

Mr. ELSTON. I notice that you are not permitted, under the section where you establish branch offices, to have mitigation or remission on the part of an assistant judge advocate general.

General HOOVER. That is correct. It was thought that the power of mitigation and remission had such a direct effect on the discipline of a command that it ought not to be lodged in a local authority.

Mr. ELSTON. Well, it is mandatory, then, that the assistant forward the record to the Judge Advocate General.

General HOOVER. To the Judge Advocate General, if he feels that any remitting action should be taken. It should make for uniformity of treatment.

Mr. ELSTON. You say that cases may be forwarded to the Judge Advocate General. In such cases, they have to be forwarded, do they not?

General HOOVER. Ultimately, not currently. The thought here is that if the assistant judge advocate general in charge of the branch office thinks a case deserves some mitigation, he may be authorized at once, in his discretion, to send it to the Judge Advocate General.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 11, LEGAL,
Tuesday, April 22, 1947.

The subcommittee met at 10 a. m., Hon. Charles H. Elston, chairman, presiding.

Mr. ELSTON. Mr. Hayden, will you take the stand, please.

STATEMENT OF HARRY V. HAYDEN, JR., NATIONAL LEGISLATIVE REPRESENTATIVE, THE AMERICAN LEGION

Mr. HAYDEN. Mr. Chairman and members of the committee, I am Harry V. Hayden, national legislative representative of the American Legion, and I would like to introduce to the committee Mr. C. N. Florence, who is one of the appeals representatives of our national rehabilitation division. A good bit of Mr. Florence's time and the time of his associates was spent on appeals in connection with courts martial, as well as disability claims before both the War and Navy Departments.

The official policy of the American Legion as established by mandates of our national conventions and our national executive committee, which are the two governing bodies of the Legion, has long favored a fair and equitable system of justice for the armed forces of the country, such system to apply equally to men of all ranks.

Nothing contributes more adversely to the morale of soldiers and sailors than the fact that for too long a time men and women in the services have not received equal treatment in the matter of administration of justice. It is a well-known fact, for instance, that in a

number of cases persons holding commissioned rank have been permitted to resign for the good of the service for infractions of rules or military law, while enlisted personnel for like offenses have been subject to court martial. In the case of the officers, they have received a neutral separation from the service, not classified as either honorable or dishonorable, while enlisted personnel for similar offenses have received either bad-conduct or dishonorable discharges. Discrepancies have also favored officers with higher rank than other officers.

This unfair system of justice has applied in all categories of disobedience of military rules and laws, from minor to capital offenses. Enlisted men guilty of carelessness in contracting social dieases have been quarantined in hospitals, removed from pay roll, reduced in rank, and placed under restrictions while officers of the same command, guilty of the same offense, have received medical treatment, have suffered no loss of pay, and were not otherwise reprimanded or restricted. Of course, this committee is familiar with the infamous Litchfield cases, where enlisted men and officers of lower rank were sentenced to fines and imprisonment for abusing prisoners, while the commanding officer, who was responsible for conditions and who was accused of ordering treatment of prisoners for which others were convicted and sentenced, was let off with a small fine and is at present serving in an administrative capacity in the War Department.

We condemn the practice in the past, where some commanding officers have used undue influence on the actions of courts martial and, as a matter of fact, have been known to reprimand not only the members of a court martial but defense counsel where the decision in a case was not in accordance with the particular commanding officer's ideas.

The American Legion feels that the legislation proposed in the two bills under consideration is a step in the right direction. H. R. 2575, which embodies some of the recommendations made by the American Bar Association committee, is considered by our staff as the measure most complete, and the following recommendations for changes in H. R. 2575 are based on consideration of both bills:

On page 3, line 7, it is recommended that the term, "when deemed proper by the appointing authority," be eliminated. A mandate of our 1946 national convention favors enlisted persons as well as officers on courts martial and boards. H. R. 2575 permits the use of enlisted persons, but the American Legion feels that such use should be mandatory rather than left to the discrimination of the appointing authority.

On line 10, "when eligible" and "of the command" and in line 11, "in his opinion" should be eliminated for the same reasons stated in the preceding paragraph.

On page 6, line 4, we recommend that the words "if available" be eliminated and on line 20, the word "may" be changed to "shall."

Page 7, line 14, beginning with the word "provided" and continuing through line 16 should be eliminated. We do not see any reason for exemptions in any case.

On the same page, lines 17 to 24 are difficult of understanding.

Page 8, line 13, starting with the word "except" and to and including "military law" on line 22 should be eliminated. We can see no reason why the persons specified should be exempt from trial by a summary court martial.

Page 9, line 6, should be amended by striking out the words "only" and "and." In the same sentence, line 7, the words "and summary" should be added after the word "special." This is following our suggestion as to article 14.

On page 11, line 14, the word "capital" should be changed to "all." We do not see why the defense should not be permitted to introduce evidence in any type of case.

On the same page, line 24, we recommend that the following phrase be inserted after the word "defense"—"or the defense may designate counsel." On page 12, line 1, after the word "officers," insert "or counsel." We see no reason why the defense should not be permitted to employ counsel, if such counsel is qualified in accordance with the qualifications as set forth in this bill.

On page 12, following line 3 and just prior to section 16, it is recommended that articles 28½ and 29½ appearing in section 12 of H. R. 576 be inserted. The reason for such insertion is self-explanatory.

On page 13, line 4, we recommend the insertion of article 35 in section 13 of H. R. 576, in lieu of article 36. We believe that this provision in H. R. 576 is better detailed in every respect.

Page 18, lines 3 and 4, we recommend the elimination of the words "after appropriate consultations with commanders on whose staffs they may serve."

Page 19, line 3, the first word "to" should be changed to "through" and the word "or" on the same line be eliminated.

On page 21, following line 7, we recommend that there be inserted: "(5) involving the dishonorable discharge of an enlisted man." It is felt that this is warranted considering the gravity of such action.

Page 33, line 4, the word "will" should be changed to "must." It is felt that the action mentioned in this paragarph should be as mandatory as is possible.

Page 37, lines 8 and 9, should be amended by striking out "a warrant officer or flight officer or officer" and substituting therefor "any person." We believe that enlisted personnel should have equal rights with officers insofar as article of war 104 is concerned.

Page 38, lines 6 and 8, should be amended by deleting the word "enlisted" in each instance. Our reason for such request is obvious.

On the same page, lines 15 and 16, the word "or" should be changed to "and." It is the opinion of the American Legion that many courts martial are due to the fact that personnel of the armed forces never had the Articles of War properly explained to them and, on this account, are not aware that some action committed is an infraction of military law.

Since it is apparent in this measure that the office of the Judge Advocate General is to be extensively used in the set-up proposed by it, it is our further suggestion that the provisions of section 28 on pages 17, 18, and 19 of H. R. 576 be incorporated, beginning with line 14, section 28, on page 17 and terminating with line 3, page 19.

The American Legion recommends that H. R. 2575, with the foregoing recommended changes, be given prompt and favorable consideration by the Congress.

All complaints regarding Army military justice apply equally to Navy military justice. We regret very much that the Navy Department, so far as we know, has not sent any specific recommendations

to Congress for legislation. We strongly recommend that the Congress immediately enact necessary laws to eliminate not only flaws in the present Navy justice set-up, but to greatly improve the administration of justice in the Navy.

I would like to make one observation here, Mr. Chairman and members of the committee. Even in enacting this improved court-martial law, it may be necessary for the Congress to see that their intent as expressed in any legislation is carried out. I have in mind section 207 of the Reorganization Act which was passed by the last Congress and approved early in August. That section directed the Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury to set up civilian boards to review discharges and make corrections, including the corrections in the way of dishonorable discharge, where any wrong or any error had been committed.

After some months, in spite of all of the legal talent of both the Army and the Navy, nothing was done. Then, finally, they decided that they didn't know whether they had authority to correct discharges. A joint letter, in February, was sent to the Attorney General inquiring as to whether they could. The Attorney General decided that the Secretaries did have authority under the Reorganization Act to correct discharges. So far as we know, very little has been done by the Army, and we have no information that the Secretary of the Navy or the Secretary of the Treasury so far as the Coast Guard is concerned, have set up these civilian boards. In the meantime, a number of men who were wrongly given dishonorable discharges are still waiting.

On behalf of the American Legion, I thank the chairman and members of the committee for the opportunity to present our views on this very important legislation. Thank you.

Mr. ELSTON. We appreciate your coming here and giving us this very fine statement. Perhaps some of the members may want to ask you some questions.

I would like to ask, first about the provision with respect to enlisted men serving in courts-martial cases. One bill before us makes it mandatory. The other makes it discretionary. I am wondering what you would think of the proposal that enlisted men serve only when requested by enlisted men?

Mr. HAYDEN. That is making it a little unusual, Mr. Chairman. We have a definite directive from our San Francisco national convention that enlisted men be on the courts martial. From my conversations with people who are familiar with that, they feel so far as the appointing authority is concerned it should be mandatory, but, as in civil cases where defendants are permitted to challenge members of a jury of their peers, that if an enlisted man does not desire enlisted men on the court martial it would be perfectly agreeable then not to have them on there.

We don't agree entirely with statements that have been made before this committee that most enlisted men prefer that other enlisted men be not on their court martial.

I have talked to Mr. Florence about that. He has handled the appeals on court martial of a number of enlisted men and he feels the same way about it.

Mr. ELSTON. Mr. Johnson?

Mr. JOHNSON of California. There is one sentence there, the last sentence in your second paragraph, where you say, "discrepancies have also favored officers with higher rank than other officers." Do you have any tangible evidence of that?

Mr. HAYDEN. Well, so far as the Army is concerned, Congressman Johnson, I was in the Navy and I can speak for that, the discrepancies in the administration of justice, not necessary in the court-martial manual, whereby higher officers have been excused or not brought up on charges that officers of lower rank have been. That applies more in the cases of enlisted men. In other words, aboard ship officers commit an offense and frequently they are taken in the captain's office and smacked on the wrist. No record is made of it. I have handled fitness reports in the Navy and I never saw mention of some of the things that I know happened. However, in the case of enlisted men, they were brought up on deck court, and sometimes on summary court, for offenses that were no greater and sometimes lesser offenses.

Mr. CLASON. How are you going to bring these officers to trial if no charges are prefererd against them?

Mr. HAYDEN. Ididn't get you, Congressman.

Mr. CLASON. If the officers play with each other, so to speak, and do not prefer charges against each other, how are you going to accomplish anything under this bill other than what has already been accomplished?

Mr. HAYDEN. Well; I think you have got a tough problem. It is a case of any law that is now administered. Something has to be done. I believe in this bill giving the Judge Advocate General more authority. I think, also, it would be better if the judge advocates served under the Judge Advocate General and not under the command, the commanding officers who mark their reports.

Mr. CLASON. Has the American Legion taken any position directly on the proposition that the judge advocates should be directly responsible to the Judge Advocate General's Department alone and not the command officers once they are appointed?

Mr. HAYDEN. I believe—Mr. Florence correct me if I am wrong—the provision for the Judge Advocate General's Department in H. R. 576, which we recommended be inserted in H. R. 2575, does just that.

Mr. CLASON. But that still would not result in any charges being preferred by the command officer, would it?

Mr. HAYDEN. Well, it might be a step in that direction, Congressman.

Mr. CLASON. In other words, they might learn of an instance——

Mr. HAYDEN. Precisely.

Mr. CLASON. And not being connected with the command, they might be in a position to call attention to it in some way?

Mr. HAYDEN. Exactly. Our complaints, Congressman, are not personal. I know for a fact that a number of officers in the service want to see conditions change. They would like to see a system of justice that applied equally to all men, because their job is much harder the way it is now.

My job as a chief in the Navy was very difficult, due to such things as this and other elements of the caste system, in trying to keep my men in line. I know there were any number of officers, including the admiral under whom I served, who felt the same way about these things. He was bound by Navy tradition, and a lot of these laws.

Mr. CLASON. Well, is it the position of the American Legion that the Judge Advocate General's Department should be set up on a basis whereby the head of it should rank equally high with the heads of other branches of the War Department and should be, insofar as posible, free from the influence of command officers?

Mr. HAYDEN. I am sure I can safely say that the American Legion would recommend that, Congressman.

Mr. CLASON. That is all.

Mr. JOHNSON of California. Aren't these matters of discipline largely a personal matter? You know very well that many enlisted men are disciplined sometimes when they could have been court-martialed.

Mr. HAYDEN. I think it is more the other way, sir. I also know that a lot of men were court-martialed when a discipline would have been ample.

Mr. JOHNSON of California. Well, that is a matter of judgment, isn't it?

Mr. HAYDEN. Nevertheless, it is a fact.

Mr. JOHNSON of California. Whatever you have, you have to repose some judgment in somebody. You don't think there is a wholesale amount of injustice going on in the handling of military justice, do you?

Mr. HAYDEN. I think there is a lot more than there should be, Congressman.

Mr. JOHNSON of California. Well, that is true with every human system of justice. There are some flaws.

Mr. HAYDEN. Well, as I said before, one matter is having a set-up and another matter is having it administered properly and equitably to all men in the service.

Mr. JOHNSON of California. You think you put your finger on the specific flaws in the present system in your statement here?

Mr. HAYDEN. Well, some of these things, such as undue influence of commanding officers on courts martial, and one of my authorities for that statement is Col. John Thomas Taylor, who served in the Army and who served as defense counsel on a court martial. He was shortly removed from his quarters and sent to a less desirable assignment because he successfully defended a man or called attention to the fact that he knew the members of the court martial had been advised as to what the commanding officer wanted done.

Mr. JOHNSON of California. Yes; but you stated a moment ago that if we get a system where the judicial system is independent and separate from the commanding officers, you believe that will correct that sort of situation.

Mr. HAYDEN. That is true.

Mr. JOHNSON of California. Those are all the questions I had.

Mr. ELSTON. Mr. Florence, do you have anything you want to add?

Mr. FLORENCE. We have nothing to add, sir.

Mr. ELSTON. All right. Thank you very much.

Mr. HAYDEN. Thank you very much, sir.

Mr. ELSTON. Is Mr. Feldman here?

Mr. FELDMAN. Yes, sir. Good morning, gentlemen.

Mr. ELSTON. Mr. Feldman, will you state your full name to the reporter and indicate the organization you represent?

Mr. FELDMAN. Yes, sir. I am Justin N. Feldman, and I am national director of veterans' affairs for the American Veterans Committee.

Mr. ELSTON. Mr. Feldman, you have a very long written statement, which we will be very glad to place in the record for you, after which you may offer such comments as you see fit.

Mr. FELDMAN. Fine, sir; if that is your pleasure.

(The statement referred to above is as follows:)

TESTIMONY OF JUSTIN N. FELDMAN, NATIONAL DIRECTOR OF VETERANS' AFFAIRS OF THE AMERICAN VETERANS COMMITTEE (AVC), ON H. R. 2575, AN AMENDMENT TO THE ARTICLES OF WAR AND THE ADMINISTRATION OF MILITARY JUSTICE

Mr. Chairman and members of the committee, I appreciate the opportunity to present testimony before this committee on behalf of the American Veterans Committee. The American Veterans Committee is an organization of veterans dedicated to the achievement of "a more democratic and prosperous America and a more stable world." Our interest in military justice is twofold. Firstly, we are interested in any and all aspects of American life which are concerned with law, justice, and democracy. We, as citizens, are directly affected by the morale and efficiency of our armed forces, and we feel very strongly that a democratic country which maintains an army for the defense of democracy must maintain democracy within its army.

And, secondly, we are almost 100,000 veterans whose rights and liberties were directly affected by the presently existing Articles of War. We had direct contact with the administration of military justice, and many of us, as myself for instance, had the responsibility of administering the presently existing laws.

In the 16 months since my release from active duty and my association with AVC, I have worked with many individuals and groups who have been interested in the problems of military justice. I have had the benefit of the thinking of committees within AVC which were formed for the specific purpose of studying the court-martial system. These committees, while made up primarily of lawyers who themselves were associated with the administration of military justice, also called on many laymen who had ideas on the subject and availed themselves of the AVC files which disclose innumerable complaints from our members, who are all honorably discharged veterans, as well as from friends and relatives of our members who may themselves have been hard hit by the presently existing system.

The most significant aspect of the continuing criticism of the present system of military justice is that there is virtual agreement that military justice operates unequally and undemocratically. Veterans who had the opportunity to observe the system first-hand can point to countless cases of actual injustice. Examples of military courts being swayed by the decisions of high-ranking officers; men tried for serious offenses and subjected to heavy penalties without competent counsel; untrained courts sitting in judgment of cases involving conflicting evidence without the guidance of technical and professional legal advice—all of these emerge from any informed veteran's discussion of the question.

The administration of military justice is designedly in the hands of professional soldiers who believe that its function is to maintain the discipline of troops and therefore operate accordingly. The present system is in a great many respects completely bankrupt as a result of the soldier's lack of faith and respect. There is one indulgent code for Regular Army officers and noncommissioned officers; another, more severe, for temporary officers; and a third of even greater severity for those who are non-Regular Army enlisted men. The present system perpetuates class differences between officers and enlisted men and is, indeed, based upon those differences. To remedy the present situation requires more than a mere tampering with isolated rules of procedure and customs of the service—it requires a sweeping revision conceived with breadth of vision and a determination to seek out and attack the basic causes of injustice rather than mere surface symptoms.

Several investigations of the administration of military justice have been undertaken and have resulted in recommendations aimed at remedying many of the defects. There has been no general over-all program put forth, however, which will serve to overcome the serious and basic deficiencies upon which the system is founded.

No study of the court-martial system intended to high light the inadequacies and sources of injustice can fail to consider the question which has most often been the source of great confusion to those who have done any thinking on the subject: "Is the purpose of the court-martial system the maintenance of discipline or is it to administer and dispense justice?" Nothing has yet been presented to indicate that the maintenance of discipline and the adequate and fair administration of military justice are mutually exclusive. It would be a sad commentary indeed if we were to agree that there can be no discipline in an army which would adhere to the fundamental principles of democracy. Would there be any sacrifice of discipline if the members of the armed forces were assured of a fair and just trial of their guilt? Surely, the court-martial system should be concerned with the achievement of justice in each individual case.

It is important in approaching this problem that we examine very carefully this philosophy which seems to underlie our court-martial system and realize that no system which advances the excuse of discipline can be considered to have any place within the fabric of American institutions when it breeds so many cases of injustice. We do not intend to deny the need for discipline and respect for authority, nor do we intend any denial of the need for methods of enforcement but we do contest the views which advocate enforcement by the deprivation of fundamental liberties and constitutional guaranties as the only answer. The Congress, when it originally enacted the Articles of War and the Manual for Courts Martial attempted to preserve the rights of the individual soldier. It is in the administration of military justice, however, that the accent on discipline as the guiding principle of military justice is not really honest. This is no more than an attempt to preserve those archaic prerogatives of commissioned officers which are based upon customs and rules conceived for mercenary armies. The Army's current concept of military justice or the exercise of court-martial jurisdiction under the present rules can be no better, or no fairer or more adequate than the individual commanding officer who is vested with all of this authority. It has been a very usual observation that courts martial are constantly subjected to influences which have no place in judicial tribunals. While it is true that much of the work of the commanding officer in this field is accomplished by his staff judge advocate, there is, however, no definitive regulation establishing the professional qualifications for this position, nor is there any guaranty that the decisions or recommendations of the staff judge advocate will be followed. The staff judge advocate is so often completely dominated by the policies of the command that he in effect presents nothing more than a rationale for the reactions and behavior of his commanding officer and is precluded from offering a qualified and objective legal opinion.

Under the present system, court-martial charges are prepared by the accuser and forwarded to the commanding officer, who, under article of war 10, has the immediate authority to appoint summary courts martial for the command to which the accused belongs. The appointing authority then refers the case to a court of his choice; to a court composed of officers who are not only chosen by him, but who are directly under his jurisdiction and command. It is he who determines their ratings and promotions, and it is he who has the authority to transfer them. How much room does this leave for independent thought and action? It is not at all unusual for a commanding officer to demand that all courts operating under his jurisdiction be read a statement of command policy for court-martial sentences in particular types of cases, nor is it at all unusual for a court to be reprimanded for its having acquitted an accused or for its having imposed a sentence which the commanding officer feels to be inadequate. The same officer who appoints the court and refers the case for trial also acts as the reviewing authority. It is he who determines the appropriateness of the charge, whether or not the case is to be tried, by whom it shall be tried, the validity of the proceedings and the appropriateness of the sentence.

There has been amazing unanimity among observers that the fundamental cause of the unstable foundation of the courts-martial system is this ultimate coordination of both command and judicial functions in one hand. This system has imposed upon one man, the commander who has court-martial jurisdiction, almost all of the duties in connection with the administration of military justice.

The results of such an imposition are obvious in both theory and practice. The commander who refers the charges for trial quite rightly would not do so if he were not seriously convinced of the accused's guilt. This has the pernicious effect of making subordinates who subsequently sit in judgment unconsciously prone to accept the decision of their commander. Since the initial review is

accomplished by the same person who referred the case for trial, it must be clear that there is at least an unconscious predisposition to make the review a cursory and generally affirmatory procedure. The historical background and justification for our system of checks and balances is too well known and respected to warrant repetition here. Its importance, however, cannot be overemphasized.

No compendium of injustices is necessary, but there are some few practices resulting from this present distribution of power that might serve for illustration. A commander who is desirous of protecting a favorite, a particularly reliable technician perhaps or an officer close to his own caste, may do so with ease and apparent impunity. He may exert his own predilections of justice and punishment over the courts because they are, simply enough, his own subordinates. He may, as has been pointed out, censure a court, dismiss it at will, appoint members who will follow his inclinations. He may appoint an incompetent defense counsel, maintain an inept reviewing staff, and may place responsibility in such a fashion as to expedite his command functions, which, after all, is his primary mission, while lessening the effectiveness and impartiality of the judicial system. The rights of an individual are soon subordinated to the expediency and desires of a functioning command.

H. R. 2575 does very little to prevent these abuses or to correct this situation. Section 3 of the bill, in the third paragraph, specifically sets forth that "the appointing authority shall detail as members thereof (courts martial) those officers of their command * * * ", and goes on in section 6 and section 7 to name those persons who may act as the appointing authority without making any serious change in the presently existing Articles of War.

The second fundamental defect of the present system is the failure to use professional legal personnel in the performance of tasks which require professional legal training. The number of convictions of soldiers who were "defended" by nonlawyers, not in combat areas but in the United States, and other rear echelons, was shameful. Many of the cases whose harsh results had widespread newspaper publicity can be found upon further inquiry to have involved a lack of competent defense counsel, or review personnel, such as the Webber case in which the death sentence was imposed upon someone who should have been classified as a conscientious objector or the Shapiro case in which the accused was tried within 90 minutes after the charges were served upon him. Both of these sentences were later modified as a result of the pressure of public opinion.

The greatest burden for the administration and implementation of the judicial process is imposed for the most part upon persons already engaged in other duties. Personnel at the pretrial and trial levels, which are, after all, the points of the initial impact of the system upon the individual, are normally drawn entirely from troop or service units. These officers have neither the training nor, in some cases, the inclination or the temperament to administer and dispense justice effectively. An impossible burden has been imposed upon troop commanders from which they should be relieved in the interest of seeking basic justice for the individual soldier. Even if it were the disposition of the commanding officer to appoint only trained and qualified personnel as prosecutors, defense counsel or law members, the peacetime Army has no reservoir of such trained personnel to make this practice feasible. In a period of stress or national emergency, when our military forces assimilate a wide cross section of the population, allocations of personnel are often made so as to leave many organizations without any or sufficient representation from the legal profession. Too often, questions of rank, and priority of other functions take precedence over considerations of efficiency and training. The inefficient or untrained officer is too often the one person most available for assignment to duties involving the administration of military justice. This results in poor investigations, inept pretrial preparation and frequently ludicrous but grave situations during trial, when the defense counsel with no legal training whatsoever frustratedly attempt to serve the ends of justice while combatting their own inadequate background. This problem can only be obviated by the transferring of professional functions to personnel specifically trained for this task. Despite the simple style of the Manual for Courts Martial, it is still a highly technical document when it confronts the untrained mind. Its use presumes a certain appreciation of various legal doctrines and cannot be absorbed without a great deal of study.

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While H. R. 2575 attempts in some degree to correct this situation, it does little more than scratch the surface. That portion of section 6 of H. R. 2575 which will make it mandatory for the authority appointing a general court martial to detail an officer of the Judge Advocate General's Department or an officer admitted to practice in a Federal court or in the highest court of a State is to be commended. But why should we not have a law member on special courts martial? After all, confinement for a period of 6 months is extremely serious. Shouldn't the accused who is subject to this type of punishment be entitled to be tried by one who is trained in judicial technique? Section 8 of this bill, however, merely recognizes the existence of the problem which I previously described; it does little to correct it. It is fine to insist that for each general or special court martial the trial judge advocate and defense counsel of each general court martial shall be trained and qualified lawyers. And it is fine to say that if the trial judge advocate or prosecuting attorney of a general court martial is a trained attorney that the appointed defense counsel shall likewise be an officer of the Judge Advocate General's Department or one who is admitted to practice law in a Federal court or at the highest court of a State. But why limit this to general courts martial? Why not include special courts martial, which also have right to deprive persons of their liberty and property? And why, even in the case of general courts martial, use the words "if available"? We feel very strongly that the Congress should provide some means whereby trained counsel will be available and their use mandatory.

We must not lose sight of the military construction of the words "if available." In Army parlance, this doesn't mean if present or if they are actually available in fact. It means, does the commanding officer, who is likely to be the appointing authority, consider the man to be available?

A third difficulty in the present system is its reluctance to face the scrutiny of public opinion or professional civilian analysis. Theoretically, military trials are open to the public, but actually they are highly secretive affairs. Neither the public nor the press have any direct knowledge of when and where cases will be heard. Then, too, civilian courts have refused to review the proceedings of military tribunals if the latter have jurisdiction. Since the jurisdiction of military courts is almost impregnable to attack, the number of successful appeals by convicted soldiers to the civilian courts is almost infinitesimal. There is no real reason for this rigid separation of judicial power, and a provision for a limited appeal to civilian courts would tap a spring of fresh doctrine sorely needed to dilute such outpourings of the boards of review as those decisions which did away with the requirement for a qualified law member or the one which approved a conviction for an offense otherwise barred by the statute of limitations on the grounds that defense counsel had failed to plead the statute affirmatively, although defense counsel was not a qualified or trained attorney.

H. R. 2575 sets up a rather complicated and detailed appellate system for review of courts martial. But we feel that it guards much too jealously the powers of the military. Under article 50 as suggested by section 26, appellate review is in the hands of the Judge Advocate General's Department a judicial counsel composed of three general officers of the Judge Advocate General's Department, and in subsection (*h*) the bill goes on to provide that after final review by the military the proceedings, findings, and sentences of courts martial "shall be final and conclusive * * * and all action taken pursuant to such proceedings shall be binding upon all * * * courts * * * and officers of the United States." This committee must seriously consider what effect this section would have upon even the present very narrow doctrine which allows for judicial review to determine whether or not the court martial exceeded the scope of its jurisdiction. We fully realize the necessity for finality of judgment, but we do not feel that this finality should rest with the military exclusively.

I would like to comment briefly at this point on certain of the other provisions of H. R. 2575 that I have not heretofore discussed.

There can be no doubt that section 3, which amends article 4 of the Articles of War as to eligibility to serve on courts martial, is commendable. The inclusion of enlisted persons on courts martial is something which has been sorely needed not only from the standpoint of justice but also from the standpoint of rebuilding the faith of the majority of the members of our armed forces in military justice. But we cannot go along with the present language of the section, which does not make it mandatory for commanding officers to appoint enlisted men—which makes it only permissive—and which does not es-

tablish any definite proportion of enlisted man and officer representation on the courts. There is no point, we feel, in passing a statute aimed at correcting injustices if by the language of that statute the injustices would be permitted to continue.

We would suggest that the special court martial be composed of three persons: one a law member and the other two military personnel regardless of rank, except that if the accused should so request a competent and qualified enlisted man should be one of the other two members. We further suggest that in the event the court is expanded beyond the three, the court be made up of an odd number of persons, one of whom will be the law member and, if the accused should so request, at least half of the others competent and qualified enlisted men. We would like to see the term "competent and qualified enlisted persons" be defined as those enlisted men of the first three Army general classification test groupings, who, regardless of rank and by reason of age, training, and experience, have had their names placed upon a roster and who are selected by lot to serve as members of the court.

We feel that a general court martial should be composed of a law member and at least six other persons who will act as a fact-finding body only. The law member should be the presiding officer, regardless of rank or seniority, and, as H. R. 2575 now provides, his rulings on all legal questions shall be final and conclusive. As to the composition of the rest of the court, we believe that the six other members should be drawn from the military personnel of the command or area. Trial terms should be established, and at every trial term, jurors should be summoned by notice from the office of the committing officer. Jurors should be composed of six persons irrespective of rank within Army general classification test groups I, II, and III. The jury panel shall be chosen from a roster of the entire personnel included in the geographical area assigned to the committing officer during any given trial term. One alternate juror should be drawn from the same source as the regular jurors and have the same qualifications. The verdict should be rendered by not less than five-sixths of the jurors, and no jury should be discharged by any court and a new trial ordered because of the jury's inability to agree upon a verdict unless the court is satisfied that agreement among such proportion of the jurors is impossible of attainment. A sealed verdict should be permissible. Polling of the jury should not be permitted except to ask if five-sixths agree. Misconduct by, or disqualification of a juror, or tampering with the jury by outsiders afford grounds for a new trial when properly established. Tampering with the jury or attempting to bribe or prejudice a juror should be a crime.

We agree with section 10 of this bill, which amends article 13 of the Articles of War, but disagree with the first proviso thereof. We feel that one of the greatest present dangers to equality and democracy in the courts is that they are set up to handle only personnel of certain rank. For if an officer is to be tried by general courts martial only is to be exempted from the jurisdiction of the special court by direction of the President or if any grade of enlisted man is to be exempted from the jurisdiction of any court by direction of the President, a nullification process sets in. The commanding officer or the accuser is loathe to press a minor offense when he knows that it can be handled only in a major way. We must eliminate as many of the distinctions in rank as we possibly can when considering a system of justice.

We further believe that section 10 should be amended so as to indicate in specific language whether a special court martial may adjudge a bad-conduct discharge in the case of an officer as well as in the case of enlisted persons.

We question the present language of section 11, which amends article 414 on the same basis as we questioned the first proviso of section 10. Why shouldn't an officer, a member of the Army Nurse Corps, a warrant officer, a flight officer, or a cadet be subject to trial by courts martial? Could we not include them in the first proviso of section 11 so if they object to trial by a summary court martial without the authority of the officer competent to bring them to trial before a special court martial they will be tried by a special court martial? And by the same token, we believe that the second proviso of section 11 should be stricken.

We have no serious objection to section 12, which amends article 16 of the Articles of War, and find the second sentence thereof extremely commendable.

We wholeheartedly approve of section 14, amending article of war 24, but would very much like to see some language included therein which would affirmatively require that a witness or accused be informed of his right against com-

pulsory self-incrimination. Those of us who had much close contact with the functions of the Army know from experience that despite the constitutional guaranties which we all have as citizens and despite the specific outlawing of compulsory self-incrimination by the Articles of War, persons of inferior rank feel compelled to answer truthfully, not understanding that it would not be an act of disobedience to remain silent. It is our further feeling that whereas section 15 is for the most part well drawn, there might be some clarification of the meaning of the language in lines 1 and 2 of page 13. I am sure that the Congress would not desire to place counsel who are trying courts martial in the position of not knowing till the end of trial whether the rulings on their objections or motions will stand or be later reversed. The language as it is presently drawn would remove the element of certainty which is extremely necessary to the proper conduct of any trial.

While we approve the intention of section 21 of this bill, we feel it has not been worked out in sufficient detail. We approve the principle which would allow for the reduction in grade or the reduction in rank of an officer, but feel that the severity of having no choice of doing anything but reducing him to the grade of private might in fact nullify the effect of this section. It would be perfectly reasonable, we believe, under certain circumstances not to dismiss a colonel but to reduce him to, say, the grade of major or captain, but if the court's only alternative is dismissal or reduction to the grade of private, courts would be loathe to impose any punishment at all.

As to section 22, article of war 46, we would like to see some requirement for competence and qualification of the officers conducting these investigations as well as some requirement that the accused be informed of his rights during the course of such investigation and that he be afforded the right to counsel during this investigation and that he be served with a copy of the investigation file.

The ineptness of investigating officers and the inability of the accused to secure counsel during investigation has been one of the greatest difficulties of the present system. It is a real sore spot, and a point at which much of the injustices with which I am sure this committee is familiar has arisen. As to subsection (*c*) of this section, it is our belief that 8 days is too long a time for a person to be held in confinement without having charges preferred against him in some official way. A vindictive, cruel, inefficient officer might well order a person into confinement, not prefer charges, release him at the end of 7 days, and have achieved his desired result without even the slightest formality. We must not forget that persons subject to military law who are confined by the military have no right to habeas corpus and that such a provision might well result in indiscriminate use which would completely thwart the basic philosophy of Anglo-Saxon and American justice. We further believe that even in time of war there should be some minimum period which must expire between the time that the accused is served with a copy of the charges and the time he is forced to go to trial. We would like to see this subsection completely reviewed in light of these comments.

With respect to section 23, amending article 47 of the Articles of War, we feel that subsection (*d*) should be clarified. As presently written, if no sentence of a special court martial were to be carried into execution until after approval, it would mean that the sentence would not start to run except from the date of approval, as is presently the case with general courts martial. What with the administrative and other delays, it is conceivable that a man would serve a month's confinement for which he would receive no credit and might then find that his sentence was disapproved or that a man might be forced to serve 4 months on a 3 month's sentence. While we agree with the idea behind execution of sentences awaiting approval, there should be some provision for crediting the accused with the time served in confinement both before and after trial but prior to approval or execution of sentence. I could point to a dozen cases within my own experience as a trial judge advocate where, because of the loss of records or some other reason for delay or the necessity of awaiting depositions from remote parts of the country, an accused person who was in confinement for as much as 3 to 5 months awaiting trial would be sentenced to 6 months or a year's confinement and would receive no credit for the time he had already spent in the guardhouse.

The study which AVC has given this question has indicated to us the need for a very basic revision of the present system. The items which I have just pointed out, which are within the framework of H. R. 2575, are by no means the only aspects of this question which should be revised.

The administration of military justice must be entirely and completely independent of command. We would like to see the present functions of the Judge

Advocate General, insofar as they concern the administration of military justice, transferred to a civilian Assistant Secretary of War who would have such civilian assistance as he finds necessary but who would be specifically prohibited from delegating any of his functions to any military officer. It is he, we believe, who should have immediate supervision of the boards of review, both in Washington and in the branch offices. The members of these boards of review should likewise be lawyers. In this way, and only in this way, can we achieve sufficient independence at the top so that the control of military justice would be withdrawn from the hands of military officers who were not suited to it by virtue of their training, temperament, or experience.

The power to activate or appoint general courts martial and order their sentences executed as well as the power to review the proceedings of all courts martial, which is now vested in division, area, and other commanders, should be vested in an area judge advocate. There should be one such area judge advocate for each of the present Army areas (the old service command or corps areas). In foreign territories, the President should be authorized to prescribe and delimit the area under control of an area judge advocate depending upon the disposition of troops or other similar conditions. This officer should have his own headquarters independent of all other headquarters and should not in any respect be subject to the jurisdiction of any Army commanders. He should be responsible only to the Assistant Secretary of War previously mentioned above.

Each area judge advocate should have such military assistants as may be necessary for the proper discharge of his power of review in addition to a full staff of law members, prosecutors, defense counsel, committing officers, professional investigators and probationary and psychiatric personnel and reporting stenographers. He should have the power to set up in his area local offices for subdivisions of the area, or for particularly large posts of troops stationed within the area, he should be authorized to assign to each office the necessary number of prosecutors, investigators, defense counsel, and, in addition, a committing officer whose duties shall be described later below. All personnel who comprise the staff of the area judge advocate should be required to have the necessary professional qualifications. In this way, there can be independence from command, impartiality, and a guaranty that the persons who dispense justice have the proper training.

The officers appointed as area judge advocates and the members of their legal staffs (including prosecutors, defense counsels, and law members) should be required to be lawyers with at least 5 years of experience as practitioners or judges in their home States. At the time of arrest or confinement the accused should be entitled as a matter of right to the advice of one of the regularly assigned defense counsel or to available counsel of his own selection. Charges should be filed with a local prosecutor who will be responsible for a complete investigation of all complaints and for the accurate and complete presentation of the evidence and of all of the charges to a committing officer. This local prosecutor will further act as liaison officer with the civilian law enforcement authorities, and any decision to submit a case to such authorities for action should be determined by a majority of affirmative votes to be polled from among the committing officer, prosecutor and defense counsel. It should be clear policy that any charge cognizable by the civilian law of the community should be tried by the civilian courts except where in the opinion of the committing officer such action would tend to deprive the soldier of a completely fair and impartial trial.

The committing officer, who will be a member of the professional class described above will be assigned to the locality by the area judge advocate. It shall be his duty to hear all charges presented to him by the local prosecutor. He shall provide for a completely fair and impartial presentation of all of the facts and shall determine those questions of law and fact related to the charges.

The primary concern of the committing officer will be to determine whether or not a prima facie case exists. Once he has determined that a crime was committed and that there is reason to believe that this accused committed the crime, it should be his responsibility to commit the accused to trial before a summary, special, or general court martial. The committing officer should be required to conduct a public hearing within 5 days after the arrest or confinement of the accused. This officer should have the power to compel the attendance of witnesses, military or civilian, by subpena and the further power to take depositions.

In the event that the committing officer determines that no prima facie case has been presented, it should be incumbent upon him to dismiss the charges and release the accused. He should also have the power to increase or decrease the quality of the initial restraint which has been imposed upon the accused. The committing officer should also have the power to require a complete psychiatric examination and report at any stage of the proceedings.

As for review and appeal we feel that the review of a conviction and sentence in the case of summary courts martial should be made upon the request of the accused and should be conducted by the area judge advocate.

In the case of special courts martial, there should be an automatic review for sufficiency by the area judge advocate and a right of appeal as a matter of right to the Assistant Secretary of War. In the case of general courts martial, the record of trial should be transmitted for review to the area judge advocate who should be empowered to approve or disapprove the sentence, reduce the sentence, or order a new trial. After publishing his order, he should, if any part of the conviction stands, forward the record to the Assistant Secretary of War, who, after review by the boards of review, should have the same powers as the area judge advocate.

Finally there should be an appeal as of right to the United States circuit court of appeals from all sentences approved by the Office of the Assistant Secretary of War providing for either the death penalty or for imprisonment for 5 years or more. There should also be appeal, not as of right, but by permission of either the Assistant Secretary of War or the circuit court of appeals, from all convictions by general courts martial. In the United States, these appeals should lie to the circuit court for the circuit in which the case was tried. From convictions in foreign countries, appeals should lie either to an appellate court of Federal court judges specially constituted by the Chief Justice of the Supreme Court of the United States, or to the Court of Appeals for the District of Columbia. On all appeals to civilian courts, briefs and argument for the accused and for the respondent should be presented by civilian lawyers assigned for this purpose.

These are our proposals on the adjective or procedural side of the courts martial question. As for the substantive charges, we believe that the first principle to guide the substantive revision of the Articles of War should be that no one subject to the Articles of War may be punished for any act or omission which has not been previously specifically prohibited or commanded under threat of a definite punishment.

From the adoption of this principle flow a number of rules which must be applied if the rights of those appearing before courts martial are to be effectively protected. It is in fact a traditional principle of our law that the certainty of prohibitory provisions constitutes the basis for Government by law. Jeremy Bentham stated this 100 years ago when he said:

"We hear of tyrants and those cruel ones; but whatever we may have felt, we have never heard of any tyrant in any such sort cruel as to punish men for disobedience to laws or orders which he had kept them from the knowledge of."

Every prohibitory provision included in the Articles of War should provide for a specific maximum penalty in case of violation. The phrase "shall be punished as a court martial may direct" should disappear completely from the Articles of War.

Crimes punishable under the Articles of War should be set forth in clear and simple language avoiding catch-all phrases and indefinite terminology. This rule strikes at the basic vice of the present Articles of War. Articles 95 and 96 should be revoked and should be replaced by two types of provisions: (a) A series of provisions prohibiting specific types of misconduct which are now punishable under articles 95 and 96 (for example, see: offenses enumerated in the tables on pages 100 and 101 in the Manual for Courts Martial, 1945 edition). (*b*) A substitute article to be incorporated in article 64 providing that no one may be punished for an act which has not been previously prohibited by an Article of War or by a written order published by a competent officer, and that punishment for such acts so prohibited shall be the punishment provided in such Article of War or such written order. If no specific punishment is provided therein the punishment should be limited by the Article. It is suggested that this limit might be set at 1 week's confinement with a forfeiture of pay for a like period.

Specific provision should also be made to regulate the limit of punishment which may be provided by the different levels of command in the written orders here contemplated. The problem of emergencies calling for punishments of special

severity might be met by allowing temporary authority to lower levels of command, subject to review. Thus it might be provided that a certain level may issue temporary orders carrying a penalty in excess of that ordinarily authorized for it, during a specific emergency period, within which the higher command which has authority to impose such penalty must approve the order if its effectiveness is to be extended.

In addition to the basic necessity of eliminating catch-all provisions, one of the strongest considerations militating against the retention of articles 95 and 96 is that based on the frequent practice of careless investigation and charging predicated on the assurance that, if the offense charged cannot be proved, especially if no willfulness can be shown, the prosecution can fall back on article 95 or 96 in order to snatch a conviction from the break-down of its case.

The same principle requires the elimination of all weasel words spread throughout the articles such as the words "reproachful" and "gesture" in article 90, the word "waste" in article 89, the words "misbehavior," "shamefully;" and "misconduct" in article 75. These words are subject to such varied interpretations that penal articles which use them cannot serve as effective deterrents to misconduct but rather afford opportunities for the exercise of arbitrary and unpredictable judgments by the military courts.

Provision should be incorporated in specific Articles of War for a rehabilitation and parole system.

In revising the Articles of War care should be taken to rearrange the subject matter in a clear and orderly fashion so as to separate into special sections matters of jurisdiction, procedure, and substance and to group the substantive provisions in such a way as to provide ready reference to the various types of offenses. This suggestion is not born simply from a desire to improve the draftsmanship of the Articles of War, but from the realization that the rights of persons subject to them will be the better protected the easier their perusual and understanding is made to the untrained mind.

As to specific substantive provisions of the Articles of War we believe the following should be done:

Article 54. This article should be extended to officers who have obtained commissions in the manner therein contemplated.

Article 62: This article should be amended expressly to permit normal political criticism and discussion of a kind generally indulged in by the civilian population, and to exclude reference to "the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered." While the demands of discipline may require particular restraint on the part of the members of the armed forces in their references to the highest authorities of the United States Government, the nonprofessional citizens' army of today can neither deny to its temporary members the basic democratic rights of political discussion nor impose upon them an artificial respect toward local civilian authorities within whose jurisdiction they may happen to find themselves.

Article 63: The word "disrespect" should be more fully defined in order to provide varying penalties for acts ranging from minor discourtesies to actual insubordination. The coverage of this article should be carefully delimited from that of article 64.

Article 64: This article should be separated into two provisions, one dealing with assault, the other with disobedience. The latter should include disobedience of standing and direct orders. The death penalty should be imposed only on the willful disobedience of direct orders given in time of war and in direct reference to combat activity.

Article 65: This article should be consolidated with articles 63 and 64.

Articles 66 and 67: The death penalty should be provided for the commission of these offenses only in time of war, or when the offense is accompanied by conspiracy to incite insurrection or mass violence.

Articles 75 and 76: These articles should be combined with article 28 to provide separately and more clearly for the various offenses therein described, which are of differing degrees of seriousness. Reference to plunder or pillage should be eliminated from article 75 in order to avoid confusion with provisions contained in articles 79 and 80.

Article 80: This article should be entirely redrafted. Insofar as it deals with public enemy property, the field is covered by article 79. Insofar as it deals with private enemy property, it should be divided into two articles, the one prohibiting plunder or pillage, and the other prohibiting "black-market" operations consisting in the disposal or acquisition by barter, sale, purchase, or

otherwise of any property, American, allied, or enemy, for purposes other than the acquisition of articles for the personal use of the one acquiring it or of that of his immediate friends or family.

Article 81: This article should exempt from punishment, or at least from the more serious degrees of punishment, acts done in good faith where the accused had no reason to suspect the presence of an enemy.

Article 84: This article should be extended to include officers. No punishment should be provided for nonwillful injury to personal equipment issued to officers or enlisted men.

Article 87: This article should be extended to apply to any person subject to the Articles of War who has any authority or influence, direct or indirect, in the procurement, protection, or disposition of any supplies for the armed forces or any component part thereof. It should also include the words "or for that of any other person directly or indirectly connected with him" after the words "for his private advantage."

Article 88: This article seems to be obsolete and could be covered by article 87 as amended.

Article 89: The first portion up to the semicolon should be eliminated since it is a disciplinary rule and not a criminal provision. The words "or any other lawful order" should be included in the parentheses after the words, "unless by order of his commanding officer."

Article 90: The article, which includes the vague words "reproachful" and "gestures," should be clarified.

Articles 92 and 93: These articles should be replaced by a general provision making all nonmilitary crimes committed in the United States, its Territories, or possessions punishable in the cases and by the penalties provided by the laws of the State, Territory, or possession where that crime was committed. Outside the limits of the United States, its Territories, and possessions, the criminal code of the District of Columbia should be the law applicable to all persons subject to military law for the punishment of all crimes therein set forth and not specifically dealt with in the Articles of War.

We have already commented on articles 95 and 96.

Article 110: This article should be amended so as to prescribe only a lecture by a member of the military justice corps to be attended by every person subject to military law upon his becoming subject thereto, explaining his rights, privileges, and responsibilities under the Articles of War.

CONCLUSION

I have tried not only to give you our basic feeling and belief of what the court-martial system should be but also to be specific as to the provisions of the bill which you are presently considering. It is only through congressional action that there can be established a fundamental basis for actual justice and democracy within the armed forces. We believe that the time has come when revision of this medieval courts system must be met. The demand is widespread and the demand is justified. Just as we of the American Veterans Committee recognize that we are citizens first, so must the Congress recognize that members of the military forces are first citizens and Americans. American soldiers do not drop their heritage of freedom, liberty, and justice when they enter the Army, and they can only funtcion effectively if they are living the things for which the fight. There is nothing incompatible with justice and democracy and a highly trained and effective army.

Mr. FELDMAN. Mr. Chairman and members of the committee, I want to thank you for the opportunity to present this testimony on behalf of the American Veterans Committee. We have been terribly interested in the problem of military justice and its administration, first, because of the fact that we are interested in any and all aspects of American life which are concerned with law, justice, and democracy; and, secondly, because of our peculiar position as veterans, wherein we were all personally touched by the system.

I think the most significant aspect of military justice on which I would like to comment and which the prepared statement devotes most of its time is to the unequal and undemocratic operation of the

present system. There are many veterans who had the opportunity to observe the system first-hand who can point to countless cases of actual injustice: Examples of military courts being swayed by the decisions of high-ranking officers; men tried for serious offenses and subjected to heavy penalties without competent counsel; untrained courts sitting in judgment of cases involving conflicting evidence without the guidance of technical and professional legal advice.

The administration of military justice presently is designedly in the hands of professional soldiers, and not professional judges. The present system is in a great many respects completely bankrupt, as a result of the soldier's lack of faith and respect.

Mr. JOHNSON of California. What was that statement, please? I didn't hear all of that.

