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STATEMENT OF RICHARD H. WELS, CHAIRMAN, SPECIAL COMMITTEE ON MILITARY JUSTICE OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION, BEFORE THE HOUSE ARMED SERVICES COMMITTEE ON H. R. 2498, A BILL TO ENACT A UNIFORM CODE OF MILITARY JUSTICE.

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Mr. Chairman, and Members of the Committee:

My name is Richard H. Wels. I am appearing before this Committee as a representative of the New York County Lawyers' Association, and speak to you as Chairman of the Association's Special Committee on Military Justice. I should like to point out that all of the members of our committee saw active service overseas during World War II, and that they are presently reserve officers of the Army, Air Force, and Navy. I myself am a lieutenant in the United States Naval Reserve, but the views expressed by me here are, of course, not to be construed as the views of the Navy Department.

With the permission of the Committee, I should like to place in the record a copy of the report made by our committee last fall containing our recommendations to the group headed by Professor Morgan which drafted the bill now before you. This report, which was made at the invitation of Professor Morgan, met with the full approval of our Association.

The bill now before you represents a long step forward in court martial reform. That the representatives of the three services have been able to agree on a uniform code of procedure, on uniform terminology, and uniform substantive laws is an accomplishment which few thought could be brought about. No one should underestimate the difficulties of that task, and the patient effort required to bring it about. It invites the hope that some day the ultimate objective of a single Judge Advocate General's Office, servicing all of the armed forces out of the office of the Secretary of Defense, will be realized.

We like many things about this bill. Our criticisms are not directed so much at what it does, as at what it does not do. Frankly, we are going to play Oliver Twist and ask for "More".

When Professor Morgan invited our views as to what ought to be in the model courts-martial bill which was being drafted, we told him that the basic reform without which there would be no such thing as real courts-martial reform, or in fact real courts-martial, was the elimination of the domination and control of courts-martial by command. The phrase "command control" is vague and indefinite to those not close to the picture. Let me explain what we mean by it. Under the existing system the same commanding officer is empowered to accuse the defendant, to draft and direct the charges against him, to select the prosecutor and defense counsel from officers under his command, to choose the members of the court from his command, to review and alter the court's decision, and to change any sentence imposed. Although the military and naval courts take oaths "to well and truly try, without prejudice or partiality, the case now depending, according to the evidence which shall be adduced, the laws for the government of the Navy, and your own conscience" those courts have too often been told by the commanding officer who appointed them

that when he ordered a court, it meant that he had concluded the man was guilty, but that he could not impose a sufficient punishment himself. Too often the courts have been told that they were expected to bring in verdicts of guilty, and impose specific sentences -- and told that even before they had heard the testimony of witnesses.

That is command control. And the control is exercised by reason of the fact that the participants in the courts (the judges, the prosecutors, and the defense counsel) are subject to the full command of the officer who appointed them, and that their service careers are in his hands. If you will read the press release issued by Secretary Forrestal's office when this bill was introduced, you will see the statement there that under this bill all of these powers which add up to command control are retained. The commanding officer still appoints the officers under his command to serve as judges and as prosecutors. He still reviews their decisions, and he has complete power to influence their decisions by the fact that he controls their promotions, assignments, leaves, and fitness reports. There is no question that this bill retains command control in all of its ugly aspects.

We are not alone in urging the elimination of command control and the creation of truly independent courts within the services. Every board and committee appointed by the War and Navy Departments has made this same recommendation, including the famous committee headed by Chief Justice Arthur T. Vanderbilt of New Jersey. The American Bar Association has made it. Veterans groups have made it. The recommendation comes from all of those concerned with our democratic way of life, who feel that it is not too much to ask that the citizen army of a democracy be given that fundamental fair play and assurance of justice which our country is trying to give to the rest of the world. It is ironic that those who are being subjected to a peacetime draft for the first time in American history themselves are not given the basic rights which our government seeks to give the rest of the world through their service.

I should like to emphasize that we are as much concerned about the maintenance of discipline in the armed forces as are those who seek to retain command control. We believe that discipline is dependent in a large degree upon the morale of the men who make up the services, and we do not believe that there can be good morale when men feel that the service courts which are set up to do them justice are not real and fair courts as we think of them here in America. There is little difference between an Army court which has been influenced by its commanding officer and the Budapest tribunal which recently convicted Cardinal Mindszenty.

