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Statement by Arthur E. Farmer, Chairman, Committee on Military
Law of the War Veterans Bar Association, for presentation
to Subcommittee No. 1, House Committee on Armed Services.

Consideration of H.R. 2498 compels the conclusion that this Uniform Code of Military Justice is an outstanding work of codification, simplification and correction of the Articles of War and the Articles for the Government of the Navy. Many loopholes that were left in the army court-martial system by the provisions of the Elston Act have been closed in the Code, and the establishment of a single system of courts-martial for all the Services fills a long-felt want. The modification of the duties of the present law member of a general court-martial, so as to make him in effect the judge and the other members of the court the jury for the purpose of arriving at findings with respect to the charges and specifications, is greatly to be commended.

The revised provisions for review of records of trial set forth in Part IX of the Uniform Code are especially salutary (with a single exception that will be noted later in this statement) in two respects: (a) they greatly simplify the provisions of A.W. 50 $\frac{1}{2}$; and (b) the creation of a Judicial Council consisting of properly qualified laymen who will have the status of judges of the United States Courts of Appeal, is a tremendous advancement not only in the proper functioning of the court-martial system, but also toward the gaining of military and public confidence in the workings of the Services' courts.

It would be possible to commend the Uniform Code in many other respects and the greatest credit is due to its framers for their work of codification. The difficulty, however, is that the basic reform which the court-martial system requires and without which no real reform is possible - the elimination of command control

from the courts - is conspicuously missing. Under the Uniform Code the commanding general will still appoint the members of the court, the trial counsel and the defense counsel from members of his command, and will review the findings and sentence. We will still have the same old story of a court and counsel, all of whom are dependent upon the appointing and reviewing authority for their efficiency ratings, their promotions, their duties and their leaves.

The provisions of Article 37 which prohibit the censure of the court and counsel and any attempt to coerce the court's actions, will be valueless in a situation where the commanding general desires to circumvent them. It is naive to suppose that it will be necessary for the commanding general to use such direct means of influencing the court that they could form the basis for prosecution under Article 37. And no one who served in any branch of the armed forces would under-estimate the difficulty of obtaining an accuser of the commanding general, or a trial of the charges if an accuser could be found. The only method of making effective the prohibitions of Article 37 is to remove from command the power to influence the court.

It cannot be emphasized too strongly that practically every committee which has studied the subject has made the removal of command control the sine qua non of effective court-martial control. The War Department Advisory Committee on Military Justice made the checking of command control its primary recommendation. Its conclusion, after having heard the Secretary of War, the Army's Chief of Staff, the Judge Advocate General of the Army, and scores of other high officials and ranking officers, after having taken testimony in regional public hearings in ten of the largest cities in the United States, and after having digested the contents of

hundreds of letters and answers to its mimeographed questionnaires, was as follows (Report, pages 6-7):

"The Committee is convinced that in many instances the commanding officer who selected the members of the courts made a deliberate attempt to influence their decisions. It is not suggested that all commanders adopted this practice but its prevalence was not denied and indeed in some instances was freely admitted. The close association between the commanding general, the staff judge advocate, and the officers of his division made it easy for the members of the court to acquaint themselves with the views of the commanding officer. Ordinarily in the last war a general court was appointed by the major general of a division from the officers in his command, and in due course their judgment was reviewed by him. Not infrequently the members of the court were given to understand that in case of a conviction they should impose the maximum sentence provided in the statute so that the general, who had no power to increase a sentence, might fix it to suit his own ideas. * * *

"Indeed, the general attitude is expressed by the maxim that discipline is a function of command. Undoubtedly there was in many instances an honest conviction that since the appointing authority was responsible for the welfare and lives of his men, he also had the power to punish them and consequently the courts appointed by him should carry out his will. We think that this attitude is completely wrong and subversive of morale; and that it is necessary to take definite steps to guard against the breakdown of the system at this point by making such action contrary to the Articles of War or regulations and by protecting the courts from the influence of the officers who authorize and conduct the prosecution."