Mr. FELDMAN. The present system, in our opinion, is in a great many respects completely bankrupt, as a result of the soldier's lack of faith and respect. There is one indulgent code for Regular Army officers and noncommissioned officers; another, more severe, for temporary officers; and a third of even greater severity for those who are non-Regular Army enlisted men. We feel that the present system perpetuates class differences between officers and enlisted men and is, indeed, based upon those differences.

We feel that no study of the court-martial system intended to highlight the inadequacies and sources of injustice can fail to consider the question which has most often been the source of great confusion to those who had done any thinking on the subject, and that is: "Is the purpose of the court-martial system the maintenance of discipline, or is it to administer and dispense justice?"

We have seen nothing yet presented to indicate that the maintenance of discipline and the adequate and fair administration of military justice are mutually exclusive. It would be a sad commentary, indeed, if we were to agree that there can be no discipline in an army which would adhere to the fundamental principles of democracy. We feel that there would be no sacrifice of discipline if the members of the armed forces were assured of a fair and just trial of their guilt. The court-martial system should be concerned with the achievement of justice in each individual case.

We feel it is important in approaching this problem to examine very carefully this philosophy which seems to underlie our court-martial system and realize that no system which advances the excuse of discipline can be considered to have any place within the fabric of American institutions when it breeds so many cases of injustice. We do not intend to deny the need for discipline and respect for authority; nor do we intend any denial of the need for methods of enforcement. But we do contest the views which advocate enforcement by the deprivation of fundamental liberties and constitutional guaranties as the only answer.

The Congress, when it originally enacted the Articles of War and the Manual for Courts Martial, provided many safeguards, but we feel it is in the administration of these laws that the break-down has occurred.

The Army's current concept of military justice or the exercise of court-martial jurisdiction under the present rules can be no better or no fairer or more adequate than the individual commanding officer

who is vested with all of this authority. It has been a very usual observation that courts martial are constantly subjected to influences which have no place in judicial tribunals. While it is true that much of the work of the commanding officer in this field is accomplished by his staff judge advocate, there is, however, no definitive regulation establishing the professional qualifications for this position; nor is there any guaranty that these decisions or recommendations of the staff judge advocate will be followed. The staff judge advocate is so often completely dominated by the policies of the command that he in effect presents nothing more than a rationale for the reactions and behavior of his commanding officer——

Mr. ELSTON. Mr. Feldman, I would like to ask you about the appellate provisions of H. R. 2575. As you seem to feel that the appellate system as provided for in this bill is inadequate I would like to know how you would change it.

Mr. FELDMAN. Well, basically, I think that probably the most important proposal of the statement is the separation of the command and judicial function. We feel that the appellate power in the hands of the same person who determines the appropriateness of the charge, who determines whether or not the case should go to trial, and who determines the composition of the court, is manifestly unfair.

Mr. ELSTON. I am talking about cases that would be appealed under H. R. 2575.

Mr. FELDMAN. Well, we feel that H. R. 2575, by setting up the board of review and the judicial council, maintains the power of review in the hands of the military almost exclusively.

Mr. ELSTON. How would you review a military trial except by military authority?

Mr. FELDMAN. We feel very strongly that the laws of the land should apply to the soldier, as well as the civilian. We have two basic ideas on appeal. One is an appeal is a matter of right to a civilian board constituted by the Secretary of War, and the other is an appeal by something comparable to the writ of certiorari to a circuit court of appeals of the Federal judicial system, which would be specifically constituted for this purpose, so that the ordinary safeguards would apply.

Mr. ELSTON. In other words, you would have the United States Circuit Court of Appeals review all court-martial cases?

Mr. FELDMAN. Just on writs of certiorari.

Mr. ELSTON. That is, where the defendant requests it and the court is willing to hear the case?

Mr. FELDMAN. Yes, sir; where the defendant requests it and where the court in its opinion feels that there is some question which should be settled by the Federal courts.

Mr. JOHNSON of California. Do you think those two ideas that you expressed should be in addition to the appellate provisions of this act, or should they be in substitution of it?

Mr. FELDMAN. Well, I feel they should be in addition, rather than in substitution, because——

Mr. JOHNSON of California. You still would have machinery set up by this act?

Mr. FELDMAN. Yes, sir.

Mr. JOHNSON of California. And then, at the discretion, as the chairman said, of the accused, he could get into court, with a writ.

Mr. FELDMAN. On the application of the accused, and the granting of such application by the court.

Mr. JOHNSON of California. Yes.

Mr. FELDMAN. Delimiting those cases in which it would be granted as a matter of right and those cases in which appeal would be only as a matter of discretion.

Mr. JOHNSON of California. Well, where it was granted it would be discretionary with the court, wouldn't it?

Mr. FELDMAN. In most cases. There are probably a group of cases in which they should be granted as a matter of right, perhaps capital cases.

Mr. JOHNSON of California. That type of hearing would only settle questions of law. They wouldn't review the evidence, would they?

Mr. FELDMAN. No, they wouldn't review the evidence. They would review matters of law and would determine—well, we know from experience that in reviewing matters of law, we also determine whether or not the accused was granted a fair trial. We feel that that is the important thing to review.

Mr. JOHNSON of California. I was going to come to that. You mean just that broad problem, whether he had a fair trial.

Mr. FELDMAN. Well, the broad problem of fair trial, jurisdiction, and other error which may have occurred during the course of the trial.

Mr. JOHNSON of California. Would he have a choice of taking that route up to a circuit court?

Mr. FELDMAN. The circuit court, we feel, would be additional protection. In other words, after having exhausted his remedies through the military and through a civilian board of the Secretary of War, he should then have the right to apply for review to the Federal courts.

Mr. JOHNSON of California. Now, would the civilian board be somewhat similar to the reviewing machinery in this act?

Mr. FELDMAN. Yes, sir; except that it would not be under the jurisdiction of the military. It would be under the jurisdiction of the Secretary of War.

Mr. JOHNSON of California. Which go one way and which go under the regular act?

Mr. FELDMAN. I don't quite understand.

Mr. JOHNSON of California. How would you determine whether the civilian board should review the case or it should be reviewed in accordance with this act?

Mr. FELDMAN. Oh, I consider the civilian board as an echelon above the judicial council and the board of review, as provided for by this act.

Mr. ELSTON. Would you want the decision of the civilian board reviewed by the United States circuit court of appeals in the event its decision is adverse to the accused?

Mr. FELDMAN. In the case where the United States circuit court of appeals feels that some question exists as to the legality or the propriety of the trial.

Mr. ELSTON. And then, of course, you would want an appeal, in the event you could get into the Supreme Court of the United States, to that court?

Mr. FELDMAN. Well, they still have that. I mean, they have that now, theoretically. I would be willing, however, to limit the appeal to the United States Supreme Court to those cases in which presently exists and that is on the question of jurisdiction.

Mr. ELSTON. Let me ask you: Have all of these things been discussed in any convention of your organization?

Mr. FELDMAN. Yes, sir; we had a military justice subcommittee meeting at our convention at Des Moines, Iowa, last June. In addition to that, these recommendations are not personal recommendations. We have had several groups of lawyers, mostly men who have been connected with the administration of military justice during their period of service, who have met, throughout the country, and discussed it and thrashed it out. Then, we had a central committee on the armed forces, which met a few months ago, just prior to our presentation of testimony before the Vanderbilt committee.

Mr. ELSTON. How many members were on that committee?

Mr. FELDMAN. We had 14 on the committee, sir.

Mr. ELSTON. Of course, H. R. 2575 had not even been introduced last summer, at the time of the convention.

Mr. FELDMAN. That is right. H. R. 2575 was just reviewed by three of us, in view of the recommendations of the committee. There were areas of agreement and areas of disagreement with H. R. 2575. The principles on which H. R. 2575 were based have been pretty well discussed. We had the benefit of copies of the Vanderbilt report prior to the preparation of H. R. 2575 and we were fairly well familiar with the results of that investigation.

Mr. ELSTON. So, I take it, that the criticism of H. R. 2575 contained in this report largely represents the viewpoint of those three persons?

Mr. FELDMAN. Well, it represents the interpretation of three persons acting for the 14-man committee, which synthesized the views of a committee which worked in San Francisco, one in Honolulu, one in Seattle, one in Washington, D. C., one in New York, one in Chicago; one in Los Angeles—I think there were about 23 or 24 committees.

Mr. ELSTON. Who are those three persons?

Mr. FELDMAN. The three persons, sir, are myself, a man by the name of Frederick Robbin of the American Civil Liberties Union, and a man by the name of Leo Bradsby, who served with me as assistant judge advocate of the First Air Force.

Mr. ELSTON. How much experience have the three men had in court-martial cases?

Mr. FELDMAN. Well, I had 3 years, sir, in the service as an officer, during which time the entire period was concerned with the administration of military justice, part of that time as a trial judge advocate at a large air base in Congressman Clason's district, and the rest of that time as an assistant judge advocate of an Air Force command.

One of the other men served as an assistant judge advocate with the Army in Japan.

The third was a trial judge advocate and also an assistant staff judge advocate with the First Air Force.

The 14-man committee had the benefit of the thinking of an awful lot of men who had worked with the administration of justice, some of them as members of the Judge Advocate General's Department, and some of them as members of the arms or services which were on duty

with the various units and divisions in the European theater, so we had a fairly good cross section. It was primarily a professional committee. The men were all lawyers and men who had worked with the administration of military justice:

Mr. JOHNSON. Mr. Feldman, if we set up an independent system of justice and remove it from the chain of command and keep it in control of the Judge Advocate General's Department, wouldn't that answer the problem?

Mr. FELDMAN. It would to a very large extent answer the problem, yes, sir. It wouldn't specifically answer the question which I believe the chairman asked concerning the appellate procedure. But we very definitely advocate the separation of the command function from the judical function, and I think if you have the opportunity to go through this prepared statement you will see that our position on that is simply the setting up of a separate Judge Advocate General's Department, giving the Judge Advocate General the power of comcand over the personnel within his own Department; then separating it into area judge advocates along the lines of the former service commands—I guess they are now called Army commands—and having within those areas the area judge advocate performing a certain appelate function, as well as appointing function, and having him in no way connected with the command. He is just a separate entity on duty in that area.

We also thought of having a system of trial judge advocates and defense counsel on that staff and law members for courts martial who would be similar to our old concept of itinerant justices and would travel within the circuit and sit as possible summary courts or as law members on special or general courts.

We also worked out a recommendation, which is contained in this report, to substitute for the present investigation under article of war 70, a procedure whereby a member of the Judge Advocate General's Department in the area or on duty with the particular command would serve as a committing magistrate, shall we say, a professional man, a lawyer who is also in the Army and is a military man, but not subject to the whims of command, who would determine whether or not a prima facie case exists, whether an adequate investigation has been conducted, whether psychiatric examination is indicated, whether the man should be confined pending trial or whether he should merely be restricted to the limits of his command, and would then make a recommendation for the type of court by which the man should be tried to the area judge advocate.

In that way we could have something like our presentment system. We thought that that would give an additional safeguard and an additional guaranty.

Mr. JOHNSON. Are you a practitioner now?

Mr. FELDMAN. Yes, sir.

Mr. JOHNSON. Where do you practice?

Mr. FELDMAN. New York City.

Mr. ELSTON. Where do the other two members of the group of three that you referred to practice?

Mr. FELDMAN. One is in Massachusetts and the other is also in New York.

Mr. JOHNSON. From your experience during that 3 years, did you know of any cases where you really felt there was a real injustice done?

Mr. FELDMAN. Yes, sir; I think there were many in which I felt that way.

Mr. JOHNSON. Well, what would you say as to the ratio? Would it be as many as 1 percent of the cases that resulted in a miscarriage of justice?

Mr. FELDMAN. Well, sir, it depends on our definition of miscarriage of justice. If you mean the cases in which a man was guilty and found guilty, I would say it probably did not run quite as high as 1 percent, but if we are to include the cases in which a man was guilty and because of some predeliction or whim of the commanding officers he got off with a slap on the wrist or a light sentence where an enlisted man would have received a more severe sentence and if we include the cases where the courts gave severe sentences where they would never have been given in civilian courts, or where they were not even indicated for any reason outside of the fact that this man was to be made an example of and if we are to include the cases in which the court gave the sentence which had been predetermined in effect by a confidential communique of the commanding officers or the commanding general, and if we are to include the cases where a stiff sentence was given because the court had been reprimanded on the basis of the last lenient sentence they had given, I would say it would run much higher than 1 percent.

Mr. JOHNSON. Well, of course, in any system where you have to punish people, you give discretion to the judge or somebody else. You can always get that difference of opinion. Now, do you think, as to the matter of sentence, there was more harshness than you find in civil courts for similar crimes?

Mr. FELDMAN. Oh, yes, sir; I have seen several cases myself, that I tried——

Mr. JOHNSON. Are you talking about the first sentence that was imposed, or the final sentence after review?

Mr. FELDMAN. I am talking even about the final sentence after review.

Mr. JOHNSON. The final one?

Mr. FELDMAN. Yes, sir.

Mr. JOHNSON. But do not the reviewing authorities correct a great many, you might say, cruel and even absurd sentences?

Mr. FELDMAN. Yes, sir; they do. I also find that they don't correct a lot of them or that they reprimand the court for not being sufficiently severe on the basis of what they would like to be done within their command. I can think of specific cases in which——

Mr. JOHNSON. Well, if you get an independent system and get men to handle the procedure all the way through who are trained in the law, don't you think that will correct all the things that you mentioned?

Mr. FELDMAN. It would correct the greatest majority.

Mr. JOHNSON. Excluding the extortionate sentences?

Mr. FELDMAN. It would correct the greatest majority, yes. I would like to see a system of sentencing which would not be placed in the hands of the court itself. I would like to see the court operate as a fact-finding body, as a jury, and have your trained law member,

a man who is trained in judicial technique and a man who has the appreciation of the general fabric of sentences throughout the armed forces, administer the sentence, much the same as our civilian judge does today, without being subject to the decisions of some perhaps more intemperate or less judicious people. In other words, I feel the question of sentence is something which requires training. We know that our judges are not able to give proper and adequate sentences unless they have the temperament and the training.

Mr. ELSTON. Isn't that all taken care of in this bill, by providing that on appeal sentence may be reversed, modified, or set aside?

Mr. FELDMAN. Yes, sir; however, there are many inter-relations or personal interrelations which occur in the armed forces which you can't overcome by language.

Mr. ELSTON. What are they? Tell us any interrelation between a comanding officer in some foreign theater and the Judge Advocate General that might preclude a man from obtaining justice.

Mr. FELDMAN. Well, No. 1, the procedure provided for by H. R. 2575 doesn't call for all of the cases getting to the Judge Advocate General. As I recall, there are just certain classes of cases which go beyond the reviewing authority and to the board of review. So you have certain cases where the commanding general does not want to slap down his favorite colonel who is commanding a base, or is commading a unit which has special court-martial jurisdiction. You run into situations where the commanding officer of a theater does not want to slap down one of his good generals who is doing a wonderful job with a division, as a military man.

Mr. JOHNSON. Well, if you get an independent system of justice, where their efficiency reports are passed on by those men, you will correct all that, won't you?

Mr. FELDMAN. Yes.

Mr. JOHNSON. Also won't you get this effect, that those men who finally review the cases will have a broad knowledge of what is done in similar situations?

Mr. FELDMAN. I feel that if we have an independent judicial arm and if the people who finally review are the people who review all the cases we will achieve that, but I don't feel that H. R. 2575 does that.

Mr. JOHNSON. As I get it from your discussion, your main thought in mind is to have men administer justice who are trained in the rules of justice, the procedure, the history, the tradition, and background.

Mr. FELDMAN. That is right, sir.

Mr. JOHNSON. You think the end result, if you get those kind of men, will be rather satisfactory?

Mr. FELDMAN. Yes, sir.

Then, on the substantive side, I think there are several omissions on the part of H. R. 2575——

Mr. ELSTON. Before you go to that, I would like to ask you this question: Do you know of any cases that would be corrected or could be corrected if it went to the United States circuit court of appeals, on appeal from the decision that was finally rendered by a board of review, or the President or the Secretary, or anybody else that had to do with it, that is, where an error of law has occurred which might be reviewed by the United States circuit court of appeals?

Mr. FELDMAN. Yes, sir; I believe I do. I can think of cases within my own experience where the accused did not have sufficient time for trial, where the accused was not granted an adequate opportunity for counsel where the accused was forced to incriminate himself by virtue of the superior rank of the officer conducting the examination or the investigation before trial and thereby forced an admission or confession which would not otherwise have been admissible into evidence.

Mr. ELSTON. All the things you are mentioning are taken care of in H. R. 2575.

Mr. FELDMAN. Well, sir, I think they are mentioned in H. R. 2575. Some of them I feel are taken care of and some of them I feel are not sufficiently tight at this time. I feel that the investigation provision, which merely calls for a fair and impartial investigation, is not actually sufficient. I would like to see a specific provision which would insist that the officer conducting the investigation warn the man that despite his superior rank he need not answer his questions if he feels they would be degrading or self-incriminatory. I would like to see a provision whereby we would eliminate the 8-day delay on preferring of charges. We must recognize the fact that we have no habeas corpus procedure in the military courts. I can think of innumerable cases where men were incarcerated for anywhere up to 3 and 4 months waiting for their records or waiting for the deposition of some witness whom they thought would come through with an incriminating statement, and the man had no recourse and was just kept in the guardhouse for 3 and 4 months. Then, finally they would decide, well, there was no prima facie case after all, or they would bring him to trial, he would get a 3 months' sentence and would have to serve 3 months from the date of trial, receiving no credit for the incarceration before trial.

Mr. ELSTON. In the civil courts credit is not necessarily given for incarceration before indictment.

Mr. FELDMAN. Not before indictment; no, sir; but I have known of cases where the charges are preferred and the delay occurs during the course of investigation or during the course of referring the case for approval to the appointing authority, where sometimes after a month or 6 weeks lapses, the appointing authority will write back and say, "Get a statement from so and so," which might take you a week to get, and then they will send it back and ask for an affidavit from so and so, while the man just sits there and receives no credit for his time. And often you find you have no prima facie case at the conclusion of that period.

Mr. CLASON. You say you were stationed at some field——

Mr. FELDMAN. Westover Field.

Mr. CLASON. During your entire service?

Mr. FELDMAN. No, sir. I was at Westover Field, very happily, I might say, for about 16 months, and I was charged with the administration of miltary justice there.

Mr. CLASON. What I was wondering about was if you would tell us whether or not all of these innumerable cases where military justice went astray occurred at Westover Field, or at other points?

Mr. FELDMAN. Well, I would say that a goodly number occurred at Westover Field. I don't think that Westover Field had a disproportionate number. During the period of my time there Colonel

Jones and Colonel McHenry were commanding—and I believe you know them both. They were both men who were sincere believers in a fair shake and a fair break for the average soldier, but it was the system and the break-down in administration, even in the case of men who were sincerely interested in a fair administration, which wreaked all these injustices.

It was a case where they had a particular mission to perform—and the mission of prosecuting the war of the utmost importance—and they couldn't spare a man who was well qualified to run an investigation, if he was also doing an operational job, and so they had to appoint——

Mr. CLASON. During the 16 months you were at Westover Field, how many cases would you say came to your attention?

Mr. FELDMAN. I would say I was trial judge advocate for an average, between special and general courts martial, of 80 cases a month.

Mr. CLASON. So that would be in the neighborhood of 1,280 cases?

Mr. FELDMAN. Yes, sir.

Mr. CLASON. And in that number of cases at Westover Field, how many did you feel justice was not meted out properly?

Mr. FELDMAN. I would say there were about 100 to 120 in which there was some aspect of the case with which I was not satisfied.

Mr. CLASON. Now, you say your experience at Westover Field was about the same as you knew it at other places?

Mr. FELDMAN. It was about the same as my experience at Mitchel Field, the same as my experience at Camp Lee, the same as my experience at Miami Beach, Fla., the same as the experience I had in Washington, Pennsylvania, or Camp Upton, N. Y., and several of the other places I served. My service was entirely within the continental limits.

Mr. CLASON. You would say, then, from your observations and contacts with other officers and individuals, you are of the opinion that this same ratio prevailed everywhere in the Army, on about that same basis?

Mr. FELDMAN. I would say we were more fortunate at Westover Field than some of the other commands were.

Mr. CLASON. Then, if 10 percent of the cases at Westover Field were not handled properly, how high would you say it went in other fields, from the information that has come to your possession?

Mr. FELDMAN. Well, I would say that the proportion of injustice varied with the type of punishment administered. I would say that you would have a lesser percentage in general courts martial and a higher percentage in specials and summaries. It would probably go as high as possibly 15 or 18 percent in the general courts martial in some areas, whereas in specials it might go as high as 25 and 30 percent, and in summaries it might go higher than that.

Mr. CLASON. You mean that it would be over 30 percent where they went wrong, in the summary courts martial?

Mr. FELDMAN. In some commands, yes, sir, and at some periods. I am thinking of periods when a commanding officer goes on a tirade about walking on the grass, so he utilizes article of war 96 and starts fining people indiscriminately with set fines for walking on the grass or for people who were thought to be walking on the grass, or failure to salute campaigns where people were marked with criminal prose-

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cution as a result perhaps of the fact that they happened to be looking at something else as the officer walked down the street. The summary court was often used as a club, and article of war 96 was a very convenient way of using it.

Mr. CLASON. Now, leaving that for a second and getting up to the general court martial, did you ever know of substantal injustice being done at Westover Field in any general court-martial case?

Mr. FELDMAN. I would say I know of substantial injustice in the direction of leniency in one case which comes to mind very easily, in the case of an officer.

Mr. CLASON. You mean that they were too lenient with that officer?

Mr. FELDMAN. Too lenient because of the fact he was an officer, yes, sir.

Mr. CLASON. Now, did you ever know of any enlisted men who, in your opinion, did not receive substantial justice in a general court martial at Westover Field?

Mr. FELDMAN. Yes, sir, I can think of several.

Mr. CLASON. Several?

Mr. FELDMAN. Yes, sir.

Mr. CLASON. And what was the type of injustice done to them?

Mr. FELDMAN. Well, I can think of one case offhand of a man who received 10 years for absence without leave, an absence of about 30 days, the case of a man who was, well, I would say, bordering on the illiterate. He had had about 2 years of schooling. He came from a small town in West Viriginia, from a farm down there. He had wanted to go home to help his family harvest the crop. He had wanted to go home because of the fact that his father had died and his mother was left alone with just his younger brother. He had been unable to communicate these facts. There was no Red Cross organization in the vicinity. There was no means whereby he could make known his feeling to the commanding officer, so that he could get a furlough for this purpose. He left, and he came back of his own accord.

Mr. CLASON. He came back of his own accord?

Mr. FELDMAN. He came back of his own accord. He happened to be the victim of an epidemic, shall we say, of a high rate of absence without leave at that period of time. The court felt sorry for him and the court I know wanted to mete out a lenient punishment, but the court gave him 10 years because of a confidential letter which had been circulated around the command to the effect that absence without leave for a period in excess of 30 days was the type of offense which under ordinary circumstances would warrant a 10-year penalty. So the man received 10 years, with the court recommending leniency. I think that the sentence was eventually cut to 5 years. But, yet, the man is serving 5 years for a 30-day indiscretion. I don't know what the final result was at the rehabilitation barracks or the rehabilitation center to which he had been sent, but——

Mr. CLASON. What I am wondering about is this: You took part in that particular case?

Mr. FELDMAN. Yes, sir.

Mr. CLASON. And you know the name of the person who sent around this written communication to the members of the court?

Mr. FELDMAN. I think I can probably recall it; yes, sir.

Mr. CLASON. Did you see the written communication yourself?

Mr. FELDMAN. Yes, sir.

Mr. CLASON. I think that is important to the committee, to know that there was this sort of thing going on in the Army, because I think it would tend to make all of us more interested in seeing to it that the provisions of any law that is enacted, if we have any part in it, should correct such abuses.

Now, that man, you say, is still serving 5 years for being——

Mr. FELDMAN. That I can't say. I know the action of the reviewing authority was to cut the sentence from 10 to 5 years.

Mr. CLASON. You know the man's name and can give it to us?

Mr. FELDMAN. I think I can probably recall it.

Mr. CLASON. You can secure it?

Mr. FELDMAN. I can secure it, I am sure of that.

Mr. CLASON. Didn't you ever do anything about it, if you felt very strongly that this man was the victim of injustice?

Mr. FELDMAN. Yes, sir. I put very strong endorsements on my letters to higher authority in recommending action and tried to be as persuasive as I could, but I could never overcome it.

Mr. CLASON. And you since haven't heard anything about it?

Mr. FELDMAN. I never heard anything about it since I left the service. I may say that since I left the service I have been concerned with the broader aspects of the problem. I have tried to collect records of trial. I have a large file of records of trial. I have been working very closely with the man who was the prosecutor at the Litchfield trials, in trying to collect data. It has been a long, drawn-out process. We are trying to see what we can do. Frankly, we are trying to collect data for the purpose of going into the Federal courts and see whether we can secure upsets of those convictions.

Mr. CLASON. Now, is there any other case that you recall as an example of substantial injustice that was committed anywhere during your service?

Mr. FELDMAN. Well, these aren't probably the most appropriate circumstances, but I am sure that I could think of them. I would like to make available to the committee the files that I have in my office on records of trial and have you go over some of them.

Some of them I think would be rather startling. I think the committee should see records of trial on courts martial because they are perhaps one of the most revealing ways to see the situation, although they in themselves don't give you the byplay. For instance, here is a very common practice. I have served as a trial judge advocate of a court which was presided over by a Regular Army colonel, who was in the Quartermaster Corps, and while he may have been a very good quartermaster he certainly did not have the judicial temperament. He was very insecure about his knowledge of the Court Martial Manual and did not want to appear to rely on the first lieutenant who sat on his left as the law member. So he tried to find out what the right answer was. He would insist during the course of trial on discussion of the principles involved and discussion of the facts involved, by saying "Now, this is off the record", and he would stop the stenographer. Then we would go on for sometimes 30 or 40 minutes, with all sorts of emotional arguments on all sides, some of which were highly inflammatory, some of which were highly damaging to the accused, and some of which were extremely inappropriate to any

judicial proceeding, bringing out factors in the background of the case, which certainly should not have been admissible. When you would object to it, even as a trial judge advocate, and say, "Well, Colonel, I don't feel that this is appropriate, that we should go into it"—"Never mind. I want to get these facts"—"Colonel, I don't think I can give them to you"—"Never mind, I want these facts, and they are off the record." Well, no officer inferior in rank is going to pursue that much further. So he got his facts off the record. Then he is ready to procede and he says, "We will go back on the record."

Mr. JOHNSON of California. Was this done right in open court?

Mr. FELDMAN. Right in open court.

Mr. JOHNSON of California. In the presence of all witnesses, the accused and everything else?

Mr. FELDMAN. Yes, sir. Now, that man, I would say, sat as president of a general court martial for a period of 9 months during which we tried approximately 50 to 60 general court-martial cases, and that procedure prevailed in every single one of these cases.

Mr. ELSTON. One of the bills before us would correct that. A person wouldn't serve in a general court-martial case unless designated by the Judge Advocate General.

Mr. FELDMAN. That is right, sir.

Mr. ELSTON. If that system were set up, the thing you are complaining about couldn't happen.

Mr. FELDMAN. Well, it could happen. I would say that it would be less apt to happen.

Mr. CLASON. At any rate, in your own opinion, H. R. 2575 is a long step forward and any improvements made in that proposed bill will be still further steps forward in giving proper justice.

Mr. FELDMAN. Yes, sir.

Mr. CLASON. On this case, though, where they went from 10 years for this man to 5 years, who set it down to 5 years?

Mr. FELDMAN. The commanding general having authority to appoint general court martial.

Mr. CLASON. And wouldn't you expect, under this bill, with the setting up of review boards, to secure from persons trained in the law, in the Judge Advocate General's Department, a proper revision of that sentence and its reduction to a proper form?

Mr. FELDMAN. Well, the reduction to 5 years, sir was made—although it was done over the signature of the commanding general—upon the recommendation of his staff judge advocate, who was trained in the law and had a more general view of the concept of administration and sentences, but the guiding principle, again, was discipline and the example. They were not so concerned with deterrents because 3 years is enough to keep a man from going a. w. o. l. for 30 days, but they were concerned with the example. They were concerned with the actual punishment.

Now, I think it is more than just training. It is an absolute conviction, in terms of the fundamental beliefs and your philosophy of law, as to whether or not you use the judicial instrument of the military as a means of discipline or whether you use it as a means of deterrents. Now, if you are going to use it as a means of discipline I say that it backfires and you find yourself with an Army in which your morale is low and the respect for the administration of military justice

is low. The thing has to be tempered and it has to be determined in a very judicious, cautious, sane, and unemotional way. It can't be done as a punishment.

Mr. DURHAM. Will the gentleman yield?

Mr. CLASON. Yes.

Mr. DURHAM. You said at the present time you, along with some other party, was reviewing those records. How did you secure those records? We, as a committee, had to use subpena power to get the records.

Mr. FELDMAN. Sir, we had the confidence of many boys who had been convicted of trials and they sent us their copies.

Mr. CLASON. In this particular case weren't there any other circumstances? It is hard for me to believe that a man would get 10 years for a 30-day A. W. O. L. in the United States, after returning and giving himself up of his own accord. Now, weren't there any other circumstances in that case?

Mr. FELDMAN. Well, he had not been a particularly efficient soldier before. As I said, he was bordering on the illiterate. He had been a common laborer. He didn't have any of the respect that some of the clerks had.

Mr. JOHNSON of California. Was that from your own personal information or knowledge, or was it solely hearsay? Do you know the fact of your own knowledge?

Mr. FELDMAN. Yes, sir. In this case I was acting as the trial judge advocate or prosecuting attorney and I had investigated the case.

Mr. JOHNSON of California. Did he know the difference between right and wrong?

Mr. FELDMAN. Yes, sir; he knew the difference between right and wrong. I mean, he met all the absolute tests. There was no question of competence.

Mr. DURHAM. Was he at Westover Field?

Mr. FELDMAN. Yes, sir.

Mr. CLASON. I appreciate your bringing the matter up. I will be glad to have you furnish us with the name and other circumstances. I would like to see what it is all about, myself.

Mr. FELDMAN. I did not mean to personalize it. It was meant to illustrate how the military functions. It was in one of our enlightened jurisdictions, shall I say. It was in an area of the country which has grown up on the concept of democracy in the law, being in one of our first colonies which has believed in that idea for quite a number of years. That has nothing to do with it. It is just the way the military functions. In many cases it is not the fault of the military. It is expediency. However, I say we can't sacrifice justice for the sake of expediency. We must find some means of correcting it.

Mr. CLASON. That is all.

Mr. NORBLAD. It has often been my feeling that a lot of the faults of military justice lies with the Regular Army officer who seems to have no conception of matters of military justice, common law, or fundamental constitutional rights. Do you agree or disagree with me on that, or would you care to comment on that?

Mr. FELDMAN. I think it is rather sweeping. I think I have met several Regular Army officers who do, but I think as a general rule the Regular Army officer is less capable of administering justice than some of our people in the civilian population, who are assimilated by virtue of a draft into the wartime Army.

Mr. NORBLAD. Do you think that a system of schooling, whether it be a correction of the West Point system or a system of postgraduate schooling of your Regular Army officer, wouldn't help to remedy this situation a lot?

Mr. FELDMAN. Well, I don't think it could be done with the Regular Army officer. That is my own personal opinion. I think the Regular Army officer is someone who at the age of 18, 19, or 20 went into West Point and received training in a very highly specialized and important phase of life. He has not had a chance as a rule to see enough of people and understand enough of their problems. He has had the Government take care of him from the time he was 19 years of age. He hasn't usually worked for a living and he doesn't know what some of these people who work for a living had to contend with. I feel that the Regular Army mind is a mind which is grabbed at a young age and directed in a particular direction and, with the very few exceptions of some of our great men who have been able to overcome that training and who have been sufficiently sensitive to appreciate the ideas and the feelings of the average individual, the Regular Army officer is incapable of administering justice.

Mr. JOHNSON of California. Of course he gets an indoctrination of 4 years in discipline, so that looms very large in his outlook.

Mr. FELDMAN. Absolutely, sir. I don't criticize the training he receives. He is a very necessary individual, but not in the field of justice.

Mr. ELSTON. Unless there are some more questions we will pass on to our next witness, who is Colonel McElwee. Thank you, Mr. Feldman.

Mr. FELDMAN. Thank you very much, gentlemen.

Mr. ELSTON. Colonel, will you state your full name, please?

Colonel MCELWEE. Pinckney G. McElwee.

Mr. ELSTON. And whom do you represent, Colonel?

Colonel MCELWEE. Mr. Chairman, I really don't represent anyone. I think I am representing the people of the United States in this matter. I have no particular ax to grind, but I have quite an experience, which I think Mr. Smart thought might be of some value to this committee.

Mr. ELSTON. Will you state for the sake of the record what your experience has been in court-martial cases?

Colonel MCELWEE. Yes, sir.

STATEMENT OF COL. PINCKNEY G. McELWEE, JUDGE ADVOCATE GENERAL'S DEPARTMENT RESERVE

Colonel MCELWEE. I am a colonel in the Judge Advocate General's Department Reserve. At present you might be interested to know that I am an attorney in the office of the Veterans' Administration.

At the beginning of the war I was called to duty at the Eighth Service Command, in the office of the staff judge advocate, where I

became an assistant for several months. That was in September. I think it was in November that I became the staff judge advocate of the Second Infantry Division. At that time there really weren't any armies and very few corps. I was the first reserve to become the staff judge advocate of any command having general court-martial jurisdiction. In June of 1942 I became the judge advocate of the Fourth Corps, under General Griswold, being the first staff judge advocate to become a corps judge advocate. In April of 1943 General Eisenhower requested my services in the North African theater, and I went to Algiers, in his headquarters, where I was placed in charge of military justice in the office of the theater judge advocate. I served in that capacity. My principal job then was to review the records of trial in death sentences and cases of dismissal of officers and to supervise military justice in the North African theater, until January of 1944, when most of the administration was put over to SOS, under General Larkin, at Oran, and I was transferred then as staff judge advocate of SOS Natousa. I remained there until April of 1944, when General Patch arrived to take care of the invasion of southern France for the Seventh Army. General Patch requested my service as staff judge advocate of the Seventh Army. I then became staff judge advocate of the Seventh Army and helped plan the invasion of southern France. I went through France and Germany as judge advocate of the Seventh Army. Up until right toward the end of the war I was the only staff judge advocate of any army who was a Reserve officer. In November of 1945 I came back to the States, on points, and was assigned by the Secretary of War to the clemency board, which was headed by Mr. Justice Roberts, where we cut these sentences down. That in general is the course of my war experience.

Although I am a member of many organizations, like the American Legion, the Veterans of Foreign Wars, the Reserve Officers Association, and so forth, I don't appear here as a representative of any of them.

Mr. ELSTON. Colonel, I think with your very broad experience, we would be very much interested in knowing what your views are concerning the pending bills before the committee.

Colonel MCELWEE. Yes, sir.

Mr. ELSTON. And how you feel the present system of administering military justice might be corrected.

Colonel MCELWEE. Yes, sir.

I would like to say first that the things that I am going to say are naturally going to be criticisms. They are going to be criticisms of defects and faults in the court-martial system and certain defects and faults in the present bill. Because of the fact that most that I will say will be directed toward the defects and faults, I would like to say, to begin with, that I think from my experience the administration of military justice during the war was very well. There were defects. There are places that need to be corrected. However, on the whole the administration, I thought, was very good and fair.

One thing that a great many people will level their shots at is the excessive punishments that were given to enlisted men. I would like to point out to the committee that in many cases I did that, myself, recommending sentences which I considered myself were excessive if they were being administered in a civil court, but we drew a sharp dis-

tinction between a case where a man was going out of the Army and going to serve a sentence after he got out and the case where he was going to remain in the Army and would get another chance to go back to duty. In other words, we considered the deterrent effect of a heavy sentence. If we had a case of a felony, where a man was convicted of a common-law type of offense, we made every effort to reduce that sentence to the standard that would be given in a Federal civil court on a similar type offense. That was because he was going out of the Army to a penitentiary or the United States—a disciplinary barracks in the United States, with a dishonorable discharge; but it we were geing to suspend a dishonorable discharge, we might very well let a sentence for 30 days absence without leave of 10 years stand because we knew that he was going to a disciplinary training center and if his course of conduct there was good in 6 months he would be back to duty, with that whole sentence suspended, and in another few months it would be remitted entirely and he would be discharged with an honorable discharge. We also knew that at the end of the war there would be a clemency board which would reduce all of these sentences. So from the point of view of the combat commander, to get the deterrent effect of a severe sentence, there were a great many sentences that were given by the combat commanders which appeared to civilians who didn't know all of the machinery of the Army to be very severe. The commander who gave them realized that they were very severe, but he never expected that sentence to be carried out.

Mr. ELSTON. And in all such cases, Colonel, excessive sentences were later reduced, were they not?

Colonel MCELWEE. I personally sat on a board and helped to cut the sentences down. I had the occasion later, in sitting on the board, arise where my own cases came before me and I was very quick to cut them down. In other words, the war was over then and these boys were going to come out. The deterrent effect was all a thing of the past.

Mr. ELSTON. In your judgment, was there equality of justice eventually?

Colonel MCELWEE. There was equality of justice as a very broad general matter.

Now, I don't have any doubt that there were many cases in which there were injustices. If you take as an example that there were 5,000,000 courts martial—I have no dream whether there were 5, 10 or 15 million cases, but supposing that there were 5,000,000 courts martial cases and there were 40,000 in which there were abnormalities, in which things were out of line, we would still have a very excellent administration of military justice. But that doesn't change the fact that there would be 40,000 too many, and if we can remove those bugs from the administration of military justice we shall have done a very good thing, in reducing the number of inequalities and injustices, and there undoubtedly were injustices.

Mr. CLASON. Mr. Chairman, getting back to this man who was given 10 years for 30 days' absence, you say you would have given a man a 10-year sentence for being a. w. o. l. for 30 days while he is still in the United States.

Colonel MCELWEE. No; on those facts alone I certainly wouldn't.

Mr. CLASON. Well, that is what the previous witness held out as having actually been done. On review, they then cut it down to 5

years. Now, based on your broad experience and on the assumption that there is no other crime committed, how long a sentence ought a person to receive in a case of that sort, where he is jut an ordinary fellow American.

Colonel McElwee. In a case of that sort, when I was handling them in an infantry division, and later when I was supervising them, I would not handle that sort of a case by a general court martial. If there were a 30 days' absence by a farm boy who went home to help his family harvest a crop and then returned to duty of his own accord, that case would have been tried by a special court, and not by a general court at all, unless he had had two or three prior convictions, where he had done more or less the same thing, and you got to the point where you figured you had better send him to a disciplinary training center. You couldn't send him to a disciplinary center without trying him by a general court, so if he had had two, three, or four prior convictions for the same thing, you might put him up for trial by a general court. However, in a case like that, for simply 30 days' absence, I have had hundreds of them and we never tried them by general court.

Mr. Clason. How long a sentence would you ordinarily mete out to a person, no matter how many times he was tried?

Colonel McElwee. In a case of that sort what he probably would get, for 30 days' absence, would be about 3 months' confinement and 3 months' forfeiture of pay. That would be my judgment right now.

Now, if we were in training, we would suspend the sentence as to confinement because you couldn't make a soldier out of a man in jail. We were trying to make soldiers out of them; we were not trying to make prisoners of them. So what it would amount to is that he would get a forfeiture of two-thirds pay for 3 months. That is about the sentence he would have gotten on a deal like that.

Mr. Clason. It sounds like a pretty stiff sentence to me. He has been in jail for 20 months——

Colonel McElwee. I didn't understand, as I heard that gentleman speaking, that he had been in jail a long time. Of course, we always gave credit for the length of time in confinement. We considered that. In the command where I was we never had long confinement in jail. In other words, a man who was in jail for over 10 days on a special court case was an unusual case.

Mr. Clason. No. He says he is still in jail today. Hostilities have been over now for some 20 months.

Colonel McElwee. Oh, I don't think he said that he is. I think the witness stated that he didn't know. I think if you check that record you will find that that fellow went to the disciplinary training center and the chances are 2 to 1 that after he was at that center for a few monhs he was restored to duty. I think if you examined the actual facts of that case, you would see that is what actually happened.

Mr. Clason. I hope you are right.

Colonel McElwee. I have seen so many of them that I am inclined to think that is what happened. Of course, I haven't an idea because I didn't review the case.

Mr. Johnson of California. Colonel, you said you gave stiff sentences on the theory that somebody in the future would mitigate the sentence. Have you ever followed any of those to see if that happened?

Colonel McElwee. Oh, yes; I kept records of them. When I was overseas I could tell you what had happened 6 months later in practically every case that had gone out of my office.

Mr. Johnson of California. Did any of them misfire on you so they got too long a sentence or a cruel sentence?

Colonel McElwee. Sometimes the boys would get in trouble in the disciplinary training center. However, in the rare case where they would get into a fight with another boy in the training center and knife him or injure him pretty badly, he would be tried again for that offense. Then the fellow would be discharged and he would be sent back to the United States, his whole sentence being reduced then in accordance with what he ought to get when he was going out of the Army. I wouldn't have that. The one who was administering that over in another section would get that case and he would pass on the whole thing then. In other words, if that fellow was going to go out of the military service, there was an entirely different point of view than if he was going to remain in.

Mr. Durham. Will the gentleman yield?

Mr. Johnson of California. Yes.

Mr. Durham. Don't you realize that that is a matter of record, whether it is a 10-year sentence or a 5-year sentence? If you reduce it, it is still a matter of record. Don't you think that has a great moral effect on an individual who was part of the vast civilian army that we had in this war and who had to go out into civilian life later on?

Colonel McElwee. You mean——

Mr. Durham. You said you executed these sentences on a different basis if the man was going to a United States disciplinary barracks or to some prison than if he was right in the immediate area and going to be restored. But still that long sentence that you gave him is a matter of record—the man's record. I mean, when he goes out to civilian life it has a moral effect.

Colonel McElwee. Of course, it is on his record the minute he is tried. When a court comes back and gives him, say 10 years——

Mr. Durham. I don't see how you can arrive at the reasoning that that is justice, though, when you are having such a wide variation or differential in your sentences.

Colonel McElwee. I think I might explain what I am driving at. The administration of justice, after a man is found guilty, in considering these long sentences, is not all one way. There are many times that I wanted to reduce a sentence, say, from 10 years to 5, where I was overruled. In other words, there is the matter of a dividing line as to what is definitely expected in any sentence and what is the sentence that you expect actually to be served.

Mr. Durham. Yes; but what I am getting at is that it is still a matter of record—in the man's record—that will follow him for life.

Colonel McElwee. I don't so consider it, sir. If a man comes out of the Army with an honorable discharge, the fact that he was tried and whether the sentence is reduced from 10 years to 5, or to 2, I don't consider would actually prejudice his record after he gets out of the Army with an honorable discharge.

Mr. Durham. If an employer looks on that record and it has a 10-year sentence that had been reduced to 6 months, the fact remains that he still got a 10-year sentence by somebody in the court-martial system.

Colonel McElwee. I don't see how the employer can get the information, because it isn't on any record that gets out of the Army.

Mr. Durham. Of course, the boy knows what he got. I mean he will have to tell him, if he is an honest individual, because he is afraid it will come out later. He will say, "Yes, I got a 10-year sentence, but it was reduced to 6 months."

Now, you say you administer it on the basis that somebody eventually will reduce this sentence. I don't get your reasoning on that. I am not a lawyer, but it doesn't make good reasoning to me.

Colonel McElwee. Whether you agree with it, sir, or not, that was done frequently and that was the reasoning behind it.

Mr. Durham. I know it was.

Colonel McElwee. And I am not going to try to back up something that was done. All I can do is to tell you the reason why it was done, whether you agree with it or not.

Mr. Elston. You would to a certain extent, have the same situation in civil courts. A man may get a very severe sentence and the greater part of it may be suspended on account of good behavior.

Colonel McElwee. That is done frequently in civil courts. Also, when a man goes to the penitentiary he gets time off for good behavior. There are certain things that are considered in reducing his sentence there.

Now, I don't mean to say or be understood that in my commands we often put out sentences that I would consider so out of proportion as to be unconscionable. There is always room for argument as to how much it should be. If a man takes a truck, steals a truck and wrecks it, is it proper to give him a 10-year sentence or a 5-year sentence or a 3-year sentence, when that truck is needed for combat troops at the front? It has cost the Government a great deal to get it over there. It is just as harmful to us as if a German has dropped a bomb on it. If you let a sentence stand for 5 years instead of cutting it to 2, there is room for argument as to whether it should be 2 or 5 years in the first place.

Mr. Elston. Doesn't it come down to this: That you have two vital things to consider? First of all you have to administer justice and secondly you have the very important factor of discipline in order to win the war.

Colonel McElwee. Oh, definitely. The combat commander—I am talking about back in the base section or in the United States—but the combat commander has got to have, in my opinion, of necessity certain authority in court-martial cases that necessarily does not have to apply in the rear areas or in the United States. In other words, it is that old business where the horse lost a nail in his shoe, the shoe was lost, the horse was lost, the rider was lost, and the war was lost. Your combat commander sometimes faces conditions where he has to take quick and drastic action. Our combat commanders did a good job during the war. We don't want to overlook the fact that they did a good job. Their psychology, of course—the entire psychology of your commander—is built, at the Military Academy, toward winning wars. They don't build a psychology toward judicial temperament at the Military Academy. They build a psychology to get a guy out and beat the hell out of the enemy, and that sort of a man who is trained to ramrod things through is going to be an unusual person if he has a judicial temperament.

I think you can work this thing out so you can have justice administered by changes in your court-martial manual which will take some of the arbitrary things out of his hands and out of the hands of the generals. I, personally, am very much in favor of this idea that they have all talked about, to put this under the Judge Advocate General.

Mr. ELSTON. Do you think the bills before us go a long way toward correcting some of the defects in the system?

Colonel McELWEE. I think this present bill, H. R. 2575, goes a very long way, and I think it is an excellent improvement.

Mr. NORBLAD. Mr. Chairman, could I ask a question before we get off the subject of maximum penalties?

Mr. ELSTON. Yes.

Mr. NORBLAD. With reference to your thought about giving a maximum penalty to the soldier and having it cut down, would you also have that apply in peacetime?

Colonel McELWEE. I don't quite understand your question.

Mr. NORBLAD. In speaking of a man getting 10 years and then it being cut down to 5 years or 2 years, or 6 months——

Colonel McELWEE. I don't think the same reasons apply in peacetime, and I don't think the same reasons necessarily apply in the continental United States, when you are fighting a war overseas.

Mr. NORBLAD. I understood you to say that. That is why I asked the question as to peacetime. In peacetime, in other words, you think the maximum penalties of section 104 of the court-martial manual should be preserved?

Colonel McELWEE. Definitely.

Mr. NORBLAD. Which provides, for instance, 3 days for every day a. w. o. l.

Colonel McELWEE. In peacetime, when I served, we followed that practice of taking the manual and cutting in half the authorized punishment, as the normal punishment.

Mr. NORBLAD. You mean the maximum or the authorized?

Colonel McELWEE. The authorized punishment. Take a case on which a punishment of 2 years was authorized. All right; we would say the normal punishment in that kind of case should be 1 year and we work up for aggravating circumstances and work down for mitigating circumstances.

Mr. NORBLAD. That is under section 104 of the manual?

Colonel McELWEE. Yes.

Mr. NORBLAD. That is the maximum, I believe.

Colonel McELWEE. That is right; that is the maximum. But we wouldn't use the maximum; we would start in the middle and work up and work down.

Mr. ELSTON. Colonel, we would be interested in having your views about these specific bills. Do you have any criticisms?

Colenel McELWEE. Yes; I have some suggestions.

In the very first instance, on the first page—it isn't in there—I think a warrant officer should be put in the definition. In other words, you have talked here about officers who are commissioned officers and soldiers who are enlisted men, but you haven't included warrant officers. I think not only enlisted men should be able to sit on our courts, but warrant officers should be permitted to sit on our courts.

