STATEMENT OF PROFESSOR ARTHUR JOHN KEEFFE OF CORNELL LAW SCHOOL

6 (2)

For over eleven years I have been a teacher of law at Cornell Law School in Ithaca, New York. Prior to that time I was for about twelve years a practicing lawyer with the firm known now as Milbank Tweed Hope and Hadley at 15 Broad Street, New York, N.Y. From April 9, 1946 to June 12, 1947, I was President of the General Court-Martial Sentence Review Board of the United States Navy. I took the job at Mr. Forrestal's request to give a civilian review to over 2000 naval courts martial and to study the court-martial system and make recommendations for its reform. With Felix Larkin, Esq., the Executive Secretary of the Committee that drafted this Uniform Code, I was one of two civilian members of an otherwise all uniformed board.

I regret to state that I must oppose the enactment of this proposed Uniform Code in its present form. I do this the more reluctantly because of the personal admiration I have for both Professor Edmund M. Morgan, Jr. and Felix Larkin, Esq. They are the ablest of lawyers and the finest of fellows. Mine is also a reluctant opposition because there is a beginning in this Code of real reform. An effort has been made to achieve the same procedures in the three services and for the first time civilian judges are created to give a limited review. In contrast with the Chamberlain bill of 1920 for which Professor Morgan once fought so hard, this proposed uniform Code, however, is a sorry substitute.

I oppose the Code for two reasons:

1. LACK OF CIVILIAN ADVISORY COUNCIL.

After an exhaustive study of the court-martial system, Army and Navy, American and British and to the extent available other foreign countries, our board recommended to Mr. Forrestal that an Advisory Council be appointed to draft reform proposals for Congress.

This recommendation was in the highest tradition of the legal profession. Roscoe Pound of the Harvard Law School many years ago suggested it to the American Bar Association. That Association under the magnificent leadership of William D. Mitchell and with the aid of Chief Justice Hughes and Attorney General Cummings obtained rule making powers from the Congress for our federal courts. Mr. Mitchell is at present Chairman of the Advisory Committee to the Supreme Court with respect to the Federal Rules of Civil Procedure. There was a similar Advisory Committee on the Federal Criminal Rules under the Chairmanship of Chief Justice Floyd E. Thompson. Arthur Vanderbilt In the state of New York, as the result of a celebrated law review article of Mr. Justice Benjamin Cardozo, two similar advisory bodies were long ago established, the Judicial Council and the Law Revision Commission.

The reason why law reform has gone to court rules rather than codes is because codes quickly become rigid, and out of date. The Congress has too many other important things to do to make changes in legal procedure. A splendid beginning was made in the drafting of court-martial

by Judge Matthew McGuire for the Navy.

In my personal judgment the worst thing wrong with this Uniform Code is its failure to provide the permanent, independent Advisory Council which our board suggested and which the American Bar Association suggests.

The Uniform Code does provide for three civilian judges and I am happy that it does, but the annual report of these men and the three Judge Advocate Generals Code 67g is a poor substitute for the informed disinterested criticism that men such as Arthur Vanderbilt and Matthew McGuire would give the Armed Services and the Congress.

A moment's reflexion will convince you that this is so. Take any of a myriad of agencies that the Congress from time to time creates. Each begins zealously and alive to the public interest. All too quickly each agency comes to associate as the public the litigants that appear before it. In many cases we have seen the best agency go quickly to pot because there was not that disinterested civilian criticism that only a body constituted as the suggested Advisory Council could give. I think many agencies in Washington would welcome aid such as we suggest and I cannot understand why the Armed Services reject it.

Having made the mistake of not appointing an Advisory Council of distinguished civilians to draft this code, the mistake is compounded by sending this Code to the Congress without clearing it with the American Bar Association and other representative lawyer and veteran groups.

There can be only one explanation as to why this

has not been done. The armed services do not want any civilian control if they can avoid it.

Let me call to your attention what an Advisory Council can do.

(a) There Ought to be One Judge Advocates Department, Not Three.

Why have three Judge Advocate Generals? Why not merge completely at least the review functions of the three services and save the country money and become more efficient? It should be noted that Mr. Forrestal has suggested something of this sort for the medical service.