We feel that the commanding officer must and should be able to place a man on trial and control and direct the prosecution. But the judicial machinery itself must be in the hands of an independent judicial system within the services which, not subject to pressure and influence from command, will insure the accused the same fair trial by competent personnel that he would receive in our criminal courts were he a civilian. This can be accomplished by including in this bill the recommendations of the Vanderbilt Committee for the creation of independent Judge Advocate General's Departments within

the services which will operate the courts of the services. It is interesting to note that Great Britain, from which our own systems of military and naval justice derive, has itself effected this reform, and that in England today the Judge Advocate General is now appointed by the Lord Chancellor, who is England's Chief Judge. It ought to be noted that this reform in Great Britain was not the work of a Socialist Government, but was the recommendation of the Lewis Committee, composed of leading judges and generals.

If the power of appointing the court and defense counsel is to rest with the Judge Advocate General's Department, as we propose, and if the judicial review of courts-martial is to be in the higher echelons of the Judge Advocate General's Department, this presupposes that there will be in each Department an independent Judge Advocate General's Corps free of the control of command in matters of promotion, assignment, leaves, fitness reports, etc. Such a professional corps already exists in the Army. It never has existed in the Navy, where line officers have been assigned legal duties. The Air Force has sponsored a bill already introduced which would exempt it from the necessity of having such a corps.

Establishment of such corps is not the departure from precedent that we are led to believe. It would be no different than the Medical Corps, the Dental Corps, the Chaplains Corps, and the Engineers Corps which have existed for many years and without criticism. We believe that matters affecting the lives and liberties of millions of men are sufficiently important to require the services of specialist officers. Failure to create such corps in the Navy and the Air Force will itself frustrate the purposes of the bill before you, since this uniform code can not receive uniform application when it is administered by trained specialists in the Army, and by non-specialist officers in the Navy and the Air Force.

I should now like to address myself to specific provisions of the bill before you.

One of the admirable provisions of the bill is Article 67, which creates a Judicial Council whose members shall be appointed by the President from civilian life and who shall receive the same salary as Judges of the United States Court of Appeals. Such Judicial Council is to be the final reviewing authority of courts-martial. The provision for such a Judicial Council is a forward looking step, and will do much to remove the confusion that now surrounds reviews. However, the language of the section is in itself confusing. It does not specify how many members of the Council there shall be. It does not indicate whether they shall be appointed by the President alone, or by and with the advice and consent of the Senate. It does not say whether they shall serve for life, for a tenure of years, or at the pleasure of the President.

We believe that if the members of the Judicial Council are to have the pay and status of the judges of the Court of Appeals, they should be appointed in the same manner and under the same conditions as such judges. We recommend that a specific number of members of the Judicial Council shall be provided for, and that they shall be appointed with Senate confirmation for life and good behavior.

Also with reference to the review provisions of the bill, Article 66(e) provides that within ten days after any decision by a board of review, the Judge Advocate General may refer the case for reconsideration to the same or another board of review. We believe that this provision destroys the independence and integrity of boards of review, and that it should be stricken. There is ample provision for review by the Judicial Council of the board of review's decision.

Article 2(11) of the bill has by its language what I am sure must be an unintentional impact upon the civil liberties of the civil populations of Guam, American Samoa, and the Trust Territory of the Pacific. At the present time the civil populations of those American territories are under the supervision of the Navy Department. On June 19, 1947, the President sent a special message to the Congress (80th Congress, 1st Session, Document No. 333) in which he advised the Congress that the State, War, Navy, and Interior Departments had jointly recommended the enactment of legislation to grant citizenship, a bill of rights, and civil government to the people of Guam and American Samoa. In that message the President requested the enactment of such legislation. While such legislation has not yet been enacted, it is inconceivable that the same Departments which made that recommendation should now recommend contrary legislation which, instead of making the peoples of our American colonies the possessors of the basic civil rights, would subject them to trial by Army and Navy courts-martial. The language of Article 2(11) should be revised so as to except from the persons subject to the jurisdiction of courts-martial the civil populations of Guam, American Samoa, and the Trust Territory.

Article 55 of the bill prohibits the imposition of any cruel and unusual punishments. We feel that the spirit of this section is violated by Article 15 (a)(2)(F) which permits the commanding officer himself to impose upon an enlisted person in any of the armed services confinement on bread and water for five days. At the present time such punishment cannot be inflicted by any civil court, or, indeed, by any court in the Army or Air Force. It may only be imposed by a naval officer. It is our considered judgment that the extension of bread and water punishment to all the services open the doors wide to future Litchfields. Such punishment to our minds seems cruel and barbaric, and to fit in the same category as the floggings, brandings, and tattooings which are specifically prohibited by Article 55. Such punishments, when imposed by the Japanese and the Germans in World War II met with the highest condemnation of the American people. They will meet with the same condemnation when imposed by American officers on American men. We understand that the retention of such punishment has been requested by the Navy Department on the ground that merely confining a man at sea is no punishment, since it operates merely to free him from the performance of his duties. Other punishments are available, however. At the very least, this section should be limited so that a man may be confined on bread and water only while he is at sea.