Mr. ELSTON. We have already given considerable attention to that subject.

Colonel McElwee. All right, sir.

I would change, on page 3, lines 5, 10, and 13, the words "enlisted persons" to "soldiers," because the word "soldier" has previously been defined.

I would say, along there, in article 4, that it would be well to include enlisted men on the court, and to have an addition there, saying the court should not have less than two in its composition. In other words, some commander who is so disposed might say, "Well, we will put an enlisted man on the court and 11 officers." In other words, they can control the thing if they wanted to by just putting one on, which would be more or less evading the thing. If they required them to put on a minimum of two, it would be a little more difficult.

Mr. Elston. Are you favor of enlisted men serving on courts?

Colonel McElwee. Oh, definitely. I think they should be on the courts. However, I agree with the idea that the accused should have the privilege of having them or not. I don't fear, as some of them seem to fear, that if you give the commander the right to use them if available he won't put them on. I don't fear that. I think the commander would put them on.

Mr. Elston. If the accused wanted them.

Colonel McElwee. Yes. But I think the important thing is that the accused have the right to have them or not, as he wishes. That to my mind is the more important thing.

Mr. Durham. Do you think there should be a definite length of service required?

Colonel McElwee. I don't know about the length of service. I think it gets down to a matter of experience. You might get an enlisted man who is a licensed lawyer who would make an excellent member of court, even though he has only one month's service, because he knows law and understands how to receive evidence, and things of that sort.

Mr. Norblad. You think enlisted men should be given the right to defend?

Colonel McElwee. You mean act as defense counsel?

Mr. Norblad. Yes.

Colonel McElwee. They not only should, yes, but I have done it myself. In other words, I had a couple of enlisted men lawyers in my office, and I used to assign them out, when men asked for them, to defend the cases. They went in and defended the cases for them.

I would suggest, on page 9, article 22, down there where it talks about process running to the United States, its Territories and possessions, that the defense can also have process or any member of the military service, even though he is outside of the continental limits of the Uinted States, with the exception that in time of war for your general military necessity he might be refused, but only for that purpose.

I have seen, from time to time, when, for instance, we were in France and the accused wanted a defense witness in Italy, and it was comparatively easy to bring him over, they said, "No. You can take his deposition." Well, it isn't always satisfactory to use a deposition in the case of an important witness.

I am quite in favor of this provision that authorizes a bad-conduct discharge. Many time a court would have liked to have done that and couldn't do it.

On page 11, it talks about the taking of depositions before a military court or commission. I would recommend that they strike out the word "commission" in lines 1, 5, and 8, because military commissions are really only used for the trial of war criminals and also for the trial of spies. We don't use them for trying our own soldiers. I had the experience, when I was in charge of a war-crime investigation in Germany, where we wanted to take the testimony of witnesses who were just going and coming—it was very hard to find witnesses and control them—in advance of the trial, and yet we were faced with the proposition that perhaps we couldn't use that testimony to try a war criminal because it was in a capital case. If it weren't for this provision in the Articles of War, there wouldn't be any question about it. So, it was restricting us in our activities in handling war-crime cases, and it wasn't doing us any good to have it in there.

On page 13 you have the matter of the disposition of records of special and summary courts. I had some recommendations in regard to giving rather liberal authority to the staff judge advocate to take action in records of inferior courts which were filed in his office when he finds the record is insufficient or he finds the sentence is exorbitant or is out of proportion. I understand that that will be taken care of if the Judge Advocate General's Department is more or less divorced in the handling of these cases, which will be satisfactory. I will give you an example. I had a case filed in my office in Germany, tried by a special court down in the unit, where a man was absent without leave for 10 minutes. He was tried by a special court and given a sentence of 6 months' confinement and forfeiture of two-thirds pay for 6 months, which to me was obviously out of all proportion for the offense charged. It was something that was indefensible. Now, I had no authority to take any action. All I could do was to send it to G–1, who according to the book which I have here [indicating] has supervision of all punishments. G–1 sent it back and said, "Forget it," and I had to forget it.

I would like to call your attention to that, incidentally, while I have it here. This is the General Staff Officers' Manual of the Air, Ground and Service Forces, dated October 1, 1945. This is since VE-day and since VJ-day. On page 43, at the top of section 77, in regard to the G–1 or personnel officer, it states here that he has supervision of the following activities, which includes law and order, and among those stated is: "Military justice, courts martial and punishment."

Now, I have been faced with that same provision when I would have a matter involving military justice or punishment. In the Seventh Army I was required to deal through G–1 and the chief of staff. I practically never ever got to see the general. Because of this provision in the manual, I was required to go to G–1, with my recommendations. He was a very conscientious fellow, I liked him personally, but the judicial temperament was not what you would expect. You couldn't expect it in a young officer in that type. He was a young West Pointer, a very capable man, but not with the judicial temperament that you would expect.

Now, where I might have said to cut a sentence down to 2 years from 10 years and he would recommend perhaps that it be allowed to stand, he would then take it to the chief of staff, who was more or less of the same mental propensity, and the chief of staff would then take it to the general, with the recommendation from their side, from the command side, rather than from the legal side, and it would frequently come back with an instruction to change the order, as the general wouldn't sign it, and I would have to draw an order for a much stiffer sentence, for him to sign.

Mr. ELSTON. How would that be corrected now?

Colonel McELWEE. This bill here requires all of the dealings of the general with the staff judge advocate.

Now, I have a suggestion along that line, so we could spell it out a little further. Perhaps I have that listed in here. It is partially covered here. I have made some notes, which I will be glad to furnish to Mr. Smart for the use of the committee. I wrote them out in longhand.

Mr. ELSTON. Suppose you just reduce those suggestions to writing, Colonel.

Colonel McELWEE. I have.

Mr. ELSTON. And turn them over to the committee. We will make them part of the record.

Colonel McELWEE. Along that line, another thing comes to mind now.

Mr. DURHAM. The provision of this bill H. R. 2575 would correct that.

Colonel McELWEE. I will find that for you in just a second.

On page 18, beginning at line 7, it says:

> Convening authorities will at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice; and the staff judge advocate of any command is authorized to communicate directly with the staff judge advocate of a superior or subordinate command, or with the Judge Advocate General.

Now, that first provision, about dealing directly with the general, will take those matters out of the hands of the command. But I still think they would say, "Well, although you deal with a general direct on your cases, still the over-all picture on punishments and miltary justice is a matter for consideration of G–1." They would still say, as long as this exists in the book or unless specifically it is put down in writing, that G–1 has supervision of that matter.

I am strongly in favor of the appellate system you provide for. I think it is excellent.

Mr. ELSTON. You don't see any occasion to take military cases into the civil courts?

Colonel McELWEE. No. I think that is just stacking one appeal on another appeal. After all, they are all human beings, whether they are on this board or that board. You can cut it anyway and you still have human beings sitting on the court of appeals.

Mr. CLASON. I wonder if you could tell us from your experience what percentage of the cases go wrong. The last man seemed to think it had been in 10 percent of the generals and up to 30 percent or more in the summaries. What do you say?

Colonel McElwee. I don't know whether there was a single court martial where there was an actual miscarriage of justice, but there were many cases where I considered the sentence too severe. My judgment on that would be that they did not exceed over 2 percent, say at the most, where they were too severe. I might also say that I am including in those cases the ones that are going to be reduced. But, however, I might add, when a long sentence was allowed to stand, I felt that there would be no stigma attached to the soldier who came out of the service ultimately with an honorable discharge.

When a fellow spent 6 months in the training center, it did him a lot of good, rather than harm. They really put them through a course of training there. I have been in the training center. They got those fellows up at the crack of dawn and they worked like Trojans. They didn't give them any sort of phony training. They put them through military training. When they came out of there, they were pretty good soldiers, so they actually did them a lot of good, rather than harm. As I say, the policy that I was following and that all the officers in my command were following was to make them soldiers rather than prisoners.

You see, we had 3 corps and about 15 divisions. I used to visit every corps and division at least twice every month, checking on every case. The Third Division would run a general-court-martial record of about 60 a month, while the Thirty-sixth Division would run a court-martial record of about 10 and the Forty-fifth Division would run a court-martial record of about 6. I tried in every way I could to find out the reason for the great difference in the court-martial record and I never was able to put my finger on it at all, why there were 6 in 1 and 60 in another. That was one of the things I couldn't explain.

Mr. Elston. All right, Colonel, you may proceed now.

Colonel McElwee. I think perhaps, since there is such a limited amount of time left, that I had better turn my statement over to Mr. Smart, rather than taking up your time.

Mr. Elston. You do that, Colonel. We will, of course, read it because it will be made part of the record.

Colonel McElwee. Yes, sir.

Mr. Elston. We appreciate very much your statement to the committee this morning, particularly because of the nature of your experience.

Colonel McElwee. There is one parting remark that I would like to make and that is in all the administration of civil or military law you always are dealing with personnel problems, with the individuals involved. Now. I think you will accomplish a lot if you keep in mind the personnel angle and do as much as can be done to take the staff judge advocates out from under the Chief of Staff and G–I in military justice matters and let him deal directly with the general. Whatever is done along that line will be a great advancement.

(Colonel McElwee's additional statement is as follows:)

My name is Pinckney G. McElwee. I am a colonel in the Judge Advocate General's Department Reserve. I am an attorney in the Office of the Solicitor, Veterans' Administration. I am a native of Missouri, a citizen of Texas, and presently living in the District of Columbia. I was an enlisted man in World War I. I am a member of the Veterans of Foreign Wars, the American Legion, Military Order of World Wars, the Reserve Officers Association, and Sons of the American Revolution. Prior to World War II, I had an extensive law practice in oil and gas and land matters in Texas.

In 1940 I was ordered to duty on September 1 as a reserve judge advocate with the rank of major as assistant staff judge advocate of the Eighth Service Command. Within a few weeks I was made the staff judge advocate of the Second Infantry Division. In June 1942 I became staff judge advocate of the Fourth Corps. In May 1943 I became assistant staff judge advocate of the North African theater, under General Eisenhower, in charge of military justice. In January 1944 I became staff judge advocate of Service of Supply, north African theater, under General Larkin. In April 1944 I became staff judge advocate of the seventh United States Army and assisted in the planning of the invasion of south France. I remained with the Seventh Army through France and Germany until several months after VE-day. I returned to the United States on 127 points in September 1945 and was assigned to duty on the clemency board of the Secretary of War headed by Mr. Justice Roberts. I was ordered to inactive status on April 5, 1946.

REMARKS RELATIVE TO H. R. 2575

Considering first the provisions of the proposed bill as written.

Page 1: The words "warrant officer" should be defined to include warrant officers and flight officers.

Page 3: An added paragraph might read as follows before line 1:

"All warrant officers in the active military service of the United States or in the active military service of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on general and special courts martial for the trial of warrant officers and soldiers and persons of these categories when available shall be detailed for such service when deemed proper by the appointing authority."

Page 3: Line 1, line 5, line 10, line 13, change the words "enlisted persons" to "soldier" in accordance with the definition of "soldier" on page 1.

Page 3: Add to article 4. No soldier shall be tried by a general court martial which has in its composition less than two soldier members present and sitting at the time the court is constituted unless he consents thereto.

Page 4: The provision regarding the authority to appoint courts is a proper matter of command for an officer having authority to issue the necessary orders. This amendment of article of war 8 is satisfactory. The provision requiring the law member to be a judge advocate general or an attorney and no other is good and needed. The later part of article 8 which permits an accused to be arraigned without having a law member present is a well-provided exception which may be needed to keep the statutes of limitation from running if no judge advocate is present or if he is disqualified.

Page 5, article 9: Special court-martial jurisdiction should be given to separate battalions as well as "detached battalions," e. g., field artillery battalions of a division. This right only exists now by virtue of a "construction" of the statutes by the Judge Advocate General which many consider a strained construction.

Pages 5 and 6: The provisions of article 11 are great improvements.

Page 7: Article 12 is an improvement in that it authorizes a bad-conduct discharge.

Page 7, article 13: This is a great improvement in that officers as well as warrant officers and enlisted men may be tried by special court, and a special court may grant a bad-conduct discharge subject to appellate review.

Page 8, article 14: Line 16 insert after "that" and before "noncommissioned officers" the words "warrant officer."

Page 9, article 16: I approve article 16 as written.

Page 9, article 22: I especially favor the absolute right given to defense counsel in the last sentence to call witnesses. I would add to the end of the sentence on line 20 "and to any member of the military service, unless unavailable in time of war due to urgent military necessity."

Page 11, article 25: Line 1, eliminate the provisions on depositories insofar as it pertains to military commissions. This commission form of trial is only used for trial of "war crime" cases, i. e., cases involving the violation of the laws of war; and it is too restricting to the persons involved in these cases to limit depositories of noncapital cases. Other countries trying spies and violators of laws of war do not so restrict depositories. This also makes it tough on those gathering evidence for war crime. For the same reason eliminate the word "commission" in lines 5 and 8.

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Page 13, article 36: Satisfactory.

Page 13, article 38: Proper and necessary.

Page 15, article 43: Line 16, after word "taken" and before the comma, insert "in both the conviction and the sentence".

Page 16, article 44: See A. W. 44 on last page of statement.

Page 16, article 46: Line 22, insert after "investigation" "the accused shall be informed of the nature of the charges under investigation and if charges have been signed shall be served with a copy thereof and".

Page 18, article 47: Is good as far as it goes but does not go far enough. It should provide in addition:

(1) All staff judge advocates shall be members of the Judge Advocate General's Department.

(2) The number of judge advocate general officers needed at each command shall be decided by the Judge Advocate General.

(3) All promotions of judge advocate general officers shall be based solely on the recommendations of the Judge Advocate General.

(4) The number of court reporters needed in the office of any staff judge advocate general of a command exercising general courts-martial jurisdiction shall be decided by the Judge Advocate General.

(5) Matters pertaining to military justice, courts-martial, and punishment shall be under the sole supervision of the staff judge advocate.

Page 18, article 47 (b): Add to end of line 22 "No charge shall be referred to trial by general courts-martial unless trial by general courts-martial is recommended by the staff judge advocate, except as to felonies and cases in which capital punishment is authorized.

Page 19: Line 3 after "or" insert "or upon the recommendation of or in the absence or disability of the staff judge advocate".

Page 19: Line 13 after "until" insert "in addition to approval by the convening authority".

Page 28: I especially approve article 50 (G).

Page 30: Line 2, after "Part" before comma "by the commander who ordered to execution of the sentence or".

Page 32, line 8, delete "termination of the War" and substitute "the discharge of the applicant from the Military Service"; line 10 after comma and before "whichever" insert "or after the passage of this act".

Page 33, A W 85: Good change.

Page 37, A W 104, line 6 after semicolon and before "except" insert "except that an officer exercising summary court-martial jurisdiction may forfeit not more than one-half of the pay for 1 week of a soldier and".

Page 37, line 8, eliminate the words "flight officer" if the definition of Warrant Officer is made to include Flight Officers.

Page 40, article 121, line 12, insert after "and" and before "take" "if it is found that such officer or soldier has been wronged, he shall".

Page 20, article 47 (f) should include: "(4) the power to commute a sentence of death."

As staff judge advocate of the Second Infantry Division I supervised matters pertaining to military justice within the division.

As staff judge advocate of IV Corps, I supervised the administration of military justice of the following Divisions: Forty-third, Thirty-eighth, Eighty-fifth, Twenty-eighth, Eighty-second, One hundredth, One hundredth and first, Thirty-third, Forty-fourth, Seventy-first, Ninety-sixth, and One hundred and fourth.

As assistant staff judge advocate of the North African theatre, I reviewed all records of trial requiring action by General Eisenhower as confirming authority involving sentences of death and dismissal of officers. I also exercised a limited supervision of military justice matters in the theatre.

As staff judge advocate of S. O. S. North African theatre, I supervised the military justice matters of all base sections from Casa Blanca to Italy.

As staff judge advocate of the Seventh Army, I supervised the Administration of military justice of VI Corps, XV Corps, XXI Corps, and the following Divisions: Third, Twenty-eighth, Thirty-fifth, Thirty-sixth, Forty-second, Forty-fourth, Forty-fifth, Seventy-first, Seventy-fifth, Seventy-ninth, Eighty-fourth, One hundredth, One hundred and first, and the Eleventh Armored, Twelfth Armored, and Thirteenth Armored Divisions.

AW 86: Any sentinel who misbehaves upon his post, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and if the offense is committed in time of peace, he shall suffer any punishment, except death, that a court martial may direct. The term "misbehaves" as used in the article shall include the following misbehavior and no other, to wit: being drunk on post, sleeping on post, or leaving his post before being regularly relieved.

AW 47: Add at end: The staff judge advocate shall be free at all times to furnish, upon request, legal advice to the trial judge advocate, the defense counsel, the law member of a general court martial, the president of a special court martial, or a summary court martial.

AW 44: In time of war, when a sentence to dismissal may lawfully be adjudged in the case of an officer the sentence may, under such regulations as the President may prescribe adjudged, in lieu thereof, reduction to any officer grade, and subject to such regulations, if such person be prima facie subject to military duty under a selective service act, adjudge in lieu thereof, reduction to the grade of private. In the event a sentence of dismissal may not be imposed, such officer may be reduced to his permanent grade, or in case of an officer holding only temporary grade he may be reduced to the grade of second lieutenant.

Any officer who shall take unfavorable or prejudicial administrative action in respect to any member of a court martial on account of his vote or on account of the result of the vote of the court, shall be guilty of an offense and shall be punished as the court martial may direct.

Page 13, article 36, line 11, after "be" insert "examined and".

Page 13, article 36, line 18, after "provided" and before "when" insert "In the event that upon examination the staff Judge Advocate finds that the record of trial is legally insufficient to support the conviction, he shall issue an order to the officer who approved the sentence to vacate the sentence and restorate all rights of which the accused was deprived, and in such case, and in cases in which there was error prejudicial to the substantial rights of accused, he may in addition to directing a vacation of the sentence and restoration of rights, direct that a rehearing, within the discretion of the appointing authority, be had."

Mr. ELSTON. We will adjourn until tomorrow morning at 10:00 o'clock.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 11, LEGAL,
Wednesday, April 23, 1947.

The subcommittee met at 10 a. m., Hon. Charles H. Elston (chairman) presiding.

Mr. ELSTON. We are very glad to have with us this morning the gentleman from Texas, Mr. Burleson, who has introduced H. R. 2143, on this general subject. Mr. Burleson the committee will be glad to have you explain the features of your bill.

Mr. BURLESON. Thank you, Mr. Chairman.

STATEMENT OF HON. OMAR BURLESON, UNITED STATES REPRESENTATIVE IN CONGRESS, SEVENTEENTH DISTRICT, STATE OF TEXAS

Mr. BURLESON. Mr. Chairman, I represent the Seventeenth District of Texas. I have introduced H. R. 2143, on this general subject. I do want to compliment the committee in the work that it has done heretofore in these hearings. I certainly think it is a splendid thing.

The bill H. R. 2575 under consideration is certainly a well prepared measure. I would like to have you bear in mind that where I have any criticism to offer I should be able to present something in its stead. There are just one or two features that I would like to comment on, if I may.

On page 10, line 13—

the use of coercion or unlawful influence in any manner whatsoever by any person subject to military law to obtain any degrading statement not material to the issue—

and so forth, it seems to me in that particular case it might indicate coercion or some unlawful influence that may be used if it were deemed that the material gathered was germane to the investigation. I think that is an abuse that has been rather prevalent in some cases. I believe it should specifically be stated in the measure that where statements are taken from an accused he should be definitely warned that any statement he made must be voluntary and that such statement may be used in evidence on his trial. It would leave no question about it.

Another item is the matter of reasonable doubt, the theory of reasonable doubt. On page 19, in line 4, it is provided that, in the review of cases—

"no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.

Mr. Chairman, it seems to met that the reasonable doubt theory should apply directly to the court. I believe that the members of the court martial should be instructed that unless they found the accused guilty beyond a reasonable doubt, that that doubt should be resolved in favor of the accused.

On page 28, following "weighing evidence," it says:

In the appellate review of records of trials by courts martial as provided in these articles, the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact.

An individual who is not present on the trial of a case is not going to be in very good position, it seems to me, to judge the credibility of the witness unless he can see him and hear him testify. In reading a record, I think it is entirely possible that bias or prejudice could enter into that individual's considerations. I believe in most of our State jurisdictions, and perhaps in our Federal courts, the theory of reasonable doubt is recognized by juries and if a defendant or an accused in the case of a court martial is found guilty in a degree lesser than that charged, that the doubt in that case should also be resolved in his favor.

I think it would be rather useless to try to take the various articles and items and go through them one by one in the bill. As I said, I think it is very good, indeed, and with its revisions is going to be a very fine measure.

As a general proposition, our civil law and criminal law is based, as I understand it, upon the theory that the punishment of a person found guilty of criminal acts is for reform. Now, that is not exactly the theory, as I understand it, in the court martial. It is more an example. Well, those two need not be radically contrary to one

another, but at the same time I think we have to get away from the theory that it is all example.

Now, in considering these matters, may I just make this observation: There is, in my most humble opinion, this very vital fact and that is we could have a great many technicalities, as we found in our civil laws. I don't believe they have any place in our military, except to a point. There is a saturation point. If we go beyond that, we get into a lot of technicalities. I don't think it would be a practical thing at all to make a record for an appeal, as we have in our civil courts. We get all confused in those things, and it takes all the lawyers in the country to handle it. That is what makes the law business, and that is the reason some of us are lawyers. But at the same time I think there are basic principles which must be recognized. The voluntary statement is one of them. The reasonable doubt theory is one of them. The presumption of innocence is another.

Now, on the presumption of innocence, taking that as an example, I know that in naval courts and boards, someone may take issue and say that that theory is recognized. Well, I think it is recognized to the extent that one interprets it as an attorney. If he wants to see that way, he may be able to find it. It is rather indefinie. I believe I will find agreement on that proposition.

I believe the members of a court martial board should be instructed that they are under oath and that they must recognize these fundamental things and consider them in determining the guilt of innocence of an accused: The presumption of innocence, that a man is presumed to be innocent always until his guilt is established by reasonable and legal and competent evidence, and that the burden of proof is on the prosecution or the Judge Advocate to establish that guilt beyond a reasonable doubt and until it is established I think they should be instructed that the accused be acquitted; the reasonable doubt as to the lesser degree; and the conclusions of a court martial board, with their members on their oath, should be based entirely upon the evidence adduced on the trial and for no other consideration.

Now, there is a technicality in the matter of peremptory challenges, but I think it is recognized or has been in many instances, in small detachments, small stations or aboard ships, that there have been times when the court martial board member probably has his mind previously made up, he had come to a previous conclusion as to the guilt or innocence of the accused, before he was chosen or at the time he was a member of the court.

I think the accused should have a right to examine a board member to find out about his prejudices or his biases and if he has either he should be excused, and there should be a provision for replacing that board member.

Now, as a general proposition, it is one of these things that I don't have an answer to. I see that there are ranking Naval and Army officers present, incidentally—I don't say this as an inspiration because of seeing them—but most of these matters in my experience were handled by legal aids—I say that generally—in the service who were Reserves, and not the legal officer. Well, you are naturally conscious of the fact that you have regular Navy and Army officers who are watching your actions and I am not sure that you are a free agent always in doing those things. After all, the Regular Army and Navy

officers are going to run the show. It is to be expected that they will run the show. When you have a Reserve officer handle those things, you know that your command, which is over you, is the regular officer. Your command is usually the Regular Navy. I say that, because that was my experience.

Now, you are going to perhaps be influenced by that very fact. What the answer to that is I don't know, unless we would set up a legal division at Annapolis or West Point.

I want to emphasize that those who handle those matters should not carry over some prejudice of the higher command, in their actions.

Mr. ELSTON. I might say to the gentleman that one of the matters that we have had under consideration is the making all judge advocates in the field responsive only to the Judge Advocate General, and all members of the court responsive to the judge advocate, as distinguished from the commanding officer, in order to remove the command influence of which you speak. That is a subject that will be given very serious consideration by the committee, as there have been a great many complaints against the very thing that you are speaking of, namely, command influence.

Mr. BURLESON. Mr. Chairman, I don't have anything else to offer, unless there are some questions.

Mr. ELSTON. While I can't speak for all the members of the committee, I am in full accord with your views about protecting an accused person in a court-martial case, the same as you do in the civil courts, by not compelling him to give evidence against himself, assuring him of the presumption of innocence, requiring proof beyond a reasonable doubt before he can be convicted, and so forth.

I think the provision to which you referred here, about weighing the evidence, was to give greater protection to the accused, so that a reviewing court could review all the evidence in the case and could even pass on the credibility of witnesses. That doesn't mean, as I interpret it, that the reviewing court is going to place itself in the position of the trial court, but if it is obvious on review that a witness was not a credible witness, the reviewing court will have a right to reject his testimony entirely. So I think that is an added protection to the accused, rather than a limitation on any of his rights.

Mr. BURLESON. Well, I just hadn't seen anything, Mr. Chairman, in the bill, as I recall, that gave the specific authority or responsibility to the board member as an individual in judging the credibility and resolving reasonable doubt. I only saw that mentioned as a review. Perhaps I could be mistaken.

Mr. ELSTON. Well, I think we generally want to see that that protection is accorded to the accused from the very beginning to the end of his trial and review.

Now, in your bill, I notice that you make it mandatory that enlisted persons serve in general or special court-martial cases. Do you think that the best results would be obtained if it were mandatory or if it were optional with the accused to have enlisted men serve?

Mr. BURLESON. Well, I think, Mr. Chairman, if it were made optional no greater right could be accorded the accused. I certainly think that would be fair.

Mr. ELSTON. It has been pointed out to us that in a great many cases enlisted men wouldn't want enlisted men to serve.

Mr. BURLESON. I don't doubt that may be true.

Mr. ELSTON. If they don't want them, of course, they shouldn't be compelled to have them.

Mr. BURLESON. I agree to that, yes, sir.

Mr. Durham. Did you serve on any courts martial during your service?

Mr. BURLESON. Mr. Durham, if I may just review a short experience—I don't want to take a lot of time—I was on the defense side of this matter out on Okinawa for a time after the war ended. Frankly, I had shied away from everything connected with it up until that time. I was more or less hiding out in the brush trying to get back home, like everybody else was, until I was persuaded that I should begin the defense of about 28 men who had been held in the bull pen back up in the hills on Okinawa. Some of them had been there more than 30 days without having a charge of any kind placed against them at all. They told me they didn't know what they were there for. I was induced by a chaplain to begin the defense of those men.

Now, I am not a criminal lawyer. I was a district attorney a number of years ago. I knew very little about criminal law, but I tried to remember just a few of these basic things that I thought were so fundamental. We only had, I think in the beginning, about five copies of Naval Courts and Boards. I tried to get most of those, although I didn't need any of them. I took every advantage I possibly could. I told them this was the law, when as a matter of fact I was giving them what little Texas criminal law I knew. I was very successful in having some of those men acquitted, just on these very basic principles that I have mentioned.

I don't mind it for the record at all, I used every advantage, every shyster trick I ever heard of. There were about three of those court martial boards in existence. The turn-over was great, particularly on summary courts. There was an officer out there, whose name is Neely—I like to call his name and get it on the record—who wasn't fit to be wearing the uniform, much less to be in command of a receiving station. He called men up before him before he appointed a court martial board, and would say, "Here's a case. This man is guilty and I want you to assess a certain punishment for him." That is an isolated case, surely, and I don't think those things were prevalent in the States, but a great deal of it happened overseas.

Mr. DURHAM. It did happen.

Mr. BURLESON. It did happen, and it was criminal in itself.

Mr. ELSTON. Of course, you appreciate that is prohibited under H. R. 2575.

Mr. BURLESON. Yes, sir. It is a crying need. It has been criminal I promised myself silently, and a lot of men out there, that I would try to do something about this thing. That is the reason for the introduction of this measure.

Certainly, as I told the chairman before the hearing, and Mr. Smart, I know it is not perfect, by any means. It is just a beginning. It is just something that we might be able to start with.

Mr. ELSTON. I can assure you, Mr. Burleson, that we will give very careful consideration to all the provisions of your bill. We appreciate your coming here and giving us this testimony this morning.

Mr. BURLESON. Thank you, Mr. Chairman. I appreciate the opportunity of appearing before your committee, too.

Mr. ELSTON. General Hoover, if you will come forward, you can resume your testimony.

General HOOVER. I believe we reached paragraph (h) of article 50 previously. The article pertains generally to our system of appellate review, and subparagraph (h) expands the present provisions of article of war 50½ with respect to the finality of court martial judgments. It is specifically provided that the findings and sentences, the proceedings and the executed punishments under the sentences shall be final and conclusive. The principle is well established at present, but the amendment is somewhat more definite than the present article.

The proposed amendment of article of war 51 consolidates the present provisions of articles 50, 51, 52, and 53, relating to remissions and suspensions of sentences. There is no substantial change in the substance of the powers that are given. There is some adjustment, through the dropping of the present article 51 with respect to temporary suspensions in the field of death and dismissal cases, for the reason that the other amendments to the articles would make the exercise of that power unnecessary and inappropriate. The Judge Advocate General is given power under the amendment to mitigate, remit, or suspend the whole or any part of a sentence in any case requiring the action of the office of the Judge Advocate General on the record of trial. This is added.

Mr. ELSTON. What if any cases at all would not be included?

General HOOVER. The special court-martial cases not involving bad conduct discharges and summary court-martial cases.

Mr. ELSTON. Would it include death cases, too?

General HOOVER. It excludes death cases, as the article does now, for the reason that the President acts on those cases.

Mr. ELSTON. In other words, the judge advocate himself could not suspend or reduce a death sentence?

General HOOVER. With respect to a death sentence the power is lodged in the President alone.

Mr. ELSTON. During the war theater commanders, however, were able to reduce the death sentence to life or a period of years, were they not?

General HOOVER. Yes, sir. That we call the commutation of a sentence, the change of a sentence to another form. The theater commanders had that power under old article 48. The power is being taken away and is to be lodged exclusively, in death cases, in the President.

Mr. ELSTON. So that even in time of war only the President could act?

General HOOVER. That is correct.

Mr. ELSTON. In the death cases?

General HOOVER. That is correct, under this amendment, sir.

I might say that it is provided with respect to the original mitigating and remitting power of the Judge Advocate General that "the power to mitigate or remit shall be exercised by the Judge Advocate General under the direction of the Secretary of War." Similar power is given to the Judge Advocate General after the orders of execution are issued. In this case also the exercise of the mitigating or remitting power would be under the direction of the Secretary of War.

It is provided specifically in this article that no order of suspension of a sentence to dishonorable discharge or bad conduct discharge shall be vacated until the confirming and appellate action under the articles is completed. As has been noted here; under the present Articles of War, it is possible to suspend the execution of a sentence to dishonorable discharge, direct the remaining part of the sentence into execution, and issue the court martial order. Pending the automatic appeal in the office of the Judge Advocate General, the appointing authority has the power to vacate the order of suspension and carry the sentence into execution. There is therefore a possibility of evasion, in a sense, of the provisions of article of war 50½. I do not want to suggest that evasion is a common practice, but it has occurred in a few cases.

Mr. ELSTON. But, General, what would the situation be where a commanding officer, the appointing power, had suspended a part of the sentence and the case went to the Judge Advocate General on review; would it be possible for the Judge Advocate General to increase the sentence above the minimum sentence prescribed by the reviewing authority below?

General HOOVER. No, sir. There is now no power, nor would there be under the amendments any power, of the Judge Advocate General's office, or any authority to increase a sentence in any respect.

Mr. ELSTON. Either a sentence or a modified sentence by a commanding officer.

General HOOVER. That is correct, sir.

Mr. DURHAM. Would he have the power to restore him to duty during suspension?

General HOOVER. Yes, sir. That is the power that is so important in our restoration program. The War Department, as I understand it, feels that it is a highly important program. It has worked very well. A great many men have been saved, in the sense that they are ultimately given an opportunity to earn an honorable discharge in lieu of a dishonorable discharge.

The proposed amendments to article of war 52 cover the matter of rehearings of cases. The present article of war 50½ provides for rehearings, which are not strictly new trials, although they are in the nature of new trials. The rehearing must be ordered when the reviewing or confirming authority takes final action on the case. Generally speaking, it must be ordered before a sentence is carried into execution.

Mr. DURHAM. Who initiates a rehearing?

General HOOVER. The reviewing or confirming authority. It is not a matter of right to the accused, at all. It is in a sense a continuation of the previous trial, with a view to developing facts not developed or to correct posible errors either in favor of the Government or of the accused, but it is a power to be exercised by the reviewing or confirming authority on his own initiative.

Mr. ELSTON. In other words, it is practically the same authority that an appellate court has in a civil trial, to send the case back for rehearing.

General HOOVER. Practically the power of the civil trial court, I should say, to grant a new trial upon motion, when the verdict comes in and a motion for new trial is made. In the event the case should go to the civil appellate court, the grant of a new trial would be more

like our new trial of which I shall speak in a moment. Our new trial would be more nearly parallel to that of the civil procedure on appeal.

The rehearing provided for in the amendment is the same rehearing that is provided for in the present Articles of War.

Mr. DURHAM. Does a defense attorney appear before this rehearing board at all, or doesn't he have the privilege of appearing before them?

General HOOVER. Yes, sir, he does appear in the rehearing. It is a trial de novo in every respect. We have the provision that no member of the court who participated in the original hearing may participate in the rehearing. There is an entirely new court, but the defense counsel and the trial judge advocate may participate in the rehearing. There is also a provision that the sentence adjudged on the rehearing may not be more severe than that adjudged on the original hearing, and on rehearing the accused cannot be tried for any offense or part of any offense of which he was found not guilty on the original hearing.

Mr. DURHAM. How about new evidence?

General HOOVER. New evidence may be introduced.

Mr. ELSTON. In other words, they apply the jeopardy rule?

General HOOVER. Yes, sir, they apply the jeopardy rule.

Mr. CLASON. What would have happened in the Durant case? The defendant's lawyers raised the question of whether the indictments were properly drawn, because of the fact it refers to nobility or titled persons in Germany as the owners of the jewels. Supposing that indictment was thrown out, would they have to try the Durant case all over again?

General HOOVER. It would be possible for the reviewing authority to direct a rehearing, yes; if he thought that serious error had been committed in the case he could direct a rehearing.

Mr. CLASON. How would there be any jeopardy, then, if you start a rehearing? Wouldn't you start all over again, with a new indictment?

General HOOVER. Oh, I didn't understand you, sir. The jeopardy rule would apply only if the court found him not guilty of that specification.

Mr. CLASON. I see. Is it customary in courts martial to start a trial outside the United States and then the whole court and everybody else, along with a million and a half dollars' worth of jewels, be flown to the United States and then flown back to Germany?

General HOOVER. It has not been done frequently.

Mr. CLASON. Has it ever been done before?

General HOOVER. I can't say, sir.

Mr. CLASON. It seems rather a strange way to conduct a court, to start it in a foreign country, then come here for a long time, and then go back to Germany. It must be a very expensive way for the Army to conduct a court martial. There is nothing in this bill, though, that would indicate the defendant is entitled to have his trial in one place.

General HOOVER. No, sir. The principle is that the jurisdiction of courts martial is not territorial in any sense.

Mr. CLASON. Well, can't a defendant demand that if trial starts in one city it must be finished in that city?

General HOOVER. We have no such rule, sir.

Mr. ELSTON. There is no such thing as venue in a court martial case?

General HOOVER. No, sir, there is no such thing as venue in a court martial case.

Mr. CLASON. Why isn't a defendant put at a distinct disadvantage? Supposing a trial starts in Washington and he has Washington attorneys and then the Army decides that they will move over to Chicago or San Francisco or over to Germany for a while, how is the defendant properly taken care of?

General HOOVER. I think the Army will try to see to it that he is not prejudiced in any way. Now, if the appointing authority should err in that regard there would be the appeal under article of war 50½.

Mr. CLASON. But in the meantime his expense will climb high, because the Washington attorney, if he is out of town, is certainly going to charge plenty.

General HOOVER. I can see the possibility of such a result.

Mr. CLASON. All right.

General HOOVER. The amended article of war 53 is entirely new. I may say that the conception, the idea of it is taken largely from Mr. Durham's bill. It provides for a new trial as distinguished from a rehearing, after the sentence has been ordered into execution. It provides for the grant of a new trial upon application to the Judge Advocate General and gives the Judge Advocate General the power to grant a trial de novo, a new trial in every sense, or to vacate sentences and restore rights and privileges lost as a result of executed sentences. It is limited in time to 1 year after final disposition of the case on appellate review and in the case of World War cases to 1 year after the termination of the war or final disposition, whichever is the latter. It is also provided that there shall be but one application for new trial in any one case. The principle of this article is adopted with the thought that it will provide a means of correcting possible injustices, particularly with respect to cases tried in time of war where the accused person may not have had an opportunity to present fully his defense in ordinary course.

Mr. ELSTON. As I see it, General, there are two limitations on this right. The first is the petition for a review which would have to be in accordance with regulations issued by the President.

General HOOVER. Yes, sir.

Mr. ELSTON. And in the second place, the Judge Advocate General would have the discretion of saying whether or not the petition could be entertained.

General HOOVER. Yes, sir. His decision in that respect would have to be final, and it is so provided in the amendment.

Mr. ELSTON. Why shouldn't it be an absolute right, rather than discretionary right?

General HOOVER. Because good cause ought to be shown before the Government is put to the expense of a new trial. If it were not discretionary, I think we should have to retry a great many cases where there would be no reasonable cause for a new trial at all. Take the ordinary desertion case, where the man admitted his absence, admitted his intent to remain away from the Army during the war. He was given a sentence within normal limits. His application for new trial is not accompanied by any showing that he was prevented in any way from presenting his defense or by any showing that he has new

evidence, or by any showing that error was committed. There would not seem to be any reason in such a case to grant a new trial.

Mr. ELSTON. What would the procedure be if a petition for a new trial were filed? Would the accused be granted a hearing on his petition?

General HOOVER. Yes, sir.

Mr. ELSTON. To determine whether or not good cause was shown.

General HOOVER. A hearing under the regulations to be prescribed is contemplated; yes, sir.

Mr. ELSTON. It would be contemplated that in that hearing the accused could appear and offer any evidence and could have counsel representing him for the purpose of convincing the Judge Advocate General that a new trial should be granted.

General HOOVER. Yes, sir.

Mr. ELSTON. In other words, it would not be passed upon simply on the petition itself?

General HOOVER. Nor on the record of trial itself. The accused person would be offered every reasonable opportunity to present anything that he wished in support of his motion for a new trial.

Mr. ELSTON. I am glad you clarified that because it is not entirely clear from the section itself, and that question certainly would be raised.

General HOOVER. I think it must be clear. I think the authority for granting new trials would not be effective unless the opportunity for a hearing be provided. In drafting the amendment, it was contemplated that such matters would be covered in the regulations to be prescribed by the President.

This article 53 is the last of the articles relating to procedure of courts martial. The following articles are called punitive articles and define the offenses for which persons subject to military law may be tried. The first change that is proposed is in article 70, which in its present form provides for the pretrial investigation. The committee will recall that we have transferred the administrative provisions of that article to article 46. There remains in article 70 the present penal provisions with respect to unnecessary delay in trials.

Mr. ELSTON. I suppose it would be impossible to fix a definite period of time within which a person should be brought to trial?

General HOOVER. We feel that it would be impossible. This matter of delay is always one of concern to those administering military justice. We find that unless there are going to be miscarriages of justice, there are some cases in which delays are inevitable because of the complicated nature of the case, because of the absence or the illness of witnesses, or because documentary evidence necessary to prove the case cannot be obtained. About all we can do is to hold responsible officers to a general standard of effort in expediting trials in the most effective ways possible. The penal provision punishes them for failure to take reasonable steps to expedite trials.

Mr. ELSTON. And that is a new provision?

General HOOVER. No, that is the old provision, sir.

Mr. ELSTON. Well, apparently the old provision was not strictly adhered to during the war, because there have been many complaints of delay.

General HOOVER. There have been delays in trials. I think they were isolated cases. Unfortunately, there have been too many of them.

Mr. ELSTON. Do you know of any case where any officer has been court-martialed because of delay?

General HOOVER. I do not, offhand. I wouldn't want to say, Mr. Chairman, that there have not been cases. I would have to look at our files to see, but I do not personally know of any.

Mr. SMART. Mr. Chairman, in that connection I would like to add that overseas, when we had a court-martial case, be it special or general, we usually had a suspend sheet which showed on the left-hand side of the page the items which should be accomplished in bringing this matter to trial and even through trial and to the reviewing authority. On the right side of the sheet there were the number of days or the amount of time that each successive handling agency was allowed to accomplish those things. Then there was a blank space opposite those days or the time in which the officer accomplishing those things wrote in how long it took him to handle it. Now, if he took any longer than that he had to reply by endorsement and state why he took any longer, and presumably the officer who did take longer than that was subject to the ninety-sixth article of war. However, as you say, I never did see anyone get court-martialed because of the delay, and I did see many delays.

Mr. DURHAM. That is being done at the present time by regulation, isn't it?

Mr. SMART. That is true, Mr. Durham.

General HOOVER. The maintenance of those time sheets is a regular practice.

Mr. DURHAM. I think that is a good practice.

General HOOVER. It is a necessary one, sir.

Mr. DURHAM. I don't see how you could write in a definite date.

General HOOVER. I agree. Especially in the combat areas, a man may be placed in confinement by an officer, the officer may be suddenly called on to go elsewhere and the man in confinement may be forgotten. It is a vital necessity that records be kept in those cases and that some one officer be made responsible for prevention or delays.

Mr. DURHAM. And your Department can assure this committee of course, that you will expedite confinements and get them to trial as speedily as you possibly can, and do it by regulation?

General HOOVER. Yes, sir.

Mr. DURHAM. Rather than by writing some definite date into the act?

General HOOVER. We think that the writing of a definite limit into the statute would be unworkable.

Mr. DURHAM. Well, it is one of the chief complaints during this war, you know.

General HOOVER. Yes, sir.

Mr. DURHAM. Because we ran into many cases where they spent as long as 90 days, or 3 months in confinement.

General HOOVER. I appreciate that.

Mr. DURHAM. It is a very bad practice.

General HOOVER. Yes, sir.

Mr. DURHAM. In the civil courts, as well as the court-martial system.

General HOOVER. The War Department has taken a keen interest in the subject. During the war, in the United States, it set up an elaborate system of reports and requirements as to prompt trials, which worked very effectively within the United States. Some attempts were made to set up similar systems in the theaters, but they were not quite as practicable there. Combat requirements came first.

Mr. DURHAM. Well, there is very little excuse for much delay in peacetime.

General HOOVER. There is no excuse, unless the complication of the case or the loss of records or the sickness of witnesses or like impediments require delays.

Mr. ELSTON. Has it been the policy of reviewing boards to consider the time that a man was confined awaiting trial?

General HOOVER. Yes, sir. It is the policy of the reviewing authorities to consider the time spent in confinement, and it is also the policy of the Judge Advocate General's office to do the same thing. If the delay is overlooked by the reviewing authority, the Judge Advocate General may and frequently does recommend some reduction in the sentence to equalize the matter.

Mr. CLASON. By the way, in smaller communities, where you have criminal courts sitting only twice a year, even in civil cases if a man is arrested right after the sitting of the criminal court, he is likely to be in jail 4 or 5 months before he is tried.

Mr. DURHAM. He can get a bond.

Mr. CLASON. A lot of them can't get bonds in criminal cases, and he is in jail for a long time, even under our civil procedure.

Mr. DURHAM. He still has the bond.

Mr. ELSTON. Or a petition for a writ of habeus corpus.

Mr. DURHAM. Yes.

General HOOVER. The next change in the punitive articles is under article of war 85, which punishes persons subject to military law for being drunk on duty. The present article makes dismissal mandatory in the case of an officer who is found drunk on duty in time of war. That is limited to the case of the officer. The amendment would make the punishment discretionary with the court in all cases, including those of officers. Now, the reason for dropping this mandatory requirement is that it has been found that in many cases where a court is confronted with dismissing an officer for a slight degree of intoxication, enough to come under the statute, but slight, while on a relatively unimportant duty, the court is apt to acquit him. We think the results will be better if the matter is left to the discretion of the court.

There is no suggestion here that the standards of officers are to be lowered.

Mr. ELSTON. Punishment is the same for an officer or an enlisted man?

General HOOVER. They are put on the same basis.

Mr. CLASON. What is the definition of drunkenness in the Army?

General HOOVER. I think I can repeat it: "Any degree of intoxication sufficient sensibly to impair the faculties of the person involved."

Mr. DURHAM. Who determines that? The psychiatrist?

General HOOVER. I think we defined drunkenness before the psychiatrist came along.

Mr. ELSTON. That definition might even include a hang-over?

General HOOVER. The definition is pretty liberal, from the standpoint of the Government. A slight degree of drunkenness comes within the article, under the definition. That is one reason we have had trouble with it.

Mr. CLASON. Ought not that be changed then, in fairness to the persons that are accused of drunkenness?

General HOOVER. I think the courts will take care of it, with all fairness to accused persons. Of course, some drunkenness, although slight, is in some situations a very serious thing. The Army has never tolerated it and doesn't want to tolerate it.

Mr. DURHAM. How about a second offense?

General HOOVER. Well, it is going to be harder on the man.

Mr. CLASON. Can you have a second offense? I understood the fellow who is convicted the first time is dismissed.

General HOOVER. At present he is dismissed, but the sentence may be commuted or suspended. We have had repetitions.

Mr. CLASON. You have had second offenses?

General HOOVER. We have had cases where there were two offenses.

This brings up to article 88. The present article 88, as noted in the report of the Committee on Military Affairs of the House in the last session and by the American Bar Association committee, is an obsolete one. It provides that—

> any person subject to military law who abuses, intimidates, does violence to, or wrongfully interferes with any person bringing provisions, supplies, or other necessaries to the camp, garrison, or quarters of the forces of the United States shall suffer such punishment as a court martial may direct.

It was an old article designed to cover the case of the officer, I suppose, or anyone else who interferred with a sutler bringing supplies into a camp. The article is not used at present. We have dropped the old clause and have substituted for it the new provisions with respect to the unlawful influence of the action of courts martial.

Mr. ELSTON. General, I am wondering what you mean by the term "or unlawfully influence the action of the court martial"?

General HOOVER. We mean by that, among other things, to permit lawful influences of the action of a court, such as might be exercised by the defense counsel or by the trial judge advocate in this argument before the court.

Mr. ELSTON. "Unlawfully" usually means violation of a law. You might influence a court wrongfully and still not do it in violation of any law.

General HOOVER. Well, we think the duties of the trial judge advocate and the defense counsel are fixed by law, by the Articles of War, so therefore their actions would not generally be unlawful. We also propose to amend the Manual for Courts Martial to prohibit certain things and to permit certain things. The publication of the rules in the Manual for Courts Martial would make certain acts unlawful, others lawful.

I may go back a moment. Our theory is that we are making the prohibition quite broad in its scope, without attempting to define any particular means of coercion or unlawful influence. We would amend the manual, for example, to expressly forbid the reprimand of a

court martial in any particular case. We would allow the court martial to receive instruction from the appointing authority or from other proper persons where the instruction did not relate to a particular case. We would allow, it is contemplated, the appointing authority to advise the court of the prvalence of a particular kind of offense in the command. We would allow proper instruction of the court, orienting the members with the general situation.

Unlawful influence, Mr. Chairman, in my understanding, is meant to include any influence which is forbidden by the Manual for Courts Martial and is meant to exclud influence permitted by the Articles of War as the manual with respect to the duties of the trial judge advocate and the defense counsel or others.