(b) There Should Be One Top Board of Sentence Review.

The Code does not provide for a top Board of Sentence Review or Clemency Board (See Keeffe Report pp 230-236). Presumably such boards are to be set up administratively by regulations (See Art. 36). This means that with no genuine civilian Advisory Council, the services will do as they please about such boards. It is not even provided that the three civilian judges buried in the Department of Defense need be consulted, though doubtless they would be. This is most important because over 75% of all court-martial cases are desertion or AWOL and involve difficult pyschiatric problems. A citizen army is bound to have many citizens who cannot make the necessary adjustment. Our board suggested that this important problem be tackled by a top clemency board headed by a distinguished civilian lawyer upon which, in addition to the clemency, officers of the services, there would be an able civilian psychiatrist and penologist.

There is need to study the prison systems of the services and such a top Board of Sentence Review would represent a needed check on the military prisons. Let's not forget what Thomas Mott Osborn found in the military prisons after the First World War. It would be an invaluable aid to a Civilian Advisory Council to have such a check on the prisons. Where is it?

(c) Are Officers Treated Better Than Men?

A great deal has been said about officers receiving less severe treatment than enlisted men. Though our board reviewed almost every case of a man convicted by a naval court martial down to one month after V-J Day who was still in prison when we reached his case, we saw the cases of only three officers. We thus could not say whether officers did or did not receive more favorable treatment than men and we pointed out that the problem was difficult and ought to be studied after a review of the cases (Keeffe Report pp 327-333). Nothing has been done about it. Will the three buried judges do this review with the three Judge Advocate Generals? You can be sure that if the Congress does not create the Advisory Council, it will never be done.

(d) The Effect of Each Discharge Should Be Studied.

Clemency has been granted in many cases by both the Army and Navy by changing a Dishonorable Discharge to a Bad Conduct Discharge. This is so much double talk because so far as our board could discover, there is very little practical difference between a bad conduct and a dishonorable discharge. We asked that the Advisory

Council be created to study those discharges so that if a man deserves some clemency and his discharge is to be changed from Dishonorable to a better ticket, he will receive the mercy. (Keeffe Report pp 318-325) There has been no Advisory Council and, therefore, there is not likely to be any correction of this dreadful injustice. To a man of self-respect, one of these discharges is civil death because a recipient of either cannot be employed by the state or federal governments or many corporations.

(e) Should Not Double Jeopardy Be Abolished?

From the cases our Board reviewed we were worried about the prevalence of double jeopardy in the armed services. An enlisted man gets into trouble. He is arrested and tried and jailed in the civil courts or his case is heard and he is acquitted or his sentence is suspended. When he is released by the civil authorities he is promptly tried again by the military for the same offense. This is wrong. In our report we said so and asked that the Advisory Council study this in all its phases. (See Keeffe Report pp 270 to 278) As you might expect with no Advisory Council, nothing has been done and Article 14 of this Uniform Code preserves double jeopardy in all its glory.

(f) The Barbarous Practice of Not Dating Sentence From Arrest Continues In This Code.

In case after case our board reviewed, no credit was given for time the enlisted man spent in jail before sentence. Article 57 (b) provides that sentence runs from the date of rendition and I cannot see that any credit is

to be given for prior confinement.

In our report we asked that credit be given in whole or in part from the date of arrest depending upon whether the defendant was confined to quarters or the post or incarcerated in the brig. (Keeffe Report pp 182-186) The point is important as in many cases delay of trial for proper preparation is in the defendant's interest and if subsequently convicted he ought to receive credit from arrest in the sentence rendered by the trial court. Once more an Advisory Council is needed.

(g) Could Not an Advisory Council Advise The Armed Services and the Congress As To Whether the Civil Legal Work of the Services Could Best Be Handled By the Judge Advocates or Civilian General Counsel?