In a poll conducted by the Judge Advocate's Association, a national organization comprising in its membership nearly 2,200 of some 2,700 lawyers who served as officers in the Judge Advocate General's Department during World War II, 703 out of 774 members, replying to a questionnaire, advocated the total separation of the appointing and reviewing authority from command, with the power of the commanding officer limited to appointing the trial judge advocate and to referring the charges for trial. The resolutions of the House of Delegates of the American Bar Association, denouncing the provisions of the Articles of War which effectuate command control and which are carried forward into the Uniform Code, are too familiar to the members of this committee to require quotation, nor

is the fact that practically every other bar association and veterans organization, as well as the Navy's own Keefe Board, has taken a strong position against the perpetuation of such powers in the commanding officer, new to the members of this committee.

It would seem proper, however, to refer to two cases in the Federal courts which were referred to in an article written by George A. Spiegelberg, Esq., Chairman of the Special Committee on Military Justice of the American Bar Association, in the January, 1949 issue of that association's journal. The first is Shapiro v. United States, 69 F. Supp. 205, and the second is Beets v. Hunter, 75 F. Supp. 825. Without going into the facts which brought forth these acid comments made by Federal judges - and which certainly merited the comments - the following is taken from the court's opinion in the Shapiro case:

"A more flagrant case of military despotism would be hard to imagine. It was the verdict of a supposedly impartial judicial tribunal; but it was evidently rendered in spite against a junior officer who had dared to demonstrate the fallibility of the judgment of his superior officers on the court - who had, indeed, made them look ridiculous. It was a case of almost complete denial of plaintiff's constitutional rights. It brings great discredit upon the administration of military justice."

And in Beets v. Hunter, Circuit Judge Murrah said:

"The trial of this case in the eyes of both the prosecution and the defense was wholly obnoxious and repulsive to their fundamental sense of justice, and that is the test by which this Court should judge it.

"The Court has no difficulty in finding that the court which tried this man was saturated with tyranny; the compliance with the Articles of War and with military justice was an empty and farcical compliance only, and the Court so finds from the facts and so holds as a matter of law.

"He (the accused) could not have received due process of law in a trial in a court before men whose judgments did not belong to them, who had not the will now the power to pass freely upon the guilt or innocence of this petitioner's offense, the offense for which he was charged."

No system which permits the possibility of trials which deservedly bring forth such judicial criticism can properly be termed a system of justice - military or otherwise.

The remedy is simple and was first succinctly stated by Secretary Patterson's War Department Advisory Committee on Military Justice. That it bore in mind the necessity of preserving the disciplinary authority of command is explicit in its statement.

The Committee said (Report, page 9):

"The need to preserve the disciplinary authority of the command and at the same time to protect the independence of the court can be met in the following manner. The authority of the division or post commander to refer a charge for prompt trial to a court appointed by a judge advocate should be absolute. The commander should, of course, be furnished with a judge advocate to advise him with reference to the disposition of the charge. The right of the command to control the prosecution, and to name the trial judge advocate, who should be a trained lawyer, should be retained. The Judge Advocate General's Department, however, should become the appointing and reviewing authority independent of the command. For this purpose the present organization of the Judge Advocate General's Department may be sufficient and the power to select and review its judgment should normally rest with the Staff Judge Advocate at Army level, so that the members of the court may be selected from a wider area and the perennial problem of disparity of sentences in similar cases may be at least partially solved. It may be best in certain instances to place the authority on a higher level, or in case of war or in case of units established at a distance from the command, to delegate the authority to a division or smaller unit. We believe that the flexibility of such a system will aid in the solving of many problems and will permit the establishment of permanent courts or traveling courts if they be found desirable."

The changes recommended are neither drastic administratively nor difficult of accomplishment practically, however revolutionary they may be in concept in the armed forces of the United States. They require only the substitution of the senior member of the Judge Advocate General's Department or senior legal specialist attached to a command, for the commanding officer as the convening authority. Each commanding general of a division or other proper unit will designate a panel of officers for court-martial duty.