Mr. ELSTON. General, I would like to get your opinion about section 8 of Mr. Durham's bill, which provides that—

> the authority appointing a general, special or summary court martial shall not censure, reprimand, or admonish such court, or any member thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise, by such court or any member thereof, of its or his judicial responsibility.

General HOOVER. I think that our proposed amendment covers all of the ground covered by the clause you have just referred to and goes perhaps a little further than that clause goes. As I said a moment ago, we would have the manual, in filling in the details of our amendment, expressly prohibit censure, reprimand or admonishment of any court with respect to the findings or sentence. I think that some of our difficulties in this regard may have arisen from a presently included clause in the manual which permits a reviewing authority to advise the court of his nonconcurrence in findings of not guilty. We intend to delete the clause.

Mr. ELSTON. I think we should make it perfectly plain, in unmistakable language, that a commanding officer is prohibited from censuring the court before or after a finding.

General HOOVER. The War Department is in agreement in principle. We think that we have accomplished it in our amendment. If we haven't, it should perhaps be changed.

Mr. ELSTON. I am not entirely sure the section as written makes it very clear.

General HOOVER. We thought that the prohibition against attempts to coerce would cover any reprimand, admonishment or censure before or after the trial.

Mr. ELSTON. Well, we can perhaps use some language that will make it clear.

General HOOVER. It is a matter of the use of language. I think there is no difference in the intent.

(Discussion off the record.)

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 11, LEGAL,
Thursday, April 24, 1947.

The subcommittee met at 10 a. m., Hon. Charles H. Elston (chairman) presiding.

Mr. ELSTON. You can take up, General Hoover, where you left off yesterday.

General HOOVER. We had reached article of war 89. The change in this article is not of great consequence, but is intended to clarify the meaning with respect to that clause which at present provides that one who willfully destroys any property whatsoever, unless by order of his commanding officer, shall be punished as a court martial may direct. It would appear that any intentional destruction of property would be willful, and the effect therefore is quite broad. We propose to ask that the clause be changed to provide that any person who wrongfully destroys any property whatsoever, and so on, shall be punished as a court martial may direct. The purpose is one of clarification only.

The next article changed is article 92. The result of the proposed amendment is to remove the mandatory alternative punishments for murder and rape and to provide that murder, what we might describe as first-degree murder, shall be punished by death or imprisonment for life, and that murder not premeditated shall be punished as a court martial may direct. As the article now stands, there is only one degree of murder and we have found that imprisonment for life, which is now the mandatory minimum sentence that may be imposed for that offense, is in any cases too severe. The amendment, we believe, will allow elasticity and proper punishments according to the seriousness of the offense.

Mr. ELSTON. General, when a court-martial verdict is rendered in a murder case, does the court indicate whether the crime was premeditated or not?

General HOOVER. Premeditation, or deliberation, is one of the usual allegations in the specification, under the form provided by the Manual for Courts Martial.

Mr. ELSTON. Of course, they might set that forth in the specifications and the court find otherwise.

General HOOVER. The court might find an accused not guilty of premeditation, yes, sir, but still find that an accused had committed the homicide with malice aforethought, which would be the test of murder.

In that case the punishment would be discretionary.

Mr. ELSTON. Would the term "murder" here include manslaughter?

General HOOVER. No, sir. Manslaughter is punishable under the ninety-third article of war, both voluntary and involuntary manslaughter.

Mr. ELSON. What about the very aggravated case of murder that may not be premeditated, for example, killing while perpetrating or attempting to perpetrate rape, arson, robbery, or burglary?

General HOOVER. If without premeditation the punishment would be in the discretion of the court martial, which would mean that the death penalty could not be imposed.

Mr. ELSTON. Even though it is in the perpetration of a very serious crime?

General HOOVER. Yes, sir; if the test is premeditation.

Mr. ELSTON. Then, if a soldier were to attempt to commit rape and succeeded he could be sentenced to death, but if he faild to commit the crime of rape but killed his intended victim he could only be given a life sentence.

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General HOOVER. Unless the court should find premeditation. Our definition of premeditation would not involve any particular time or period in which the premeditation was entertained. I believe that murder under the circumstances you describe might normally come under the first clause, which would authorize death or imprisonment for life.

Mr. ELSTON. But there might be a case of where there was no premeditation at all.

General HOOVER. Yes, sir.

Mr. ELSTON. But the killing occured while the slayer was engaged in the commission of a very serious crime such as rape.

General HOOVER. If there were no premeditation, as I understand the wording of the proposed amendment, the death penalty could not be imposed.

Mr. ELSTON. The reason I asked those questions is because in the State of Ohio, for example, murder in the first degree is committed where the killing is with premeditation or intentionally but without premeditation, while committing or attempt to commit rape, arson, robbery, or burglary.

General HOOVER. We do not attempt to make that distinction here.

It may be noted that under the proposed amendment to this article, the mandatory punishment of death or life imprisonment for rape is removed and the punishment is made death or such other punishment as a court martial may direct. We have many degrees of culpability in rape cases. There may be elements of violence in one which are not in another. There may be elements related to the character of the woman or related to the possibility of the belief by the accused that consent was in fact given.

Mr. ELSTON. Where is rape defined in military law?

General HOOVER. In the Manual for Courts Martial.

Mr. ELSTON. And does the manual make a distinction between rape with consent and rape without consent?

General HOOVER. No, sir. I will read the definition. It is very short. It is taken from paragraph 149a of the Manual for Courts Martial. [Reading:]

> Rape is the unlawful carnal knowledge of a woman by force and without her consent.

Mr. ELSTON. What about the case of rape with consent on a girl under a certain age?

General HOOVER. We punish under the ninety-sixth article of war for carnal knowledge of a female under the age of consent, which as fixed by the Federal statutes is 16 years, but that so-called statutory rape is not within the definition of the manual covering the ninety-third article of war. The rape we are talking about, under the ninety-third article of war, is common law rape.

With respect to article of war 93, which is the article denouncing the common forms of felony, the only change we make is to strike out the term "embezzlement" and to add a proviso to the effect that any person subject to military law who commits larceny or embezzlement shall be guilty of larceny within the meaning of this article.

Mr. ELSTON. Do you make any distinction between grand and petty larceny?

General HOOVER. We do not, in the article. We do make a distinction in the quantum of punishment that may be imposed, as fixed in paragraph 104c of the Manual for Courts Martial. The purpose of this amendment is to remove the technical distinction between larceny and embezzlement which in many cases becomes very difficult of application, particularly with personnel administering courts martial who are not thoroughly versed in the law. Larceny, as we know, at common law requires a trespass, whereas embezzlement is the fraudulent conversion of property into whose hands the property has lawfully come. We soon find ourselves in the area of custody as distinguished from possession. The proposed amendment we think follows the trend of most State jurisdictions toward avoiding the technical distinctions between larceny and embezzlement.

Mr. ELSTON. I am wondering why in article 93 you mention specific crimes and do not include all crimes which are ordinarily considered to be felonies?

General HOOVER. The article has been on the books for some time and is intended, as I understand it, to cover the most prevalent felonies.

Mr. ELSTON. What would you do in the case of a felony that is not referred to in article 93?

General HOOVER. If it were a felony under the laws of the United States it would be punishable under a clause of article of war 96, which provides for the punishment, among other things, of all crimes or offenses not capital. It is a comprehensive clause which has been construed to mean all crimes under the Federal statutes of general application other than those defined in the ninety-third article of war or elsewhere.

Mr. ELSTON. And what punishment may be meted out in those cases?

General HOOVER. The punishment prescribed by the Federal statute is the maximum, unless the President has prescribed a lesser punishment.

Mr. ELSTON. It wouldn't be, then, as a court martial may direct.

General HOOVER. As far as the ninety-sixth article of war is concerned, the court martial may impose any punishment up to life imprisonment, but——

Mr. ELSTON. So that if you construe articles 93 and 96 together, the court martial may impose most any sentence short of a death sentence.

General HOOVER. As far as the articles are concerned, but the President has prescribed limitations of punishment which cover all of those offenses, substantially all, I should say, of those involved in article 93 and a great many that are covered by article of war 96.

For example, we have a maximum prescribed for the offense of obtaining money or property by false pretenses, punishable under article 96. Depending on the amount involved, the maximum confinement would run from 6 months to 5 years, which I think is somewhat less than the penalties authorized in the Federal statutes on the subject.

Article 94 in its present form details specifically a number of forms of fraud against the United States. There are a great many forms of offenses involved in frauds against the United States. The present terminology is substantially identical with that of the statutes in the Criminal Code of the United States applicable in the United States civil courts. For the purpose of clarification and brevity,

therefore, we have stricken out the particular descriptions of frauds and have substituted a general clause which would make punishable anyone subject to military law who defrauds or attempts to defraud the Government of the United States or any of its agencies in any manner denounced by the Criminal Code of the United States or in any manner whatsoever. It is intended to be a comprehensive clause covering frauds against the United States.

We also make a change with respect to the term "embezzlement," similar to that under article 93, the embezzlement of property furnished or intended for the military service being a specifically denounced offense under the ninety-fourth article of war, although the offense in its nature is the same as the embezzlement denounced in article of war 93.

Mr. ELSTON. Under what article would conspiracy be punishable?

General HOOVER. Conspiracy to defraud would be punishable under the ninety-fourth article. That is, conspiracy to defraud the United States would be punishable under the ninety-fourth article of war.

Mr. ELSTON. It is not specifically mentioned in the ninety-fourth article, is it?

General HOOVER. Except by assimilation or reference, where we provide that anyone who defrauds or attempts to defraud in any manner denounced by the Criminal Code of the United States, or any manner whatsoever, commits an offense under this article.

Mr. ELSTON. Of course, conspiracy can be committed without an actual attempt. That is, several persons may get together and conspire to defraud the United States and never make any actual attempt to carry their plan into execution. Under the Federal statutes, it would be punishable as conspiracy.

General HOOVER. Under present procedure we may punish conspiracy, what we call common law conspiracy, that is, a mere unlawful agreement to do an unlawful act, without an overt act, under the ninety-sixth article of war and go to the Federal statutes for the maximum punishment.

The amendments to article 94 also contain a somewhat abbreviated restatement of the circumstances under which persons who have been discharged or released from the military service may be brought to trial for violations of article of war 94 and for stealing or failing to account for property or money held in trust for enlisted persons or as an official custodian.

Mr. ELSTON. General, what is the general rule with respect to offenses committed while a person is in the military service but his crime is not discovered until after his severance from the service?

General HOOVER. The general rule is that a person subject to military law who is once discharged may not thereafter be tried for an offense committed while in the military service prior to his discharge. The theory is that the individual passes to the status of a civilian at least for the time being; that when he becomes a civilian, under constitutional principles he is not subject to military law; and that the subsequent trial would be an attempt to revive a jurisdiction which has once lapsed. We have always taken the position that at least in those cases where no specific authorization is provided by the Congress there should not be an attempt to impose military jurisdiction. Our present clause is substantially the same as that added to article of war 94 by the amendments of 1920.

Mr. ELSTON. What would happen in the case of a person who was arrested for the commission of some offense while in the military service, but his period of enlistment expired before he was brought to trial?

General HOOVER. We continue with the trial upon the theory that jurisdiction once attaching continues until the disposition of the case. We have a considerable number of such cases.

Mr. ELSTON. Then, as I understand it, if the person is in the military service and he is discharged and it is thereafter found that he has committed some military offense not punishable in the civil courts, he would be completely exonerated.

General HOOVER. Yes, sir; as concerns court martial, except under the provisions of article 94 that we are now considering.

Mr. ELSTON. That refers, however, to just a few specific offenses.

General HOOVER. That is right; it refers, generally speaking, to frauds against the United States or theft or embezzlement from enlisted persons or of funds held as an official custodian. We have had some cases in recent months in which we have had great difficulty in finding any forum in which a man could be brought to trial following his discharge, the offense having been committed, in most of these cases, outside the territorial limits of the United States.

Mr. BROOKS. May I ask a question?

Mr. ELSTON. Yes.

Mr. BROOKS. General, in that case, of course, the civil courts have no jurisdiction.

General HOOVER. The Federal district courts would not generally have jurisdiction, as I understand it, unless the offense were committed in the district, or on the high seas, or on our ships in harbor.

Mr. BROOKS. Correct. Now, under this article 94, of course there is granted jurisdiction after the man has left the service, but he could also be tried certainly under a very similar statute.

That makes it a penalty to wrong the Government by larceny or embezzlement.

General HOOVER. Yes, sir; if we can find the forum in which to try him.

Mr. BROOKS. Yes.

General HOOVER. The kind of case that I referred to a moment ago would be illustrated by murder committed, we will say, in France. For some reason the complicity of the accused is not ascertained until after his discharge. We haven't any way to bring him to trial before a United States civil court.

Mr. BROOKS. Don't you think that ought to be corrected?

General HOOVER. I doubt we can do it under the principles we have always followed. We have felt that there should not be an undue extension of military jurisdiction to civilians.

Mr. BROOKS. What would happen in the case where—in Guam, for instance—there was a complication between a soldier and an American civilian working out there, and the man was discharged before trial.

General HOOVER. I think that case would probably come within our amendment here, because it would involve a trust relationship.

Mr. BROOKS. That only involves property.

General HOOVER. Yes, sir.

Mr. BROOKS. The amendment to which you refer involves only property.

General HOOVER. Yes, sir; it would not cover an offense of murder, for example.

Mr. BROOKS. Or mayhem, or anything of that sort.

General HOOVER. No, sir; it would not cover that type of offense. It has been argued that the Congress might constitutionally extend jurisdiction in those cases; that is, in the case of the ordinary felonies. My own view is that there would be a serious doubt as to the constitutionality of such an extension of the military jurisdiction over the civilian. The Constitution gives the military jurisdiction only in cases arising in the land forces.

Mr. ELSTON. General, don't you think the constitutional prohibition would be satisfied so long as it could be shown that the offense was committed while the offender was under military jurisdiction?

General HOOVER. That is the basis of the argument in favor of extending the jurisdiction to all types of offenses. We have taken the view the term "cases" as used in the fifth amendment involves not only the commission of the offense, but, with purely civil offenses, jurisdiction over the man as a member of the military forces.

Mr. ELSTON. If you don't extend it to all types of offenses, I am wondering if you might not find yourself in a rather embarrassing position some day. Suppose, for example, the case that is now being tried involving the theft of hundreds of thousands of dollars worth of jewels had not been discovered until after the offenders had been separated from the service.

General HOOVER. Our position in the matter does prevent trials by court martial in certain cases.

Mr. ELSTON. In that case, they would not be punishable had they been separated from the service and their crime was not discovered before they left.

General HOOVER. By the military courts, that is correct; yes, sir.

Mr. ELSTON. They couldn't be punished in any Federal court because the offense was committed in some foreign country.

General HOOVER. Perhaps in that particular case, the offense having been committed in occupied enemy territory, a military commission would have jurisdiction in the case. But if the offense had been committed in a foreign country such as France, not militarily occupied, the only jurisdiction would be in the French courts.

Mr. ELSTON. Would the military commission have jurisdiction over an American soldier after the soldier had been separated from the service?

General HOOVER. We have taken the view that it would have jurisdiction with respect to an offense committed within occupied territory, upon the theory that the jurisdiction of the courts in the occupied territory is not dependent on the status of the person.

Mr. ELSTON. Well, it would seem to me that if they would have constitutional jurisdiction, certainly the Army and the Navy themselves would have even more jurisdiction because they are specifically recognized in the Constitution and the military commission is not.

General HOOVER. But the jurisdiction of the military is generally limited by the Articles of War to persons subject to military law as they are defined in article of war 2. The jurisdiction depends on the status of the person.

Mr. ELSTON. Do you think that some provision should be made to provide for the punishment of persons who commit offienses while they are under military jurisdiction but who have been separated from the service and whose crime was not discovered until after such separation occurred?

General HOOVER. My own view is that the proposed provisions of article of war 94 should not be expanded because the assumption of military jurisdiction in the case of the civilian involves deprivation of the right of trial by jury. Everything considered, the Army will be better off if we do not attempt to extend the jurisdiction, conceding that we may be unable to find a forum in a few cases.

Mr. BROOKS. Mr. Chairman, along that line may I ask another question?

Mr. ELSTON. Yes.

Mr. BROOKS. General, have you had any difficulty in reference to the discharge of any man who was on investigation for a crime at the time of discharge?

General HOOVER. Yes; we have had isolated cases. The man is discharged by one administrative agency while another administrative agency is investigating his conduct.

Mr. BROOKS. The rule you enunciate there would in effect permit someone in a different branch of the War Department to grant a pardon to an offender.

General HOOVER. It has worked out in somewhat that way in a few cases. We think that it is an evil, but an evil to be suffered in order to maintain our position that the military will not reach out and try civilians.

Beginning with article of war 104, we have various articles carrying miscellaneous provisions. We propose to amend article of war 104, which gives certain disciplinary powers to commanding officers to expand the punishments authorized in the cases of officers, warrant officers, and flight officers. We also change the wording slightly to make it clear that the various punishments, such as admonition, reprimand, withholding of privileges, extra fatigue, or restriction may be combined in any one case. We have had some difficulty in interpreting the article to permit more than one of these forms of punishment. Since they are not of severe character in any case it is thought desirable that any combination of them may be used.

Now, with respect to the officer, the present article of war provides that in time of war or grave public emergency a commanding officer of the grade of brigadier general or of higher grade may, under the provisions of this article, impose upon an officer of his command below the grade of major a forfeiture of not more than one-half of such officer's monthly pay for 1 month. This clause was found to be quite useful during the war because it provided a means of avoiding trials of officers. Trials of officers, from the standpoint of the standing of the officer, his dignity and his authority, are undesirable. Furthermore, trials are cumbersome and complicated. It has been possible to bring the officer to trial only before a general court martial. Under this clause of article 104 substantial punishment, by depriving an officer of half of his pay for 1 month, was found to be quite feasible, simple, and effective. It did not particularly prejudice the officer's standing, but it was punishment in a place where the officer felt it.

It was so useful that it was thought proper to expand its provisions up to the grade of colonel, to include warrant officers and flight officers, and to extend the amount of authorized forfeitures up to one-half pay for 3 months.

Mr. ELSTON. I assume any action taken under this section against an officer would be noted in his record?

General HOOVER. It is noted in his record; yes, sir. Incidentally, it may become a very serious thing for the officer. If he is in jeopardy of reclassification or if he is subsequently tried by court martial, the fact that he has been punished under article of war 104 definitely militates against him.

It may be noted that, except for providing for combinations of punishments, there is no extension of the powers of disciplinary punishment with respect to enlisted personnel.

The article provides that the imposition of punishment shall not be a bar to trial by court martial for a serious offense growing out of the same act or omission. That is to say, if an officer should drive his automobile in excess of the speed limit, thereby subjecting himself to punishment under the one hundred and fourth article of war for a disorder, and in so driving he should culpably run over and kill a man and thereby become guilty of manslaughter, the imposition of punishment under this article for driving in excess of the speed limit would not be a bar on trial for the manslaughter. We have clarified the language in this connection somewhat to make it clearer that the imposition of punishment under this article will not be a bar to trial for a serious crime or offense growing out of the same act or omission.

Mr. ELSTON. General, the disciplinary powers that are given to the commanding officer under article 104 are in addition to such prosecution as may take place before a summary court martial.

General HOOVER. For a serious offense; yes, sir.

Mr. ELSTON. So that you have four methods of punishment in the military service: General court martial, special court martial, summary court martial, and the disciplinary punishment that may be imposed under article 104.

General HOOVER. That is correct.

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. That is to say, the administrative discharge—the form of it, the time at which it is given—is to be prescribed by War Department regulations. There is no change in substance.

Mr. ELSTON. For the record what types of separation may take place other than dismissal from the service by dishonorable discharge, blue discharge, expiration of term of enlistment, or bad-conduct discharge?

General HOOVER. There might be a discharge for the convenience of the Government, discharge for minority, discharge for physical disqualifications, discharge for dependency, and the like. 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.

The article of war 110, which relates to the reading and explanation to enlisted men of the Articles of War, we have added a requirement for reading article 24, which relates to self-incrimination, and article 28, which includes definitions of desertion in certain cases; that is, absence without leave with intent to avoid hazardous duty or shirk important service. We also add article 121 relating to the right to complain to superior authority of wrongs. The present article 110 provides that certain articles enumerated therein be read and explained. We have substituted the disjunctive, providing that the articles will be read or explained, this with the thought that the explanation that the enlisted man gets is ordinarily an idle thing. That is, it is often made by a junior officer who is more apt to confuse than to clarify in explaining the articles. It was thought that if it were definitely provided that the articles should be read or explained carefully, the explanations would be attempted only by someone who knew how to explain them. The result would be that the enlisted man would be placed in a better position.

We have also provided that a text of the Articles of War and of the Manual for Courts Martial shall be available to any soldier upon his request.

M. Brooks. Now, General, would there be any way of posting those articles?

General Hoover. Yes, sir; that is one way it could be done.

Mr. Brooks. Are there any provisions for posting them?

General Hoover. It is contemplated that something along that line would be required by the manual.

Mr. Brooks. I remember my service in the Army, which has been many years ago, but I never recall seeing the Articles of War or having them explained to me or in any way having any knowledge of them, save hearsay. It seems to me it might go to eliminating some offenses, if they were published in such a way that men could see them.

General Hoover. That was the object of the addition of this clause. We feel that the present acquaintance of the average enlisted man with the Articles of War is perfunctory, to say the least.

Mr. Brooks. Yes.

General Hoover. He really doesn't understand them. Anything we can do to bring them home to them we feel ought to be done.

The change in article 116, provides that the powers of an assistant trial judge advocate or an assistant defense counsel of a general or special court martial shall be those of the trial judge advocate or the defense counsel. The present clause applies only to general courts martial, and we ask that it be amended to include special courts martial also. The omission of the word "special" in the present article was perhaps an inadvertence.

Article 117, relating to the removal of civil suits to the United States civil courts in certain cases has been modified, with an attempt to clarify the language, without change in substance in any regard. Reference to an act of Congress approved March 3, 1911, is not a modern reference and has been eliminated. We are providing that the removal shall be in the manner prescribed by law.

Mr. Elston. This, of course, could not enlarge the jurisdiction of the civil courts?

General HOOVER. It is not intended to enlarge the jurisdiction or change the methods of procedure in any respect.

Mr. ELSTON. In other words, if the court has a rule that suits under a certain amount shall not be entertained, this would not change that rule?

General HOOVER. This would not change the present effect of the article in any way. The typical case arising under this article is where a soldier while on guard duty shoots and kills a man, perhaps off a military reservation, at a place where the State courts have jurisdiction. The State court seizes him and proceeds with a homicide trial. This article gives the soldier a right to contend that what he did was under color of his authority as a soldier and that because his act involved the performance of a duty under the laws of the United States he has a right to have the cause taken into the courts of the United States as distinguished from the courts of the State.

Mr. BROOKS. But you say the court must otherwise have jurisdiction to handle that type of case?

General HOOVER. Oh, yes.

Mr. BROOKS. So that a soldier who was charged with embezzlement and claimed that the transaction was under color of his authority as a soldier, if the sum was under $3,000—isn't that the limit now, in trial by Federal courts——

General HOOVER. If I have given that impression——

Mr. BROOKS. They would not have jurisdiction.

General HOOVER. I should like to correct that. I believe that any cause may be taken under this article into the appropriate Federal court having jurisdiction of the person, regardless of other limitations as to jurisdiction.

Mr. BROOKS. The test is whether or not he is in the uniform of a soldier and whether it is under color of his authority?

General HOOVER. I so understand it, yes, sir.

Some changes are made in article 121, relating to complaints of wrongs. They are changes in terminology only. The present article provides that complaints may be made to the general commanding in the locality. This is an archaic description, and we have substituted a clause providing that the complaint may be made to the officer exercising general court-martial jurisdiction over the person against whom the complaint is made. The change follows the procedure actually followed in such cases at the present time.

Our section 44 of the bill provides that the amendments shall become effective on the 1st day of the fourth calendar month after approval of this act. I am not sure that that gives us time enough. The object of it is to give us time to prepare changes in the Manual for Courts Martial, to publish the book, and get the Army acquainted with the changes before the act actually goes into effect.

Section 45 carries a clause similar to one included in the present articles which provides that offenses committed before the changes in the Articles of War become effective may be prosecuted in the same manner as if the act had not been passed.

Mr. Chairman, I believe that concludes consideration of all of the provisions of the bill.

Mr. ELSTON. General, I believe that section 45 might need a little clarification. Does this section mean that any person who may have

heretofore committed an offense, which offense has not been tried, shall receive all the benefits under this act?

General HOOVER. As far as the conviction of the offense, yes. He would receive the benefits of such changes in the appellate procedure as are made, but we would authorize his conviction of the offense as now defined and punishment for the offense as now authorized, although this act may change the character of the offense. An illustration would be on our embezzlement and larceny changes. If a man should commit an embezzlement as denounced under the present Articles of War and we should commence prosecution for embezzlement before the amendments took effect, the prosecution could be carried to conclusion on the basis of a conviction of and indictment for embezzlement regardless of the terms of this act.

It is my understanding that it would not deprive any person of any of the procedural benefits that might take effect upon the enactment of the amendments, if the procedural steps were to be taken after the effective date of the enactment.

Mr. BROOKS. Now, General, if some change in this act is so construed as to make some act previously a crime no longer a crime, that would not be construed according to the way you have explained it, would it?

General HOOVER. Yes, sir.

Mr. BROOKS. Wouldn't this be a legislative pardon, when we change the offense?

General HOOVER. I think the effect of this clause will be to prevent the legislative pardon.

Mr. BROOKS. So that even though under this new act a set of circumstances would no longer be an offense punishable as a crime, a soldier could still be punished for a crime?

General HOOVER. Yes, sir.

Mr. BROOKS. Wouldn't it be preferable to change this previous section in reference to the date the act should become effective, so as to put it say on the 1st day of the next year and not have these circumstances arise that way?

General HOOVER. It could very properly be extended to any time that you think proper. Four months is a little short.

Mr. BROOKS. I mean some distant date, so you could dispose of these cases and you wouldn't be trying a man for a set of circumstances which are no longer a crime under the new law.

General HOOVER. I think, for example, if it were put into effect after the sixth calendar month, it would as a practical matter permit the disposition of those cases.

Mr. ELSTON. I just don't feel that it is clear enough yet, that all persons who may have committed an offense but who have not been tried at the time this act was passed are entitled to all the benefits under the act.

General HOOVER. We have't said that expressly, sir.

Mr. ELSTON. I appreciate that we should adhere strictly to the ex post facto rule, that you can't increase a penalty.

General HOOVER. Yes, sir.

Mr. ELSTON. Or you can't try a person for an offense that was not an offense when it was committed.

General HOOVER. Yes, sir.

Mr. ELSTON. But as to benefits I believe we ought to make it clear that any person, whether his act was committed before this act was passed or not, should receive the advantages of this act.

General HOOVER. I think he should receive procedural benefits. I am not sure, Mr. Elston, that he should receive the benefit of a change in the nature of the offense.

Mr. ELSTON. Well, isn't it a general principle of law that if a person commits an offense and before he is tried the punishment is reduced, he gets the benefit of the reduction, but would not be changed with any increase in penalty.

General HOOVER. I am sure that he could not be changed with any increase in penalty. The object of this clause is to make it clear that the present penalties would apply in that case. I think we have an illustration in our amendments of article 92, with our murder penalties. For the purpose of avoiding confusion it seems to me that a man who is tried for murder under the present article, before these amendments become effective, ought to be punished as provided by the previous act. That was the act in effect when he committed the offense. We are not adding to his punishment, but we are not taking anything away from it. It seems to me it is a better result to leave him subject to the penalties in effect when he committed the act. That is a matter of legislative policy, of course.

Mr. BROOKS. Don't you think, General, as a matter of practice, if a man is convicted under a law that we repeal the Executive is going to give him a pardon?

General HOOVER. I think so.

Mr. BROOKS. That is customary.

General HOOVER. Oh, yes.

Mr. BROOKS. Now, if we change the nature of a crime so that the man would no longer be guilty of that type of crime, then in effect we give him a legislative pardon?

Now, if we change the offense to lessen the punishment, we are to that extent making it a less serious crime.

General HOOVER. I think from the standpoint of punishment and of clemency you are entirely correct, that we would adjust the punishment to the latest expression of views by the Congress, but the thought with this article is that it makes for certainty and avoids confusion. It settles the situation from the legal standpoint.

I do not believe that we have, by the amendment, made any act not a crime, which is a crime under the present articles. We have changed the nomenclature with respect to embezzlement and larceny and we have changed the punishment authorized in the case of murder and rape, but I do not believe there is any case in which a crime is now defined by the articles which will not also be so defined under the amendments.

Mr. ELSTON. Don't you think a person who is charged with murder or rape and who has not been tried when this act becomes effective should receive the benefits under article 92 as amended?

General HOOVER. I do not believe that he should, as far as his legal guilt and his legal amenability to punishment are concerned. The whole transaction should be governed by law in effect when he committed the offense.

Mr. ELSTON. Well, you might send a person to death who would not be sent to death after this act was passed.

General HOOVER. I think that from the legal standpoint that is a correct legislative principle. I think that administratively it would be extremely bad policy and that we would never do it. That is to say, in a murder case, if we thought that premeditation were not proved, we would reduce the penalty accordingly, but do it as a matter of clemency rather than as a matter of legal limitation.

Mr. BROOKS. The other day, you explained the matter of premeditation and you made some reference to the fact that that might be lacking as a quality of the offense under certain circumstances. For instance, a person, as Mr. Elston indicated a while ago in his questions, charged with rape might in attempting the crime commit murder. Well, the quality of premeditation would carry with it into any crime committed, wouldn't it?

General HOOVER. I should think in that particular case you probably would have premeditation.

Mr. BROOKS. In other words, isn't it the rule that a person presumes a natural result in his actions?

General HOOVER. That is the theory, as I understand it. If the murder is the probable result to be expected from the way the rape is committed, the murder is premeditated.

Mr. BROOKS. If you shot at a man intending just to wound him, but he dies, why it carries with it premeditation.

General HOOVER. Yes, sir. A case not involving premeditattion might be one in which there is a quarrel or a dispute but no legal provocation for shooting, but one of the men on the spur of the moment in actual anger or passion shoots and kills his opponent. The element of premeditation there just about disappears.

Mr. BROOKS. Yes.

General HOOVER. He acted intentionally, but he never planned the thing. It was never premeditated.

Mr. BROOKS. Unless that is under what some jurisdictions would be called manslaughter. Some jurisdictions call it second degree murder, I believe it is.

General HOOVER. Yes, sir; manslaughter if prompted by legal provocation.

Mr. BROOKS. Where there is no intention. It is in the heat of passion. There is no premeditation.

General HOOVER. Yes, sir.

Mr. ELSTON. I think you will find that while the general rule is that the person is presumed to intend the natural, reasonable, and probable consequence of his voluntary acts, an intent to kill may be inferred from the nature of his act. You do not in any case infer premeditation.

General HOOVER. I think that is correct, sir. An inference of premeditation would require a basis in facts proved.

Mr. ELSTON. General, I want to thank you on behalf of the committee for your very excellent statement, which I am sure will be helpful to every Member of Congress who is interested in this subject.

Now, General Green, do you have anything to add?

General GREEN. Nothing further; no, sir.

Mr. ELSTON. I believe our next witness is Colonel Roberts. Is Colonel Roberts here?

Mr. ROBERTS. Yes, sir.

Mr. ELSTON. Your name is William A. Roberts?

Mr. ROBERTS. Yes, sir; I am William A. Roberts. I am the senior partner of the law firm of Roberts & McInnis, of this city, in the Transportation Building.

Mr. ELSTON. And you appear here this morning in what capacity?

Mr. ROBERTS. I am and have been for 2 years the chairman of the policy committee of AMVETS, and I appear for AMVETS with the authority of both the convention and the executive committee, as well as the national commander.

Mr. ELSTON. Colonel, we will be very glad to have your statement.

Mr. ROBERTS. I have a prepared statement, which is fairly short.

STATEMENT OF WILLIAM A. ROBERTS, CHAIRMAN, POLICY COMMITTEE, AMVETS

Mr. ROBERTS. 1. AMVETS approves in principle and purpose H. R. 2575 and urges its prompt consideration and adoption with certain amendments.

2. At its annual convention held in St. Louis in November 1946, the assembled delegates of AMVETS unanimously approved committee reports recommending, among other things, the following:

(*a*) The immediate revision of the judicial system of the United States armed forces so that the review of the action of courts martial should not take place through command channels or under their control but through a separate legal channel.

(*b*) That there be established a separate corps of officers and enlisted personnel of legal training and experience qualified for service in the investigation, prosecution, determination, and defense of criminal actions against personnel of the armed forces and that such corps be developed and trained in times of peace for assignment in the peacetime armed forces on temporary or permanent duty and for use in times of war.

(*c*) That provision be made for service of enlisted personnel in all positions on all courts engaged in the trial of enlisted personnel in the discretion of the appointing authority or mandatory to the extent of one-third of the court at the request of the accused.

(*d*) That the confinement of personnel of the armed forces beyond 10 days without the presentation of fully investigated charges, except only during combat emergencies, be a punishable offense.

(*e*) That all records of all cases tried by court martial be reviewed by the Judge Advocate General of the appropriate service or his authorized representatives with power to approve, disapprove, revise, amend, or suspend any court-martial sentence without increasing its penalty, and with power to direct the execution thereof by the appropriate commander in the field.

3. It would be consistent with the policy of AMVETS if there were established for the armed forces a single final appellate court subordinate only to the clemency of the President, with final jurisdiction to review the records of the proceedings of courts martial from any of the armed services. Such court should consist of legally trained and qualified members, not necessarily from the armed forces, whose tenure of office should be for life and whose procedure and compensation would be substantially the equivalent of United States court of appeals.

The amendements which AMVETS would recommend in H. R. 2575 would be consistent with above statements of principle and otherwise would be directed toward the elimination from the bill of optional qualifications and limitations which might in practice permit a commanding officer in his discretion to avoid the remedial features of the legislation.

Review of all of the reports of official and unofficial bodies who have studied the deficiencies of the system of military justice make it clear that the principal deficiencies are in the execution of existing laws and regulations. AMVETS is, therefore, of the opinion that it would be futile to enact remedial legislation unless Congress provides the funds and the machinery for the training and assignment of qualified personnel to administer the laws. It is further our opinion that the initial organization and the adoption of implementing regulations should be undertaken by the armed forces with the advice and assistance of a congressionally designated board of civilian advisers qualified with legal and military experience and representative of the principal veterans' organizations.

Those are coessential features of our comment on the bill. We feel, however, that the bill itself does not completely cover the needs and requirements for modification.

For example, the bill is directed primarily at the system of military justice in the United States Army. All through our conferences, and of the numerous subcommittees, it was equally apparent that as much and more remedial action was required in connection with the Navy. The same is true, of course, of the rather newer organization of the Air Forces.

Now, there is nothing particularly novel in the presentation of AMVETS, except perhaps the suggestion that the ultimate court of review should be one which is not under any command influence and which has dignity similar to that of the United States court of appeals, with tenure for life.

The proposals of H. R. 2575 for the equivalent of a board under the jurisdiction of a military officer, with provision for temporary service on that board, do not seem to us to be adequate.

I think it is fair to say in normal times when there is no great public interest, the inclination, if you must use general officers for such a board, is to take general officers, as well as others, who are not qualified for command functions or for administrative functions, and who are not necessarily qualified to represent either the best of the command channel or the best of judicial action.

Furthermore, all such officers are and must be, in spite of their native character, aware of the opinion and influence of the command channel when they return to other duties or in regard to privileges or subsequent assignment.

We think, in studying the history of review of court-martial action, that the two things which have caused failure in review, from the point of view of the accused, have been the influence of the commanding officer, where he appoints, controls, and sometimes reprimands the court—that is an old story to this committee, they have heard it frequently; and, secondly, the tendency in all military channels, which is always unsatisfactory to the civilian lawyer, for each reviewing channel to be extremely reluctant to find any flaw or fault in the action of the prior reviewing channel or of any court. It is

an uphill fight to obtain consideration de novo. When there are a great many cases pending for review and the staff is inadequate and the facilities are limited, there is an increased tendency to merely confirm that which has gone before without any fresh consideration, even though it be upon the record.

With regard to the recommendation, which came in many forms from many sources, in AMVETS and without AMVETS, of some imperative requirement that proper charges be made, with mandatory investigation, and presented to the accused within a very short time within his confinement, there is of course a wealth of experience. I personally have had experience in that connection, of an enlisted man who was confined and improperly so, at hard labor for 6 months, before he ever was served with any charges whatsoever except the most general charges. He was then only served with charges when, at the risk approximating insubordination I made a personal demand as defense counsel for such charges.

I might add the commanding officer in that particular instance was so disgruntled with the action of the court, the general court which acquitted the man of almost all of the charges and found him guilty of only a very minor charge, and which was so apparent and so expressed, that he refused to review the record in that case on the minor charge of conviction for a period of nearly 6 months more, during which time the man was confined in a foreign country, with convicted persons for a long period of time. The record was in fact not reviewed in the ultimate administrative channel until much longer than 6 months.

I have known of other instances where the action of the command channel in review has been so completely turned over to the former prosecuting officers appointed by the command channel that it was doubtful that there was any fresh approach to the legal adequacy or the factual adequacy of the record.

I might say also that we are cognizant of the fact that in modern warfare a great many of the personnel are not in companies and battalions and regiments, or in the equivalent combat units of the naval forces, but are in fact assigned on detached service, administrative activities, which are becoming increasingly important. It is quite evident that when masses of men are not used in combat to the extent they have been in the past, there is going to be a still further decentralization of Army forces.

Under such circumstances, it is extremely hard to hope and difficult to believe that a commanding officer will be willing to continually assign qualified legally trained men to handle disciplinary matters which are beyond his normal disciplinary jurisdiction.

In practice, the difficulty is to try to keep qualified men of a rank and compensation available for the job to try men for cases or even to act as prosecuting or defense officers on courts martial.

Generally the principles of the bill and the report of the committee—in fact the report of the committee last year contained much of what I said. I think the principal thing is that Congress should enact legislation and they should remember that both the Navy, the Army and the Air Forces all should be covered by it. There are many instances in which it is entirely possible for personnel of the Army, as in the South Pacific theater, to be under the jurisdiction of a naval commander. Personnel assigned from one or the other of the services may well be acting with respect to the other two branches of the serv-

ice. Under such circumstances, if you attempt to require by general regulation the assignment of qualified personnel for purposes of executing military justice, still the commander can very easily qualify in his own mind his first need for a good supply officer or a corresponding need for a good defense attorney and he can easily reconcile under such circumstances the assignment of an inferior officer, one without qualification or one who is completely subordinate, instead of a qualified officer.

I think that covers the basis of our testimony. As to the exact form of the amendments, we have read very carefully the prepared testimony of the American Legion and we think that in purpose their specific recommendations insofar as they go are accurate and good.

Of course, neither plan provides an adequately separate staff of legally trained personnel, heading up in a reasonably independent legal officer of the Army.

I might say—and this is testimony of my own; there was no specific action upon it—out of the conversations with many men on the committees, we felt there was an equivalent need, in effecting military justice—apart from the adjustment of the existing laws—for a great strengthening of the independence of the inspector general. I personally would like to see Congress establish the inspector general of the armed forces in somewhat the same category as the Comptroller General is with respect to financial matters in the civil government. I have seen a number of times when inspectors general, so-called, particularly in the newly established arms, have been anything but completely independent officers. I have frequently seen them consult with command officers as to their wishes with respect to inquiry, which is contrary to the purposes of the Army.

Throughout the entire discussions, during which we were served by very highly qualified officers from the Army at the convention and before—and we have had contact with a great many officers in the Army—we felt that the Army itself is thoroughly sympathetic with the view that changes be made, but all through the discussions we felt also, from even the most qualified and sympathetic officers, the fundamental indoctrinated belief of the Regular Army officer that somehow or other you get back to the fact, "How are you going to have discipline if you can't execute your judicial function through the command channel?" That psychological obstacle will be severe and difficult to overcome. We think it will take an act of Congress to establish a separate judicial system, to overcome that resistance.

Mr. ELSTON. Don't you think the matter would be largely taken care of if court-martial judges were appointed directly by the Judge Advocate General, rather than by any commanding officer?

Mr. ROBERTS. Appointed and designated for a particular court martial?

Mr. ELSTON. Yes.

Mr. ROBERTS. I think it would, if you had an adequate corps, but the tendency of course in any specialized corps is to limit the promotion, to limit the number of available grades, and to make it unpopular.

Therefore, I would assume that unless Congress set up a very rigid requirement, as a practical matter you would find that there would be insufficient legally trained officers for the Judge Advocate General to appoint.

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I do recognize the administrative difficulty in the field, particularly in small islands or in scattered Territorial possessions, in which we may well fight again, where there are small units and relatively unskilled command officers, of obtaining officers who are designated by or approved in advance by the Judge Advocate General.

Mr. ELSTON. Now, I notice that you recommend there be a single final appellate court subordinate only to the President.

Mr. ROBERTS. That is correct, sir.

Mr. ELSTON. Whose members are to serve for life.

Mr. ROBERTS. That is correct, sir.

Mr. ELSTON. How would you have them appointed?

Mr. ROBERTS. I think they well might be appointed by the President and have substantially the same characteristics as the United States circuit court.

Mr. ELSTON. You think you would get better judges that way than you would if the board were set up in the Judge Advocate General's Department?

Mr. ROBERTS. I am absolutely certain of that. I have no doubts about that whatsoever. Whenever there is intense public interest or whenever there is a major problem I would expect the Judge Advocate General and the Chief of Staff to see to it that men of caliber were appointed, but it is a very short time that such duties either become desirable because of the fixed position of that board and are available for political considerations or before more ambitious officers seek to get away from them in order to approach their ultimate objective. I would think men who are appointed for the purpose and who would serve for life, preferably of course in the largest number from the armed services, but certainly no such a restriction, the President might appoint, within limits, men of judicial capacity from civil life.

I think there is just as much need in connection with the large number of personnel who are involved in times of war at least in the armed services for ultimate impartial judicial consideration as there is in civil life.

Mr. BROOKS. Mr. Roberts, how do you consider the matter of a uniform system of justice for all branches of service?

Mr. ROBERTS. I think it is very important. I think it is very important that there be a uniform system of justice for all branches of service because it is increasingly clear, regardless of other considerations, that the services must be much more closely integrated. They do in practice and in fact, in many administrative jobs other than direct combat positions, work together and under command channels related to each other. I think the assignment of personnel, first started in this war, I believe, from draft to the Navy, Army, or Air Force, impartially means that a civilian soldier moving into the armed forces has no choice of his arm and he ought to be entitled to the same basic principles of administration, practices, and systems in one arm as in the other.

Mr. BROOKS. In reference to your court, you recommend an appellate tenure for life. You would have that sitting here, I imagine, in Washington?

Mr. ROBERTS. It would of course be approached only by a relatively few cases. It would operate on the record and therefore it might well sit here in Washington.

Mr. BROOKS. Would you have all major crimes appealable to it?

Mr. ROBERTS. I would.

Mr. BROOKS. Even in time of war?

Mr. ROBERTS. I would, and I wouldn't put that solely on the basis of the punishment because, as everybody knows many times a man is tried in a minor court on a minor charge for one or two motives: Either to dispose of the case quickly, without a general court because of the administrative difficulties of a general court, or because it is desired to give the man protection against subsequent criminal prosecution by a court having the power to apply a more serious punishment. I don't think it should turn entirely on punishment. It probably should be specified as to offenses as well as the punishment.

Mr. BROOKS. Of course, we permitted by act the handling of certain cases overseas, I mean capital cases, during time of war, and I am glad to say that the War Department has ceased to use that act, for a long time. You would not be in favor of continuing that, would you?

Mr. ROBERTS. Of the assignment of final jurisdiction overseas?

Mr. BROOKS. Yes.

Mr. ROBERTS. I think it always was subject to ultimate Executive clemency in the proper cases, wasn't it?

Mr. BROOKS. To the President.

Mr. ROBERTS. Yes, and it is only by he divesting himself of his authority that such can occur. I don't know of any instance—maybe there are some but I have never heard of any instance—in which the safety of the country was impaired by the preservation of ultimate recourse to the President where capital cases were involved.

Mr. BROOKS. That is all, Mr. Chairman.

Mr. ELSTON. That is all, Colonel Roberts. Thank you very much for your statement.

Mr. ROBERTS. Yes, sir.

Mr. ELSTON. Anything further, Mr. Smart?

Mr. SMART. I would like to say for the record that I have received two communications, one from the New York County Lawyers Association which was represented before the committee by Mr. George Spiegelberg and the other from the War Veterans' Bar Association which was represented by Mr. Arthur E. Farmer. Both of those communications contained suggested amendments to H. R. 2575. Rather than to increase the voluminous record, I would just like the record to show that those communications have been received and will be considered by the committee when it goes into executive session for amendments.

Mr. ELSTON. The record may so show and statements will be considered in executive session.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 11, LEGAL,
Friday, April 25, 1947.

The subcommittee met at 10 a. m., Hon. Charles H. Elston (chairman) presiding.

MR. ELSTON. Mr. Secretary, when you were before the committee a few days ago, I believe we adjourned before you had completed your statement.

Mr. ROYALL. Yes, sir.

Mr. ELSTON. So at this time we will be glad to hear from you again.

Mr. ROYALL. Thank you, Mr. Chairman, very much.

I have followed a summary of the testimony that had been given before the committee, and I would like to address myself primarily to four matters of importance as to which there is a possible difference of opinion.

We are not seeking in this case primarily to oppose or to favor the bill which the House Military Affairs Committee worked on and which Mr. Durham introduced nor are we seeking primarily to oppose or to favor the American Bar Association report itself or any other suggestions. We are just trying to get a solution which we think is the best for the Army and its members. I am sure the committee has exactly the same point of view. The changes we are proposing in this bill are pretty radical changes, the most radical changes that have been made in the court-martial system since the system was first started. We don't make any apology for making the changes radical. However, as we all know in case of any change in judicial procedures, we have to move with a certain amount of caution and to bear in mind all the considerations which affect any particular question.

The four things which seem to me to require a little additional discussion are, first, the matter of removing the courts martial and the Judge Advocate General's Department from the chain of command; second, the question of a separate promotion list; third, the question of enlisted men on the courts; and, fourth, the question of whether the preliminary investigation should be mandatory.

Some others may suggest themselves to the committee. After I complete a brief preliminary statement, I would like any such called to my attention.

On the question of preliminary investigation—I am not taking these questions up quite in the order I gave them—we follof the American Bar Association report exactly. We have provision for requiring a preliminary investigation. The only issue is whether it should be made jurisdictional. The feeling we have was partially stated by me before. First, we believe it more analogous to the civil court procedure not to make it jurisdictional. Then we feel that if a man is convicted on evidence produced in court and his guilt is proven, it is really nothing more than a technicality to go back and say, "He is guilty, but the case wasn't investigated enough in the first instance". The investigation itself cannot affect the evidence produced at the trial. The accused still has a chance to put up his defense, and under our suggestions made here he has an equal power with the prosecution to provide the evidence for his defense.

We would like to get away from technicalities. The one advantage of the court-martial system over the civil system which stands out most, is the lack of purely technical legal questions that can be raised, and that is the reason I feel—and the American Bar Association committee at least implied—that the court-martial system—even as it is—gives substantial justice—does better than civil courts. This is all I want to say about that. I think it worth the committee's reexamination and close examination to see if we can't leave preliminary examination as a requirement, but not make it a technical ground on appeal.