An Advisory Council would be of great value to the Armed Services because there is a great deal of civil litigation and procurement now handled by civilian lawyers in both the Navy and Army and Department of Defense. Ballantine made a study for the Navy on the office of the General Counsel that such an Advisory Council could and should follow up

I have taken the liberty of listing these matters at considerable length to show the Committee that there is no Advisory Council created for the same reason that the drafting of this Code was not done by such an Advisory Council. The Armed Services want a minimum of civilian control, preferably none. I don't blame them. But as former President Herbert Hoover has recently pointed out, the expenditure of money is so great a factor in our total

economy there must be more not less civilian control. In this instance a citizen army is to be left without informed civilian disinterested advice. Above every other reform, the Congress must insist upon the appointment of a civilian Advisory Council by the President. If this be done it will not matter whether the proposed uniform Code is enacted or defeated. The business will then be in competent disinterested civilian hands and by annual reports and studies the Congress and the Secretary of Defense can correct the serious defects in this present legislation.

2. UNLIKE THE CHAMBERLAIN BILL OF 1920, THE PRESENT UNIFORM CODE PRESERVES SUBSTANTIALLY UNIMPAIRED COMMAND CONTROL OF THE COURT-MARTIAL SYSTEM; AND IT FAILS TO PROVIDE THE NEEDED IMPARTIAL JUDICIAL REVIEW.

The Congress will remember that the Chamberlain Bill of 1920, which failed of passage, proposed that command control of courts martial be eliminated in two ways: one, the convening authority or commanding officer was not to have the right any longer to review the judgment of the court that heard the case; two, court-martial cases after they were decided by the trial court were to be reviewed automatically before three judges appointed by the President, constituting a court of military appeals and located in the Office of the Judge Advocate General. In sharp contrast to the provisions of the Chamberlain bill, the present Uniform Code preserves intact the review of the convening authority, not only for clemency but also for points of law. And while it does create a judicial

council, consisting of three civilian judges and located in the Department of Defense, the right to appeal a court-martial case to this judicial council is badly limited.

Let me take up these matters in more detail:

(a) The Code leaves Unlimited Review In The Convening Authority That Makes the Charges And Appoints the Court

The convening authority or commanding officer makes the charges against the accused and picks the membership of the court. From the experience of our board in reviewing naval courts martial, I can confidently assert that the principal thing wrong with trials is the fact that the court is so under the domination of the commanding officer that there is no trial at all. It is not so much that innocent men are convicted as that outrageously long sentences are given by the trial court. The convening authority is not a member of the trial court. He does not see the accused or hear the witnesses. Yet the trial court knows that their decision will be reviewed by the convening authority and the line of least resistance for the members of the court is to fix a long sentence and let the convening authority fix the final sentence. This is just the reverse of what should be done. The court under our American system--the court that hears the accused and sees the witnesses--should follow through and fix the sentence, because it is in the best position to do so.

It was the suggestion of Arthur Vanderbilt that

this review of the convening authority on law points be eliminated and that the review power be cut down to review for clemency only. It has been the suggestion of the American Bar Association not only that the review be limited to clemency but that the selection of the court be made by the Judge Advocate General and taken away from the convening authority. This suggestion is a good one and I heartily approve it. It was the suggestion of our board that the provisions of the Chamberlain Bill of 1920 be followed, and that the review power of the convening authority for either law points or clemency be eliminated entirely (Keeffe Report pp 189 to 206). This is for the reason that we thought that under the guise of clemency, a convening authority will actually fix the sentence and the courts appointed by him would continue to give too long sentences, knowing full well that under his clemency power, the convening authority will reduce the sentence to what he thinks it ought to be. The viciousness of this system has always been the fact that not all sentences were reduced as the trial court thought they would be.

The difficulty is that the present Uniform Code preserves intact (Articles 60-64) the right of the convening authority or the commanding officer to make the charges against the accused, to appoint the court that is to try the accused, and to review the sentence passed by his own appointed court.

There will never be any improvement in court-

martial trial procedure so long as this power remains in the convening authority or commanding officer.

(b) The Code Preserves an Unnecessary and Expensive Bureaucracy In That Boards of Review In the Offices of the Judge Advocate Are Unnecessary, Wasteful, Cumbersome and Undesirable.