Article 28 provides that a reporter at a court martial shall make a record of the proceedings of and testimony before the court. Under present procedure, the reporter does not make a record of the

opening and closing arguments of counsel. We feel that such arguments should be recorded, and that the bill should so provide. This is important since, in the review of courts-martial, trial counsel are not normally afforded an opportunity to present their views to the reviewing authority. Only by a reading of their arguments can their views and theories be made known.

Article 37 prohibits commanding officers from attempting to influence courts-martial. This provision flows from Article of War 88, as embodied in the Elston Bill. The latitude which is directly given to command to interfere in the business of courts-martial even under this provision is demonstrated by Article 87 of the new Army Court-Martial Manual, which provides that:

"A commanding officer may, through his staff judge advocate or otherwise, give general instruction to a court-martial which he has appointed, preferably before any cases have been referred to it for trial. Such instruction may relate to the rules of evidence, burden of proof, and presumption of innocence, and may include information as to the state of discipline in the command, as to the prevalence of offenses which have impaired efficiency and discipline, and of command measures which have been taken to prevent offenses. Such instructions may also present the views of the Department of the Army as to what are regarded as appropriate sentences for designated classes of offenses. The commander may not, however, directly or indirectly give instruction to or otherwise unlawfully influence a court as to its future action in a particular case."

It is our view that this article, although we support its purpose is ineffective to accomplish that purpose. We believe that the inherent powers of commanding officers are such that, if they desire to manifest their displeasure at the manner in which members of a court appointed by them have handled a case, they can readily do so through the exercise of administrative discretion without furnishing any overt proof of a violation of Article 37 by them. This article is ineffective in the case of a commanding officer who desires to influence or dominate a court.

Article 54(c) should specifically provide that, in addition to a copy of the record of the proceedings, the accused shall be furnished with copies of all documentary exhibits.

Article 88 provides that any officer who uses disrespectful language concerning the President, Vice-President, members of Congress and of the Cabinet, Governor, and members of state and territorial legislatures shall be subject to court-martial action. In view of the recent case of Captain Dierdorfer on the West Coast, and general public reaction to the punishment awarded that officer, it is our view that careful consideration should be given this section, and that it should be safeguarded against the political martyrdom of service personnel.

Articles 118 and 120 make drastic revision in certain present practices. At the present time military personnel who are charged with murder and rape committed in the continental United States during peace time are tried by civilian courts. These new articles would make such offenses punishable by general court-martial. Such offenses are serious crimes. Their prosecution and punishment in peace time should not be taken away from the civilian authorities and entrusted to the services until adequate specialist corps have been established in all of the services which can assure that they will receive adequate competent disposition.

I should like to conclude with a few remarks about special courts-martial, the three man-courts provided for in Article 16. These correspond to the present summary courts-martial in the Navy, and special courts-martial in the Army. It has been my experience (and that of most other reserve officers) that the principal abuses in courts-martial occurred in such courts, which were invariably appointed by the commanding officer of the ship or unit in which the offense occurred. Such officers, who had close connection with the personalities and problems involved, have a greater concern with the outcome of a case than does the officer with general court martial authority, who is usually on a higher echelon. The bulk of the cases in which command exercised its influence over the courts occurred in such cases.

Such special courts have far-reaching powers. They are, for instance, authorized by Article 19 of the present bill to award bad conduct discharges. All of you are familiar with the fact that a bad conduct discharge can cripple a man's life, and do him irreparable damage. Yet a great many of the safeguards which this bill throws around general courts-martial are not available in special courts. Thus, law officers are not required on special courts, and both the prosecutor and defense counsel may be persons without legal training. I can envisage situations where it is not practicable to furnish such safeguards in special courts, but I think that in the great majority of cases they can be made available. Certainly if they are not, the special court should not be able to award a bad conduct discharge. We recommend that your committee revise the language of the bill so as to require the furnishing of all safeguards in special courts wherever practicable, and to require a certificate from the commanding officer setting forth the reasons why it was not practicable to furnish them in such cases where they were not.

In conclusion, I should like to state that the bill before you, while not the ideal measure for which we have striven, is a large improvement upon the existing system. Amendments of the character which have been suggested will make it a good bill, and will give to our citizen Army, Navy, and Air Force, and their families, the assurance that they are receiving the full benefits of that American way of life for which they are willingly risking their lives.