Now, as to the enlisted men on courts, your own hearings have shown a difference of opinion. They have corroborated to some extent what the American Bar Association found, that there were a considerable number of enlisted men who feel they shouldn't be on the courts. You perhaps heard more of them state that thought they should be. The reason for the opposition is that a great many of enlisted men would rather be tried by officers and have more confidence in them because on the average officers are the more experienced, particularly under our competitive system of selecting officers. It doesn't mean that there are not excellent enlisted men. It doesn't mean that there are not officers who are unqualified. But on the average you get a more experienced court if you have it composed of officers. If it were permissive with the enlisted man—that is, if he had the option—in many instances he would feel that he would be reflecting on himself if he did not ask enlisted men to serve and might feel that his failure to ask for enlisted men would militate against him in the trial. What we really need is the most experienced men we can get on the courts. We need a system which will provide on the average the most capable men.

We will provide by regulation for enlisted men to serve, but we don't want it frozen in the statute. There might be instances in actual operation, particularly in war and with isolated units, where it would be difficult to get competent enlisted men, unless you get them from a man's own company, which I don't think anyone wants to do. We might find in the future that enlisted men on courts would create divisions and feelings between enlisted men and officers in the same court and might militate against the needed discipline. I am in favor of trying enlisted men on courts.

I always have been in favor of trying it. I was originally in favor of making it mandatory, but I believe that to make it permissive and to provide for it by regulation and to give us a chance if it proves unsuccessful to modify it or change it, would from an over-all Army standpoint be the best solution. That is the opinion that the American Bar Association, after its many hearings, also reached. On that question General Collins, who will follow me, will have some views, perhaps, because that is one of the features of this matter that is tied in with the importance of discipline and command authority.

Now, on the question of a separate promotion list, which is closely related to the importance and influence that is to be given to the Judge Advocate General's Department, you know that in our personnel bill, which will come before another subcommittee, we seek not only an increase in the relative size of the Judge Advocate General's Department, but also to weight the promotion list of the JAG by 3 years, which will give them some advantage because of their technical training.

The only people that will have a separate promotion list will be the medical and chaplains organizations. They differ from the JAG in this respect, that they are not mutually transferable with the other elements of the Army, while in the case of the JAG we have officers transferred from the line into JAG and we have had a number of instances of officers transferred from the JAG back into the line. That circumstance and the desirability of having an over-all and single promotion system from the standpoint of morale leads us to believe that a separate list would not be advisable.

This is a long-time fight in the Army. Every time we appoint a committee to investigate any feature of Army administration, they come up, it seems, with a suggestion that that particular function be divorced from command. We had a study of food. They wanted to keep the food officers independent of the commanding officer. We had a study of morale services. They wanted to make that independent of the command officers. Even the Medical Corps, which has a separate promotion list, wants to be independent. Well, you just can't run an Army that way. You have got to give the commanding officer authority, if you are going to charge him with responsibility. That is a question that General Collins will deal with also.

Now, the final question is the general one of how far we are going to divorce the Judge Advocate General from the chain of command. We have gone terribly far in this bill. We have gone further than the command officers who have had experience in the field wanted to go. We have pushed to the limit the question of the matter of independence.

I would like to review briefly what we have done. We have given the Judge Advocate General the right to assign his officers. We have given the field judge advocate officers direct communication with the Judge Advocate General. We have given the Judge Advocate General specific duty and authority to make field inspections in the various commands. We have provided, or we will provide by regulation, that the staff judge advocates shall have direct communication with the commanding officer, so it won't have to go through G–1 or any intervening officer. This in practice means that except in the case of an obstreperous and unreasonable judge advocate officer, the commanding officer will rely on the judge advocate. The judge advocate has direct communication with his commanding officer. He is assigned from Washington. He had additional authority, which I will give you in a moment.

Now, then, in addition to that, we have given the judge advocate officers additional authority in the trial of cases. The law member must be a JAG officer, or an officer selected from the list prepared by the JAG where a JAG officer is not available. The law member is given considerably more power, more like presiding judge in a civil court. The trial judge advocate and the defense counsel will nominally be JAG officers or officers from a list prepared by the Judge Advocate General. There will be instances where that would be impractical in the field, but in no event will the trial judge advocate be a lawyer of that type and the defense counsel not one.

In the appellate procedure we have given a great deal additional power to the Judge Advocate General's Department: To confirm all general court cases; to pass on all dishonorable or bad conduct discharges of special as well as general courts, the Judge Advocate General or his direct agent reviews all dishonorable and bad-conduct discharges of general and special courts; the Judge Advocate General is given the authority to weigh the evidence; he is given the authority to mitigate, rescind, or suspend sentences; he is given the authority to direct rehearings in a discretionary manner; he is given the authority to grant new trials; and the Judicial Council is created, giving him a broad confirming authority. The Judge Advocate General and his appellate people have more authority than any appellate court that I

know in civil life. Those things are necessary, we thought—though they go pretty far—to prevent at an earlier stage inequities and inequalities.

Now, in another important respect we have protected the sanctity of the court. We have provided by our bill against the coercion or influence of the court. We intend to provide by regulation spelling that out a little more in detail. We abolish in our manual the present procedure of stating nonconcurrence with the finding of not guilty.

We will provide specifically for the court to exercise its own judgment on what is fair and right and not give a maximum sentence hoping it will be corrected later.

Those are important things. There is a little difference between our bill and the Durham bill on this question of influence. We have offered it in rather general language, intending to make it more specific in regulations. Mr. Durham's bill spells it out. We don't care about that one way or the other. As a matter of fact, it is perfectly satisfactory to take the language of the Durham bill—I believe it is 10½—and spell it out in the statute, because our intention is to prevent coercion.

Now, this question of command is a question which field commanders are better qualified to speak on than I am. My only experience as a combat troop commander was as a first lieutenant and for a while a battery commander of artillery in the first war. We didn't have judge advocates in my battery. But the higher commanders who have fought this war are entitled to have their opinion considered not only by me, but by your committee, and I am sure the committee feels the same way.

General Collins, who served in both the Pacific and the European theaters, and who was the commander of the Seventh Corps under General Bradley, will follow me in a moment, and give you the views not only of himself but of the combat commanders as a whole on this question of command.

In concluding I want to say, for whatever it may be worth to the committee, I have recently written an article for the Virginia Law Review, which was requested months ago—I tried to delay it until this bill was determined, but couldn't—and this article in the Virginia Law Review states pretty full the views of the War Department and my personal views on those matters. If at any time it would be of any service to the committee, I will be glad to give you a copy, even though it hasn't been actually published and won't be for a month or so.

I want to say, finally, I think the American Bar Association Committee was entirely correct in making the statement, which I gave you before:

> The Army system of justice in general and as written in the books is a good one. It is excellent in theory and designed to secure swift and sure justice. The innocent are almost never convicted and the guilty seldom acquitted.

If we give effect to the restoration and to the action in the initial clemency review, there cannot be any doubt that the War Department's dealing with civil type cases is as merciful as a similar disposition in the civil courts; nor can there be any question that in military type cases this is the most merciful system of military justice we have ever administered.

The approach to this problem, it seems to me, is important. We cannot follow every vagary of the man who says, "There ought to be a law." Those of you gentlemen who served in State legislatures, as I believe I said before to some of you, have learned the danger of amending basic statutes on a spot-to-spot basis. On the other hand, it would be a mistake and a most serious mistake to take the attitude that what is, is right and to resist changes that are clearly indicated. In evaluating the changes that are to be made, we must not lose sight of the point of view of the combat commanders. They feel that the Army's job is to build a fighting force and win a war. They believe that the men as a whole, particularly the good men, must be protected. This cannot be done, they say, without discipline over the cowardly and the unruly. This discipline, in turn, requires machinery for swift and effective punishment of wrongdoer. We believe the court-martial system in the past has met this situation with good success, that while discipline was being maintained, the dispensation of justice has been on the whole sound and fair and compared favorably with justice elsewhere.

We do realize, with the wide experience gained in World War II, we can and must make some improvement in the existing system.

I would like you gentlemen to hear from General Collins, who will deal with the command situation principally and possibly some of the other matters I mentioned, and deal with them from the standpoint of a combat commander who has seen a great deal of actual and active service in World War II.

Mr. ELSTON. Are there any questions of the Secretary?

Mr. BROOKS. Mr. Chairman, the other day I asked if it wouldn't be possible for the Secretary to come back. I just wanted to ask him two or three questions that I didn't have an opportunity to ask the other day. I wanted to ask you about this, Mr. Secretary:

I discussed it with you several weeks ago and that is in reference to the repeal of the statute which authorizes in certain capital cases the imposition of sentence from overseas. You are familiar with that statute. What do you think of that?

Mr. ROYALL. Well, we have recommended that all death sentences require confirmation in this country.

Mr. BROOKS. I understand that for some time you have been proceeding without the use of the statute.

Mr. ROYALL. During the war period the death sentences were confirmed in the theater. Shortly after I became Under Secretary of War, almost immediately, we rescinded that provision and since some time in the fall of 1945, I believe, all death sentences have come back to this country and been presented to me for recommendation to the President. My recollection is that three cases have been actually confirmed, that is, death cases, and executed in that period of approximately a year and a half.

Mr. BROOKS. Do you mean, Mr. Secretary, since you have started reviewing them here there have been three cases confirmed?

Mr. ROYALL. Yes. I don't know the exact date of execution in another one.

General GREEN. Three, sir.

Mr. ROYALL. Three is right.

Mr. BROOKS. How many executions?

Mr. ROYALL. I think they have all probably been executed.

Mr. BROOKS. What I was wondering about, Mr. Secretary, was the executions prior to the——

Mr. ROYALL. There were 141 executions during the war. Now, that sounds like a very large number. It is, on a man-year basis, much the smallest number of any American war. If we had applied the same rate of executions to the Union side of the Civil War—and we have the records in the War Department—there would have been in this war 1,450 executions instead of 141, on the same ratio.

Mr. BROOKS. Mr. Secretary——

Mr. ROYALL. In the Mexican War it would have been considerably greater. If we had applied the same proportion, that we used in World War I, to World War II there would have been 25 percent more in this war.

Now, only one of those cases was for anything except a civil type offense. One of them was for a very flagrant case of desertion in the face of the enemy. The others were all cases of murder or rape, or both. They were atrocious cases. I went over the records of them, rather briefly, of course, because they had already been executed, and I found that no man was executed for murder or rape committed on a German or a Jap. They were all, with the exception of some people in Sicily—there was one case involving murder and rape in Sicily, a very atrocious case—they were all against either American personnel or our allies. There was no case of an execution for rape where the man charged had ever seen the woman before he raped her. There was no case where there was any previous acquaintance at all. So they were all most flagrant types of cases.

We have sought to deal with death sentences to some extent in this bill. Maybe we are getting too merciful. I don't know. We have permitted a discretionary punishment for rape under this statute, instead of making life or death mandatory for it. We have done the same for murder without premeditation, which brings it more in line with the civil courts. We are repealing the provisions which would authorize in a future war the overseas commander to execute the sentences. The three cases which I have affirmed or recommended to the President to affirm death sentences I believe would be affirmed anywhere the death sentence was provided. I may have erred on the part of mercy, because I have set aside I don't know how many, but many more than I have affirmed.

General GREEN. That is right.

Mr. BROOKS. What percentage of those executed were overseas executions

Mr. ROYALL. You mean of the 141?

Mr. BROOKS. Yes .

Mr. ROYALL. At one time I had that figure pretty clearly in mind. I hate to give it, but I will supply that for the record.

General GREEN. About half and half, sir—half overseas and half here.

Mr. ROYALL. It was almost half and half. My impression was that it was slightly larger overseas.

General HOOVER. I think it was about 60 here and 80 overseas.

Mr. ROYALL. Sixty to eighty was my recollection, and it is confirmed by General Hoover.

Mr. BROOKS. You recommend an abandonment of that practice, do you?

Mr. ROYALL. Yes, sir. I did it with some misgivings. I realize the combat commander has a terrific problem. While I believe in capital punishment, I am not strong for carrying it out in many cases. I think that such is also the tendency of the public at large, of the Nation. I feel that a man ought to have a pretty careful review before his life is taken away.

Mr. BROOKS. Now, yesterday one of the service organizations recommended the establishment of one court of last resort in the War Department to handle serious cases, probably to be located here. Have you given that any thought, Mr. Secretary?

Mr. ROYALL. We have substantially done that in this judicial council which we have created in the act.

Mr. BROOKS. The terms of the members of the council are definite and final or are they of a limited time?

Mr. ROYALL. They wouldn't be appointed for any special term. They would be selected with great care. I think it would be unwise to freeze that by any particular type of organization. The power of review in the serious cases is very broad and we have provided for a great deal of careful review all along the line and in this council at the top. We believe it is adequate.

Mr. BROOKS. That is all.

Mr. KILDAY. General, I think allowing discretionary punishment would be the proper thing. I don't know that you are getting soft about it. My experience in prosecuting was that the prosecution was handicapped by too high a minimum punishment and frequently a guilty man gets off because of the necessity of inflicting too stern a punishment.

Mr. ROYALL. That is right.

Mr. KILDAY. Now, on the question of a mandatory preliminary investigation, I take it there is quite a distinction, of course, between a mandatory investigation and a mandatory preliminary hearing, for instance, such as we have in the civil courts.

Mr. ROYALL. There is some distinction there.

Mr. KILDAY. But isn't it your belief that a thorough preliminary investigation is in the interest of prosecution, rather than in the interest of the defense? In other words, when the case is thoroughly investigated and all of the evidence is assembled, there is much more likelihood of a guilty man being convicted.

Mr. ROYALL. We believe very strongly in it and we will provide for it as strongly as we can, without making it grounds for a technical appeal. That is the only difference we have.

Mr. KILDAY. In doing so you don't make it more strenuous on the man who might be accused, I mean in not making it a jurisdictional question. That would be, in my opinion, in favor of the accused, rather than in favor of the prosecution.

Mr. ROYALL. It would be in favor of the accused.

Mr. KILDAY. I make that point——

Mr. ROYALL. We all know, in civil life, those of us who have tried criminal cases for the defendant, we look with technical zeal at the grand jury proceedings and try to see whether the jury was properly drawn, and all that. We know when we do so, that we are just being

technical. We know it hasn't anything much to do with the guilt or innocence of the accused. I think we want to avoid just such technicalities. We should insist to the limit on a preliminary investigation, short of making it a technicality.

Mr. KILDAY. That is all, Mr. Chairman.

Mr. ELSTON. All right, Mr. Secretary, we appreciate this additional statement and thank you.

We will be very glad at this time to hear from General Collins.

General COLLINS. Yes, sir.

Mr. ELSTON. General Collins, for the record, I wish you would state first of all what your experience has been in the military service.

STATEMENT OF J. LAWTON COLLINS, LIEUTENANT GENERAL, UNITED STATES ARMY

General COLLINS. I have had 30 years experience as a commissioned officer, and served in the First World War and the recent World War. During the First World War I had quite a good deal of experience with courts-martial procedures, having been judge advocate of several courts martial. In this war I was chief of staff of the Hawaiian Department, immediately after Pearl Harbor. I then commanded the Twenty-fifth Infantry Division, which relieved the First Marine Division on Guadalcanal. My division fought through that campaign and the New Georgia campaign in the upper Solomons. I was then relieved of command of that division and assigned to command of the Seventh Army Corps, for the initial landing in Normandy. The Seventh Corps conducted the Cherbourg campaign, the break through from Normandy, and then we went on to capture Aachen and Cologne and met the Russians on the line of the Elbe.

Mr. ELSTON. General, we will be very glad to have any comment you care to make on the bill that is pending before this committee, to improve the administration of military justice.

General COLLINS. Secretary Royall and General Eisenhower were anxious to have presented to your committee the point of view of a field commander, primarily on the question of the separation of the judge advocate general wholly from the chain of command, and I am confident that what I have to say on this subject presents not only my own personal view based on my personal experience, but also on many discussions of this matter that I have had both with General Eisenhower personally, with men of the ilk of General Bradley, and others, so while I couldn't speak for them, nevertheless I am confident that I reflect their point of view.

It seems to me that the major point to have in mind in discussing this matter is that there should be no separation of authority and responsibility. The commander has the definite responsibility for his command and for everyone that is in it. How it performs in action and how it conducts itself is primarily his responsibility and we feel if you take from him any part of his authority over his command you are then definitely weakening his capacity to do his job. I think it would be a serious mistake to set up a chain of judge advocates with responsibility independent of the commanders, and I think it would frequently result in a failure of genuine justice.

I would like to cite some specific examples that come to my mind, during my own experience, to illustrate what I mean. The night before my division left Hawaii to go to Guadalcanal a company commander of one of the companies decided that that would be a good time to have a celebration, before he left Hawaii. This was a unit new in the division. The men had just been transferred to the division and these officers were relatively new. It was one of the special companies of the division. This officer had four young officers assigned to him. He sent them to Schofield and they proceeded to buy about 15 bottles of champagne, if I remember rightly, and a couple of bottles of whisky. Then they had a drinking party in the barracks to which they were assigned. This barracks was occupied by some of the senior noncommissioned officers of this company and the other half of it was the company orderly room and the officers' quarters. This party was held in the officers' section, at night. The thing got bad and the company commander began to fire his pistol. To make a long story short, one of the young officers went berserk and went outside and began to fire at people indiscriminately. In order to protect life, a noncommissioned officer finally shot him and he died the next day as a result of those injuries. Now, this occurred the night before we were to leave. It was a last-minute problem for the division commander, as you can well see. Most of the witnesses were soldiers in the camp, that is, witnesses of the major offense. I, as division commander, was notified of this about 5 o'clock in the morning. I promtly directed an investigation, an impartial investigation, by my inspector general, and we got the evidence as well as we could and as rapidly as we could.

I was impressed by the fact that, while there were five officers involved, in my judgment really only one man was responsible and that was the company commander. I left him behind, in Hawaii. Depositions were taken from the other four officers and the bulk of the witnesses of the final shooting remained there on the post. *I had charges preferred against him before we left. He passed to the jurisdiction of the post commander at Schofield Barracks. He was later tried and as I recall it, was sentenced to dismissal from the Army. Whether that sentence was ever confirmed or not, I don't know, because I had gone off to the war.

I had the four young officers in before me and talked with them. I told them that I was not going to prefer charges against them, unless they demanded a court martial; then I was going to punish them under the one hundred and fourth article of war; that I was personally convinced while they were guilty of conduct unbecoming an officer there were extenuating circumstances and I thought it would have been a very difficult thing at the beginning of their careers in combat service to have them tried by a court martial; that I was going to watch them and I was going to give them company punishment, you might say, which they agreed to accept. I gave them a reprimand and I restored them to duty in units other than the one to which they belonged. I made a new deal for the officers of that particular company. It so happened that one of those young officers was later assigned to one of the companies in the Thirty-fifth Infantry, if I remember rightly. He won a Distinguished Service Cross during the war. He was one of the best company commanders we had in the divi-

sion. Each of those four men did well in action. I saw to it that they received the commendations they merited, which would in part, at any rate, erase the blot on their records.

Now, I was able to do that as the commanding general of that division, for which I was responsible. Had there been a separate judge advocate grouping or system in there, they would have had the power of decision, and not I. I would have had to refer that case to them. I feel that I was far better qualified to decide how that case should be handled, on the spot, under those conditions, than any judge advocate could possibly have been. I believe that justice was attained thereby.

Let me give you another example. We remained on Guadalcanal, after the fighting was over, for several months unloading ships before we went into the New Georgia campaign. We were very fortunate. We had very few trials. But we did have some men who had been sentenced either by general courts or by special courts to serve a period under confinement. I was particularly anxious to see that there would be no shirking in the division in order to avoid combat, in other words, to see that nobody, just before we were ready to go into action or at any stage, would commit some offense merely to avoid action. I was also anxious to give the enlisted men who might be under duress a chance to make good again in action. So it was a standing rule in my division that whenever we went back into action all of the men in the guardhouse reverted to duty with their units and the company commanders and the regimental commanders were informed to watch those men in action and then, depending upon what they did—I suspended their sentences as soon as they were returned to duty—in action we would wipe out the remainder of their sentence completely or else very materially cut it if they did well in action. In almost every instance that was the way it worked out. Once again, I say, as commander on my own authority I was able to do that. I think that sort of thing is the thing that the commander must be permitted to do. He must have that power, just as he must have the power of the initial submission of charges, and the review of the proceedings.

I thoroughly believe in the business of review and of close coordination between the commander and his judge advocate, and every good commander that I have ever known in the Army had that very close contact. That is the main point that I would like to stress. It has been my experience, and I am sure it has been the experience of other commanders, that the commander must have authority commensurate with his responsibility. When you consider the other things that a commander does, he has control over life and death, then it certainly seems to me that you should not divorce from him the authority of his chain of command, which extends to the ultimate business of courts martial. Our responsibility for ordering men into action under terribly adverse conditions carries a far more powerful authority than the authority we now have under the court-martial system. If you can trust us with one, then I think in all logic you must trust us with the other.

Now, with reference to enlisted men serving on courts martial, I personally feel that the recommendation of the bar association and the provisions of this bill are sound. The one thing I think we should avoid is to make mandatory the serving of enlisted men on

courts martial. I think that would make the law so rigid that it would often delay the execution of justice and in some instance perhaps prevent actual justice in the case. During the war we served all over the world and there were many cases where there were relatively small groupings of men, for instance, in the China-Burma theater—and if we had mandatory provisions that required enlisted men to serve on such courts, I think often it would have delayed justice. It might have made it impossible to have a court at the place where the crime was committed. When you consider that many times the witnesses were native; or they were people that couldn't be picked up and moved from that location to some other place where there were enough men and large installations to guarantee getting qualified men, I think you will see that if you make it wholly mandatory and rigid, it would be a rather difficult provision to actually administer.

There is one other angle which strikes me as worthy of consideration. If there was anything wrong with our justice during the war, I think as a general proposition it could be traceable to lack of experience on the part of many of our officers. You must remember that we expanded our officer corps from some 16,000 Regulars and twenty-odd thousand National Guard and Reserve officers, who had had some real experience with troops up to about 900,000 officers. That is a tremendous expansion. We weren't able always to teach these chaps all of the intricacies of their jobs. Now, think how much more difficult it would be to instruct all of our enlisted men in the details of court-martial procedure. I think you would be lessening your chance of getting justice, by forcing the placing of enlisted men on our courts rather than leaving it as it is now provided in Mr. Durham's bill.

Then one final point. It seems to me that if you make it mandatory and specify that a certain percentage shall be enlisted men, you practically legislate a caste system because you imply that the officer is not going to give justice to his men. The fundamental of a good officer, in my opinion—the absolutely fundamental thing—is that they must look after the interests of their men and see that justice is obtained first, last, and all the time. There is nothing more important in his whole responsibility, it seems to me. Now, if you write into the law that there must be a certain percentage of enlisted men on the court, I assume that you would be doing this in order to ensure justice. I say at the same moment, then, you are in a sense setting up a caste system and saying that the officers are not competent to administer justice fairly to their men. I think that it would be an unfortunate thing to have this done.

Those are the main points that I have, Mr. Chairman. I would be very happy to answer any questions.

Mr. KILDAY. Just before you leave, may I ask one question——

Mr. ELSTON. Yes.

Mr. KILDAY. Would you comment, General, or give us your views, if there should be a provision giving an enlisted man accused the right to request a certain number of enlisted men?

General COLLINS. I haven't given that any particular thought, Mr. Kilday, but as a quick answer I can see no great objection to it. In other words, I think if the enlisted man desires to have enlisted men

on the court he ought to have the right to request that some be on the court. Now, whether it should be specified that a minimum number shall be detailed on the court, and so on, in this instance, I am not really qualified to answer.

Mr. KILDAY. Of course, it should provide a maximum.

General COLLINS. Yes. I think there should be provided some maximum, not to exceed a certain percentage of the court.

Mr. KILDAY. Doesn't this bill provide that it should not exceed one-third, if the convening authority finds it practical?

General COLLINS. Yes. My general slant is that it should be permissive, rather than a rigid requirement, because I think it will be difficult, very difficult to administer in many places. It may result in delays.

Mr. KILDAY. That is all I have.

Mr. ELSTON. General, I would like to ask you what system was invoked during the war with respect to the rehabilitation of men who had been accused of some offense and what success you had in it and to what extent the divorcing of the Judge Advocate General's Department from command might interfere with that system.

Generol COLLINS. Well, I had in my own division very close relations with my judge advocate, and we discussed every single case personally together. In many instances I suspended sentences, on my own authority—I had that authority—and put men directly back to duty with troops and there had commanders watch them and see how that worked out. That did work out very well. We had other cases, particularly in cases of psychoneurosis, where it was a border-line case as to whether or not a man actually was guilty of desertion in the face of the enemy or failure to leave his foxhole for an attack, and things of that character. We worked in very close conjunction with our medical officers, who of course are very important people in this picture. For example, during the fighting at Munda, in the New Georgia campaign, I formed a special group, under a very able medical officer, and when we had men that were seemingly cracking, we would send them back. In certain cases charges might be preferred against them. We had them carefully investigated and if in the judgment of the medical officer, and in my judgment if it was one of these borderline cases we always gave the man the benefit of the doubt. We put him into this special camp, where he was given a shot in the arm that put him to sleep maybe for as much as 48 hours. We did not remove him from the scene of action. We kept him right there, maybe for a week. Frequently those men could then be put right back into their unit again and make good. I had followed the same system when we first moved back to New Georgia, from our camp at Guadalcanal.

Mr. ELSTON. Another matter that has given us some concern has been the complaints that have been made about officers coercing accused persons and not giving them a fair trial, not giving them sufficient opportunity to present their case. I would like to ask you, as a field commander, whether or not any cases of that kind or very many of them came to your attention.

General COLLINS. Not a single case came to my attention during the war. However, I was a corps commander during the last part of the war. You see, I was out of the chain of command, with respect to the divisions that were under me, but I had under my own command, my

immediate command, at times as many as 75,000 in our corps troops, and no single case came to my attention.

Mr. ELSTON. Did any cases come to your attention where the complaint had been made that the court had been censured because of any verdict it may have rendered or where the court had been instructed in advance as to what the commander wanted in the way of a sentence?

General COLLINS. I have never had that experience, nor has it ever been brought to my attention, that a commander instructed a court ahead of time. In my whole experience in the Army, I have never personally run across that. I have seen, in reading some of the evidence before this committee, mention of such a condition, I have heard second-hand that in certain cases courts had been censured by commanders for failing to give as serious a sentence as the commander thought should have been given. But, as I understand it, you have a mandatory provision in this bill which forbids that in the future, and I firmly support such a provision.

Mr. BROOKS. Of course, there are cases when the Federal judge scores a jury for not having done its duty, too.

General COLLINS. That is right.

Mr. DURHAM. General Collins, you were speaking about having to confer with the medical officers. As a commander in the field, doesn't the handling of all those details require a lot of time? From the standpoint of the commanding officer in the field, doesn't he have other duties which are more important in some other department, when you are fighting, like you actually were, on these islands?

General COLLINS. No, sir; I think not. Now, I didn't confer with the medico on all sorts of details, or where he would put his aid stations, and things of that character. As I said earlier, in my judgment there are two main responsibilities that a commander has, in action. First of all, he must be sure that he is fighting a sound plan. He personally has to be up where he can see what is being done and actively take the responsibility for directing that battle, but at the same time he has the responsibility for the morale of his men, which he can never relinquish in action or at any other time, because his men won't fight unless thy have confidence in him, and unless they know he is looking after them. I never paid attention to much of the detailed procedures. But there were two things I never gave up, and I don't think any real commander will ever give up: First, the responsibility for the action itself and secondly, the business of looking after the morale of his men.

The business of seeing that justice is done, in these cases where there is a question of a man's honor or his integrity or his willingess to move up, is something I never would delegate to anybody else. Before we ever took any action on that sort of a case, I personally would always look into it. I don't think any commander should ever give up that authority.

Mr. DURHAM. That is bound to require a lot of time.

General COLLINS. Not too much because, thank God, there were not too many cases of that sort.

Mr. DURHAM. General Collins, if that had been an enlisted men's brawl, at Hawaii, instead of an officers' brawl, you would have handled it in the same way as you handled this officers' brawl?

General COLLINS. That is right.

Mr. ELSTON. General Collins, I think it has been clearly shown to the committee that there are two very important factors to be taken into consideration in the trial of court martial cases or in the administration of justice generally in the service: First, discipline, and second, the administration of justice. Now, I wonder if you would like to comment on those two factors.

General COLLINS. I think in the service it is very difficult to separate the two of them. In other words, I think that our court martial system should be designed primarily to insure justice. I think, if you don't get justice out of it, you will never have sound discipline because just as soon as men have any idea that their commander is favoring the officers as against the enlisted men or certain categories of enlisted men or not acting in an impartial way, then you immediately lower morale, and without good morale you will never have discipline. So I think you can't really separate the business of justice and of discipline. They are inextricably bound together.

There is one other point I think, that has come to mind, that may not apply directly in answer to your question, Mr. Chairman, but it is involved in this over-all question, and that is that there are two general conditions under which soldiers live: Peace and war, of course. The conditions as to administration of justice during wartime are inevitably different from what they may be, we will say, right here in Washington in peacetime. I think that that is another reason why, in writing the regulations and the legal specifications, there must be sufficient flexibility to insure that justice is obtained in time of war, when it is more difficult to obtain than in time of peace. We commanders are faced with these two radically different situations: One, peacetime, when certainly the procedures ought to be as nearly the same as civil courts as possible; and time of war, when men's lives are at stake. At such time the business of securing witnesses has to be done promptly. Maybe the man will be killed in action next day. You have to get his testimony and get action promptly. The witnesses may be wiped out, or they may have moved on. I think you have to remember that.

As I say, you have these two different conditions, and the condition during time of war is something that you gentlemen don't have to face in your civil courts at all.

Mr. KILDAY. Mr. Chairman. On that point, General, you wouldn't recommend the different procedure for peacetime and a different one for wartime.

General COLLINS. I would not, no.

Mr. KILDAY. Would you elaborate on that?

General COLLINS. Yes, sir.

Mr. KILDAY. On the question of experience that is required?

General COLLINS. Yes, sir. I think if we tried to set up one system for peacetime and another system for wartime we would merely enlarge the problem of trying to train our civilian components. For example, it is hard enough now to train these officers that we bring into active service. The officers in the Army can't practice their profession in peacetime. They can only study it. Now, if we were to try to set up one system of court martial jurisdiction in peacetime, with which

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our civilian officers could become familiar, and then a war comes along and they have to shift over and run into a different set of procedures and a different legal basis, it would be exceedingly difficult and I think it would cause confusion and would be worse than the condition we have had in the past war.

Mr. KILDAY. I agree with you, but I wanted to get it in the record, that you did not advocate that.

General COLLINS. I do not advocate that.

Mr. KILDAY. As to those instances that you mentioned, particularly in the situation that occurred in Hawaii, the proposals that have been made here by those who advocate the independent JAG, let us say, also advocate that the commanding officer have the exclusive power to prefer charges, so that that phase of it, the company punishment that you gave the young officers, could have still been handled by you in the manner that you did, under the proposal that the command would prefer charges, couldn't it?

General COLLINS. Yes, it is true, but I would have had to consult with those people, it would seem to me. Now, time was of the essence, then. We had to move fast. I didn't have very much time. We left that very afternoon.

Mr. KILDAY. Of course, you would have then been in the position of a complaining witness who institutes criminal charges in a civil court. For instance, the person who may have been hit in a fight or something of that kind.

General COLLINS. That is right.

Mr. KILDAY. You just could exercise your own judgment as to whether you would do it.

Then I am interested in the other phase. Clearly you would not have had the power to empty your guardhouses and give the man the chance to be rehabilitated.

General COLLINS. That is right.

Mr. KILDAY. Because once you prefer the charges——

General COLLINS. He would have passed more or less out of my control, don't you see.

Mr. KILDAY. Yes.

General COLLINS. And even though you might say that under the system proposed I would still have been able to consult the judge advocate, I wouldn't have had the power of decision. I say, that is something I think should not be taken away from the commanders.

Mr. KILDAY. I think the power of decision under this proposal would rest exclusively with command, under the proposal which has been outlined here; that the two things the command will have to do will be the preferring of charges and the appointment of a trial judge advocate. In other words, he would start the charges and his man would follow them up and see they were carried out. Do you care to comment on where you would be with those two powers remaining in the bill?

General COLLINS. Well, I am no lawyer, Mr. Kilday, but it seems to me that, taking that second case at Gudalcanal, where we actually did take the men out of the guardhouse serving sentences, restoring them to duty and suspending temporarily their sentences, I was able to do all of that wholly on my own. I think if you set up a separate

system of judge advocates, certainly I would be forced to consult with them. If they wanted to disagree with me, unless I have definite power there, maybe I could be overruled. I certainly think that that would be subversive of discipline and it would also tend to lessen the power of justice.

Mr. BROOKS. Mr. Chairman, on that same line—if the gentleman will yield?

Mr. KILDAY. I yield.

Mr. BROOKS. You couldn't have sent the men back into combat with the tacit understanding that if they made a good record that would be recognized by the same authorities which gave them the original sentence, if there was a complete divorce between the command and the Judge Advocate General's office.

General COLLINS. Certainly it wouldn't seem to me it could be done, unless the judge advocate agreed with the commander. Now, if he disagreed, then it couldn't be done. I say that is a power of discretion. It is these discretionary powers that the commander has now which I think would be weakened materially under this proposed system.

Mr. BROOKS. The trouble would be, too, that you couldn't form an agreement in advance over what a man might do in combat.

General COLLINS. That is right.

Mr. BROOKS. You would have to wait until after the performance is completed.

General COLLINS. Right.

Mr. ELSTON. General, I am interested in knowing how you generally select a court. Do you seek to pick men with some legal experience, or not?

General COLLINS. Yes, sir. We always try to seek men with legal experience, but even more important is to get men with judgment, because frequently you don't have anybody with legal experience. That is the thing, to get men of experience and men of judgment.

Mr. ELSTON. Gentlemen, any further questions?

(No response.)

Mr. ELSTON. If not, we will excuse you, General. We certainly appreciate the very informative statement you made to the committee, and I am certain it will be quite helpful to us.

General COLLINS. It has been a privilege to have been before you. Thank you, sir.

Mr. ELSTON. I don't know of any field commander who could have given us much better information than you have.

General COLLINS. Thank you, sir.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 11, LEGAL,
Monday, April 28, 1947.

The subcommittee met at 10 a. m., Hon. Charles H. Elston (chairman) presiding.

Mr. ELSTON. Suppose you proceed, Mr. Durham, to make your statement.

STATEMENT ON HON. CARL T. DURHAM, UNITED STATES REPRESENTATIVE IN CONGRESS, SIXTH DISTRICT, STATE OF NORTH CAROLINA

Mr. DURHAM. Mr. Chairman, I appreciate this opportunity of appearing before the subcommittee this morning, which has charge of the judicial system and is also considering the bill before it at the present time.

Last year, if you will recall, pursuant to House Resolution 20 of the Seventy-ninth Congress, a subcommittee of the old Military Affairs Committee was authorized to investigate the war efforts. The committee, which was composed at that time of myself, Mr. Sikes, Mr. Winstead, Mr. Price, Mr. Martin, Mr. Fenton, and Mr. Leroy Johnson, held extensive hearings on the entire judicial system of the Army. That study, which culminated in this report, which is House Report No. 2722, developed the fact that the Judge Advocate General's Department should receive more consideration than it had heretofore been given, within the Army set-up. This Department is of course the legal division of the Army. Its duties are in connection with military justice, being the only part of its duties. I think that is one thing that we should think about seriously. The Department is called upon to give interpretations of Army regulations within the Army and legal advice on all the multifarious matters of Army business relationships. With the advent of the war a tremendous burden as thrown upon it, in connection with the procurement of contracts. The Department is very small, as you already heard before the committee. The Army Organization Act of 1920 authorized 120 officers. Not only was this number not enlarged, it was actually cut down in practice during past years. Officers for the Department were drawn partly from civil life and appointed as Reserve officers, with the rank of captain, at the foot of the list. Such an appointment has never been particularly attractive to able and ambitious lawyers from civil life. It has been hard for the Department to get and keep capable professional men. To some extent the Department had been staffed from officers of the Regular Army who were transferred in grade from other branches of the service. Some of these have had legal experience and practice. Others were captains that were sent by the Army to law schools and then transferred to the Judge Advocate General's Department.

I think it can be asserted without hesitation that Congress has not made sufficient provision for the Judge Advocate General's Department to obtain and retain any officers of the caliber that the Army needs for this Department. The Judge Advocate General has at times in the past urged the necessity for more officers, with better possibilities of advancement, but it met with very little sympathy from the General Staff, with the result that Congress has never been properly apprised of the situation.

Now, Mr. Chairman, the objective of this committee, when it was set up under House Resolution 20, in my opinion has resulted in an over-all study of this judicial system and has been very beneficial. I feel it has been of some help to this subcommittee, in trying to solve this problem. I think the committee has gone into this system very thoroughly and has developed information on a very technical matter that very few Members of Congress are familiar with.

Personally, I want to congratulate this committee for taking this up at this time and trying to improve this system during this session of Congress. I feel that the Department has cooperated wholeheartedly in trying to solve this problem.

Now, there are some differences of opinion, which the committee has already gone into very thoroughly, on some of these points at variance between the recommendations of the subcommittee which studied this proposal last year and also the bar association and the War Department. I am sure that this committee can resolve those differences, so that, in the final enactment, this legislation is going to be a great improvement over the old system.

Mr. Chairman, I would like to file with the committee an analysis of H. R. 576, which I hope will be of some help to the committee. I also would like to file with the committee and make it a part of the record the House Report No. 2722.

Mr. Chairman, I appreciate very much this time and will not take any more of your time this morning.

Mr. ELSTON. We will be very glad to have those made a part of the record.

(The analysis of H. R. 576 is as follows:)

COMMENTS ON H. R. 576

[By Carl T. Durham, of North Carolina]

Section 2: This section provides for change of language in the Articles of War designating the law member as trial judge advocate to bring his title more in accord with his functions, those of a judge and impartial advocate of both sides. The prosecution will be called prosecuting officer.

Section 3: (*a*) This section provides that when charges are brought against an enlisted man for trial by general or special court martial, enlisted men shall be appointed to at least one-third of the total membership of the court and that accused shall be informed of his right to demand that enlisted personnel sit on the court. Persons having less than 2 years' services shall not be appointed as members of a court martial in excess of the minority membership thereof.

(*b*) This section also provides that all officers and enlisted men on active duty in the Army (and the Marine Corps when detached for service with the Army by order of the President) shall be competent to serve on courts martial for trial of any person lawfully brought before such courts for trial.

Sections 4 and 5: These sections provide for change of language to conform with possibility members of courts are enlisted men.

Section 6: This section is to carry out recommendation 4, which provides that the law member of the court be in fact a law member, and that he serve impartially as a judge of law and advocate of both sides not participating in the voting.

Section 7. This section provides for change of language in article of war 9 to include enlisted men.

Section 8. This section is to carry out recommendation 5, which is designed to insure the power of command has no influence in the findings of the court. Influence of command on military justice takes two forms which might be called official and unofficial. These two forms are easily commingled. Officially, the power of command, though not unchecked, is paramount in the processes of military justice. It is present at every step. The initial charges against the accused are ordinarily brought by the company commander, even if he does not originate them himself. He has some discretion in the matter. He may ignore the accusations, though, of course, he cannot do so if they are serious and the accuser might take them to a higher officer, or he may decide that the matter can be dealt with as company punishment. There are many ways in which he can make his powers and wishes in a particular case known and felt. This same power is in a still larger way vested in the officer exercising general court martial jurisdiction. He may change the local commander's recommendation

regarding the appropriateness of trial and the personnel of the court, prosecution and defense. This recommendation is designed to divorce, as far as possible, courts martial from this type of influence by removing power to punish members of the courts for decisions.

Section 9. This section is to carry out recommendation 6, which requires that the trial judge advocate and defense counsel be officers of the Judge Advocate General's Department or officers who are members of a Federal court bar or of the highest court of State or Territory of the United States; that he shall at the conclusion of the proceedings as requested by the president of the court sum up the case impartially for both the prosecution and defense. This section is to insure that the accused is furnished with legally trained defense counsel who will be given the same privileges as the prosecution, and who will be competent to represent the accused in a proper legal manner.

(*b*) Article of war 8 provides that a law member shall sit on each court which shall be an officer of the Judge Advocate General's Department, except when an officer of that Department is not available for the purpose, an officer of some other branch of the service shall be selected by appointing authority as specifically qualified to perform the duties of the law member. Members of the Judge Advocate General's Department do not sit as law members. In their stead sit other officers, many of whom have been known to demonstrate their incapacity. Lawyers from the Judge Advocate General's Department are for some reason or other never available to serve in this capacity except in some unusual or conspicuous trial.

Section 13. (*a*) This section is to carry out that part of recommendation 1, which provides for taking the case, after trial, out of the hands of the general who appointed the court, and hands it over to the Judge Advocate General's Department. Very important.

(*b*) Ordinarily the company commander brings the charges against an accused man. He appoints the investigating officer in general court; upon receipt of investigating officer's report decides whether the case should be tried at all; and recommends the prosecutor, judges, and frequently defense counsel. All personnel involved are immediately under the jurisdiction of this commanding officer—leaves, promotions, grading in service, duties to which they are assigned, reputation, and, to a large extent, future careers are in his hands. While the commanding officer may not reverse an acquittal nor increase the severity of the sentence in the overwhelming majority of cases, he is the final judge of both law and fact. Any evidence whatever that has been accepted as true by the commanding general in his capacity of reviewing authority, the judicial authorities or the Army in Washington are bound to accept it as true and are prevented from correcting even an obvious injustice.

Section 14. (*a*) This section is to carry out recommendation 10, which provides that article of war 70 be amended to provide that failure to comply with its requirements for a thorough and impartial investigation before trial shall be a jurisdictional error. Very important.

(*b*) Under present procedure, upon examination by an officer in the Military Justice Division, if the record is found legally insufficient to support the finding and sentence the case is referred to the board of review. If the opinion of the latter is concurred in by the Judge Advocate General and both agree it is legally sufficient, confirmation by higher authority is recommended. If they both find the record legally insufficient to support the findings or that errors of law have been committed injuriously affecting the substantial rights of the accused, the findings and sentence may be vacated in whole or in part, the proceedings remanded to the authority convening the court for a rehearing or other appropriate action. If the Judge Advocate General and the board do not agree, both opinions are sent to the Secretary of War for action by the President. Members of the board of review may find that the evidence on which the conviction was adjudged was dubious or worthless, but if the slightest bit of evidence legally justifying the conviction was accepted by the court and the commanding general there is nothing the board can do about it; no legal error has been committed.

(*c*) This section provides that the reviewing or confirming authority shall determine whether any error was committed which injuriously affected any substantial rights of the accused, and if such error was committed the proceedings shall be held invalid, or the findings or sentence or the findings and sentence shall be disapproved in whole or in part. Any reasonable doubt as to whether such an error affected a substantial right of the accused shall be re-

solved in favor of the accused. This article (article 37) has too often been cited as grounds for dismissing the gravest errors in which they are not regarded as having injuriously affected any substantial right of the accused.

(*d*) This section also provides that omission of the words "hard labor" in any sentence adjudging imprisonment or confinement shall not deprive the authorities executing the sentence of the power to require hard labor as part of the punishment where it is authorized by Eecutive order prescribing maximum punishments.

Section 15: This section is to carry out recommendation 8, which requires publication in home newspapers of conviction of an officer for cowardice or fraud, and making it scandalous for any other officer to associate with him, be dropped. This has long been obsolete.

Section 16: (a) This section provides for a table of maximum punishments prescribed by the President which may be imposed for crimes and offenses of the character for which punishment is left to the discretion of the court martial; the punishment imposed shall not exceed the limit prescribed by the President and shall apply to officers and enlisted personnel alike.

(b) The President shall differentiate between crimes committed in war and those committed in peace, between crimes committed in zones of combat and occupied foreign countries and crimes in other areas.

Section 17: (a) This section provides that no sentence of summary court martial shall be carried into execution until it has been approved by the officer appointing the court or the officer commanding for time being; no sentence of general court martial appointed by the President shall be carried into execution until it has been approved by the President; no sentence of general court martial appointed by other than the President and no sentence of special court martial shall be carried into execution until approved by the Judge Advocate General or such other officers in the Judge Advocate General's office designated by him.

(b) This section takes military justice out of complete control by the general.

Section 18: (a) This section provides that in addition to approval required by any authority other than the President (see sec. 17 above) confirmation by the President is required in the following cases:

(1) Sentence respecting general officers.

(2) Sentence for dismissal of an officer; except in time of war a sentence extending to dismissal of officer below grade of brigadier general may be carried into execution without such confirmation.

(3) Sentence for suspension or dismissal of a cadet.

(4) Sentence of death except persons convicted in time of war for murder, rape, mutiny, desertion, or as spies.

Section 19: This section provides for repeal of article of war 50, which in brief states that no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority.

Section 20: This section provides for change of language to carry out that part of recommendation 1 which provides for taking the case, after trial, out of the hands of the general who appointed the court, and hands it over to the Judge Advocate General's Department.

Section 21: This section provides for change of language to conform with possibility of enlisted men being members of court.

Section 22: This section is to carry out recommendation 9, which provides that all convictions not previously reviewed by the board of review and under which accused has been confined for more than 6 months shall be reviewed by the board of review. The purpose of this recommendation is to close a loophole now existing. Cases in which a dishonorable discharge has been suspended are reviewed by the military justice division; cases in which a dishonorable discharge is not suspended are subject to the far more exacting scrutiny of the board of review. With the definite intention of avoiding the latter, in certain cases, the general exercising court-martial jurisdiction sometimes suspends the dishonorable discharge until after the case has been approved by the military justice division and then orders its execution. This enables the case to bypass examination by the board of review.

Section 23: This section provides for change of language of article of war 50½ to carry out recommendation 1 (taking case, after trial, out of the hands of the general who appointed the court, and hands it over to the Judge Advocate General's Department) as applied to the practically independent powers of such persons as theater commanders.

Section 24: (a) This section provides that the Judge Advocate General upon petition by or on behalf of persons tried by general court martial (whether or not the sentence has been carried into execution) is authorized to retry any case de novo, to alter sentence (alteration is not to be in excess of original sentence), to issue an honorable discharge in lieu of dishonorable discharge, and to restore commission or grade to an officer.

(b) This section also provides that, upon retrial of the case, defendant shall not be tried for any offense of which he was found not guilty in original proceeding, and no sentence in excess of the original sentence shall be enforced unless the sentence is based on finding of guilty of an offense not considered upon the merits in original proceeding.

(c) This section further provides that the Assistant Judge Advocate General at the head of any branch of the Judge Advocate General's office established in distant command (article of war 50½) shall have same powers in respect to cases tried by general court martial within that command as conferred on the Judge Advocate General by the provisions of that article.

Section 25: (a) This section is to carry out recommendation 10, which provides that general court martial shall not have jurisdiction to try a charge referred to it for trial unless a thorough and impartial investigation shall have been made before it was referred for trial.

(b) This section also provides that accused be represented by counsel; be allowed to cross-examine witnesses against him, if available; be allowed to present anything in his own behalf either in defense or mitigation; it further provides that the investigating officer shall examine available witnesses requested by accused.

Section 26: (a) This section is to carry out recommendation 12, which provides that punishment for rape be subject to discretion of court. It further provides that punishment for murder shall be death or imprisonment for life as court martial may direct; persons who commit rape shall be punished as court martial may direct.

(b) This section also provides that in time of peace no person shall be tried by court martial for murder or rape committed in geographical limits of United States or the District of Columbia.

Section 27: This section is to carry out recommendation 13, which provides for omission of the clause, "conduct of a nature to bring discredit on the military service" from article of war 96. This clause has been used for other purposes in a way that constitutes a serious abuse of justice. Any petty crime or error of judgment can be stretched into "conduct of a nature to bring discredit on the military service."

Section 28: This section is to carry out that part of recommendation 1 which provides for enlargement and reorganization of the Judge Advocate General's Department. Very important: This is not an amendment to the Articles of War, but to the National Defense Act, which is the organizational basis of the Army. It is aimed to strengthen the Judge Advocate General's Department in various ways.