The present uniform code not only provides for review by the convening authority or commanding officer but after the case has passed him, it is to be reviewed by boards of review in the offices of the three Judge Advocate Generals. This seems to me an unnecessary step and a waste of time and money. An efficient review would bring the case directly from the trial court to a court of military appeals such as the Chamberlain Bill proposed. The boards of review in the offices of the three Judge Advocate Generals appointed by him will be subject to his control. You cannot expect such boards of review to give that disinterested impartial review that the Congress desires. Like the trial court, under the domination of the convening authority, the boards of review will be under the domination of the Judge Advocate General. It is equally undesirable. Courts should not be under the domination of any one. The very creation of these boards of review is most undesirable in that it is proposed to give some cases only a military review before these boards of review. This perpetuates the old mistake of unequal review.

(c) Appeals Under the Code To the Judicial Court Appear To Be For Generals and Admirals Unless You Get Death.

The present uniform code creates a judicial

council of three civilian judges, but the difficulty is that the same vice that was present before persists. The great virtue of the Chamberlain Bill was that the case of every man was reviewed automatically before a court of judges appointed by the President. This was our suggestion (Keeffe Report pp 216-222). There is no reason why the three judges cannot be expanded to five or seven if need be, and all the cases heard automatically by them.

The Congress should realize that over 75% of the cases are desertion or AWOL and there are very few points of law in them. I would think that the officers of the Judge Advocate General's Department would be much more profitably employed in preparing cases for the Judicial Council. Why give the double review? The time consumed by the Convening Authority and these Boards of Review is a waste of time and money. Certainly the work of this Court will not be greater than the United States Circuit Courts of Appeals for the Second Circuit or of the U.S. Court of Appeals for the District of Columbia. If it is to receive the pay and rank of a United States Circuit Court, it ought to do the work of such a court. I am sure five judges could do it, sitting in panels of three judges as the circuits do. Why not do this? I cannot believe there is any merit in any suggestion that boards of review are necessary to cut down the volume of cases. Our board reviewed over 2000 naval courts martial from April to September. It can be

done adequately by a five Judge Civilian Court if it organizes right and goes to work.

Under the present uniform code, who can be sure who is given an unqualified right to bring his case to the Judicial Council? Unless you have been sentenced to death, the only ones who are given--under the uniform code--an unqualified right to have their cases reviewed before the Judicial Council are generals and admirals. I submit that this is contrary to the American system and that everyone regardless of rank should have his case automatically heard before this top civilian Judicial Council. Here again we see command influence in operation.

(d) The Code Lets the District Attorney (JAG) Decide What Cases To Appeal To The Judicial Council.

The Judge Advocate General is not, and by the nature of his office and appointment, cannot be an impartial judicial officer. He is in as inconsistent a position as a commanding officer or convening authority. He is to enforce discipline and he is to give defense. It is for this reason that the English in their reforms have provided that the Judge Advocate General be a civilian appointed on the recommendation of the Lord Chancellor and be responsible to him.

Significantly, in order to reduce this conflict the English have removed the Judge Advocate General from the control of the Secretaries for State and Air. The Committee headed by Justice Lewis declared that the prosecuting and defense sides of the office of the

Judge Advocate General's office must be completely separated. This recommendation of the Lewis Committee follows and approves the similar recommendation of the prior Oliver Committee. And the recommendation has actually been put into effect. See Report of the Army and Air Force Courts-Martial Committee of 1946 published in January, 1949, Prefatory Note and paragraphs 107 and 109 and 115 to 120. The prosecution seems to be placed under the Adjutant General of the British Army for purposes of discipline and general administration. And the English have under consideration changing the name of their Judge Advocate to "Chief Judge Martial" since in the future his duties are to be purely judicial and his title is "confusing and misleading." See paragraphs 30 and 114 of the Lewis Committee. The English also are considering changing the name of the trial "Judge Advocate." The suggestion is to call the Trial Judge Advocate, the "Judge Martial," or "Deputy Judge Martial." (See paragraph 197 of the Lewis Committee report). This present reform carries out the program of the Oliver Committee appointed when the English Prime Minister was a Conservative.

