

STATEMENT OF THE HONORABLE W. JOHN KENNEY,
UNDER SECRETARY OF THE NAVY, BEFORE SUBCOMMITTEE #1
OF THE HOUSE ARMED SERVICES COMMITTEE ON H. R. 2498,
A BILL TO ENACT A UNIFORM CODE OF MILITARY JUSTICE.

During the initial stages of the hearings on this bill, this Committee heard much criticism directed at the so-called command control of courts-martial, and at this bill for failing to eliminate such control. I appreciate this opportunity to state the views of the Navy Department with respect to this problem, and to clear away some of the emotional mists that surround it. I am hopeful that when I am through, you will agree with me that the Uniform Code of Military Justice is sound in this regard, and that to change the method provided therein for convening and appointing personnel of courts-martial would be not only unnecessary but unwise.

At the outset, I believe the Committee should, and does, recognize the very basic fact that the military services are fundamentally different in nature from civilian society. Judge Robert P. Patterson, former Secretary of War, an eminent jurist, a competent administrator and a man who knows military life from the ground up, has said:

"Many of the critics overlook the place of military justice in the army or the navy. An army is organized to win victory in war and the organization must be one that will bring success in combat. That means singleness of command and the responsibility of the field commander for everything that goes on in the field.

The army has other functions such as feeding, medical care, and justice, but they are subordinate. You cannot organize an army to carry out those functions principally. And when critics say you ought to have a completely independent judiciary, they overlook the primary purpose of the army, namely safeguarding the nation and winning the war."

In order to be effective in carrying out the assigned responsibility of a military force -- success in battle -- good discipline is essential. The element of discipline is an intangible; it is that impalpable factor which distinguishes a crack outfit from a mediocre one. The existence of discipline depends in large measure upon the amount of respect which the personnel of the unit have for the commanding officer -- respect for his ability, his fairness, and his authority. To subtract from the commanding officer's powers of discipline through courts-martial can only result in a diminution of his effectiveness as a commander. He is the man who is cognizant of the needs of his command -- he knows the men and their problems. He is, in my opinion, the man best qualified to appoint a court.

The appointment of courts by commanding officers does not represent, nor has it resulted in, improper control of the administration of justice. The Navy believes that the system of military justice works well. Of course, an occasional miscarriage receives wide-spread publicity, but no mention is made of the thousands of cases in which justice is fairly meted out. Our studies indicate that the conviction of an innocent man is rare indeed, whereas the guilty are usually punished. Sentences which are unduly severe as originally imposed are ultimately

corrected in the review processes of Naval justice. The same conclusion was reached by the General Court-Martial Sentence Review Board, of which Professor Arthur John Keeffe of Cornell University was Chairman, which reviewed over two thousand general courts-martial cases in 1946. This Board determined that the sentences of Naval general courts-martial prisoners after full departmental review were reasonable and just. It found that sentences imposed by courts-martial in cases involving civilian type offenses compared favorably with those imposed by civilian criminal courts.

Authority and responsibility go hand in hand. If we are to lay upon commanding officers the grave responsibilities inherent in carrying out a battle mission, we must also endow them with the authority by which they can secure the maximum effective effort from every man in the organization. Authority is not an evil thing in and of itself. It is bad only when it is exercised without wisdom, dignity and restraint. One of the best guarantees against such arbitrary exercise of authority is the high degree of personal integrity of our officers, a factor which I believe has been completely overlooked in the previous testimony before this Committee. In my opinion, nothing could be more harmful to the maintenance of good discipline than taking away from the commander his power to provide for the proper administration of justice within his command.