Section 29: (a) This section is to carry out recommendation 16, which provides for altering of Army regulations governing reclassification boards, boards convened under Public Law 190 and similar boards to assure full protection for the rights of officers and enlisted men against whom allegations are made including provision for defense counsel for witnesses on complete parity with privilege of the Army.

(b) The Articles of War and the system of courts martial do not exhaust the Army's power of disciplining offenders and eliminating them with ingnominy from the service. There are administrative processes which can be used for this purpose, the mere threat of which serves as a deterrent. Enlisted men, for example, can be given Blue discharges, which are said to be neither honorable nor dishonorable but which have the same practical effect as a dishonorable discharge. Officers have always been subjected to reclassification boards. Reclassification boards may reassign officers, demote them, or separate them from the service entirely. This recommendation is designed to give some relief relative to this.

[From Post-Gazette, Pittsburgh, Pa., April 27, 1946]

MILITARY JUSTICE

Studies aimed at drastic revision of the Army and Navy judicial systems recognize the need for reforms. And while we applaud any effort to improve

the sytems, those who may have been the victims of inequities leading to the reforms should not be forgotten.

A subcommittee of the House Military Affairs Committee has sharply criticized the Army court-martial system and raised doubt as to the justice of some of the 142 death sentences meted out to soldiers since Pearl Harbor. There has been some embarrassment over this report, which was intended for full committee use and not for the public. However, its authenticity has not been denied and its content emphasizes the need for an extensive reorganization of the Army's entire system of justice.

Among other things, the report recommended a Judicial Department in the Army, "as complete and autonomous in its field" as the Medical Department, fully manned with qualified personnel to serve as members of courts and defense counsel. It also calls for a new provision for reversal of injustices, which must be a part of any real reform.

"There is a widespread belief among intelligent soldiers," said the report, "that not so much a qualified court as a weak and compliant court has been the objective. * * * Amateurs, from the legal point of view, may pass on questions of life and death. * * * It is known that some of the most striking miscarriages of justice have taken place abroad. * * *"

Not to be outdone by the Army, the Navy has announced that it will recommend important changes in the articles for the government of the Navy. Like the Army, it calls for establishment of a legal corps with qualified officers for law duty only, or, if this does not prove feasible, a course on Navy law obligatory for officers.

The need for revision of military judicial procedure is seen in the discrepancy in severity of sentences imposed by the two branches of the service. While 142 soldiers have been executed for various offenses since Pearl Harbor, no Navy man has been executed for any offense since soon after the Civil War. The Navy's explanation for this discrepancy is that all Navy death sentences must be approved "right up the line to the President of the United States and somewhere along the line the sentences must have been disapproved by an individual who did not believe in capital punishment."

We would like to see the systems of both services reformed and brought more nearly into uniformity. And, while they're at it, we would like to see them review the cases of young men who, under the stress of abnormal conditions, committed indiscretions for which they have been too severely punished under an archaic system.

[From Times, April 25, 1946, Shreveport, La.]

Court-Martial Reform

Regardless of the merits or demerits of its findings, the House Military Affairs Subcommittee was along the right track in its study of the military courts-martial system. Certainly it is within the function of such a commitee and of Congress to inquire into such matters and to take such steps as may be proper.

Probably the court-martial system really should be studied as two systems—one the system as it functions in time of peace and the other as it functions in time of war. Wartime courts martial are likely to impose sentences far more severe than would be imposed for the same offense by a civilian and in a civilian court, or even by a military court in time of peace. This is particularly true of offenses by men in uniform against citizens of other countries, or against civilians of their own country. The principle is that the surest way to keep Army culprits from disrupting civilian peace is by cracking down at every possible occasion.

There is some basic logic in this as a wartime policy, but in practical application there can be no question that it leads to many instances of injustice. It might be argued by some also that it is not just a case of courts-martial sentences being too severe, but of civilian court sentences being too mild. Dealing only with the latter phase of that contention there could be little argument but what a civilian court often does act too weakly in administering punishment.

On the other hand, filing criminal charges against men in uniform has become a racket—often a blackmail racket—in foreign countries. It has been a racket in this country, too, even in Louisiana in maneuvers, though mostly on a petty scale. Overseas, filing charges of rape against American soldiers ran rampant and there can be little question that many of the charges were entirely unfounded.

The crime can carry a death sentence and in some case the death penalty was inflicted. It is hardly logical to assume that any American was executed for rape when he was not guilty of the crime but penitentiary sentences out of proportion to any guilt involved probably were inflicted in more than one instance.

World War II is probably somewhat of a repetition of World War I so far as over-severe courts-martial sentences are concerned—except that with more men in service in World War II there was greater opportunity for injustices—numerically that is. After World War I the Army and the Navy themselves initiated a review of all courts-martial sentences but even with reductions of sentences thus brought about many injustices remained.

An inquiry by this writer into the cases of some 300 servicemen confined in Leavenworth penitentiary after World War I as a result of wartime courts-martial sentences resulted in more than two-thirds of the men gaining pardons, paroles, or commutation. One of those granted leniency was a boy who had won the Congressional Medal of Honor at 17 and been convicted in France of murder on evidence both circumstantial and questionable. Another was a youth given a life sentence for alleged assault with intent to commit a criminal offense on the 80-year-old operator of a place of ill repute in France; and so on down the line.

On the other hand, the fact that courts-martial sentences often are very tough by comparison with offenses for similar crimes in civilian life should not be used as a foundation for maudlin efforts to gain clemency for those thoroughly guilty and given no more than they deserve in the way of punishment.

[From Register, April 24, 1946, Mobile, Ala.]

ROYALL AND ARMY COURTS MARTIAL

A House Military Affairs Subcommittee report criticizing the Army courts-martial system and urging reforms became public property in Washington the other day without being formally released.

The report, described as 25,000 words and 55 pages long, found various faults with the system as it now functions and said so in no uncertain terms.

Kenneth C. Royall, Under Secretary of War, went up in the air because the report got out. He called it a "proposed report" containing "numerous incorrect statements." He discouraged the drawing of conclusions from it.

A notable circumstance is that the House subcommittee responsible for the document did not join Mr. Royall in branding it a "proposed report" or in discouraging conclusions on a basis of its contents.

If the Army courts-martial system has anything like the shortcomings complained of in the report, we suggest that Under Secretary of War Royall could put his time to better use in speeding corrections than in throwing cold water on the subcommittee's findings.

[From Star, April 24, 1946, Kansas City, Mo.]

REVISING THE ARMY LEGAL SYSTEM

The raking over of Army courts martial by a House subcommittee's 25,000-word report and a spirited rebuttal by Kenneth C. Royall, Under Secretary of War, have crystallized the issue of how much the system of military justice needs to be revamped.

In reporting a total of 142 soldiers executed since Pearl Harbor, a Military Affairs Subcommittee charged that the system's wartime record was complete with instances of striking miscarriages of justice, sentences of unwarranted severity pronounced as a means of enforcing discipline and general discrimination against enlisted men.

Mr. Royall, a distinguished North Carolina trial lawyer before he accepted a wartime Army commission, branded the criticism as "grossly unfair." He contended that the Army is interested in ridding military law of its flaws. As proof he cites a rehabilitation plan that has restored to duty and eligibility for an honorable discharge 32,000 men convicted by general courts martial. Mr. Royall also points to the work of a clemency board headed by the former Supreme Court Justice Owen J. Roberts, which has nearly completed reviewing 83,000 cases.

The whole subject of Army courts martial also has been dramatized by the slow-moving London trials of officers and men accused of beating soldiers con-

fined to the detention camp at Litchfield, England. The court itself has bogged down repeatedly in a welter of bickering and charges of unfair intent leveled against the officer-members of the court and their commanding officers.

Of all the recommendations made by the House group, none seems to have more merit than a proposal to adapt to the Army the Anglo-Saxon legal principle of a jury of peers and permit accused soldiers to be tried by a court that includes enlisted men as well as officers. This and other proposals to strengthen the Army's legal procedure should be explored by a new War Department advisory board selected by the American Bar Association expressly to review the court-martial system.

Under Secretary Royall injects a hopeful element into the present controversy by conceding the Army knows its court-martial plan needs overhauling and that there is a will to pluck out the defects.

[From Bulletin, Philadelphia, Pa., April 22, 1946]

COURT MARTIAL REFORMS

Extensive overhaul of Army courts martial is recommended by a House Military Affairs Subcommittee which made an exhaustive investigation of sentences imposed during the war. In general, committee members feel that the military courts err on the side of severity and frequently are conducted by officers not properly grounded in procedure.

One of the most frequent gripes about courts martial from enlisted men has dealt with charges a soldier may bring against an officer. The committee finds this right is largely a paper provision, and that a crack-down usually follows, with the complainant either transferred or court martialed. The committee also thinks more equality could be written into the regulations providing like penalties for the same offenses for officers and men.

Perhaps the most meat in the committee's findings lies in the suggestion that an Army judicial department be set up in the same way that the Medical Corps was created, and that this department handle all Army trials. This would give qualified and specially trained personnel to the military courts.

Some changes undoubtedly are desirable. How far they can go without serious interference with discipline is a ticklish question, and one on which Congress will need expert guidance. Correction of injustices is another matter, and one on which there can be little argument.

[From New York Times, April 22, 1946, New York, N. Y.]

COURT-MARTIAL REFORM

The subcommittee of the House Military Affairs Committee, in its study of courts martial and its suggestions for reform, is carrying out a clearly authorized function of the Congress. Many of the reforms it suggests for Army courts are long overdue. Similar reforms also should be initiated for the Navy. The House committee's recommendation for appointment of a "Judge Advocate General of the United States"—presumably a civilian—is especially noteworthy. This would place civil authority above that of the military in establishing court procedures. That is in the American tradition.

For the record it should be said that courts martial probably reach as fair a verdict in 9 trials out of 10 as do comparable civilian courts. Their defect is that their members are subject to pressures that are not present in a civil court, and that trial always is by a jury of a man's superiors, not of his peers. The enlisted man, especially, feels this distinction. One of the recommendations is that enlisted men sit on a court convened to try an enlisted man. The difference to the result in any court martial might be small. The enlisted man, however, probably would feel that a more balanced hearing had been granted him.

It probably never will be possible in the Army or Navy—especially during a war—to place the same safeguards around a man's liberties as are present in civil life. It would not even be desirable if it adversely affected necessary discipline or efficiency of operation in a critical situation. But there is certainly room for improvement over present practices wherein one man can be, in effect, complainant, prosecutor, judge and jury.

[From Post-Dispatch, March 27, 1946, St. Louis, Mo.]

REVISION BUT NOT REDRESS

The War Department has ordered a glance at military injustice, but not a searching stare. It has named nine able lawyers to review the court-martial system. But what about the unjust punishments that were the end result of that system? And what of brutality in Army prisons, which was sometimes a byproduct?

Secretary Patterson has assured an objective and authoritative study of court-martial procedure by naming such capable attorneys as Jacob M. Lashly of St. Louis to make the inquiry. Some lines for investigation already have been drawn by House Military Committee men. They discovered four major defects in military jurisprudence—weak protection for defendants, extreme sentences, lack of fair redress for improper convictions, and trial of enlisted men on charges for which officers might not even have been reprimanded.

Mr. Patterson's committee ought to find means for correcting these defects in the military trial system. Then what? The inquiry will not atone for miscarriages of justice which the system produced.

Two months ago, the Army provided a list of 50 severe cases reviewed by clemency boards. In every case, the sentence was harsh. This raised the question as to how many of the 35,000 military prisoners might deserve attention from the plodding clemency boards. At about the same time, a court martial uncovered the brutality to American prisoners at Litchfield detention camp in England. An enlisted guard was convicted, but only recently were officers of the camp even made to face charges. And that raised the question as to how far such barbarism extended to other military prisons.

It is taking a long time, and strong public pressure, to arouse military justice to the cruel treatment of some prisoners and the need for clemency for others. It is taking even longer to arouse Congress to the need for an investigation. The Senate has kept the Morse resolution for an inquiry virtually pigeonholed for 2 months.

Now Secretary Patterson says, "The War Department wants the most efficient and just system of military justice that can be devised." His step to help create such a system is commendable, but what does it mean to men who are victims of the injustice of the present system? Since the Army is so slow to help them, the Senate should quit using the Morse resolution for a pillow, and order a systematic review of court-martial procedures and punishment. Only then can there be any certainty that justice has been done.

[From Times, February 19, 1946, El Paso, Tex.]

COURTS MARTIAL HIT

"Reform the court-martial system" is one of the demands being showered on Congress, on newspapers, on commanding officers, by the GI's protesting in posts all over the world against what they call injustices.

"Put enlisted men on courts-martial boards" was a key demand voiced by a mass meeting of American soldiers in Paris. The protesters alleged that officers generally get treated more leniently than enlisted men for the same type of offenses.

The House Military Affairs Committee has been investigating court-martial procedure, and is expected to release its findings soon. The committee may recommend that defendants in courts martial be given the same rights as defendants in civil trials. The War Department is reviewing all court-martial sentences, and many of them have already been reduced.

Whatever the truth or the falsity of the present charges against the court-martial system, everybody agrees that it has been greatly improved since World War I. In 1919 Brig. Gen. Samuel T. Ansell, Acting Judge Advocate General during World War I, called the old court-martial system "un-American and archaic." He said its injustices served to "eliminate public esteem and affection for the Army."

One boy was sentenced to 40 years for swearing at an officer. Another got 15 years for leaving camp for 40 days; he had gone home to nurse a sick wife. Another got 25 years for slipping home, before going overseas, to say good-by to his mother.

As a result of an investigation by Congress after World War I, the court-martial system was overhauled from top to bottom. Congress revised the law so as to throw more safeguards around men on trial.*

[From Tribune, January 24, 1946, Johnstown, Pa.]

INJUSTICES OF COURTS MARTIAL

There is a loud outcry against the United States Army's court-martial system. Demands for reform of the system are being showered upon Congress, newspapers and commanding officers by GI's protesting in posts all over the world against what they call injustices.

"Put enlisted men on courts-martial boards" was a key demand voiced by a mass meeting of American soldiers in Paris last week. The protesters alleged that officers generally get treated more leniently than enlisted men for the same type of offenses.

The National Whirligig today calls attention to several instances in which courts martial, conducted entirely by Army officers, have handed down excessively harsh sentences to enlisted men, sentences that could not have been duplicated in any regular criminal court in the land.

The House Military Affairs Committee has been investigating the procedure and is expected to release its findings soon. The committee may recommend that defendants in courts martial be given the same rights as defendants in civil trials. The War Department is reviewing all court-martial sentences, and many of them already have been reduced.

In 1919, soon after the close of World War I, Brig. Gen. Samuel T. Ansell, Acting Judge Advocate General during that conflict, called the old court-martial system "un-American and archaic." He said its injustices served to "eliminate public esteem and affection for the Army."

One boy was sentenced to 40 years for swearing at an officer. Another got 15 years for leaving camp for 40 days. He had gone home to nurse a sick wife. Another got 25 years for slipping home, before going overseas, to say good-by to his mother.

As a result of an investigation by Congress after World War I the court-martial system was overhauled from top to bottom. The law was revised with the intent of throwing safeguards around men on trial, but little improvement has been discernible. Class distinction, as between commissioned officers and enlisted men, is very sharply drawn in the Army and Navy, and this class-consciousness, which in many cases has no justification on the grounds of comparative intelligence, is still frequently reflected in court-martial verdicts.

Congress should make another attempt to correct the manifest injustices of the system, and better luck to it this time.

[From Tribune, January 24, 1946, Tampa, Fla.]

COURT-MARTIAL REFORM

Among other insistent demands upon Congress, as it "gets set" for a busy session, is one for reform of the court-martial system. The demand comes from GI's in posts all around the globe, in protest against what they call injustices.

The keynote of the demand is: "Put enlisted men on the court-martial boards." This demand was voiced by a mass meeting of American soldiers in Paris last week. The ground for the protest is that, the soldiers claim, officers generally get more lenient treatment than enlisted men, for the same type of offenses.

The House Military Affairs Committee has been hearing complaints about the court-martial system and is making an investigation. It is expected to report soon. One recommendation probably will be that defendants in court-martial trials be given the same rights as defendants in civil trials. The War Department has been reviewing court-martial sentences and many of them have been reduced.

Everybody agrees court-martial procedure has greatly improved since World War I. In 1919, Brigadier General Ansell, then Acting Judge Advocate General, pronounced the system then in vogue "un-American and archaic." He said the injustices then prevalent served to "eliminate public esteem and affection for the Army."

At that time one boy was sentenced to 40 years for swearing at an officer. Another got 15 years for leaving camp for 40 days; he had gone home to nurse a sick wife. Another got 25 years for slipping home, before going overseas, to say goodby to his mother. These unquestionably were unduly and undeservedly harsh sentences. Because of complaints about such excessive punishment Congress overhauled the system from top to bottom, to throw more safeguards around men on trial.

Just now attention is being given the case of Pfc. Joseph Hicswa, who is under sentence in Japan to die by firing squad, on conviction by court martial. Hicswa, who had an excellent combat record, was just about to sail for home on furlough, when, with two companions, he went "on a bat" and the three, encountering a group of Japs in a public park, set upon them and stabbed two of them to death. The fact that Hicswa was probably under alcoholic influence of course offers no mitigation of the offense; but his good record as a soldier should be entitled to some consideration. After all, American soldiers in the Pacific had acquired the habit of killing Japs. We are not insisting that Hicswa's homicidal act should be excused, but we think the trial and sentence should be thoroughly reviewed by the War Department. Only the War Department and the President have authority to set aside or reduce the sentence.

[From Post-Dispatch, January 21, 1946, St. Louis, Mo.]

INJUSTICE IN THE COURTS MARTIAL

The present system of military courts martial might do for a hireling army, but it has caused gross injustices in our civilian armed forces. Now that military security is not at stake, it is time for the full investigation proposed by Senators McCarran and Morse.

The charge of "gross injustices" is not ours alone. Those are the words of spokesmen for the House Military Affairs Committee. The committee already has found that defendants are not fully protected in Army courts. Inexperienced officers have been assigned to defend men against the death sentence. Enlisted men have been tried for offenses which would not cause a reprimand for officers. Too many men have been given "blue" discharges, which are supposed to be neither honorable nor dishonorable, but still can impugn a veteran's reputation forever.

The Navy court-martial system has been changed little since the days of sailing ships. Vice Adm. Joseph K. Taussig of the Naval Clemency and Prison Inspection Board admits that naval courts "usually impose excessively severe sentences, which are mitigated with monotonous regularity." Admiral Taussig says "inertia of the Navy" is to blame for preservation of this relic of a wind-blown fleet.

The fact that the Navy has set up a court-martial review board, and that special Army clemency boards have reduced penalties in half of the 50 most severe cases reviewed so far, does not alter this unfair situation. The armed forces are correcting individual injustices, when to their shame they have not tried to improve the system which produced these injustices.

Chairman McCarran has every reason to ask for a thorough inquiry into courts martial by the Senate Judiciary Committee. The committee not only would search for miscarriages of justice, but would give the armed forces a plan for legal reform. Bitter evidence shows that they need it.

[From News, Lynchburg, Va., June 2, 1945]

ARMY PUNISHMENT

That the House Military Committee should call upon the Army for an explanation of sentences imposed by courts martial may be regarded in some respects as meddling in affairs over which the committee has no direct control. The Army, however, is not an organization which can do no wrong or commit no errors of judgment. Courts martial are not tribunals of both first and last resorts. It is proper, therefore, that there should be a bar of appeal.

The complaint of Representative Thomason, of Texas, that soldiers have been given discharges without honor after suffering nerve exhaustion caused by combat experience appears to be one that deserves complete investigation. Mr.

Thomason cites one such case. It may be shown that this man has been harshly punished or, on the other hand, that he deserved the penalty inflicted. No matter how it turns out, the result will be in the interest of justice and it may lead to the adjustment of many other complaints.

We are all fully aware of the necessity for strict discipline in the Army; that severe penalties must be demanded and enforced in order that every man know what is expected of him and do it without question. It is difficult, however, to understand that any man who has been in combat and who suffers the after effects of such an experience should be stigmatized. It is to be remembered, as Mr. Thomason indicates, that these men have another life to live. It is outside the Army, that is true, but their military records follow them all the rest of their days. The ex-soldier without an honorable discharge stands mighty little show of getting along. It is not infrequent that a bum in civilian life can be made into a good soldier, but a dishonored soldier has small chance as a citizen.

The bulk of our army today is of civilian personnel—men who will return to civilian pursuits as soon as the job in hand is completed. Courts martial, therefore, should lean backward in the effort to return them to their former status with as good or better reputations than they enjoyed when they entered the service of their country. So it is well that every case in which there is doubt be thoroughly investigated. It is a terrible thing to ruin a man's standing among his own people.

[From Intelligence Journal, Lancaster, Pa., June 1, 1945]

A NECESSARY INVESTIGATION

The House Military Affairs Committee has called upon the Army for an explanation of some of its courts-martial sentences and discharges. The case of Pvt. Joseph McGee, of Worcester, Mass., who was dishonorably discharged and given a 2-year sentence, for hitting German prisoners of war, resulted in widespread demands for an investigation of this nature.

Disclosure of McGee's case resulted in the sentence being reduced to the time served and he was reinstated in the Army. A reexamination of his case showed that all that he had was punch several prisoners, who he was guarding, because they refused to work and insulted him when he ordered them to do so.

Despite all of this, McGee, who has enough points to qualify him for an honorable discharge, has decided to stay in the Army until the Japanese are defeated.

The feeling has been that there may have been other cases, similar to McGee's, that have never been brought to light.

On the other hand, Congressman Thomason, ranking member of the House committee, which has asked representatives of the Adjutant General's office to appear before the committee today, said he has heard of cases of soldiers being discharged without honor for reasons beyond their control.

"I'm terribly disturbed about this thing," Congressman Thomason said. "I have heard of a number of instances where men have been let out with other than honorable discharges. Some of these are cases of sheer nerve exhaustion, of boys who have lived through tough air raids. And yet they may be called cowards just because of these discharges."

The Congressman also pointed out that many veterans' benefits are given only to those with honorable discharges and for that reason he desired to go into the matter fully. He also called attention to the fact that the GI bill of rights has set up a review board to pass on the courts martial and said that he intended to determine if the board is functioning as it should be.

The committee is to be commended for its interest in the matter of courts martial and sentences and it should make a thorough investigation.

[From Chicago Tribune, Chicago, Ill., June 8, 1945]

ARMY JUSTICE

Representative Thomason, of Texas, has asked the House Military Affairs Committee to investigate the conduct of courts martial by the Army. His suggestion is sound, and the investigation should be thoroughgoing.

Mr. Thomason was particularly concerned about the trial of men who may have been victims of combat fatigue, and the discharge of some of the defendants from the Army "without honor." Combat fatigue, known during the last war as shell shock, is a demonstrable medical condition. A patient is not insane and he is not a coward. He may have, and often has had, a splendid combat record. A day comes when he can't take it any more and a board of officers, who have faced the same hazards and who themselves are prepared to take them in the future, is hardly an unprejudiced tribunal, even when furnished with medical testimony. Obviously, combat fatigue offers a refuge to malingerers. Equally obvious, the knowledge of this will cause the Army to be oversuspicious in genuine cases. Such cases should be reviewed in the light of the findings of unprejudiced civilian psychiatrists and physicians.

The review of Army court-martial cases should not be confined to those involving combat fatigue, however. Martial law was drafted in different times, for a different kind of soldier from the one who wears the United States uniform today. The professional soldier a century or more ago was recruited, as often as not, from the dregs of society. When a weapon was placed in his hand the most savage discipline was required to insure that he did not turn it against those whom he was enlisted to protect. Such a code is neither necessary nor desirable to govern civilians in uniform defending a free country of which they are free citizens.

During the war the Army has made tremendous advances in the rehabilitation and return to combat of men convicted of military offenses. At the same time, courts martial have all too often felt themselves under the necessity of making an example of military offenders. They have imposed savage sentences, well knowing that in the process of review most of those sentences would be greatly tempered. Some of their penalties, naturally, will escape this screening process, and when they do gross injustice will have been done. Congressional surveillance can do much to correct these abuses.

[From News, April 30, 1946, Los Angeles, Calif.]

LOBBYING BY THE ARMED SERVICES

No one is especially surprised when Congress yields to the real-estate lobby, the farm bloc, or to this or that special-interest group.

But when the armed forces start lobbying in peacetime Washington sensitive observers decide enough is enough and that government by pressure has assumed proportions of a calamity.

Currently, the Army has been trying to suppress and shelve the House Military Affairs Subcommittee's report on courts martial, with its devastating condemnations of military jurisprudence.

Here, therefore, is lobbying with a vengeance. Here is lobbying to the end of trying to keep from the public facts and opinions pointing to means of correcting the admitted evils and defects in the armed services trial systems.

As is the case with much of the lobbying going on these days, this latest Army maneuver is both self-defeating and socially defeating.

If we are to get on with the job of formulating a national military policy and of rebuilding the military services to serve the needs of peace, the way to begin is not to sabotage investigation or the presentation of information designed to improve and strengthen the people's Army and the people's Navy.

The way to begin is to open all congressional doors to free discussion and free exchange of ideas on military matters.

[From Sentinel, Grand Junction, Colo., April 23, 1946]

The military subcommittee of the lower House of Congress has recommended that there be an extensive overhaul of the Army's system of justice. This recommendation was made after a study of Army court records for the war years—a record that convinced this committee that court-martial sentences, as a rule, were too stiff; that miscarriages of justice are far too frequent in Army court martials, and that enlisted men in this phase of army life, as in many others, are at a disadvantage. From many experiences and observations related

by ex-service men, the findings of this military subcommittee are not exaggerated. And we believe the public generally will agree with it that the existing court-martial system needs an extensive overhaul.

[From Eagle, Brooklyn, N. Y., April 22, 1946]

CHARGES AGAINST ARMY TRIALS MUST BE QUICKLY INVESTIGATED

Modern civilization tolerates drumhead procedures only under stress of conflict. There are exceptions to this, as witness the mockeries perpetrated in some dictator-ridden countries. But for the most part well-conditioned governments extend certain "inalienable rights" to the accused, and nearly everywhere the English common law concept of judicial procedure has at least some token observance.

Hence it is frightening to read the report of the House Military Affairs subcommittee's report on army courts-martial containing shocking assertions that serious charges were brought against American soldiers capriciously, that members of courts-martial were largely amateurs, that miscarriages of justice took place overseas, that excessive sentences were imposed, some of them even to death.

It is only a small comfort that the Army itself reacts to the charges with the swift assertion that the 25,000-word report of the subcommittee contains many errors. Nor is it too reassuring that the report has been tabled for the present for reconsideration by the entire committee, when it would appear witnesses to corroborate or attack the assertions in the report will be called.

Army sentences have always seemed excessive to the civilian mind. Penalties of many years' imprisonment for seemingly minor offense shocked people accustomed to the comparative leniency of our civil courts. But behind this was always the understanding that even the most excessive sentences imposed for military infraction were rarely served out and that many times even the extreme penalty was commuted by the high comand.

The quicker the congressional committee comes to grips with the ugly charges its subcommittee has made, so much more quickly will American public opinion be guided accurately into the position which it must take.

(H. Rept. No. 2722 is as follows:)

[H. Rept. No. 2722, 79th Cong., 2d sess.]

INVESTIGATION OF THE NATIONAL WAR EFFORT

JUDICIAL SYSTEM, UNITED STATES ARMY

Pursuant to House Resolution 20, Seventy-ninth Congress, authorizing the Committee on Military Affairs to investigate the war effort, the committee has for more than a year been studying court-martial procedure and the entire judicial system of the Army. The history, characteristics, administration, and results, and the effects of the system on soldier morale and acceptability of military service to American citizens, have all been carefully examined. As a result of this study, the committee presents the following recommendations:

Recommendation 1:

That the Judge Advocate General's Department be vested with judicial power it does not now possess;

That, after a special or general court has been held, the findings and sentences shall pass directly to the Judge Advocate General's Department for all further actions of review, promulgation, and confirmation, except for such final appellate review as may be made by the Judge Advocate General of the Army in accordance with recommendation 2 below and such final confirmation as may legally require action on the part of the President.

That in view of its increased responsibility the Judge Advocate General's Department be reorganized and enlarged, both as to number and the qualifications of its personnel, provision being made for Judge Advocate General jurisdictions to be set up throughout the Army, independent of the immediate commands in which cases arise, and provision being made for higher reviewing officers of the Judge Advocate General's Department to take part in actual trials from time

to time throughout their service in order to keep their judgment realistic as well as academically and legally sound.

That officers of the Judge Advocate General's Department be made available to sit as law members, trial judge advocates, and defense counsel in all general courts martial in accordance with recommendations 4 and 6 below; and

That the Articles of War be amended as may be necessary to give effect to the foregoing provisions of this recommendation.

Recommendation 2:

That the Judge Advocate General of the Army be vested with judicial appellate power in all general court-martial cases apart from the administrative processes of review;

That the Judge Advocate General be empowered to consider appeals from the judgments of general courts martial both as to law and fact;

That the Articles of War be amended as may be needed to provide that any defendant may file a petition for rehearing in appeal from the judgment of any general court martial, said petition to be addresed to the Judge Advocate General;

That the Judge Advocate General be empowered in his judgment to retry any case de novo, to order any case retried de novo, or to void any original proceeding or to alter any sentence, or to issue an honorable discharge in place of a dishonorable discharge, or to restore to an officer his commission or the grade of which he may have been deprived by sentence of a general court martial, or to take other action as may be required to correct any injustice and so far as possible to make whole the party or parties injured; and

That when, by direction of the President, as provided in article of war 50½, an office of Assistant Judge Advocate General is established in any distant command, said Assistant Judge Advocate General shall exercise in that command judicial powers and duties corresponding to those authorized in the foregoing paragraphs for the Judge Advocate General of the Army.

Recommendation 3:

That Congress consider amending article of war 4 in such manner as to provide that when charges are brought against enlisted men for trial by special or general court martial, they shall be informed of their right to have enlisted men sit on the court;

That if the accused so requests, enlisted men shall be appointed to the number of one third of the total membership of the court;

That enlisted men so appointed shall be selected from other companies or equivalent organizations than that of the accused person and that of the officer bringing the charges; and

That failure to comply with this provision shall be a jurisdictional error.

Recommendation 4:

That article of war 8 be amended in such manner as to require that the law member of a general court martial be an office of the Judge Advocate General's Department or an officer who is a member of the bar of a Federal court, or of the highest court of a State or Territory of the United States;

That the law member shall at the conclusion of proceedings, if requested by the president of the court, sum up the case impartially for both the prosecution and the defense;

That the law member shall not vote on the findings or sentence;

That failure to observe the foregoing provisions shall constitute a jurisdictional error; and

That consideration be given to the advisability of denominating the law member by the term "trial judge advocate," at present applied to the prosecutor, and the prosecuting officer by the term "prosecuting officer."

Recommendation 5:

That articles of war 8, 9, and 10 be amended as may be necessary to prohibit the censure, reprimand, or admonishing of any member of a court martial by any authority who has appointed a general, special, or summary court, with respect to the findings or sentences adjudged by such court or other exercise of his judicial responsibility.

Recommendation 6:

That article of war 11 be amended to require that the trial judge advocate and the defense counsel of each general or special court martial shall be officers of the Judge Advocate General's Department, or officers who are members of the bar of a Federal court, or of the highest court of a State or Territory of the United States.

Recommendation 7:

That Congress consider amending article of war 45 and such other articles as may be necessary, to provide a maximum table of punishments in time of war;

That in this connection a differentiation be made between military personnel in zones of combat or in occupation of foreign countries and military personnel in areas where more normal conditions prevail even in wartime; and

That the above table of maximum punishments apply equally to officers and enlisted men.

Recommendation 8:

That article of war 44, requiring publication in his home newspapers of the conviction of an officer for cowardice or fraud and making it scandalous for any other officer to associate with him, be dropped.

Recommendation 9:

That article of war 50½ be amended to require that all convictions which have not previously been reviewed by the board of review, and under which the accused has been confined more than 6 months, be reviewed by the board of review.

Recommendation 10:

That article of war 70 be amended to provide that failure to comply with its requirement for a thorough and impartial investigation before trial shall be a jurisdictional error.

Recommendation 11:

That article of war 70 be further amended to make provision that a showing of evidence having been obtained by oppressive, cruel, or persecuting practices, including threats for forcing confessions or admissions from accused persons or persons under investigation, shall cause such evidence to be excluded; that the acceptance by the court of such evidence, admissions, or confessions shall constitute error injuriously affecting the substantial rights of the accused; and that officers or others clearly responsible for such practices shall themselves be subject to charges under the Articles of War.

Recommendation 12:

That article of war 92 be amended to make the punishment for rape subject to the discretion of the court.

Recommendation 13:

That article of war 96 be amended by the omission of the clause "conduct of a nature to bring discredit on the military service."

Recommendation 14:

That the Manual for Courts Martial, paragraph 97, be altered to make it a matter of right for defense counsel to procure witnesses by subpena on an equal basis with the prosecution.

Recommendation 15:

That the Manual for Courts Martial be altered to require that notices of impending court-martial trials be published on bulletin boards in the camp or post where they are to be held, with an accompanying statement that attendance at the trials is permitted to he public and to military personnel.

Recommendation 16:

That Army regulations governing reclassification boards, boards convened under Public Law 190, and similar boards be altered to provide full protection for the rights of officers and enlisted men against whom allegations are made, including provision for defense counsel and witnesses on complete parity with the privilege of the Army.

Mr. ELSTON. I want to say to you, Mr. Durham, that we appreciate your having sat with this committee on these hearings. Your help has been worth a great deal to us, particularly in view of the fact that you were chairman of the special committee last year that went into this subject very thoroughly and made the report which you have just offered for the record.

I believe Mr. Johnson wanted to ask you a question.

Mr. JOHNSON of California. I want to ask you one question, if I might. I notice in your bill you set up sort of a skeleton organization of the Judge Advocate General's Department, providing that the head man should be a major general and four assistants with the rank of brigadier general. Did you have some advice from Army people on that, as to what would be required to set up the type of

Judge Advocate General's Department that you contemplated by your bill?

Mr. DURHAM. Well, we had no particular advice from any one. We did, as you recall, Mr. Johnson—you were a member of that committee—work about as close as we could with the Judge Advocate General's office in making these recommedations last year. Of course, at that time we were not in full agreement, as you recall.

Mr. JOHNSON of California. That is right.

Mr. DURHAM. We narrowed those objections down to where this report was finally put out as an over-all study, realizing of course that we would not be able last year to enact this into legislation, so as to have it become law. Of course, that is one of the points where the committee and the War Department are still at some variance. I am no going to insist on these details, as far as they are carried out in my bill. I m for improvement in the system as a whole. I think the objective that was initiated here by this committee has been carried out to a large extent in the War Department's own bill.

Mr. JOHNSON of California. What I was thinking about was this: If we change the chairman's bill and incorporate some of the features of your bill, I think we would have to consider what type of an organization the Department should have. We don't want to turn loose, on a radically different theory than they have operated on before, and then just have them wilter on the vine.

I wasn't at all the meetings of the subcommittee. I thought maybe at some time that had been considered, as to what the structure should be, that is, as to the rank of the top man, how many assistants and their rank, and so forth, shcuild be.

That is why I asked the question.

Mr. DURHAM. I would have to go back and read some of the hearings, so as to give you in detail everything that took place in connection with that.

Mr. JOHNSON of California. I want to compliment you, too. You did a very fine job last year. You worked very hard on that bill. I think you did an excellent job in getting conflicting viewpoints composed on our committee.

Mr. DURHAM. Thank you very much.

Mr. ELSTON. We would be very glad, Mr. Durham, to have you sit with us at any future meetings we have, to get the benefit of your advice and counsel.

Mr. DURHAM. Mr. Chairman, with your permission, when the committee begins taking up the bill, I would like to have the privilege of sitting with you.

Mr. ELSTON. We will be very glad to have you sit with us.

General Green, we asked you if you could get some data for us on the cost of increasing the Judge Advocate General's Department.

General GREEN. I took that up with the legislative and liaison officer, and he is going to furnish it, sir.

Colonel DINSMORE. Mr. Chairman——

Mr. ELSTON. Colonel Dinsmore.

Colonel DINSMORE. I spoke to the Under Secretary about the matter immediately when I got back Friday and he said at once that he would give the committee anything it wanted. We hoped to have a letter

for you from the Under Secretary today, I hope this morning. They are working on it now.

Mr. ELSTON. All right. When it comes in we will place it in the record.

Colonel DINSMORE. Yes, sir.

Mr. ELSTON. Thank you very much, Colonel.

General Green, have you anything further to add?

General GREEN. Not a thing, sir.

Mr. ELSTON. General Hoover.

General HOOVER. No, sir.

Mr. ELSTON. Mr. Smart has some figures for the record, relative to the present direct costs for maintaining the Judge Advocate General's Department and relative to the anticipated increase in direct cost if an independent Judge Advocate General's Department should be established. Without objection, these figures will be included in the record. Hearings may be reopened in order to receive any pertinent information but for the present they are considered as having been concluded.

(See attached sheet for information.)

WAR DEPARTMENT,
OFFICE OF THE UNDER SECRETARY,
Washington, D. C., April 28, 1947.

Hon. CHARLES H. ELSTON,
Chairman, Legal Subcommittee (No. 11), Committee on Armed Services, House of Representatives, Washington, D. C.

DEAR MR. ELSTON: In response to your request for an estimate of increased personnel requirements and increased costs which would result from the enactment of H. R. 2575 Eightieth Congress, and H. R. 576, Eightieth Congress, respectively, the following information is furnished.

It is estimated that the total commissioned personnel requirements of the Judge Advocate General's Department under H. R. 2575 would be 937, as compared with an estimated required commissioned strength for the fiscal year 1948 of 655, or an increase of 282.

It is estimated that the total commissioned personnel requirements of the Judge Advocate General's Department under H. R. 576 would be 997, or 60 more than would be required under H. R. 2575, and 342 more than estimated current requirements.

In addition to the above, and in either case, it is estimated that requirements for military personnel, in addition to commissioned officers, would be substantially equal to the requirements for commissioned personnel, and that some 40 additional civilian employees would be required, with ratings from CAF-3 to CAF-6.

It is estimated that the additional cost of H. R. 2575 over and above current estimates, would be approximately $3,200,000 per annum, and that the increased cost over and above current estimates of H. R. 576 would be approximately $3,900,000 per annum, or about $700,000 more than the estimated increased cost of H. R. 2575.

Sincerely yours,

KENNETH C. ROYALL,
Under Secretary of War.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington 25, D. C., April 29, 1947.

Hon. CHARLES R. ELSTON,
Chairman, Legal Subcommittee (No. 11), Committee on Armed Services, House of Representatives, Washington, D. C.

DEAR MR. ELSTON: Pursuant to the request of your committee, attached hereto is the statement furnished by the Assistant Judge Advocate General showing

the number of officers performing Judge Advocate General's Department duties at the present time.

Sincerely yours,

JOHN P. DINSMORE,
Colonel, GSC, Special Assistant to the Chief, Legislative and Liaison Division.

[Inclosure.]

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington 25, D. C., April 29, 1947.

Memorandum for Chief, Legislative and Liaison Division, War Department General Staff, Room 3 C-916, The Pentagon, Washington, D. C.

Subject: Number of Officers Performing Judge Advocate General's Department Duties

1. In accord with your request the following information is submitted with respect to officers, on a world-wide basis, now performing Judge Advocate General's Department duties

Regular Army (includes 17 officers detailed from other arms and services, 8 of which are attending civilian law schools, and 5 recalled to active duty from retirement)	194
Reserve, National Guard, and AUS	555
Total	749

2. Of the above, 458 are commissioned or detailed in this Department. The remaining 291 are officers of other armed arms and services who are required to perform legal duties due to the shortage of members of this Department. The number, 291, is computed from the best sources available and is a computation rather than an actual count.

HUBERT D. HOOVER,
Brigadier General, USA,
Assistant Judge Advocate General

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
Washington 25, D. C., April 28, 1947.

Hon. CHARES H. ELSTON,
House of Representatives.

DEAR MR. ELSTON: Pursuant to your request, I have contacted the Judge Advocate General's Department requesting the estimated cost for the maintenance of the Judge Advocate General's Department with its present personnel of 749. In response to this request I have been informed that the direct cost for such maintenance is $7,700,000.

Very truly yours,

ROBERT W. SMART,
Professional Staff Member

U. S. GOVERNMENT PRINTING OFFICE : O—1948

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[No. 177]

FULL COMMITTEE HEARINGS ON H. R. 774 AND H. R. 2575

House of Representatives,
Committee on Armed Services,
Washington, D. C., Tuesday, July 8, 1947.

The committee met at 10 a. m., Hon. Walter G. Andrews, chairman, presiding.

The Chairman. Gentlemen, the committee will be in order.

The chief business of this morning is a bill from Mr. Elston's committee, the military-justice bill. But I understand that Mr. Anderson of California desires to report a minor bill, H. R. 774, of Mr. Bland's. Is that correct?

Mr. Anderson. That is correct.

The Chairman. I will yield to Mr. Anderson of California.

REPORT BY MR. ANDERSON, CHAIRMAN, SUBCOMMITTEE NO. 6, PROCUREMENT AND SUPPLY

Mr. Anderson. Mr. Chairman and members of the committee, I have a brief report here on H. R. 774, introduced by our colleague, Congressman Bland, of Virginia. We were unable to obtain committee prints for the amended bill, but for the purpose of the record I will read the amendments this morning.

The purpose of H. R. 774, introduced by Mr. Bland, of Virginia, is to extend to the Secretary of the Treasury the authority heretofore exercised by the Secretaries of War and of the Navy under legislation enacted in 1896.

The earlier act referred to permits the service Secretaries, in their discretion, to loan or give obsolete or condemned combat material to certain designated veterans' organizations and other nonprofit institutions.

The War and Navy Departments have no objection to the extension of this authority to the Secretary of the Treasury. However, certain objections were raised by both services with respect to the language of the bill as introduced. Accordingly, the subcommittee requested the departments to confer together for the purpose of working out mutually suitable amendments. This they have now done.

As originally drafted, the language of the bill is identical with that of the 1896 act, as amended, save for the inclusion of the Secretary of the Treasury and the addition of section 2. The present law describes the equipment which may be loaned or given away as follows: "Condemned or obsolete ordnance, guns, projectiles, books, manuscripts, works of art, drawings, plans, models, and other condemned

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or obsolete material." The War Department feels that this language is subject to a narrow interpretation which would exclude types of material other than those covered by the specific classes enumerated. Considering the fact that this law was passed before the appearance of tanks and aircraft, it appears that the basic statute may have intended to provide the then current types of combat material for historical, ceremonial, or exhibitional purposes. It is not felt that the language is broad enough here to include many modern-day weapons which would have value for these same purposes.

Accordingly, upon the recommendation of the War Department, the following amendments were adopted:

On page 2, in lines 9 and 10, strike out the words "ordnance, guns, projectiles" and substitute in lieu thereof the words "combat material".

On page 2, in line 10, strike out the comma after the word "plans" and substitute in lieu thereof the word "and".

On page 2, in line 11, strike out the following: ", and other condemned or obsolete material".

The Navy Department's objection was based upon the fear that section 2 of the bill might be construed as repealing Public Law 649 of the Seventy-ninth Congress, under which the Secretary of the Navy now possesses authority much broader in scope, both as to categories of material and possible donees, than that granted in 1896 act. Acordingly, the subcommittee has amended section 2 to read as follows:

SEC. 2. The Act of May 22, 1896, as amended, shall not be construed as altering, amending, or repealing the provisions of any other law under authority of which the President, the Secretary of War, the Secretary of the Navy, or the Secretary of the Treasury may dispose of Government material.

That, Mr. Chairman, is my report, and I suggest the bill be favorably reported to the House.

The CHAIRMAN. Is there any discussion?

Mr. VAN ZANDT. What is the bill?

Mr. ANDERSON. Seven hundred and seventy-four.

The CHAIRMAN. Well, a majority of the members have heard the report. Without objection, the bill will be reported favorably.

Gentlemen, unfortunately, the House meets at 11 this morning, but I assume we can sit until a quarter past 11 without any interruption. There is another small bill that is awaiting report, but I am going to forego that at the moment because this meeting was called particularly to hear a report on the military justice bill.

I might also say that it had been the intention to have an executive committee meeting this morning on the question of inspection trips. The sheets that have been turned in by the membership have been analyzed by the staff. Mr. Brown has been designated to pursue the matter further with those who desire to go to the Pacific, and Mr. Blandford, for those who desire to go to Europe. Sometime this week it is hoped that Mr. Brown will be able to arrange a meeting, maybe along in the latter part of the afternoon, and Mr. Blandford similarly with the other group, in order to get the ideas of the groups as to the time element; that is, when they prefer to make the trips. A little conference will be necessary on that. They will then take it up with the Army and the Navy.

The Chair will now yield to the gentleman from Ohio, the chairman of subcommittee No. 11, Mr. Elston. Before doing so, I may say that last week Mr. Short, as acting chairman, indicated to the War Department that he would permit the reading of two letters addressed to him. I talked with Mr. Short last night and confirmed that. So, after Mr. Elston's report, I am going to turn these letters over to Mr. Smart for reading, whenever Mr. Elston designates.

Mr. ELSTON. Mr. Chairman, if it is agreeable, I would like to have the letters read first because the report I make will comment on those letters.

The CHAIRMAN. All right, without objection the letters addressed to Mr. Short, as acting chairman last week, in accordance with his agreement, will be read. They are from the Secretary of War and the Chief of Staff, General Eisenhower, with a forwarding letter by General Royall.

Mr. SMART. The first letter is [reading]:

WAR DEPARTMENT,
Washington, D. C., June 30, 1947.

Hon. DEWEY SHORT,
Acting Chairman, Committee on Armed Services,
House of Representatives, Washington, D. C.

DEAR MR. SHORT: I understand that your committee is about to consider the question of separation of command and judicial authority in the Army and the creation of a separate Judge Advocate General's Department. with its own promotion list, and with independent authority to mitigate or remit certain types of sentences.

My views upon these questions have heretofore been presented during the hearings before your Legal Subcommittee, at which time I pointed out the far-reaching advances advocated by the War Department in conferring judicial authority on the Judge Advocate General and enlarging his power. Those provisions have my earnest approval. I feel, however, that further enlargement of such powers, with consequent curtailment of the authority of field commanders, would be a serious mistake.

I also feel that it would be a fundamentally unsound policy to confer upon any offiical in the War Department authority of decision entirely independent of the Secretary of War, with the latter having no power to control or direct.

I am transmitting herewith for the consideration of your committee letters addressed to you by the Secretary of War and the Chief of Staff, setting forth their respective views on these matters.

Sincerely yours,

KENNETH C. ROYALL,
Under Secretary of War.

The second letter is [reading]:

WAR DEPARTMENT,
THE CHIEF OF STAFF,
Washington, D. C., June 30, 1947.

Hon. DEWEY SHORT,
Acting Chairman, Committee on Armed Services
House of Representatives, Washington, D. C.

DEAR MR. SHORT: Discussion on the floor of the House of Representatives reported in the Congressional Record indicates that your committee intends to consider a proposal that judicial and command authority in the Army be completely separated. I understand that a further proposal would confer upon the Judge Advocate General independent power to mitigate or remit certain types of sentences.

I feel very strongly that this would be a serious mistake. A commander of troops carries grave responsibility which is enormously enlarged in time of war. This responsibility can be fully discharged only by the exercise of commensurate authority without which the effectiveness of the commander

will be seriously impaired. I am completely confident that every experienced combat commander will agree with me that any other system would produce ruinous results.

I am convinced that this conclusion is valid under either peacetime or wartime conditions. It is manifest, however, that it is both undesirable and impracticable to provide one system of procedure for use in peacetime and a different one for use in war.