In the ordinary course, the convening authority would appoint the court from the panel submitted by the commanding general of the division of which the accused is a member. But when that commanding general has shown any tendency to attempt to influence the members of the panel - even though it would be impossible to obtain a conviction under Article 37, or if it were inexpedient to transfer or try the commanding general because of his military value - then the accused from that division would be tried by members of a panel from another division.

It is obvious that the problem would be more difficult in the naval forces, but the custom in the Navy has been for the Secretary of the Navy and the Naval Judge Advocate General to retain largely the power to appoint its general courts-martial, and it has not been customary for the commanding officers of units of the fleet to appoint such courts. In the normal case, therefore, it is apparent that it would be quite practicable for the senior legal specialist attached to the staff of the commander-in-chief of a fleet, or the commanding officer of a naval station or larger shore activity of the Navy beyond the continental limits of the United States (Uniform Code, Article 22) to convene a court with no greater difficulty than the commander-in-chief of the fleet or the commanding officer of the naval station would have experienced in so doing. The provisions of subdivision (6) and (7) of Article 22 giving convening authority to other commanding officers on lower levels may be continued by substituting for these commanding officers the senior member of the Judge Advocate General's Corps or the senior legal specialist attached to their staff.

It is quite possible that a situation may arise in the Navy where no legal specialist will be available. In such instances, a legal specialist could be temporarily attached to the staff of the command. A court which has the power to impose a sentence of death, of life imprisonment, or of bad-conduct or dishonorable discharge (which carry with them permanent disgrace and impairment of earning power in civilian life), should not be so appointed as to permit of any possible reflection upon its impartiality and independence merely because it would be inconvenient to attach, temporarily, a legal specialist to a lower echelon of one of the services.

The senior member of the Judge Advocate General's Corps, or the senior legal specialist, having been designated as the convening authority, the same powers of review should be exercised by them as are exercised by the commanding officer as convening authority under the proposed Uniform Code. Before the record is forwarded to the convening authority for review, however, it should be passed upon by the commanding officer who in the Uniform Code is designated as convening authority, for the exercise of clemency. His endorsement would limit the power of the reviewing authorities with respect to approval of the sentence.

In addition to this primary revision in the method of appointing general courts and accomplishing the initial review of their findings and sentence, certain other important changes should be made in the Uniform Code. These will be discussed in the order of their appearance in the Articles of the Code.

1. Article 8 authorizes civil officers summarily to apprehend "A deserter from the armed forces of the United States". This article should be amended so as to authorize such officers to apprehend "a deserter or a person absent without leave from the armed forces of the United States". The heading of the article should be amended in like manner to read: "Apprehension of Deserters and Personnel Absent Without Leave".

2. Article 15 is concerned with the right of a commanding officer to impose non-judicial punishment. In the Army an accused has the right, under the provisions of the Manual for Courts-Martial, to refuse such punishment and demand trial by a court-martial. In the Navy this is not true. When it is realized that a commanding officer may, under subdivision (a)(1)(C) impose upon an officer forfeiture of 1/2 pay per month for a period up to three months, and may in like manner reduce an enlisted man in grade or order him confined on bread and water for five days, the injustice of such a provision is apparent. Whether or not the imposition of punishment of such severity, without a right to trial, has been sanctified by custom in one branch of the Service, it is still unjustifiable, and the fact that no such power is given to commanding officers in another branch of the Service and discipline has been maintained despite the lack of such power, shows conclusively that the power is not necessary to the maintenance of discipline.

In any event, confinement on bread and water is a barbarous relic of earlier days and should be abolished, and if the commanding officer is to have power to impose non-judicial punishment without affording his personnel an opportunity to demand trial by court-martial, then he should not be permitted to impose forfeiture of one-half pay per month for more than one month, nor to reduce an enlisted man in grade. It is hereby earnestly recommended, however, that the non-judicial punishments, with the exception of

confinement on bread and water, be maintained as provided by the bill, but that the right to demand trial by court-martial be written in.

Further, trial by court-martial should be trial by a special or general court and not by the commanding officer's alter ego, the summary court officer. In order to effect the latter change, Article 20 must be amended, as hereinafter set forth.