I should like to pass now to a discussion of the possibility under this proposed bill of command appointment of courts-martial influencing the outcome of cases. In drafting the bill, we have attempted to provide as many safeguards for the accused as practicable, and I believe that the result is a system in which a man tried by court-martial will be given as fair treatment as is humanly possible. First of all, Article 32 provides for a thorough and impartial investigation before charges may be referred for trial. During this investigation, the accused is entitled to be represented by counsel, which is to be provided for him unless he desires counsel of his own choice. Under Article 34, the convening authority may not refer charges to a general court-martial unless trial is warranted by evidence indicated in the report of the investigation. Assuming that an accused is brought to trial before a general court, he must, and I should like to emphasize this point, be provided with a defense counsel who is a trained lawyer, unless he chooses counsel of his own. Furthermore, there will be assigned to every general court-martial a law officer who must be a trained lawyer, who is authorized to rule with finality upon such interlocutory questions as admission of evidence. Article 54 is of fundamental importance since it makes mandatory the keeping of a record of all general courts-martial, which record, it is intended, shall be a verbatim transcript of the proceedings.

In the event of conviction, the review procedures provided by the Uniform Code afford excellent protection to the accused. First, the case is reviewed by the convening authority, who must secure the advice of his staff judge advocate; he may diminish or abolish the sentence, but he may not increase it. The convening authority must then forward the record to the Judge Advocate General, who must refer each case involving a severe sentence to a Board of Review composed of not less than three trained lawyers. Here, the case is scrutinized thoroughly both on the law and on the facts, and if the Board of Review does not affirm the findings and sentence it may order the charges dismissed. In the event that the Board of Review sustains the conviction and sentence, the accused has the right to petition the Judicial Council, composed of the ablest civilians available, for a review of the case on the law. The Judicial Council has power to order the dismissal of charges if it finds error of law.

The protections from improper influence given the accused have the greatest effect in the review processes at levels higher than the convening authority. It should be noted that once the convening authority has passed upon the case, it goes into the hands of completely disinterested persons, some military and some civilian, but none of whom are in the chain of command. The system of review provided in this bill guarantees that the ultimate

disposition of a general court-martial case will be entirely free from any taint of improper domination and will be based upon detached, objective consideration. But -- in order to go even further in establishing free action for our courts -- we have incorporated Article 37 into the Code, making improper or coercive influence unlawful. The language of this article is almost identical with that inserted into the Articles of War by this Committee last year in the Elston Bill. I consider it a most sound and effective means of protection. If any person attempts to influence the outcome of any case, he will have committed an offense under the Code which is punishable under Article 98. Furthermore, if any person criticizes any of the personnel of the court concerning the exercise of their functions, he, too, will have committed an offense under the Code. No person sitting as a member of a court, or serving as law officer or as counsel need fear receiving any reprimand from his commanding officer indicating displeasure at the court's action. Under Article 37, it would be unlawful to insert in such a person's record an admonition which might affect that officer's entire career.

It has been suggested that one means of minimizing command influence would be for the convening authority to establish panels of officers for duty as members of courts-martial, from which panels his staff judge advocate or legal officer would appoint individuals for a given trial. Such a procedure presupposes that all officers put on the panel are available for court-martial

duty at any time. This is not the case in actual practice, simply because the needs of the service, particularly afloat, make their availability unpredictable. Changes in the personnel comprising such a panel could not, in the face of a statute authorizing the staff judge advocate to appoint them, be made after such appointment.

The result would inevitably handicap the commander in the discharge of his duties, and in time of war the consequences might be serious. Furthermore, the suggested method also presupposes that one panel will do for the trial of all types of cases. This is not true. For example, the trial of an enlisted man for theft would not require members with special qualifications or particular seniority, whereas the trial of the captain of a battleship for negligently hazarding his vessel would call for senior officers of sea-going and technical experience.

In closing, I should like to express to the members of the Committee my belief in the merit of the bill which you are considering. It is the result of long and careful study, of the free interchange of ideas, of an awareness of the need for preserving the rights of individuals to the fullest extent possible in a military organization. At the same time, we have attempted to provide a system which will be workable from an administrative standpoint and will not create such a mass of technical obstacles as to render the accomplishment of the armed forces'

primary mission a hopeless task. I am hopeful that this bill will receive the support of Congress and be enacted into law.