He fails to note the JAG's decisions are advisory only

To all intents and purposes there is no difference between the Judge Advocate General and a District Attorney in civilian life. Yet, despite this basic conflict of interests, the uniform code in Article 67 (b) (2) provides that the Judge Advocate General may order forward to the Judicial Council for review, such cases as he pleases. This strikes me as very bad. This

means that if you are given a death sentence or you are a general or an admiral or you are a man whose case interests the Judge Advocate General, you can have your case appealed to the three civilian judges appointed by the President.

From what I have seen of review of courts martial, I say to you that the time has come when review should be given to every case equally and without depending upon the action of anyone. When national defense is so necessary that we have to have large citizen armies, the least that this Congress can do for the parents of American youth is to see to it that the case of every one of them who is convicted, be reviewed before a top civilian court. I say expand the Judicial Council to five Judges and give review to every one alike.

(e) The Code Provision For Review By Petition Is a Phoney. It Is For the Wicked and Well Connected, Not For G.I. Joe.

There is a third way by which a case can be reviewed by the Judicial Council after it has been unnecessarily reviewed by the convening authority and a board of review in the offices of the three Judge Advocates. Article 67 (b) (3) provides that upon petition of the accused, the Judicial Council can grant a review. I call your attention to the fact that the code significantly does not tell us who is to make this petition. In my short tour of duty with the Navy, I saw the cases of very few defendants that were highly educated men. They were very young men, and in most

cases very poorly educated men. They were men who were in trouble largely because of bad home environment. They were the children of divorced parents, and the real poor and neglected in America. These men, if they are to exercise the right to appeal, to file a petition to the Judicial Council, will have to have assistance. The only ones who will not require assistance are the wicked and the well connected. This method of providing an appeal by petition will result in the wrong kind of cases going to the Judicial Council and the right kind being buried in the board of review in the office of the Judge Advocate General.

(f) The Code Does Not Provide For A Chief Defense Counsel.

To be sure that every case is presented to the Judicial Council, it was the suggestion of our board, based on our experience in reviewing the cases, that there should be created a Chief Defense Counsel. (Keeffe Report p. 254) Such an officer, and not the Judge Advocate General, should have the responsibility of appealing cases to the top civilian court. It is too much to expect any Judge Advocate General, no matter how well intentioned and no matter how capable, to act in two capacities like Pooh Bah. It is like asking the District Attorney to appeal the case of a defendant that he has convicted. If we have a Chief Defense Counsel appointed by the Secretary of Defense, there is good reason to suppose that the Chief Defense Counsel will present to the civilian court the points that should be presented in the defense

of every man convicted by a court martial. If he fails to do so, he has failed to do his specific duty.

(g) The Code Does Not Insure Appeal To The U.S. Supreme Court For G.I's and Gobs.

Furthermore, in our report we called attention to the fact that throughout the war there were no cases appealed to the Supreme Court of the United States with respect to any American boy. It is a curious thing that our highest court has heard cases with respect to Yamashita, Homma, and the German saboteurs, but not one case--except for the recent Hirshberg case--of an American boy.

In my judgment this is one of the greatest reflections upon the American court-martial system and in my judgment we will never have cases appealed to the Supreme Court of the United States unless we have a Chief Defense Counsel charged with the duty of appealing to the Supreme Court of the United States such cases as in his judgment, he deems appealable. It is not that the services are opposed to giving an enlisted man a fair trial. The vice is that the system lodges appeal in the Judge Advocate General. If the system were changed so that a Chief Defense Counsel were charged with this duty, he could be depended upon to do it. I have the highest respect for the officers of the Armed Services and I know no body of men that can be better trusted to do their duty. However, it might be well to have the Chief Defense Counsel a civilian. Once we change this