After long and careful study I have come to support the provisions of H. R. 2575, now pending before your committee, which will provide a complete system of judicial review, thorough, impartial, and free from command influence, and will also effectively preclude interference with the judicial process. I firmly believe, however, that further curtailment of command authority would be both unsound and unsafe. The new proposal would repose in a staff officer, completely removed from any responsibility for winning a war, complete authority to act independently in a matter of the utmost importance to victory. Field commanders will always accept such decisions from the Secretary of War or the President, recognizing in those two officials a responsibility equal to their own in maintaining order and discipline—particularly battle discipline. To empower a separate staff agency to act independently in this matter could not fail to engender friction and dissatisfaction disastrous to the welfare of the service. This can be completely avoided administratively by proper indoctrination of all concerned.

Sincerely,

DWIGHT D. EISENHOWER.

The third and last letter is [reading]:

WAR DEPARTMENT,
Washington, June 30, 1947.

Hon. DEWEY SHORT,
Acting Chairman, Committee on Armed Services,
House of Representatives, Washington, D. C.

DEAR MR. SHORT: In the course of the debate on H. R. 3830 as reported in the Congressional Record for June 25 one attempt was made to amend the promotion bill with respect to judge advocates. The proposed amendment was defeated but it was indicated that a similar amendment would be presented to the Armed Services Committee when it considers H. R. 2575.

I am very happy that the House rejected the amendment and passed H. R. 3830 as reported by your committee. To include promotion provisions in H. R. 2575, in my opinion, would be extremely bad. The Officer Personnel Act (H. R. 3830) was submitted to your committee after an exhaustive research and study of many months and your Personnel Subcommittee spent many weeks upon it before finally reporting the bill to the whole committee. The proposal to establish a separate promotion list for the Judge Advocate General's Department was considered very carefully both by the Under Secretary and myself. The decision to retain the present single promotion for the Army was reached for these reasons:

The Army had separate promotion lists for each branch until 1920. That system was a complete and utter failure. Under it there was continual and constant political maneuvering by officers of the various arms. The Army was torn by internal jealousies and bickering. No single reform in our promotion laws has ever accomplished as much good as establishment of the single list in 1920. It unified the Regular Army and built a proper spirit in its Officer Corps. To set up a separate promotion list for the Judge Advocate General's Department can have only one purpose—provide better promotion possibilities for its officers—than for the officers of other branches. Should this succeed, judge advocates will not gain but will lose. They will lose the esteem and good feeling of their brother officers. The Army and the Nation will also lose because one break in the separate list will start anew the jealousies which existed prior to World War I. Congress will be under constant pressure to set up other separate branches and then, to enhance personal opportunities, there will be constant efforts to increase the size of specific branches in order to create more positions in high rank. This is not theory; this was the actual situation prior to 1917.

The proponents of a separate promotion list for the judge advocates apparently do not realize the effect it would have on most individuals in that Department. Its officers are not distributed evenly through all the grades. There

are no lieutenants in it at all; 37 percent of its present officers have between 21 and 28 years' service; over 50 percent will be in the grade of lieutenant colonel when initial promotions have been made. With a separate promotion list for such a small group the grade of colonel having initially been filled there would then result great stagnation for all officers below that grade.

A great virtue of a single list containing 25,000 officers is that abnormal distribution of officers in the several branches can be taken care of. The number of colonels for each branch does not have to be exactly proportional to the number in each branch but can be made proportional to the numbers in each branch who are in the next lower grade. Thus, if in a certain year group of lieutenant colonels up for promotion to the grade of colonel there are 10 more judge advocates than their proportional number should be, there is no difficulty occasioned because in some other branch or branches there will be a corresponding shortage and all qualified judge advocates can be promoted. However, if the officers of that small branch are on a separate list then when the "hump" of that list becomes eligible for promotion a large and undue attrition must take place. Following that there will be a great surge of promotions and then stagnation again. This condition was alleviated for the Army as a whole by the single list and the new promotion law has been specifically drawn up to avoid it.

Not only would the inclusion of promotion provisions in H. R. 2575 be extremely bad but any attempt to specify numbers in the Judge Advocate General's Department without also increasing the authority strength of the Regular Army would be harmful. Adding to the number of judge advocates does not decrease the load on combat officers and those of the technical arms and services. Therefore, if a large increase in the size of the Judge Advocate General's Department is proposed it must include provision for increasing the total size of the officer corps. Section 502 (a) of H. R. 3830 provides that the authorized active-list commissioned strength of the several branches of the Army shall be determined from time to time by the Secretary of War within the authorized strength of the Regular Army. This provision was inserted in order to insure proper coordination in the distribution of available regular officers. This is not a static problem but changes with organization, weapons, and missions. I feel it essential that the flexibility granted in H. R. 3830 not be nullified by prescriptions placed in other bills.

The hearings on H. R. 2575 and remarks made on the floor during the debate on H. R. 3830 indicated that one reason for proposing changes in the promotion system for judge advocates was the fact that virtually all witnesses except those from the War Department urged such changes. These witnesses represented various organizations. None of them could or did pose as expert witnesses except in matters of law. They certainly did not represent any expert opinion on Army organization or personnel. Few problems confronting the War Department are so complex and involved as the matter of promotion for career Regular officers. Those members of your committee who labored so long and so arduously on H. R. 3830 can testify to that. The promotion bill was drawn up to assure every officer of equal opportunity and to give the Army an adequate rank structure. Piecemeal changes in it on behalf of single groups will do irreparable harm to the Army because it will be an opening break in what we believe is the best promotion legislation ever passed by the House.

ROBERT P. PATTERSON,
Secretary of War.

The CHAIRMAN. Mr. Elston.

REPORT BY MR. ELSTON, CHAIRMAN, SUBCOMMITTEE NO. 11, LEGAL

Mr. ELSTON. Mr. Chairman, before proceeding to make any statement about the provisions of the bill, I want to first of all express appreciation to the members of my subcommittee who worked so long and so arduously in the perfection of this bill. We held a great many meetings and our attendance was excellent. We heard a lot of witnesses. We feel that the bill we have presented to the committee is a sound one. We are grateful to Mr. Smart for the assistance he gave us, and to General Green, General Hoover, and Colonel Dinsmore, from the War Department, who sat with us in our meetings and gave us very valuable assistance.

Now, some reference has been made to the promotion bill which has been passed, H. R. 3830. I might say at the outset that our purpose is not to start in to amend that bill. At the time that bill was before this committee, you will recall I mentioned the fact that we were considering in our subcommittee the possibility of a separate Judge Advocate General's Department for the Army. I believe the conclusion at that time was that regardless of what was done with the promotion bill it would not be through Congress by the time our bill was reported and that the matter could be worked out in conference. The bill has passed the House but has not passed the Senate, so that situation still prevails.

We thought for a time we might consider both the Navy and the Army bills together, but after finishing the Army bill and receiving the Navy bill from the Navy Department, we came to the conclusion that the situation was so entirely different in the two Departments that we better proceed with the Army bill and take up the Navy bill at a later date.

I might say that our bill was reported unanimously. There was a dissenting vote with regard to the separation of the Judge Advocate General's Department from the other branches of the service, but with that one dissenting vote the bill was unanimously reported by our committee.

Now, Mr. Chairman, in order that the members may have a full appreciation of the importance of the legislation which is presented here today, I consider it both advisable and necessary to relate, in a general way, the events which have brought the subject of military justice to our attention.

During the course of World War II approximately 11,000,000 men saw service in the United States Army, and of that number approximately 80,000 were convicted by general courts martial. A far larger number were convicted by special courts martial. Even before the cessation of hostilities it was apparent to the War Department and to the Congress that a detailed study of the Army system of justice was appropriate. In fact, it was necessary. Accordingly, in 1944 and 1945, the War Department sent Col. Phillip McCook, former prominent New York jurist, to various theaters of operation to conduct such studies. Additional reports were submitted to the War Department from other sources.

Within a few months after the end of hostilities, the matter was brought to the attention of the American Bar Association, and on March 25, 1946, the War Department Advisory Committee on Military Justice was appointed by order of the Secretary of War. The committee, under the chairmanship of the Honorable Arthur T. Vanderbilt, and referred to as the "Vanderbilt committee," consisted of nine outstanding lawyers and Federal jurists from eight States and the District of Columbia. From March 25, 1946, until December 13, 1946, a period of almost 9 months, the members of that committee engaged in studies, investigations, and hearings, and availed themselves of voluminous statistical data of the Judge Advocate General's Department and other sources. At full committee hearings in Washington, the Secretary of War, the Under Secretary of War, the Chief of Staff, the Commander of the Army Ground Forces, the Judge Advocate General, the Assistant Judge Advocate General, numerous other offi-

cers, and the representatives of five veterans' organizations were heard. There were numerous personal interviews, supplemented by letters and the digesting of 321 answers to questionnaires from both military and nonmilitary personnel. Additional widely advertised regional public hearings were held at New York, Philadelphia, Baltimore, Raleigh, Atlanta, Chicago, St. Louis, Denver, San Francisco, and Seattle. The subsequent report of the committee was based on these extensive inquiries.

During the Seventy-ninth Congress a Military Affairs subcommittee under the chairmanship of our colleague, Hon. Carl T. Durham, devoted more than 1 year to detailed study of the Army system of justice. The report of the Durham committee has been thoroughly considered in our deliberations. I might say, interpolating, Mr. Chairman and members of the committee, our committee considered not only H. R. 2575, but H. R. 576, introduced by Mr. Durham; and the bill we report this morning contains provisions of H. R. 2575, amended somewhat, plus one provision from Mr. Durham's bill.

Additional studies have been conducted by special committees of the American Legion, VFW, AMVETS, AVC, the New York County Lawyers Association, the War Veterans' Bar Association, the Judge Advocate Generals' Association, and the Phi Alpha Delta Law Fraternity. The reports and recommendations of each of these groups were made available to us and representatives of each of the organizations appeared before our committee in public hearings in support of their recommendations. Other witnesses, who had particular knowledge of the subject by virtue of their service and experience in the recent war, were heard.

In our opinion, the combined efforts of these organizations and individuals represent the most comprehensive study of military justice that has been conducted in the history of our country. Any discussion of the technical aspects of the bill would probably result in more confusion than may exist at the present. In general, the main accomplishments of the bill may be outlined as follows:

1. Enlisted men have been authorized to sit as members of courts martial.

2. It subjects officers to trial by special courts martial.

3. It prohibits the unlawful influence of courts martial or the members thereof.

4. Warrant officers are authorized to sit as members of courts martial.

5. An accused, if he so desires, may have counsel at the pretrial investigation.

6. Authority to grant a bad-conduct discharge has been granted to general and special courts martial.

7. The review and appellate provisions have been strengthened.

8. A lesser punishment than death or life imprisonment for murder or rape have been provided.

9. A lesser punishment than dismissal from service for officers drunk during time of war has been provided.

10. The authority of commanding officers under the one hundred and fourth article of war has been increased so far as it pertains to officers but not to enlisted men.

11. The clemency power of the Judge Advocate General has been increased.

12. An independent Judge Advocate General's corps has been established.

From the foregoing general summary, the following points merit additional consideration.

1. Should enlisted men be authorized to sit as members of a court martial in the trial of other enlisted men?

The War Department agrees that they should, at the option of the appointing authority. Our committee agrees that they should, at the option of the defendant and has amended section 3 accordingly. We seriously doubt that the inclusion of enlisted men as members of the court will benefit enlisted men who are defendants; however, the choice is properly a right of the defendant. Once having exercised that right he must assume the responsibility for the results of his choice. I might say there that no less than one-third of the court shall consist of enlisted men——

Mr. KILDAY. If he requests enlisted men, it must be no less than one-third.

Mr. ELSTON. Yes, if he requests enlisted men.

2. Should the trial judge advocate and defense counsel be attorneys, if available?

There is unanimous agreement that such personnel must be attorneys and the War Department has so provided in section 8, pages 5 and 6.

3. A greater equality in the treatment of officers and enlisted men should be provided.

The committee agrees that a greater equality must be attained and have accordingly amended section 10, page 7, making officers subject to trial by special courts martial. Heretofore, the President has had authority to exempt such classes as he may designate from trial by special and summary courts martial and under that authority has exempted officers from trial by these two courts. As a result, officers have been triable by general courts martial only. This resulted in a reluctance on the part of superior commanders to subject officers to trial and possible dismissal for comparatively minor offenses. As a result officers would escape punishment for the same offenses for which enlisted men were tried and convicted. That I think we will agree created a very bad situation in the Army.

Section 21, page 16, provides that, in time of war, an officer, in lieu of a dishonorable discharge, may be reduced to the grade of private.

Since a commanding officers authority under the fourth article of war has been increased in this bill so that he may forfeit one-half of an officers pay for 3 months, rather than 1 month, a far greater restraint on officers will be the inevitable result. Enlisted men are not subject to this increased power of forfeiture.

4. Should the pretrial investigation be made mandatory and should the accused be furnished counsel at such investigations?

This question presents a more difficult problem than is apparent. In our consideration of the subject of military justice we have been guided by the principle that the basic rights of an accused should be protected without encumbering the military system in such a maze of technicalities that it fails in its purpose. Upon this premise we have concluded that an investigation should precede every general courts-martial trial but that the investigation shall be considered sufficient if it has substantially protected the rights of the accused.

To hold otherwise would subject every general courts-martial case to reversal for jurisdictional error on purely technical grounds.

Our committee has added another safeguard in amending section 22 by providing counsel in every pretrail investigation upon the request of the accused. As a matter of custom the Army already provides such counsel in serious cases. It now becomes a matter of right, at the option of the accused.

5. A more adequate review should be provided.

Any system of judicial review is complicated, technical, and difficult to understand. The principal provisions of judicial review are presently contained in A. W. 50 and A. W. 50½. In an attempt to clarify these sections they have been rewritten by the War Department in section 26 of H. R. 2575. The new section provides for a new judicial council of three general officers, in addition to the present board of review, and defines the action to be taken upon cases examined. The section makes explicit the finality of sentences of court martial, and for the first time, authorizes reviewing authorities to weigh the evidence in addition to determining the law. Absence of this authority heretofore has been a common cause of criticism.

Under the present Army system it is possible for a defendant to be convicted and dishonorably discharged without having had an appellate review of the dishonorable discharge portion of his sentence. Not only is it possible, there have been many such cases resulting in extensive criticism of the Army system. The War Department has corrected this situation in section 26 (a) of the bill .

The question of clemency may properly be considered in this connection and the committee finds itself at variance with the War Department position as set out in section 26 of the bill. The bill provides that "the Judge Advocate General shall have the power to mitigate, remit, or suspend the whole or any part of a sentence in any case requiring appellate review under section 26 (A. W. 50) and not requiring approval or confirmation by the President," such power to be exercised under the direction of the Secretary of War.

The practical result of this provision is that the Judge Advocate General becomes merely a recommending officer. It is presumed that the most capable legal man in the Army will be in the Judge Advocate General's Department and it is certain that the complete appellate review of all such cases will be conducted in his Department. It necessarily follows that, except for the trial court, the Judge Advocate and the reviewing officers in his Department have a more intimate knowledge of the facts and the law of the case, than any other individual or group. While the War Department does not agree, it seems only proper to us that the Judge Advocate's authority on clemency matters should be commensurate with his responsibility for appellate review, and we have amended section 28, on pages 29 and 30, accordingly.

6. Should "command influence" with respect to the judicial acts of courts martial military commissions, and the members thereof, be curtailed?

There is unanimous agreement that "command influence" has been improper and must be stopped. In addition to its provisions in section 33 of the bill, the War Department has accepted section 10½

of the Durham bill as an amendment. We consider these provisions adequate to stop this phase of "command influence."

With the very few exceptions which I have mentioned there is complete agreement between our committee and the War Department on every section of the bill, as amended, through section 45. This brings us to the final and by far the most important question which our committee has considered:

Should an independent Judge Advocate General's Corps, with a separate promotion list, be established?

The War Department opposes the establishment of an independent Judge Advocate General's Corps; however, our committee, with one dissenting vote, favors such a corps. It is important to note that every rganizational representative and every individual who testified before the committee, except War Department witnesses, not only favored but urged the establishment of an independent Judge Advocate General's Department.

Under present law "command" has an abnormal and unjustified influence over military justice. In opposing our decision the War Department stresses the necessity for preserving proper discipline and for giving line commanders authority which is commensurate with their responsibility. We fully agree that discipline is of the utmost importance and must be preserved; however, we feel equally certain that in the administration of military justice there is a point beyond which the considerations of justice are paramount to discipline. Under present law and under this bill, as amended, "command" has abundant authority to enforce discipline. We haven't taken all the power away from them, by any manner of means. The command officer refers the charges for trial, convenes the court, appoints the trial Judge Advocate, law member and defense counsel who must now be qualified personnel of the Judge Advocate General's Department and, after the trial reviews the case with full authority to approve or disapprove the whole or any part of the sentence.

We contend that "command" should ask for nothing more in the furtherance of discipline. At the conclusion of a trial, under the present system, the same officers who conducted the case return to the command of a line officer who has full authority over their efficiency ratings, promotion recommendations, leaves, and duty assignments. These officers, many of whom have families and have chosen the Army for a career, would be less human if they ignored the possibilities of such influence. We contend that those who are charged with the impartial administration of military justice must have sufficient freedom of judicial determination to meet the responsibility.

I would like to summarize the War Department's criticism.

1. We have been informed of the strenuous objections of the Secretary of War, the Under Secretary of War, and the Chief of Staff with reference to the creation of an independent Judge Advocate General's Corps. I wish to state to the full committee that with one exception, the committee was fully aware of all of these objections prior to its final determination of this question. The one exception referred to is the criticism of the Secretary of War with reference to the effect that such a corps would have upon the basic provisions of the new promotion bill as embodied in H. R. 3830 and recently favorably considered by the Armed Services Committee and the House. The Sec-

retary's first objection is that the creation of a separate promotion list can have only one purpose—provide better promotion possibilities for its officer than for the officers of other branches, and that the creation of such a list would result in ill feeling between judge advocate officers and other officers and would constitute a break in the present structure which should not be tolerated. Upon this point we disagreed. It seems apparent that "command" considers the Judge Advocate Department to be composed of a nonprofessional group whereas we are of the opinion that the Judge Advocate's Department must be a professional group especially trained in order that it may properly perform its function.

We have been reliably informed that approximately 90 percent of the field work of the Judge Advocate's Department consists of matters directly related to military justice and that more than 50 percent of its work in Washington is of the same nature. Another considerable function consists in the investigation and adjustment of claims. It can hardly be expected that unqualified personnel can adequately handle these assignments. If they could this subject would not be before the committee today. The committee may be assured that at no time has it been our intenton to create a special corps which would give special consideration and unusual advantages to any officer or group of officers. In advocating an independent corps we neither ask for nor expect to receive any advantage in promotion or otherwise that is not shared by every other officer of the Army. The War Department apparently does not view judge advocate officers as command officers. They do not command troops and so far as we know, no judge advocate officer has ever risen to the office of Chief of Staff or any other comparable position in command. The recognition of this group as being a professional group should cause no greater inconvenience than is the case with doctors, dentists, veterinarians, chaplains, nurses, and medical specialists.

2. The Secretary states that great stagnation would result for all officers below the grade of colonel since 50 percent of the officers will be in the grade of lieutenant colonel when initial promotions have been made. It is pertinent to repeat the Secretary's statement that 37 percent of the present officers have between 21 and 28 years' service and that the group as a whole are comparatively old. We fully agree with the basic provisions of the promotion bill and do not desire to create any unusual problems by our present action. In this connection the following points should be kept in mind:

(*a*) The present age group is old and must soon retire from service.

(*b*) The Secretary of War is not reqired to fill all vacancies now and as a matter of fact, it is not anticipated that he shall.

(*c*) The humps in various grades would be no way abnormal than are now present in the Chaplains, Dental, and Veterinarian Corps and particularly, to the Air Corps.

(*d*) Expansion of the corps to its anticipated size will be slow at the very best and officers will be difficult to obtain.

3. The Secretary states that the creation of an independent corps will not decrease the load on combat officers. We think that the creation of an independent corps would inevitably result in lessening the burden on combat officers, rather than increasing it. It is an indisputable fact that throughout the war, the trial judge advocates, law members and defense counsels in addition to officers for the investigation

of claims, were largely drawn from officers of the line. This resulted in those officers having a dual function and the testimony before our committee made it very apparent that the added function of military justice and claims was held to be of secondary importance. Under Public Law 281, Seventy-ninth Congress (December 1945), the Regular Army strength was increased from 15,700 to 25,000. At that time the Judge Advocate General was authorized 121 officers and under the new law he was permitted an increase of 21 additional officers to a total of 142. At that time there were several hundred applications for admission into the Judge Advocate General's Department but only a very small number were nominated.

Those who failed of selection returned to civilian life and as a consequence when the limit was removed under Public Law 670 in April of 1946, and the authorized officer strength increased to 50,000, there were exceedingly few officers available to fill the vacancies in the Judge Advocate General's Department. Two hundred and eighty Regular Army officers are on duty in the Judge Advocate General's Department. In March of this year, approximately 750 officers were on duty in the Department and a planning figure of 600 had been submitted for the departmental needs of the present Regular Army strength. When the War Department introduced H. R. 2575, they stated that it would require 937 officers to accommodate the increased need for legally qualified officers. It has been repeatedly stated that the authorized officer strength of 50,000 in the Regular Army will not be reached for perhaps 10 years. It is anticipated that this strength will be approximately 38,000 by the end of this year. We should bear in mind there are now on duty 132,000 officers and that not less than 80,000 will continue to be needed in the foreseeable future. Some may say that to create an independent Judge Advocate General's Corps will only serve to renew the pressure on Congress from other branches of the service, and particularly to renew the questions presented by the Corps of Engineers in the consideration of the promotion bill. Until the proper function of the Corps of Enginers can be determined, it is not a proper matter for discussion. It is well to note that in the Senate consideration of S. 758, the unification bill, it has been impossible to arrive at any decision as to the proper logistical function of the Corps of Engineers. Pending determination of that question by the proper authorities and subject to future legislation on the subject, we reiterate that that question raises no conflict with the creation of an independent Judge Advocate General's Corps.

It is difficult to determine the costs which would be incurred by the enactment of this legislation. The War Department has estimated that the enactment of H. R. 2575 would require a total of 937 officers and a comparable number of enlisted men, at a cost of $3,200,000. H. R. 2575 is a War Department bill and it is assumed that, if enacted, adequate personnel would be provided as rapidly as they become available. Our amendment proposes a corps of 750 officers, and warrant officers and enlisted men in such numbers as the Secretary of War may determine. In any event we are of the opinion that the establishment of an independent Judge Advocate General's Corps would cost no more than the enactment of the original provisions of H. R. 2575, as proposed by the War Department.

We are now on the threshold either of universal military training or of the maintenance of a professional army at least five times larger

than that maintained before the last war. The future army, no matter how it may be raised, will be composed of the physically fit youth of the country. The first contact with any judicial system for the overwhelming majority of these young men will be their experience with the administration of military justice. We believe that it is our duty, so far as lies within our power, to see that the system to which they are exposed is reasonably designed to achieve justice. The system now in effect, together with the changes recommended by the War Department in H. R. 2575, cannot guarantee the result desired.

Mr. Chairman, we respectfully submit that the bill, as amended, will accomplish the desired result and accordingly request the favorable consideration of the full committee. And to bring the matter before the committee for discussion, Mr. Chairman, I move a favorable report on H. R. 2575 as amended by the subcommittee.

The CHAIRMAN. The Chair desires to commend the chairman upon the very unusual scope of the report, both factually and revealing the work done not only by this subcommittee but by the many other organzations to which you referred. Is there any discussion?

Mr. KILDAY. Mr. Chairman——

The CHAIRMAN. Mr. Kilday.

Mr. KILDAY. I don't know how much time we have for discussion.

The CHAIRMAN. Well, we will proceed so far as we can.

Mr. KILDAY. Mr. Chairman, I want to make it clear that I agree with the report that has been filed by the chairman, with one possible exception. I agree that the bill is adequate to secure the necessary adjustments in the administration of military justice. The one question that I am in doubt about is as to the creation of a separate Judge Advocate General's Corps. By that I don't mean necessarily that the Judge Advocate General should not have all of the other powers that he is given in this bill. The thing I refer to is the establishment of a separate Judge Advocate General's Corps, with a separate promotion list. I don't believe it is quite accurate to say that in the subcommittee the vote was unanimous with one exception. There was a bare quorum of the subcommittee present, as I recall it. I don't know how those absent would have voted had they been present, but that was the situation. I was not satisfied with the consideration that we were able to give this particular question because it was the last question to come before the committee and we had very little time to devote to it. As a matter of fact, the amendment carried in the bill was not before the subcommittee; nor was it discussed by the subcommittee. The vote that we took—I believe the chairman will confirm—was as to whether we should report to the full committee the substance of the principle contained in the Durham bill, H. R. 576. Thereafter, that amendment which now appears in the bill was drafted. That is correct, isn't it?

Mr. ELSTON. That is correct. The amendment was drafted in legal form.

Mr. KILDAY. That is right.

Mr. ELSTON. But it certainly does carry into effect the exact thing agreed upon in the committee.

Mr. KILDAY. With a possible exception of the numbers.

Mr. ELSTON. Let me state that the numbers correspond with the promotion bill, H. R. 3830, in those percents.

Mr. KILDAY. At that time we did not know what the number to be assigned to the Judge Advocate General's Department would be—nor as to the percentage distribution. I believe it is correct that I was the only member of the subcommittee present that day who had also served on the Personnel Committee which had drafted the promotion bill, H. R. 3830, that was up for consideration that day. We reached this point a very few minutes before we had to go to the floor to take up H. R. 3830, so we did not get to give it that proper consideration. Now, being a member of that Subcommittee on Personnel, I was thoroughly familiar with the efforts of other branches of the service to secure separate promotion lists. We had them not only from the engineers, as the gentleman from Ohio has mentioned, but I believe also the Dental Corps wants a separate promotion list from the Medical Corps. They are now included with the Medical Corps. They have requested a separate promotion list from the Medical Corps. There are other branches of the service that would like to have separate promotion lists. After the many weeks that we put in on the promotion bill, we came to the conclusion that the proper system of promotion was that in H. R. 3830, with the single promotion list.

Now, it is true that the witnesses who came here and the organizations who testified on this matter advocated a separate Judge Advocate General's Corps. On the other hand, it is also true that the committees of those various organizations were composed, with the exception I guess of the American Bar Association, almost exclusively of men who had served in the Judge Advocate General's Department during the war. They were men whose military experience had been with the Judge Advocate General. I am sure they were sincere in their review that separation of the Judge Advocate General's Corps was the solution of the problem. But I am not convinced that it is. Some human being is going to have to be trusted with military justice. It is either going to be through the chain of command and up to the Chief of Staff or it is going through a separate Judge Advocate General's Department and up to the Judge Advocate General. In either instance, you are going to have to trust somebody with the administration of military justice. With the men I have seen as Chief of Staff and Judge Advocates General, I don't know that you would lose anything by leaving it to the Chief of Staff in connection with military justice, supervised by the Secretary of War and the Under Secretary of War—civilians—who would have the final say and the final confirmation.

I doubt very much if we ought to go into this without hearing further from combat commanders. The subcommittee heard from General Collins, who was very strongly opposed to this and recited some of his experiences as a combat commander in the administration of military justice. He was the only combat commander that we heard.

Now, in view of the fact that General Eisenhower takes such a strong position against it, as to the manner in which it would function in the field under combat—we are making a very new departure here—I feel that the full committee, especially in view of the inadequate consideration I feel that the subcommittee was able to give to this particular portion, and I am talking about the separate Judge Advocate General Corps, would be fully justified in hearing further from combat commanders on this question.

Mr. ELSTON. Mr. Chairman——

The CHAIRMAN. The Chair asks the gentleman from Texas if he has any amendment in mind, to accomplish his purpose?

Mr. KILDAY. I thought I would make the suggestion first that we do hear from other combat commanders and General Eisenhower, if he is able to come. He stated here in a letter his position on it. Inasmuch as the Chief of Staff, whoever he may be, is going to have to live with this thing and administer it, I think the committee should hear and have subject to cross-examination the men who can give us the basis of their objections. It is evident that there is very serious objection from the Chief of Staff and from the Secretary of War. We have had that objection expressed to us only in a letter. It may be that they can thoroughly justify their objection. It may be that we would be convinced that their objection is more apparent than real after we had heard from them. I think it is worth our while to take a little time to hear from them.

Mr. ELSTON. Will the gentleman yield?

Mr. KILDAY. Yes.

Mr. ELSTON. Mr. Chairman——

The CHAIRMAN. Mr. Eliston.

Mr. ELSTON. It is true we had only one combat commander before us, but he was a brilliant officer. General Collins has had a tremendous amount of experience. He made an excellent witness before the committee. My impression is that before he came over here to testify, he was assigned to testify by General Eisenhower.

Mr. KILDAY. Of course I don't know——

Mr. ELSTON. And was stating the position of combat commanders generally.

I might say to the gentleman from Texas that the reasons he gave for saying there should not be an independent Judge Advocate General's Course were easily answered. He cited some cases of where a commanding officer had some persons before him who had committed various offenses and he did certain things. If he had not had the authority to do that, discipline might have broken down. He made them better officers by reason of it, and so forth. But he still has that power. He had then the power to do the very things that he said. It hasn't been taken away from him. The separation of the departments doesn't take away that power, because he still has the power of review. He convenes the court. He doesn't have to file a charge at all, if he doesn't want to.

Mr. KILDAY. General Collins' testimony detailed a number of specific instances that had happened in the Pacific, and I think some after he had gone to Europe, with reference to military justice. As you say, some of them were very easily answerable and even under this proposal he could have taken the same action that he took in those instances, but there are other instances in which I don't believe he could have—for instance, the instance he cited on Guadalcanal, when he had men that he was preferring charges against. He issued orders that the guardhouses should be emptied and all of the men returned to their units, with instructions to their commanding officers to observe them in combat and report on their conduct in combat. There he was able to drop all of the charges that had been preferred and to restore them to full military status.

Now, as I conceive the operation of this system set up under this amendment, his function would be preferring charges. When he

had preferred charges, the man would pass from his jurisdiction to the jurisdiction of the Judge Advocate General, in the administration of military justice, and would then no longer be under the jurisdiction of the combat commander. So, in that instance he would not have been able to take the action he did take.

Mr. ELSTON. Will the gentleman yield?

Mr. KILDAY. Yes.

Mr. ELSTON. I think we can assume the Judge Advocate General would be just as anxious to win the war as the combat commander.

Mr. KILDAY. There is no doubt about that.

Mr. ELSTON. He could certainly cooperate with any commanding officer to do that very thing, if it was considered necessary in his judgment.

Mr. KILDAY. In the field you are not going to have the Judge Advocate up there with the troops, when they are going into combat. The division commander is out there with them. It is a question of the practicality of the administration of military justice. Once the charges are preferred, I can't imagine the division commander maintaining any close supervision over the man that he has filed charges against, when the further administration of it passes to another functionary of the Army. He is through with it.

Mr. ELSTON. Wouldn't he be able, if he had filed charges, to withdraw the charges at any time before the court had convened?

Mr. KILDAY. I don't know whether he would or not. I doubt that seriously as a practical proposition.

Mr. RIVERS. Mr. Chairman——

The CHAIRMAN. Mr. Rivers.

Mr. RIVERS. Mr. Chairman, as a member of the subcommittee, while I may not have been there at all the meetings—which, of course, is impossible because sometimes there is a conflict—I would like to state now for the record that the chairman had my proxy at all times. Certainly I am in accord with this report. The other day, when I wanted to introduce testimony on that broad personnel bill, containing some 300 pages, the Chair properly ruled that additional testimony could only be given in the event it went back to the subcommittee. I do believe if we now allow the subcommittee to be bypassed, it will break down the subcommittee set-up. We have languished over this thing. It is a difficult proposition. We have had a lot of testimony. One of our members brought out many things which showed that the commanding officers injected their personalities into these things.

Mr. KILDAY. I am not referring to that. That is in the bill, and I endorsed that.

Mr. RIVERS. Wait a minute. That led to our conclusion on these things. I believe, if you will read this report, you will see that the committee has worked hard. We have tried to be fair. We have tried to give these boys a break. I think, if there was ever a bill that should have been considered by this whole committee, it was that personnel bill. It wasn't. It was considered by a subcommittee. It was almost an insuperable task. Now here comes a bill which does depart from certain practices of the Army, but that is our responsibility. I do think we would make a mistake if we just flooded our considerations and our deliberations and say, because certain combat officers did

not have the opportunity to appear before our committee, that they were estopped. The Army took cognizance of their position and sent us a duly designated representative, in the person of General Collins.

The CHAIRMAN. The question is on the motion of Mr. Elston for a favorable report——

Mr. KILDAY. Mr. Chairman, I have a number of amendments. There is a roll call on the floor that we will have to answer. I am going to have to object to a vote being taken at this time.

The CHAIRMAN. In view of the fact that Mr. Kilday of Texas has an amendment which he wishes to offer, the Chair, if it meets with the approval of Mr. Elston, is going to suggest that Mr. Smart, the professional staff member for this committee, submit to each member of the full committee an outline of the amendments to be offered by Mr. Kilday, and that we meet 1 week from today, Tuesday morning, the 15th of July, with the first order of business being to act upon the Kilday amendments and the bill.

Mr. KILDAY. Mr. Chairman, I might say that I will be glad to contact the chairman of the subcommittee and the professional staff member and see if we can't work together and expedite it in every way possible.

The CHAIRMAN. May I ask the gentleman from Ohio as to his position on the matter?

Mr. ELSTON. Mr. Chairman, I think that is a good suggestion, that we go over for another week, so that we have full and ample opportunity to consider any amendments.

I would just like to make this one observation, however, before we go over. I don't believe there is any necessity for receiving additional testimony. I would like to say this, in answering to the gentleman from Texas: Not only could the commanding officer before a trial court has been convened withdraw the charges but even after conviction, under this bill he has power to modify, set aside, reverse, or amend a sentence. If he has a guardhouse full of men and he wants to send them in combat, he can suspend the sentence of every one of them and send them in combat. When they come back, if he wants to set it aside completely or suspend it further, he has the power to do so.

Mr. KILDAY.. Will the gentleman yield?

Mr. ELSTON. Yes.

Mr. KILDAY. I thoroughly endorse the principles of the bill. It just narrows down to a question of whether we have a separate Judge Advocate General's Corps, with a separate promotion list.

Mr. ELSTON. Yes.

The CHAIRMAN. Mr. Kilday will submit a copy of his amendment to Mr. Smart, for submission to the members, with discussion of the amendment and the bill the first order of business at the committee meeting next Tuesday. The committee now stands adjourned until next Tuesday.

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[No. 185]

FULL COMMITTEE HEARINGS ON H. R. 2964, 3417, 3735, 1544, 2993, 2575

House of Representatives,
Committee on Armed Services,
Washington, D. C., Tuesday, July 15, 1947.

The committee met at 9 a. m., Hon. Walter G. Andrews (chairman) presiding.

The Chairman. Gentlemen, the committee will be in order.

The Chair would like to congratulate the membership upon their unusual presence at 9 o'clock in the morning, and also the Secretary of War and the Chief of Staff whose appearance here at this early hour we appreciate. My best advise is that Congress will definitely adjourn Saturday, the 26th of July, from which it is apparent the only bills which might be reported from this committee today which would have any chance of being acted upon in the House would be those which would normally go on the consent calendar. Therefore, they must be bills upon which there is no disagreement.

The Chair is going to ask Mr. Elston if he would report briefly two bills on transfer of property, if they are ready. Mr. Smart is not here at the moment, so I will wait just a moment——

Mr. Elston. Mr. Chairman, on those bills I would like to yield to the gentleman from Texas, Mr. Kilday, inasmuch as he is the author of one of the bills.

The Chairman. I yield to Mr. Kilday for a brief statement on his bill.

Mr. Kilday. Mine is H. R. 2964, which would authorize the Secretary of War to transfer to the regents of the University of Texas of that portion of the San Antonio Arsenal determined to be surplus to the needs of the War Department. The bill was heard by the legal subcommittee. It is reported unanimously to the full committee. The War Department suggested a technical amendment and other than that announced it had no opposition to the bill. The subcommittee adopted three amendments: One that the War Department suggested; one changing it from the regents of the University of Texas to the San Antonio Medical Foundation; and some clarifying amendments, that it would be transferred without compensation, that is, the War Department or the Navy Department could take it back without compensation, in the event of an emergency. The proposal is to establish on the property a medical school by the University of Texas. It is very strongly endorsed by the former Surgeon General of the Army as being a valuable asset to the Brooke Medical Center at San Antonio. So, I move a favorable report of H. R. 2964, with the amendments which I think Mr. Smart has.

The CHAIRMAN. Mr. Elston, I understand the bill comes with the unanimous report of the subcommittee?

Mr. ELSTON. That is correct.

The CHAIRMAN. Without objection, the bill will be favorably reported.

Mr. ELSTON. Now, Mr. Chairman, I would like to yield to Mr. Sikes, who is the author of two other bills and ask him to report on them.

Mr. SIKES. Mr. Chairman, H. R. 3417, introduced by me, would transfer an undeveloped part of the harbor area owned by the War Department now used for harbor defenses at Pensacola to Escambia County. It adjoins property which is owned by Escambia County and which is utilized for public recreational purposes. The property cannot be sold. It is used for the good of the general public. The property is being declared surplus. I seek to transfer this property to Escambia County, to be used for the general public, with the same restrictions, so it cannot be sold and cannot get to the hands of speculators. There are about 700 acres involved in the tract. The War Department has suggested an amendment and I am in accord with the purpose of the amendment.

The other bill, H. R. 3735, would transfer about 600 acres of land in the general area of and on Santa Rosa Island belonging to the War Department to Okaloosa County, for public recreational purposes, with the same restrictions so it could not be sold. The War Department is in accord with the purposes of the bill, because it is intended to make this property available to the general public and it is felt that it can serve its best purpose in that way. Amendments were also suggested by the War Department for its own safeguard, to H. R. 3735, and I am in accord with all the amendments.

The CHAIRMAN. Is this a unanimous report?

Mr. ELSTON. This is a unanimous report, Mr. Chairman, and I move a favorable report.

The CHAIRMAN. Without objection, the bills will be reported favorably.

Now, as a member of subcommittee No. 12, I desire to report H. R. 1544, approved by both the War and Navy Departments, to provide appropriate lapel buttons for widows, parents, and next of kin of men who lost their lives in the armed services of World War II. Unless there is objection, this bill will be reported favorably.

The Chair also wants to bring up H. R. 2993, known as the Corregidor bill, which was formerly taken up in the Military Affairs Committee, awarding increased rank to certain men who were imprisoned with General Wainwright at Corregidor. It is the same bill which was before the committee last year. Is there any objection?

Mr. JOHNSON of California. What is the bill? We don't have a copy here.

The CHAIRMAN. H. R. 2993. If there is any objection, we won't delay any longer this morning.

Mr. KILDAY. Mr. Chairman, may I ask a question?

The CHAIRMAN. Mr. Kilday.

Mr. KILDAY. This bill was proposed by the War Department. In the last Congress, it passed both the House and the Senate, but there was an amendment in the House bill which was passed at the end of the session and the conferees never got together. It authorizes the War Department to appoint a certain number of the men who were

captured in the Philippines as generals, in addition to the ceiling on generals that exists in the general law. These are the men who were taken prisoner with General Wainwright. Some of them were acting as generals. One or two or them had been appointed who were not acting as generals at the time. It is a bill that General Wainwright is very much interested in. As I say, it passed both Houses at the last Congress.

The CHAIRMAN. Is there objection?

(No response.)

The CHAIRMAN. Without objection, the bill will be reported favorably.

Gentlemen, there are four bills that may possibly come to conference between now and a week from Saturday. To refresh your memory, in the event of a conference on these bills, the following are appointed or have been previously appointed, as conferees. For the conference on the promotion bill: Mr. Short, Mr. Cole, the Chair, Mr. Drewry, and Mr. Kilday. In the event of conference on the procurement bill: Mr. Anderson, Mr. Bates, Mr. Bishop, Mr. Philbin, and Mr. Drewry. Possible conference on the terminal leave bill—although my best information is the Senate will not consider that bill—will be Mr. Blackney, Mr. Cole, Mr. Shafer, Mr. Durham, and Mr. Sikes. The conference on the medical services bill: Mrs. Smith, Mr. Shafer, Mr. Anderson, Mr. Rivers, and Mr. Durham. I understand the proposed amendments in the Senate are in the way of clarification, so that in all probability we could accept the amendments. Mr. Smart, of the professional staff, I understand is following it and will keep Mrs. Smith and the member conferees informed.

Now, gentlemen, we come to H. R. 2575, the so-called military justice bill, which is the main business of this morning. When we adjourned last Tuesday the amendments of the gentleman from Texas, Mr. Kilday, were pending. In accordance with our agreement, the Chair now very gladly recognizes the Secretary of War, Mr. Patterson.

STATEMENT OF ROBERT P. PATTERSON, SECRETARY OF WAR

Secretary PATTERSON. Mr. Chairman, I would be very glad to state briefly the views of the War Department on H. R. 2575, the military justice bill. In general, the War Department is in accord with the bill as an improvement on the system of courts martial. There are only two respects in which we do not go along with the provisions of this measure. The first is that there is an omission of the power of review by the Secretary of War on certain discretionary powers of the Judge Advocate General under the bill. That appears in two places—

Mr. SMART. Pages 30 and 31 of the reprint.

Secretary PATTERSON. Pages 30 and 31, the amendments to article 51. As it was set up, the powers of review by the Judge Advocate General on the discretionary power to mitigate, reduce, or suspend sentences, either as part of the original case or later on by virtue of clemency, were subject to the direction of the Secretary of War. The clause "under the direction of the Secretary of War" was stricken, and we suggest to you its restoration. At the present time, of course, sentences are not reviewed at all as to mitigation, reduction or suspension, except by clemency, by the Under Secretary of War. This

is a new provision giving the Judge Advocate General the review of sentences in his discretion. It is a power that I don't know of at all in any system of civilian justice. In civilian justice the trial court that sets the sentence is the final authority on the sentence, except for the Executive's pardoning power. That is certainly true in the United States system of justice and, so far as I know, true of every State, where the pardoning power resides in the chief executive of the State. We have no objection at all to the Judge Advocate General having this power, but I think sound organization requires that this power, like any other power anywhere in the War Department, should come finally to the Secretary of War.

The Secretary of War is fairly held responsible for the operations of the War Department. If he is to be held responsible he should have the authority, final authority, in review of the action of any one up and down the line, particularly on discretionary matters. He can then fairly be held accountable for the results not only in military justice but in their effects upon the discipline of the Army. But if the power is lodged finally and without further recourse in a subordinate official, there is nothing the Secretary of War can do about it. The Congress and the people cannot hold the Secretary of War then responsible for everything within the War Department.

I might express it in other language by saying it is a division of responsibility, instead of fastening a single responsibility upon the head of the Department. So, it seems to me that principles of administration of justice and also principles of sound organization within the Army and within the War Department are both cogent considerations for the restoration of those words.

The other point that I would like to mention has to do with the last 4 sections, pages 44 to 47. Those are organizational sections having to do with the Judge Advocate Generals' department. The first one provides for a Judge Advocate General with the rank of major general, and assistant with the rank of major general, three brigadier generals, and a commissioned officers strength to be determined by the Secretary of War, but such strength shall not be less than one and a half percent of the authorized active list commissioned-officer strength of the Regular Army; in other words, five generals in the Judge Advocate General's Department and a commissioned officer strength not less than 1½ percent of the commissioned strength of the Regular Army.

We recently had before you, and you approved it and it has been passed by the House, a general promotion bill. We believe that these provisions here run counter to the sections of the general promotion bill. The provision of five generals in the Judge Advocate General's Department is a provision for more generals than their proper share in general officer strength of the Army, much higher than other departments: The Medical Corps, Engineers, Ordnance, and quite a number of other vital services. We believe it would be a mistake to write piece-meal legislation of this kind providing for a certain general officer strength in the Judge Advocate General's Department on a higher basis than for the other branches of the Army.

On the 1½ percent for the total officer commissioned strength in the Judge Advocate General's Department I will say simply this: That would provide 750, on the present authorized strength of the Regular Army of 50,000 officers. One and a half percent of that is 750.

Mr. SHORT. That would be an indication for every other branch to come in and demand a higher percentage, wouldn't it, Mr. Secretary?

Secretary PATTERSON. Yes, sir. The 750 was no doubt set as a result of some letters that came up here from the War Department having to do with our present need for commissioned officers of the Judge Advocate General's Department on a 1,070,000-man army, but the 50,000 regular Army officer strength is by no means geared to a 1,070,000-man army. The required officer strength for our present Army is something over 100,000, of whom we took care of only 50,000 in the Regular Army list.

I think it quite clear that this provision here that there shall be one and a half percent at least of the commissioned strength in the Regular Army had to do with an oversight as between our present needs for a 1,070,000 man army and the lack of relation of that figure to the present authorized strength of the officers of the Regular Army. This will be on any proportionate basis over double strength for that department, as against others.

Mr. ELSTON. May I ask a question right there, Mr. Secretary?

Secretary PATTERSON. Yes, sir.

Mr. ELSTON. The testimony before our subcommittee was that they would need nine-hundred-and-some officers to man the Judge Advocate General's Department under H. R. 2575 as it was submitted by the War Department. One and a half percent is only 750.

Secretary PATTERSON. Well, I can say that 750 would be a proper number if you had 100,000 officers of the Regular Army authorized, or thereabout, based upon say a regular standing force of 1,070,000 men, but that is not the plan under which the War Department has been asking for authorized strength of Regular Army officers. The ceiling was set, and all we asked the Congress was for 50,000. We plan to fill our needs for the balance by the use of temporary officers, National Guard officers, Reserve officers, and officers serving after the conclusion of the war.

Mr. ELSTON. May I ask another question there? In H. R. 2575, the War Department asked for three more generals to comprise the new Judicial Council, in addition to the Judge Advocate General.

Secretary PATTERSON. I can't say. I wasn't familiar with that feature of it, Mr. Elston. I don't see how they can provide a Judicial Council of three general officers in addition to the Judge Advocate General. That would make four. Of course, this amended bill provides for five, but I would say four, too, is too many. You make a fair point, no doubt of that.

Now, the next section will give the Judge Advocate General's Department a separate promotion list. We believe that would be an unfortunate development. As you all know, going back into the history of the Army, there was a separate promotion list for each arm and service down until 1920. It caused great confusion, a great deal of maneuvering to get from a slow list to a fast moving list, which was disruptive of good order. Then, in the National Defense Act of 1920, that was all abolished and there was a single promotion list, with the two exceptions of the Medical Corps and the Chaplains. That, again, is dealt with in the promotion bill that you recently approved and which was passed by the House, and we think dealt with in a proper, sound, salutary way. If we go back again now to the separate promotion lists, we will be asking again for the troubles and

difficulties we had prior to the great reform in that respect that we had in 1920.

I can distinguish the cases of the Medical Corps and the Chaplains from the case of the Judge Advocate General's Department. I think the distinctions will occur to you, too.

The Medical Corps, which has a separate list, is composed of highly professional officers, with very little in the way of flow of traffic between them and the rest of the Army. The same is true of the Chaplains. Once a chaplain in the Army, always a chaplain. There is no flexibility there at all or a shift of an officer from being a chaplain to being an officer in some other line of the Army. That is not true of the Judge Advocate General's Department. I know of many cases myself of officers in the Judge Advocate General's Department who have been infantry officers, then in the Judge Advocate General's Department, then back to the infantry or to the field artillery. In other words, the amalgamation of the Judge Advocate General's Department into the Army is a much firmer proposition than with the Medical Corps or the Chaplains. If we have a separate promotion list for the Judge Advocate General, you will find a great many officers figuring out whether promotion is going to be more rapid there or on the general list, and assignments made in accordance with what the prospects may be for the individual.