3. Article 19: Under the provisions of this article special courts-martial may judge a bad-conduct discharge even though not a single member of the court or of counsel is trained in the law. It is certain that a bad-conduct discharge will be a stain on a man's record throughout life and will seriously affect both his opportunities to obtain employment and his chances for advancement. Such a stigma and the imposition of such a handicap should not be imposed unless a law officer shall sit as a member of the court to guide it in its reception of evidence and in the application of the relevant law. It is therefore strongly urged that Article 19 be amended by adding the following language to the final sentence of Article 19:

"and unless a law officer, qualified as set forth in Article 26(a) hereof, shall be appointed to the court and shall be present throughout the trial."

4. Article 20: This article should be amended by adding to the first sentence the following words:

"nor shall he be brought to trial before a summary court-martial in any event, unless he shall consent to trial by such court."

5. Article 52: Subdivision (b) of this article enumerates the matters of which the accused shall be advised in connection with the investigation of the charges preferred. It should be amended to include a provision that he must be advised of his right to be represented by counsel. To assume that the accused will be aware of this right without being specifically informed of it, would be most unrealistic and if the accused is to have the right to be represented by counsel, it should be made realistic by the change indicated. This change may be accomplished by rewording the first line of subdivision (b) as follows:

"The accused shall be advised of the charges against him and of his right to be represented by counsel * * * "

6. Article 52: Subdivision (c) of this article requires an amendment to eliminate a material source of confusion. This subdivision provides, among other things, as follows:

"A tie vote * * * on a question of the accused's sanity shall be a determination against the accused."

This section should be amended by stating specifically that the loss of a motion for a finding of not guilty based upon the accused's lack of sanity, shall not preclude a finding of not guilty because of the accused's lack of sanity, and that an accused may not be convicted where his sanity is in issue, except upon the concurrence of two-thirds of the members of the court present at the time the vote was taken as to the sanity of the accused.

7. Article 66: The framers of the Uniform Code have done an especially fine piece of work with respect to the system of review. Nevertheless, a most undesirable provision is embodied in subdivision (e) of Article 66. This subdivision provides that within ten days after any decision of a Board of Review, the Judge Advocate general may refer the case for reconsideration to the same

or another Board of Review.

The decision of a Board of Review should be final and no more excuse exists for referring the same case to another Board of Review than for bringing before the Court of Appeals for the Second Circuit a case which has already been decided by the Court of Appeals for the First Circuit. Under the provisions of subdivision (b)(1) of Article 67, the Judicial Council is required to review the record in all cases reviewed by a Board of Review which the Judge Advocate General orders forwarded to the Judicial Council for review. That provision gives to the Judge Advocate General the right to cause a review of a decision of a Board of Review in which he does not concur. Having the right to submit such a case to the Judicial Council, no reason exists why he should be able to peddle the case among other Boards of Review until he obtains the decision which he desires.

8. Article 67: Subdivision (c) of this article provides that the Judicial Council shall act upon a petition for review within fifteen days of the receipt thereof. It seems likely that this period may be insufficient in many instances, and it is therefore suggested that the period should be enlarged to thirty days.

9. Article 69: In the interests of clarity, the first part of the second sentence of this article should be reworded as follows:

"If any part of the findings or sentence is found incorrect in law or in fact * * *".

It is difficult to believe that in the case of a review by an officer in the office of the Judge Advocate General, the reviewing officer shall not have the power to weigh the evidence in like manner as the Board of Review and Judicial Council are now empowered.

This should be made clear by the rewording indicated.

10. Article 70: In order to make subdivision (c)(3) of this article conform to the proposed amendment to subdivision (3) of Article 66, it should be reworded as follows:

"when The Judge Advocate General has transmitted a case to the Judicial Council."

While the Uniform Code will not accomplish the desired result of achieving a real system of justice in the courts of the armed services unless command control is eliminated in the manner indicated in this statement, it cannot be too strongly emphasized that the revisions of the present Articles of War and Articles for the Government of the Navy embodied in the Code are essential parts of such a system. Each of them must be maintained, subject to the changes above set forth, in addition to the removal of command control, if real reform is to be accomplished.

Respectfully submitted,

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