court martial system so that a Chief Defense Counsel is created and is free to act, we will see appeals brought to the Supreme Court of the United States from courts-martial convictions as they should be, instead of being buried in the offices of the Judge Advocate Generals. The convictions that we have read about at Litchfield, the recent convictions that we have read about in the American District in Germany, arising out of the Malmedy massacre (see N.Y. Times for Wednesday, March 2, 1949), indicate that there are cases that should be brought to the Supreme Court of the United States. In my own experience, we had a group of cases involving alleged rape in the sugar cane in Hawaii which should have been appealed to the Supreme Court of the United States and were not. In fact, the recommendation of Felix Larkin, Esq. and myself that the convictions in those cases be set aside has not yet, so far as I know, been followed, and our request that those cases--in the event conviction was not set aside--be referred for study by a committee of the American Bar Association has not been honored. There were other cases that our board reviewed involving difficult judicial points which should have been reviewed in the Supreme Court of the United States and were not. Mr. Larkin and I made similar recommendations in respect to these and so far as I know, nothing has been done to set aside the sentences. Clemency was extended, but the conviction remains and this is a great injustice. To my way of thinking, a Chief

Defense Counsel is an absolute necessity. Along with the creation of such an office should go a change in the outmoded method of appeal of a court-martial case into the Supreme Court of the United States. Such cases can not be appealed except by filing a writ of habeas corpus in a District Court of the United States and appealing from the district court to the circuit and then applying by writ of certiorari to the Supreme Court of the United States. Our board asked this be corrected but nothing has been done so far as I know and this Code does not change matters. (Keeffe Report pp 251-253) The least that should be done is to give the Chief Defense Counsel the right to appeal to the United States Court of Appeals for the District of Columbia or directly to the Supreme Court of the United States by certiorari.

(h) Having Sabotaged the Judicial Council In Limiting Its Right To Hear Appeals In Every Case, The Code Completes The Job By Limiting It To Points Of Law Only.

Another difficulty in the Judicial Council, as set up on the present code, is the fact that the Judicial Council can review only matters of law. The experience of the Army with its boards of review has been very bad. It has been difficult if not impossible to tell what is a question of fact and what is a question of law. The result is that review by the boards of review of the Army has been particularly criticized. The present code permits an unlimited review before the boards of review, but in creating the new Judicial Council, it per-

petuates the vice that was present in the old Army boards of review. It limits the Judicial Council to review questions of law and chains the Judicial Council to the facts as found by command. This is not the kind of civilian review that we ought to have. We reviewed cases where we thought that confessions had been extorted from the accused by torture. Is the obtaining of a confession by extortion a question of fact or a question of law? Cases of that sort are bound to be difficult to review and the statute should be drawn so that the Judicial Council has an unlimited right to review questions of fact as well as questions of law. (See Article by Samuel Morgan, Dec. 1946 Atlantic Monthly and Keeffe Report pp 226 to 227)

3. THE ONLY HOPE FOR REAL REFORM OF COURTS MARTIAL IS TO CREATE AN ADVISORY COUNCIL.

From what I have said, it seems clear to me that there is no hope for an adequate thorough-going reform of the court-martial system unless a permanent Advisory Council is created as suggested by our Board. (Keeffe Report pp 2 to 5 of Introduction) and the American Bar Association.

The hope of those in the armed services who oppose reform is that those of us who are informed and interested will lose interest and tire out. It is a severe personal sacrifice for busy lawyers and busy men to take the time that is necessary to present the civilian point of view on reform to the Congress. The Congress should recognize

that we are a scattered group and the matter should not be left in this way. The American Bar Association proposes, in line with the suggestion of our Board, that there be a permanent independent Advisory Council of lawyers appointed by the President. Over and above every other reform, I again urge upon you the importance of creating this Advisory Council so that the disinterested opinion of men like Vanderbilt and McGuire and the rest can be brought to your attention.

Respectfully submitted,

NOTE

I call the attention of the Committee to Article 106 of the Uniform Code under which as I read it "any person in time of war" becomes subject to court martial. Article 106 applies by its terms to "any person" who is "in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in and of the prosecution of the war by the United States." Unless this is not "time of war" as meant by Article 106, it would take effect today on enactment. In any event during the last war it would be difficult, it seems, to find anyone in the United States not subject to this broad and dangerous language. With double jeopardy the vogue then, most civilians in war time would be subject to both civil trial and court martial. This language should be torn out by the roots.