We strongly urge that you set up no separate promotion list for the Judge Advocate General's Department. I realize that that was included as a provision in the report of the Committee of the American Bar Association. I treat that recommendation, as all recommendations of that committee, with great respect. The fact remains, however, that that committee was not composed of people who were familiar with the history of the Army—with our experience under separate promotion lists. They, like every other specialist body you get, tell you to drop everything else and concentrate everything on their specialty.

Mr. SHORT. Judge, it might be well for the members of this committee to bear in mind that you are speaking as a former Federal judge, as well as the Secretary of War.

Mr. BATES. Mr. Secretary, did you suggest these changes in the subcommittee hearings?

Secretary PATTERSON. Well, I can't say Mr. Bates. Colonel Dinsmore will know. He has followed this.

Colonel DINSMORE. I didn't hear the question, Mr. Bates.

Mr. BATES. Did the subcommittee have the benefit of such advice as the Secretary has now given the full committee?

Mr. ELSTON. Certainly we had the benefit of advice from the War Department. We gave the War Department every opportunity to come in and be heard, and they came in and they were heard.

Mr. KILDAY. Mr. Chairman, we heard the Under Secretary and General Lawton Collins on this phase of it.

Mr. ELSTON. Yes, but they had the opportunity of presenting any additional testimony they wanted.

Mr. KILDAY. Yes.

Mr. ELSTON. I may say, in response to the Secretary's statement with reference to the American Bar Association, the War Department's Advisory Committee on Military Justice made the same recommenda-

tions. Of course it was suggested by the American Bar Association, but it was actually by virtue of appointment by the War Department. They made the recommendation for a separate Judge Advocate General's Department. It is known as the Vanderbilt Committee.

Secretary PATTERSON. That was the committee I had reference to. I appointed the committee, on the nomination of the President of the American Bar Association. I go along with most of the recommendations contained in the report of that committee. They were eminent lawyers. They were utterly unfamiliar, however, with the experience and the history of the Army with regard to a single promotion list and a separate promotion list. Like all committees, as I say, they told you that everything would be well if you would dignify the position of the people in the specialty that they themselves were in.

Mr. KILDAY. Mr. Chairman——

Secretary PATTERSON. I have never known that to fail.

Mr. KILDAY. At that point, of course this was a committee of lawyers that recommended a separate promotion list for lawyers. The Association of Engineers recommended a separate promotion list for the engineers. The Associations of Dentists recommended or requested a separate promotion list for dentists. So each profession, when they get together, try to take care of themselves.

Secretary PATTERSON. That is right.

Mr. JOHNSON of California. Mr. Chairman, may I ask a question?

The CHAIRMAN. Mr. Johnson of California.

Mr. JOHNSON of California. Isn't it a fact that, in the report of the Ameican Bar Association, they spent about nine-tenths of their time emphasizing this particular point? That is what they think is the crux of the whole reform in the Judge Advocate General's Department: A separate independent system of justice. Explain, if you will, please—I certainly respect your opinion, with all your background and experience in the Army and also in the law—if a separate, independent judiciary is required to render exact justice, why doesn't that apply to the 1,070,000 people in the Army, as well as in civil life?

Secretary PATTERSON. The separate independent system of justice—in order to get away from any suspicion of partiality or bias—is an entirely separate proposition from a separate promotion list. You can have the provisions of this bill, in safeguarding the independence of court martial, which I go along with—you can have the virtues of those provisions without a separate promotion list for Judge Advocate General officers. I don't see any connection between the two.

Mr. JOHNSON of California. Yes, but then you have officers who are untrained in this particular field passing on the competency of men that are in a highly specialized field. This, to me, is the same principle as you have in the Medical Corps.

Secretary PATTERSON. No. The principles of promotion by selection under the officers' promotion bill are applicable to officers of the Judge Advocate General's Department just the same. This is a provision to set up a privileged class of officers. That is what it is.

Mr. ELSTON. In what respect does it make them privileged? It simply sets up a separate promotion list. In what respect do they have any privileges not accorded other officers?

Secretary PATTERSON. They have the privilege of chance of promotion within their own group, with the same results and results that

I think were not happy ones, that were so apparent in the Army situation prior to 1920. The Engineers will be next. The Ordnance officers will be next. You will break it all down, gentlemen.

Mr. ELSTON. They may not be promoted as fast as they were under a general promotion bill.

Secretary PATTERSON. We have these efforts made ever so often. There was a bill introduced in the 1930's to give the Judge Advocate General's Department a separate promotion list. It did not carry. We will have bills for different branches every time, to get them off the single promotion list and have a little list of their own. It has, even so far as they are concerned, unfortunate as well as fortunate results. You will get stagnation up in that list. Then everybody is unhappy about it. I am told that every officer in the Judge Advocate General's Department would immediately be promoted to major or higher on a separate promotion list, as this bill provides—every single one of them. They would all be generals, colonels, lieutenant colonels, or majors. You wouldn't have any one below.

Mr. BROOKS. Mr. Chairman——

Mr. DURHAM. Mr. Chairman——

Mr. BROOKS. Mr. Secretary, what disturbed me was the point you just mentioned: Whether or not instead of being privileged you are actually penalizing them. I don't think they are privileged, but I do think there is a possibility they might be penalized, by putting them in a small group. It is hard for me—and I am sure it is hard for you, a judge—to figure how you can fail to appreciate the fact that this is a specialized service. As you referred to physicians, it is hard for me to distinguish or understand why they couldn't be characterized in that respect as a physician would.

Secretary PATTERSON. Of course, lawyers are a professional class.

Mr. BROOKS. They are highly specialized.

Secretary PATTERSON. No question as to that—not nearly as high specialized or so expert, though, as doctors. There is quite a difference.

Mr. BROOKS. The difference is merely in the degree.

Secretary PATTERSON. You get more lawyers in Congress than you do doctors, for instance.

Mr. CLASON. Mr. Chairman——

Mr. THOMAS. That is why it takes so long to do anything.

The CHAIRMAN. Just a moment. Mr. Clason.

Mr. CLASON. Mr. Secretary, you just made the remark that you understood every person in the Judge Advocate General's Office under this promotion list would be a major or higher.

Secretary PATTERSON. I was told so.

Mr. CLASON. As a matter of fact, under this section 47, you would have the right to authorize the percentage in the grade of colonel, the percentage in the grade of lieutenant colonel, and the percentage in the grade of major. Therefore, you would be in a position at any time to determine the number of majors, and, as a matter of fact, 23 percent at least must be in the grade of captain and 36 percent in the grade of first lieutenant. So, if you felt at any time an unusual or unwarranted number were going to be colonels, liteutenant colonels, or majors, you would have it within your own power to prevent; would you not?

Secretary PATTERSON. Well, I see the provisions you refer to, Mr. Clason. General Dahlquist was the source of my information. He is here.

General DAHLQUIST. What you say is true, Mr. Clason—that the authority is there—but we submit, with the opportunity for the promotion that is offered and with a politically minded group of people, the pressure to fill the vacancies would be tremendous. This bill specifically permits this for the judge advocates, by setting a number of 750. It means that there will be a vacancy in the grade of colonel or higher for every officer who has completed 18 years' service. On the Army promotion list, by seniority alone, they can go down only as 28 years' service. It would mean that for every judge advocate who has over 13 years' service, there would be a vacancy in the grade of lieutenant colonel. As to the vacancies permitted for majors, when all the rest had been promoted, there would be 30 holes yet to be filled.

Mr. ELSTON. General, may I say——

Mr. CLASON. Just a minute.

Mr. ELSTON. Will the genleman yield?

Mr. CLASON. I would like to ask if he still feels that would give them too many colonels, lieutenant colonels, and majors. The Secretary of War has it in his own hands, in accordance with the provision on page 45, to cut the percentages in half, or by quarters, or cut it all to pieces. So I don't see that there is any strength in your statement.

Mr. KILDAY. Will the gentleman yield?

Mr. CLASON. I would like to have the observation of the General.

General DAHLQUIST. That is all right. That language was copied from the promotion bill.

Mr. CLASON. If that is true, then they would be under exactly the same rules as with other promotion lists.

General DAHLQUIST. Except they have set the authorized strengths. It was our intention and will be our intention to fill the authorized vacancies. The pressure will be on to fill the authorized vacancies.

Mr. CLASON. Certainly, if the Secretary of War felt it was not a fair distribution of officers in the several grades, he would see to it that a proper distribution was made; would he not?

General DAHLQUIST. I would hope that he would.

Mr. CLASON. Surely. On the other proposition, this 1½ percent, that would base it on 50,000 officers. As I understand it, you have over 100,000 officers in the Army.

General DAHLQUIST. That is right.

Mr. CLASON. So that 1½ percent of that would be 1,500. On the basis of a limitation of 1½ percent of the authorized active list commissioned officer strength of the Regular Army, this is only 750. So you still have to cut your strength in two to bring this 1½ percent down to the 750; do you not?

General DAHLQUIST. 50,000 officers couldn't officer an Army of over 450,000 enlisted men, or a total strength of 500,000. One and a half percent of that strength, or 750, would give us a lawyer for every 600 soldiers. I don't know whether this Army is going to fight with lawyers or not.

Now, the letters that were written to Mr. Elston—one signed by Mr. Royall and one signed by General Hoover, on April 28 and 29,

which are on the last page of the hearings—specifically state "for fiscal year 1948." Both of those letters referred to the number of judge advocates we would need under the Durham bill for a strength of 1,070,000 men. Comparing the problem with other branches, we will require approximately 6,000 doctors for that strength Army; but in the Regular Army the authorized proportion is 3,000. We would require 6,900 engineers, but the authorized part of the Regular Army is something like 2,800. We will require 18,000 infantry officers, but the amount that we have authorized out of the 50,000 Regular Army strength is something over 6,000.

Mr. CLASON. Yes; but you testified yourself, if I remember it correctly, that you would need 900 officers in the Judge Advocate General's Department to carry on with the present force.

General DAHLQUIST. For 1,070,000 men; but 50,000 officers cannot officer a 1,070,000-man Army.

Mr. CLASON. Well, 50,000 cannot, but this is only three-quarters of 1 percent of the number that you are now using.

Mr. ELSTON. General, you are not required to fill those vacancies under this law at all.

General DAHLQUIST. You are required to have not less than 750 Regular Army judge advocates under——

Mr. ELSTON. That is authorized, but you are not required to fill the vacancies. Some vacancies may not be filled for a long period of time.

Mr. GAVIN. Yes, but if they are available, they would make every effort to get them filled.

Mr. KILDAY. The bill specifically says that the strength shall not be less than 1½ percent. It is absolutely mandatory.

Mr. ELSTON. If they are vacant, they don't have to fill them.

Secretary PATTERSON. It seems plain to me, gentlemen, on the size of the officer strength of the Judge Advocate General, the law is as if the figure 750 was written right in there. That is what 1½ percent of 50,000 is. That was taken not with a view to what you will need in the Regular Army, but what you need now with an Army of 1,070,000 men.

Mr. KILDAY. Mr. Chairman——

The CHAIRMAN. Mr. Kilday.

Mr. KILDAY. Mr. Chairman, this discussion shows the futility of trying to do something like that. In the committee that worked so hard on the promotion system, where we all understood we were working on a basis of 50,000 permanent Regular Army officers, we never got into a discussion of this kind. Now we come in here to change what we did in a very delicately balanced bill, without full information on the part of those who didn't actively participate, and it throws our entire promotion bill out of balance. It destroys all we did over many weeks of work.

The CHAIRMAN. The Chair would like to ask—I assume there will be no roll call in the House until 10:30 or a quarter to 11. General Eisenhower has asked to appear. I am merely making inquiry as to the time element.

Secretary PATTERSON. I have concluded, Mr. Chairman. I will say simply this, on the provision in section 48 to the effect that all members of the Judge Advocate General's Corps shall perform their duties under direction of the Judge Advocate General: That is a provision

that simply will not work. Members of that corps are assigned to the Chief of Ordnance to do his law work and to the Chief Signal Officer to do his law work. Well, they have to work, when they are assigned that way, under direction of the Chief of Ordnance or the Chief Signal Officer. They cannot work under the direction of the Judge Advocate General in cases like that. So I suggest that that provision also be omitted. I have concluded.

Mr. DURHAM. Mr. Chairman, may I ask the Secretary just one question?

The CHAIRMAN. Mr. Durham.

Mr. DURHAM. Mr. Secretary, isn't the primary objective here one of justice, and not of promotion in this whole field?

Secretary PATTERSON. Yes, sir. I don't think any particular branch of the Army ought to be aggrandized and the positions of the officers made more advantageous than those of other branches.

I might just say, on this provision for five generals: Bear in mind that the Adjutant General has two, the Quartermaster Corps four, Finance one, Medical Corps four, Corps of Engineers three, Ordnance Department three, Chemical Corps one, and Signal Corps one. Here you have a slug of five—above any of those branches of the Army. I am not minimizing the importance of the Judge Advocate General's Department, but these other departments are important, too. Thank you.

The CHAIRMAN. Thank you very much, Mr. Secretary.

General Eisenhower, will you come forward, sir. The Chair will yield to Mr. Elston—or do you desire to make a statement first, General Eisenhower?

STATEMENT OF GEN. DWIGHT D. EISENHOWER, CHIEF OF STAFF, UNITED STATES ARMY

General EISENHOWER. I should like, unless there are other questions, to cover one point only. This bill, of course, is designed to assure justice to that very small proportion of an Army that commits offenses. In the War Department, as Chief of Staff, I have not a single thing to do with it. This all heads up under the Judge Advocate General and civilians: the Under Secretary of War and the Secretary. My experience in the war was entirely different. It was that of a field commander. I would like to point out first of all that when you people here send a field commander to the field and place upon him the responsibilities of taking care of more than 3,000,000 Americans and using them in winning a victory, you are putting upon his shoulders a terrific responsibility. He is not concerned with this particular small group so much as he is with the morale, the feeling, and the sense of justice that his 3,000,000 men get. That is what he is concerned with.

Now, in the court-martial system, there is of course an exemplary punishment idea which has its effect upon these 3,000,000 men. I should like to relate one little story to indicate very briefly where this court-martial system affects the Army as a whole. We had battled our way up to the frontiers of Germany. It was cold, disagreeable weather. Our great shortages were primarily in gasoline and secondly in cigarettes. A great black market and thievery ring started in Paris. That became known throughout that command. Every time I visited the front and walked along the front, all I heard was, "Gen-

eral, what are you doing about that business? These people stealing our gasoline so we can go no place, and stealing our cigarettes." I kept out of the thing because it was not my primary responsibility to try these men, but I saw that they were getting very severe sentences.

We took great care to publish those so that the boys in the front line knew about it. But that it what was done because the commander had some authority. As quickly as those sentences were all given, after the files were concluded, I went into that group of men, with my judge advocate, and with General Lear, who had been brought over to be the deputy theater commander, and I offered every one of them this: Complete opportunity to exonerate himself if he would volunteer for the front line. I made that offer to every single one of them, including men who had been given 75 years on this thing. I want to point out that 14 of those men who had 15 years or less refused to volunteer for the front line. I am trying to show you that there is a very delicate thing, but a very, very powerful thing always involved in this business and that is the morale of the whole fighting force. The commander in the field is not primarily concerned with the exact handling of details. Admitting that that is important, I want to tell you that my most onerous problem in the war was the administrative burden of giving consideration to court-martial sentences. Every case that involved the death of an enlisted man or the dismissal of an officer had to come to me, and every single week I gave an entire day to the detailed consideration of such cases. If any commander in the future can be relieved of that, he would very much like to be relieved of it.

It is a terrific burden. But all the way along the line, no matter how high you go, finally there must be someone that is in the chain of responsibility, or the men in the field are not going to take it and like it. If they are out there doing their best, from the commander on down to the last private, and it is to be said, "No matter what kind of sentence is given to this man, some staff officer with no responsibility for winning the war, who is not even subject to the supervision of the Secretary of War for the handling of this thing," will pass on it, there is going to be resentment—and very deep resentment. I assure you there will be.

Now, all the way along the line I have no objection to the provisions of this bill, although some of them rather amused me as to what apparently it is believed they will attain; but I do say the Judge Advocate General in exercising his authority must be subject to the supervision of the Secretary of War. As long as that is known, everybody in the field will accept it because they will say "the Secretary of War bears the same responsibility toward winning this thing that we do."

The only other point I want to mention is this: This business of separate promotion lists. Gentlemen, war has become a teamwork job. It is not setting up a bunch of specialists and letting each go his own way and trying to make him independent. We have got to go the other way. We have got to integrate and integrate more and more, if we are going to win wars. Every commander in the field has a series of officers who are highly skilled specialists. I had an armored force officer, for example. You have an officer that is expert in radar. You have an officer that is expert in the procurement of intelligence. You have all sorts of specialists. Each one of them has to be just as skillful in his line as does a medical officer in his line or a judge ad-

vocate in his line. We can't possibly go to this business of giving each one of them a separate promotion list and disturbing or diverting their loyalties from a central idea of the Commander in Chief of all the forces of the United States and the job of winning the war. That is the way it works out. All the rest of the provisions of the bill I accept without any mental reservations at all, but I do think those two are errors.

Mr. ELSTON. Mr. Chairman——

The CHAIRMAN. Mr. Elston.

Mr. ELSTON. General, aren't you assuming this bill takes from the commanding officer all the command authority he now has with respect to court-martial cases? As a matter of fact, the commanding officer still refers the charges for trial.

General EISENHOWER. That is right.

Mr. ELSTON. And has complete control over the investigation and the reference of the case for trial.

General EISENHOWER. That is correct.

Mr. ELSTON. In addition to that, he convenes the court.

GENERAL EISENHOWER. That is right.

Mr. ELSTON. He doesn't have to convene the court at all, if he doesn't want to.

General EISENHOWER. Correct.

Mr. ELSTON. He appoints the trial judge advocate.

General EISENHOWER. That is right.

Mr. ELSTON. He appoints the law member and the defense counsel, who must now be qualified under the Judge Advocate General's Department.

General EISENHOWER. That is correct.

Mr. ELSTON. And after the trial, the commanding officer has full authority to approve or disaprove in whole or in part any sentence.

General EISENHOWER. That is right.

Mr. ELSTON. Now, what more authority can a commanding officer ask for?

General EISENHOWER. I am not asking for any more authority for the comanding officer. I am talking about the Secretary of War. When this case finally gets into the War Department and it is reviewed, it is acknowledged that the Judge Advocate General has complete independent review power as to all of its legal features. It has to be legally sufficient, in accordance with the rules of evidence and all the rest of it. It has to have his approval. But when it comes to the mitigating of that sentence I say it has got to be in the chain of authority, to be done by someone that has some responsibility for winning the war, and not just sitting on the outside and exercising his authority independently of the Secretary of War.

Mr. ELSTON. That power hasn't been taken entirely from the Secretary of War.

General EISENHOWER. There was a provision in there, as I saw it, sir: "Under the supervision of the Secretary of War"—a very mild thing, that he is doing this as an agent of the Secretary of War. That was eliminated.

Mr. KILDAY. Pages 30 and 31.

Mr. ELSTON. On page 30, article 51 provides:

The power of the President, the Secretary of War, and any reviewing authority to order the execution of a sentence of a court martial shall include the power

to mitigate, remit, or suspend the whole or any part thereof, except that a death sentence may not be suspended.

The Secretary of War still has that much authority left.

General EISENHOWER. But the secretary——

Mr. ELSTON. The Judge Advocate General sits more or less as a supreme court in the review of cases and passes on questions of evidence and rules of law.

General EISENHOWER. That is right.

Mr. ELSTON. If the Judge Advocate General hasn't the power to mitigate, remit or suspend the whole or any part thereof any sentence without the approval of the Secretary of War, then you might just as well not give him any authority at all.

General EISENHOWER. Oh, I don't know——

Mr. ELSTON. The Secretary of War can still review the case after the Judge Advocate General gets through with it.

General EISENHOWER. Not if the Judge Advocate General has remitted the sentence. There is nothing then that the Secretary of War can do about it. Now, I didn't know the Supreme Court of the United States had the power to mitigate sentences. I thought they reviewed for matters of law. I didn't know they could reduce sentences.

Mr. ELSTON. No; they have a right to review all questions of law.

General EISENHOWER. Certainly, and so does the Judge Advocate General. I advocate and believe in it.

Mr. ELSTON. You have a different system in the Army than you do in the civil courts. In the first place, when you try cases in the civil court you have trained lawyers and judges who preside. In the Army, the courts martial have not been made up of lawyers. They have been made up of persons other than lawyers. One of the most severe criticisms of the Army system was that you had an extreme sentence in one case and a light sentence in the other case.

General EISENHOWER. That is right.

Mr. ELSON. There has to be some authority that can review those cases and bring about some uniformity. That is the very purpose of this section, so somebody in authority can bring about uniformity and reduce some of the criticism that has prevailed with respect to court-martial cases.

General EISENHOWER. I might tell you, as a personal experience, that my judge advocate all during the war was always against me when I wanted to reduce and mitigate sentences. Personally, I don't believe it is the officers of the Army who are in favor of these tremendously stiff sentences. In any event, I agree that some one should have that power, but it is the duty of the Judge Advocate General to bring that to the attention of the Secretary of War. The Secretary of War is the man you people hold responsible and the President holds responsible. I believe it is altogether wrong to take from his hands a power of this kind and put it in a separate staff officer, saying "There, you can do as you please."

Mr. BATES. Mr. Chairman——

The CHAIRMAN. Mr. Bates.

Mr. BATES. There seems to be quite a good deal of difference of opinion between the committee and the high ranking officers of the War Department. It seems to me this matter ought to be referred back to the committee for further consideration, and I so move——

The CHAIRMAN. Just a moment, Mr. Bates, the Chair, in agreement with the full committee and the chairman of the subcommittee agreed to hear the Secretary of War and the Chief of Staff this morning. The parliamentary situation at that time was this: Mr. Kilday had the floor to offer an amendment——

Mr. GAVIN. Why not offer it?

Mr. VAN ZANDT. Let us get the amendment on the floor.

The CHAIRMAN. Just a moment, are there any questions of General Eisenhower?

Mr. BATES. The only reason, Mr. Chairman, I make the suggestion is because this is a very controversial matter. I can visualize where it may continue on for another hour.

Mr. BROOKS. Mr. Chairman, in that connection, a good deal was said——

The CHAIRMAN. Are there any further questions of the General?

Mr. BROOKS (continuing). As to what other subcommittees have done in the way of work. I am a member of the subcommittee and have seen Mr. Elston work on it. I say this subcommittee has done hard work over a long period of time. You can't laugh off the work of this subcommittee, in its effort to do a real fair job for the full committee and for the Congress. They have done it. I don't think the inference ought to be given that this subcommittee has not tried to do a good job on it.

Mr. KILDAY. Mr. Chairman——

The CHAIRMAN. Mr. Kilday.

Mr. KILDAY. It happens that I am a member of both subcommittees. I am not attempting to reflect on the work done by either. We worked hard on both bills. I would like to ask the gentleman from Ohio, with reference to this article 51: Don't you agree that those two provisions are separate? At first you give the power of mitigation, and so on, to the Secretary of War and the reviewing authority on sentences up to dismissal and death. Then you have another provision as to those sentences which are not required to be reviewed under article 50 and not requiring approval or confirmation by the President. In that connection, you are exercising a question of Executive clemency, and, in accordance with our theory of government, the exercise of that Executive clemency should certainly be by an executive officer. In other words, as it now heads up in the War Department, the Under Secretary exercises it, but of course he is an appointee of the President and he is exercising one of the powers of the President, as the head of Government. Should this provision remain in it?

Mr. ELSTON. I stated to General Eisenhower that I think the situation is different than in civil courts, because you have courts martial made up of other than lawyers, and somebody should have the authority. I see no reason why the Judge Advocate General shouldn't have the power to mitigate.

Mr. KILDAY. But in our bill we changed that and required that the Judge Advocate and the defense counsel be lawyers. Also, we give the law member of the court final power on law questions, which he has not heretofore had. All questions of admissibility of evidence have been subject to a vote of the court, whereas under this bill that we are considering we give the law member the absolute right to rule on the admissibility of the evidence and the law questions involved.

Mr. ELSTON. The gentleman from Texas knows we discussed this at great length in the committee and it was the conclusion of the committee that this part of the bill be stricken out.

Mr. KILDAY. I think it is very clumsily worded. I don't think we caught the full meaning of it.

The CHAIRMAN. Are there any further questions of General Eisenhower.

Mr. SHORT. There are two things I wish this committee would get straight and fixed in their minds. The first is in the opinion of the Secretary of War and the Chief of Staff this bill does set up a separate promotion list for the Judge Advocate General. If we are going to do that, it will be an invitation for every branch of the service to come in here and want a separate promotion list. It will disrupt the whole law that has already been passed.

General EISENHOWER. That is my opinion.

Mr. GAVIN. Why not at that point reach a decision.

Mr. SHORT. That, he says, is his opinion. I want to get that fixed in mind.

Another point is that in modern warfare every branch of the service is really composed of specialists. Every branch is specialized.

General EISENHOWER. That is correct.

Mr. SHORT. There should be no favoritism whatever shown any of them.

General EISENHOWER. That is correct.

Mr. SHORT. The second point I want the committee to get fixed in mind beyond any doubt, so we won't argue about it when you gentlemen leave us, is that this bill, if enacted in its present form will take final authority from the Secretary of War, who is held chiefly responsible for the winning of the war.

General EISENHOWER. That is correct, sir.

Mr. SHORT (continuing). And places it in one of the subordinates of the Army.

General EISENHOWER. That is correct, sir.

Mr. SHORT. A separate branch.

General EISENHOWER. Yes.

Mr. SHORT. That is all I want to say.

The CHAIRMAN. Are there any further questions?

Mr. VAN ZANDT. Let us offer the amendments.

The CHAIRMAN. Thank you very much.

The parliamentary situation was: The Chair had recognized Mr. Kilday to offer an amendment. A substitute motion is in order.

Mr. KILDAY. Mr. Chairman, a parlimentary inquiry——

Mr. ELSTON. Mr. Chairman, before Mr. Kilday offers that amendment, I would like to say, as to the section which the Secretary seems to take serious objection to, striking out the words "but the power to mitigate or remit shall be exercised by the Judge Advocate General under the direction of the Secretary of War", I don't think the committee was so adamant and firm on that that they would feel like insisting on it in any event. So far as I am concerned, I would be willing, if the other members of the subcommittee are willing, that those words be reinserted, so as to give the Secretary the power.

Mr. BROOKS. What page is that on?

Mr. ELSTON. Page 30—I don't think that is a matter of any tremendous consequence, because we give the Judge Advocate General a great deal more authority than he had before, and if the Secretary wants to retain the power in all cases to mitigate or remit sentences I personally don't have any serious objection to it. I would like to say it is agreeable to me that those words be reinserted, if it is agreeable to the other members of the subcommittee.

The CHAIRMAN. The chairman of the subcommittee makes unanimous-consent request to change the provision on page 30. Is there objection?

Mr. KILDAY. The same applies on page 31, line 8?

Mr. ELSTON. Well, yes.

Mr. BATES. Mr. Chairman, a question for information——

Mr. ELSTON. That disposes of one of the questions.

The CHAIRMAN. Mr. Bates——

Mr. SHORT. You include the provision on page 31?

Mr. ELSTON. Yes.

The CHAIRMAN. The changes suggested by the chairman of the subcommittee are adopted.

Mr. KILDAY. A parliamentary inquiry, Mr. Chairman.

The CHAIRMAN. Yes, sir.

Mr. KILDAY. I propose to offer an amendment to strike out sections 46, 47, 48, and 49. Should that amendment not prevail, I propose to offer two amendments to those sections. Now, my question is whether I should offer the perfecting amendments first or the motion to strike the complete sections?

The CHAIRMAN. The Chair is of the opinion that the perfecting amendments should be offered first.

Mr. KILDAY. Then, whatever may happen to them, an amendment would still be in order to strike the four sections?

The CHAIRMAN. That is correct.

Mr. KILDAY. I offer an amendment, on page 44, line 22, to strike out section 46 as it now appears in the committee print and to substitute therefor the following language:

SEC. 8. JUDGE ADVOCATE GENERAL'S DEPARTMENT.—The Judge Advocate General's Department shall consist of the Judge Advocate General with the rank of major general, such assistants judge advocate general and such number of general officers in the grades of major general or brigadier general as the Secretary of War may from time to time determine to be necessary to meet the needs of the service, and active list commissioned-officer strength of officers in grades from colonel to first lieutenant as may from time to time be determined to be necessary by the Secretary of War and in addition warrant officers and enlisted men in such numbers as the Secretary of War shall from time to time determine to be necessary: *Provided*, That no officer shall hereafter be assigned to the Judge Advocate General's Department unless he be an officer admitted to the practice of law in a Federal district or higher court or in the highest court of a State of the United States.

This is designed to eliminate the question that Judge Patterson discussed of 750 judge advocate officers out of a total of 50,000 now authorized.

Mr. SHORT. You say nothing about percentage.

Mr. KILDAY. That is right. It would place the Judge Advocate General's Department of the Army on the same basis as all other

services under the bill that we have already passed for promotion and allocation of officers to branches and services.

Mr. DURHAM. Is that the same provision that is in the War Department's bill?

Mr. KILDAY. I am not sure. But it would bring this bill into line with the promotion bill which has been passed.

Mr. SMART. It is not in the War Department bill.

The CHAIRMAN. Is there any discussion on the amendment?

Mr. ELSTON. Mr. Chairman, it is just one step to take out of this bill a separate Judge Advocate General's Department. Now, the 1½ percent would provide for 750 officers. They do not all have to be appointed immediately. As a matter of fact, the War Department told us they needed 937 officers. This is less than the amount the War Department itself suggested. It may be years before the vacancies would be filled. They would be filled along with vacancies in the other branches of the service, as they saw fit to fill them. It is not necessary that it be taken out. You come down to the question: Do you or do you not want a separate Judge Advocate General's Department. Do you want a separate department to administer justice? I appreciate all these problems of command, and so forth, but the commanding officer still has all of the things that we have indicated to the committee in our previous statement and indicated here this morning.

The subcommittee considered this phase of the bill more carefully than anything else and discussed it I believe more at length than anything else. It reached the conclusion, with the exception of one vote, that we should have the separate system in the Army.

Mr. KILDAY. Will the gentleman yield?

Mr. ELSTON. Be glad to.

Mr. KILDAY. It is correct, though, in the subcommittee, when we voted on the amendment, we did not have before us the number of officers to be assigned to the Judge Advocate General's Department. Nor did we have the percentages. The only vote we took was as to whether we should incorporate into the bill to be reported to the full committee the substance of the similar provision in the Durham bill, with the understanding the number would be arrived at by the chairman and Mr. Smart.

Mr. ELSTON. That is correct.

Mr. KILDAY. So we did not actually pass on the number of officers to be assigned to the Judge Advocate General's Department.

Mr. ELSTON. But there is nothing inconsistent, in the 1½ percent, in the testimony that was offered to the committee.

Mr. KILDAY. The point I am making is, you referred to the fact that this had been discussed by the committee and carefully arrived at. The fact is we did not vote on the number to be allocated to the Judge Advocate General's Department. We only voted on whether this principle should be incorporated in the bill.

Mr. ELSTON. That is true, but we have been more favorable than the War Department itself suggested. We say 750. They said 937.

Mr. BROOKS. We discussed it at great length. We went all over the ramifications and features of it. Mr. Kilday was present at the time. He entered into the discussion freely. The idea was to put in a percentage, rather than a number——

Mr. ELSTON. That is right.

Mr. BROOKS (continuing). Because it would vary up and down, according to the size of the Army and the needs of the service.

Mr. KILDAY. But we never voted on the percentage.

Mr. CLASON. Mr. Chairman——

The CHAIRMAN. Just a moment. The committee will go into executive session.

(The following proceedings were taken in executive session.)

The CHAIRMAN. The amendment of the gentleman from Texas, Mr. Kilday, is pending. The Chair recognizes Mr. Johnson of California, who has asked to be recognized.

Mr. JOHNSON of California. I want to ask Mr. Elston a question. Isn't it a fact that, under the bill as we have it before us, the Secretary of War is still over the Judge Advocate General's Department?

Mr. ELSTON. Yes.

Mr. JOHNSON of California. Yet the promotion list is out of balance with the rest of the Army. He can refuse to fill those vacancies.

Mr. ELSTON. That is correct. Mr. Clason referred to the section of the bill.

Mr. KILDAY. This doesn't refer to that. This is the over-all number. This provision, I might say to the gentleman from California, is on the over-all number. I do propose another amendment with reference to the question of promotion. This is only as to whether an arbitrary 1½ percent of your 50,000 officers shall be allocated to the Judge Advocate General's Department.

Mr. SIKES. Let us vote.

The CHAIRMAN. I may say to some of the gentlemen, the lawyers have us in quite a fix this morning and I propose to play it out with them.

Mr. DURHAM. Mr. Chairman——

The CHAIRMAN. The Chair recognizes Mr. Durham.

Mr. DURHAM. We have had expressions of opinion throughout the country on this point under discussion here. The American Bar Association recommended this provision which is in the bill. The American Legion, the Veterans of Foreign Wars, and every other service organization I think in the country recommended this provision. The main objective I think in this whole thing was the need of some kind of system of military justice which of course would be independent. It would be a public tribunal which would weigh facts and law. That is what this subcommittee has been trying to work out.

Now, this question of promotion I think is something that can be solved. That is a question that can be solved.

Now, the policy here was to bring in the Secretary of War and also the head of our whole Army. I think, if we are going into this question again, this committee should hear some witnesses that appeared over the last year and a half in favor of this provision. I don't know how the chairman feels about that, but——

Mr. CLASON. Would the gentleman yield for a question?

Mr. DURHAM. If the committee is not thoroughly familiar with this problem, let them hear some of those witnesses. It has been hashed all over the country. Every group of people that I know, except the War Department, is in favor of this provision.

Mr. CLASON. Would the gentleman yield for a question?

Mr. DURHAM. Yes.

Mr. CLASON. The purpose of our committee is to attempt to get court martial set up that would mete out fair justice, based upon the crime that the man has committed. General Eisenhower has pointed out, in his own statement I think, that oftentimes they handed out sentences overseas that were way out of proportion to anything the defendant had done.

Now, Mr. Norblad, who is a member of the committee and has been in the Judge Advocate General's Department and served in connection with these courts martial—and every other person that has served on a court martial—stated that in his opinion the Judge Advocate General's group ought to be a separate promotion group and they ought to be taken wholly out of the control insofar as position or other influence as respecting trials are concerned, of line officers.

Mr. DURHAM. The majority of people that the American Bar Association heard before that committee in my State—I attended the hearings—were people that had had experience in the Judge Advocate General's Department.

Mr. CLASON. And every veterans' organization came up here with men that had served, and they gave their experience. Every one of them, to a man, stated that they ought to have a separate promotion list. When we have men like Mr. Norblad, who said his own commanding officer attempted to censure him for what he had done——

Mr. KILDAY. That is all taken care of in this bill. You are not discussing the amendment before the committee. We have made it a court-martial offense for any of those things to be done or attempted, in other portions of the bill.

Mr. CLASON. Yes.

Mr. KILDAY. Let us separate the thing——

Mr. CLASON. Just a second, before I yield for a speech.

Mr. KILDAY. Discuss this issue. This is only the 1½ percent.

Mr. CLASON. Wait, I would like to finish my talk before you start yours. My proposition is simply this: Every one of these witnesses came in and said the best way to accomplish this, in their opinion, was to have a separate promotion list. That was the only way they saw we could have an impartial and fair court-martial system. That is the reason I think all of us felt this way about.

Mr. KILDAY. Will the gentleman name one witness who was not a lawyer who took that position?

Mr. CLASON. I don't know what their position was.

Mr. KILDAY. Every one was a lawyer.

Mr. CLASON. I wouldn't say that.

Mr. ELSTON. Will the gentleman yield?

Mr. DURHAM. Mr. Chairman——

The CHAIRMAN. Mr. Durham.

Mr. DURHAM. I want to ask the chairman how many officers were allotted under this new authorization.

Mr. ELSTON. You mean under the 50,000?

Mr. DURHAM. By the War Department.

Mr. ELSTON. 937.

Mr. DURHAM. I mean, not under the bill, but allotted at the present time under the authorized strength. What is the number?

Mr. ELSTON. I don't recall the number.

Mr. DURHAM. It was a very small number, wasn't it.

Mr. KILDAY. Two-hundred-some.

Mr. DURHAM. So this question of whether or not it is going to be 740 or 900 authorized, in either one of these amendments, is absolutely absurd.

Mr. ELSTON. Mr. Chairman, I think we ought to vote on this this morning without too much discussion. I don't want for a minute to prevent free discussion, but I am hopeful we can vote on it this mornign before the bell rings. Since this bill has been reported out, the press of the country and various associations—veterans' associations and others—have expressed unanimous approval of it. The only disapproval comes from the War Department itself. Just this morning the chairman received a wire, and I also received a wire which is brief, and I would like to read it. It is from the Judge Advocate's Association, that is made up of men who have served as judge advocates in the Army:

This association has observed with deep satisfaction the action of the legal subcommittee in bringing to your full committee a report relative to changes in the military justice system. This in our opinion is the finest study ever made on this subject. The recommende bill reflecting many War Department recommendations will go far to eliminate future criticism both just and unjust. The concluding sections strengthening the Judge Advocate General's Corps are vital not only to make the system work but to free command in the future from the charge which we know too often to have been justified that justice dominated by command is something less than true justice. We hope you adopt unanimously your subcommittee's report.

Brig. Gen. RALPH G. BOYD.
President of the Judge Advocates Association.

(The wire received by the chairman is as follows:)

BOSTON, MASS., *July 14, 1947.*

Hon. CHARLES H. ELSTON,
House Office Building, Washingtn, D. C.

We have wired Chairman Andrews as follows: This association has observed with deep satisfaction the action of the legal subcommittee in bringing to your full committee a report relative to changes in the military justice system. This in our opinion is the finest study ever made on this subject. The recommended bill reflecting many War Department recommendations will go far to eliminate future criticism both just and unjust. The concluding sections strengthening the Judge Advocate General's Corps are vital not only to make the system work but to free command in the future from the charge which we known too often to have been justified that justice dominated by command is something less than true justice. We hope you adopt unanimously your subcommittee's report.

Brig. Gen. RALPH G. BOYD,
President, Judge Advocates Association.

NEW YORK, N. Y., *July 30, 1947.*

Hon. WALTER G. ANDREWS,
Chairman Armed Services Committee,
House of Representatives, Washington, D. C.

The special committee on military justice of the Association of the Bar of the City of New York believes that proper administration of military justice requires the creation of an independent Judge Advocate General's Department and the removal of the processes of military justice from the control of command. The committee on military justice of the New York County Lawyers Association, of which Mr. George Spiegelberg is chairman, have authorized me to state that they are in full agreement. We would appreciate your transmitting our views to your committee.

FREDERICK V. P. BRYAN, *Chairman.*

Mr. ELSTON. Mr. Chairman, all these amendments go to one thing and that is whether or not you are going to have an independent Judge

Advocate General's Department. In civil life you wouldn't think of mixing the judicial with the executive departments, because you can't obtain proper justice if you are going to scramble the departments. You have to have a separate department.

It is our studied opinion and considered opinion that you can't have military justice properly administered unless you have the separate Judge Advocate General's Department. It is the opinion of everybody except the War Department.

In my judgment, we have not taken from command sufficient authority so that they would be unable in time of war or at any other time to maintain discipline. I believe it is a good bill, and I hope we can vote on these amendments.

Mr. SHORT. Mr. Chairman——

The CHAIRMAN. The Chair will yield briefly to Mr. Short.

Mr. SHORT. The first thing I want to say, Mr. Chairman, is I think his subcommittee has done a marvelous job. They have studied as long and as hard as any other subcommittee of this full committee. I have no better friend in Congress and there is no man I think more highly of than Charlie Elston. I don't want to oppose him. Certainly, I am in sympathy with the provisions of this measure. We all want justice meted out, and we want to equalize sentences. I feel there is a great need of it, as every one of you do, but I don't want to rush through here in the last minute and do something that is ludicrous and will make us the laughing stock. We have already gone on record, in the promotion bill, of setting up a uniform system of promotion, with the one-half of 1 percent provision of the authorized active strength of officers in all branches of the armed services—and I mean the Army, the Navy, and Marine Corps. There was a unanimity of opinion. There was fundamental agreement between the branches of the Service. The bill was reported unanimously by our subcommittee, that also worked long and hard on that. Now, then, to come in here and set up 1½ percent of the authorized active commissioned officer strength in the Judge Advocate General's Department—which is giving them three times as many officers as any other branch of the service—simply runs counter to the bill we have already passed.

Mr. KILDAY. Will the gentleman yield?

Mr. SHORT. Just a minute, and I will; I will be glad to.

I think a lot of the confusion here this morning in the mind of my friend from Massachusetts, Mr. Clason, is: You are failing to distinguish between the actual and the authorized strength of the services. It is true that we have 1,070,000 men in our Army today, with over 130,000 officers, but the authorized strength of officers in the Regular Army is 50,000, which can man only an army of half a million. The truth of the matter is we have only 37,500 officers in the Regular Army today. We dont have our authorized strength. That is the fundamental point.

Mr. BROOKS. Will the gentleman yield?

Mr. SHORT. Yes.

Mr. BROOKS. If the subcommittee which had reported the original bill had allowed free latitude of discussion, like we are having today, I don't believe this committee would have reported that out as it was.

Mr. ELSTON. And you remember, we raised the question on the floor that this was coming.

Mr. BROOKS. Our position was never allowed to come out at all.

Mr. SHORT. I don't know of any one who was shut off. I know the gentleman from Louisiana thinks he is shut off by every chairman who presides over a committee.

Mr. BROOKS. I know I was shut off, and I know there was some opposition.

Mr. SHORT. I gave you every opportunity to be heard. I think the gentleman from New York, Mr. Cole; Mr. Vinson; Mr. Andrews; and the gentleman from Texas, Mr. Kilday, who served on both of these committees, will agree that what I said here is true.

You are going to set up a separate promotion list, and it is going to destroy the whole promotion system.

Mr. KILDAY. I agree with that. We are confusing two issues. I am as strong for revising military justice as anybody, but that has no relationship to the number of officers who should be permanent regular officers in the Judge Advocate General's Department. I am not saying that we should revise the military justice set-up when I urge the adoption of the amendment. It has no reference to the administration of military justice.

Mr. ELSTON. Will the gentleman yield to me?

Mr. KILDAY. Yes.

Mr. SHORT. Sure.

Mr. ELSTON. If we are going to report the bill out, we have got to fix a percentage. Now, the promotion bill will be in conference. This bill will be conference, if we report it out and it passes the House. That perhaps is something that can be worked out later. I think we came to that conclusion at the time we reported the promotion bill out.

Mr. SHORT. That is true.

Mr. ELSTON. We raised the question on the floor.

Mr. SHORT. Yes.

Mr. ELSTON. When this question was before us.

Mr. SHORT. Yes.

Mr. ELSTON. I said we would not take the time that day, because I knew you wanted to get the bill out.

Mr. SHORT. That is right.

Mr. ELSTON. I discussed the situation with the chairman, and you, Mr. Short——

Mr. SHORT. Yes.

Mr. ELSTON. To have an open discussion of the problem later on.

Mr. VAN ZANDT. Let us vote.

The CHAIRMAN. The question is on the amendment proposed by the gentleman of Texas, Mr. Kilday. All those in favor of the amendment will raise their right hands. The clerk will count them.

(Hands raised.)

The CHAIRMAN. I will vote Mr. Vinson aye, by his proxy.

Those opposed.

(Hands raised.)

Mr. ELSTON. I will vote Mr. Rivers no. I have his proxy.

Mr. BROOKS. I will vote Mr. Sikes no.

Mr. HARLOW. Nine voted aye, sir ,and fifteen voted against.

The CHAIRMAN. The vote is 15 nays and 9 ayes, so the amendment is rejected.

Mr. KILDAY. I offer an amendment, Mr. Chairman——

The CHAIRMAN. Mr. Kilday.

Mr. KILDAY. On page 46, line 15, change the period to a colon and add the following proviso:

Provided, That the promotion of officers whose names are carried on the Judge Advocate General's promotion list shall be no faster than the officers whose names were immediately adjacent to theirs on the Army promotion list prior to the establishment of the Judge Advocate General's promotion list, and in order to insure this the Secretary of War shall limit the authorized number in each grade on the Judge Advocate General's promotion list so that the junior officer in the grade of colonel, lieutenant colonel, and major shall have as many "years' service" creditable for promotion purposes as the junior officer in each of these grades on the Army promotion list.

This is designed to eliminate the question, discussed by Judge Patterson, of more rapid promotion——

Mr. BROOKS. Will it guarantee they will have the same promotion as the other services? Before the war they had less promotion than the combat branches of service.

Mr. KILDAY. This imports into the Army the equivalent of the Navy running mate system. He would be promoted no faster and no slower than his opposite number in the line of the Army. That is the whole thing.

Mr. VAN ZANDT. Let us vote.

Mr. ELSTON. Mr. Chairman, just one word on it. It all comes down to the same thing we have been discussing. We can discuss it for hours and get no further. I submit all these amendments go to the same thing and should more or less be considered together.

Mr. VAN ZANDT. Vote.

The CHAIRMAN. The question is on the last amendment offered by the gentleman from Texas, Mr. Kilday. All those in favor will raise their right hands.

(Hands raised.)

The CHAIRMAN. The Chair will vote Mr. Vinson aye.

Those opposed will register by raising their right hands.

(Hands raised.)

Mr. ELSTON. I vote Mr. Rivers no.

Mr. BROOKS. I vote Mr. Sikes No.

Mr. HARLOW. 14 nays; 10 ayes.

The CHAIRMAN. 14 in the negative and 10 in the affirmative. The amendment is rejected.

Mr. KILDAY. I offer a motion.

The CHAIRMAN. Mr. Kilday.

Mr. KILDAY. I move to strike out sections 46, 47, 48, and 49.

Mr. VAN ZANDT. Vote.

The CHAIRMAN. A brief statement by the gentleman from Texas striking out sections 46, 47, 48, and 49, on pages 44 to 47, inclusive.

Mr. ELSTON. That would simply strike out the section creating a separate Judge Advocate General's Department.

Mr. KILDAY. That is correct. It would have the effect of refusing to create a separate Judge Advocate General's Department. I am ready to vote.

The CHAIRMAN. All those in favor of the amendment will raise their right hands.

(Hands raised.)

The CHAIRMAN. The Chair votes Mr. Vinson aye.

Those opposed raise their right hands.

(Hands raised.)

Mr. ELSTON. I vote Mr. Rivers no.

Mr. BROOKS. I vote Mr. Sikes no.

Mr. HARLOW. 14 nays; 9 ayes.

The CHAIRMAN. The motion is rejected.

Any further amendments, Mr. Kilday?

Mr. KILDAY. No, sir.

Mr. ELSTON. I move a favorable report, Mr. Chairman.

The CHAIRMAN. The chairman of the subcommittee, Mr. Elston, moves a favorable report on the bill.

Mr. ELSTON. As amended.

The CHAIRMAN. As amended by the chairman——

Mr. SMART. Mr. Chairman, there are a few corrective amendments.

Mr. ELSTON. There are a few corrective amendments, of no consequence.

The CHAIRMAN. All those in favor of reporting the bill favorably will raise their hands——

Mr. GAVIN. With the corrective amendments.

The CHAIRMAN. With the amendments.

(Hands raised.)

The CHAIRMAN. The Chair votes Mr. Vinson aye.

Mr. ELSTON. I vote Mr. Rivers aye.

Mr. BROOKS. I vote Mr. Sikes aye.

The CHAIRMAN. The bill is reported.

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