

OFFICE OF THE SECRETARY OF DEFENSE

March 1, 1949

Memo. for Professor Morgan

Mr. Larkin thought you might be
interested in reading the attached.

Louise Spilman

For Prof. Morgan.

5 (9)

ON TRIAL (ABC)

Question: Should courts martial procedures be reformed?

Judge: General Samuel T. Ansell, Washington Attorney, former Judge Advocate General, US Army

Ansell: The issue in peril is whether or not the courts martial procedure in our Armed Forces should be changed. Although this question has been argued at length by men within the Armed Services, since the last war the issue has been hotly debated in Congress, and by such distinguished organizations as the American Bar Association. More recently Mr. Forrestal, the Secretary of Defense, has appointed a special committee to study the issue and the results of this study have been submitted to Congress. This is an issue which is of concern to all Americans; we therefore place it on trial before you. The fundamental point of disagreement between the parties in this court is whether or not courts martial should be divorced from what the services call the chain of command. Stated otherwise the question is whether those who sit as judges in courts martial trials and the defense attorneys who defend the accused should be independent of the officer who is responsible for bringing the charges. Is it necessary to remove the judges from under the control of the commanding officer in order to give them the necessary independence and freedom to judge fairly? Would such a change bring about greater confidence in our system of military justice by those in the services and the American public? Would such breaking up of the commanding officer's authority destroy the effectiveness of the supervision and undermine the military effectiveness of the services? Now let us proceed with the testimony, cross-examination of the witnesses for and against such reforms. The court will recognize

the counsel for the affirmative, ERNEST W. GIBSON, Governor of the State of Vermont, who has formerly served as a US Senator from Vermont, and who was on active duty through the war as an officer of our Army.

GIBSON: Your honor, I'll call as my witness GEORGE H. SPIEGELBERG, NY attorney, Chairman of the American Bar Association's special committee on military justice, and a veteran of both World Wars. Mr. Spiegelberg, will you tell us what is a court martial and who are subject to and affected by it?

SPIEGELBERG: The court martial is the court before which all persons in the service are brought for trial, from the most petty offenses to the most serious. Those who are brought before it are all members of the armed services, the Army, the Navy, the Air Force, the Coast Guard, and those accompanying the services. A conservative estimate of the number presently affected by court martial who are citizens of this country would exceed two million. In time of war of course the number is greatly increased and in the last war, over fifteen million American citizens were subject to court martials.

GIBSON: How up to date is our present military law?

SPIEGELBERG: Our present military law is not at all up to date. It is based substantially on British military law of the 18th century. It was framed to an army of mercenaries; for an army which the Duke of Wellington in 1811 described in the following words "None but the worst description of men enter the regular service, the scum of the earth who have all enlisted to drink". Today's system of military justice is as inapplicable to the citizen army of the US as the remarks of the Duke were and are to the men who are in the services.

GIBSON: Now what is the chief defect in existing military law?

SPIEGELBERG: The chief defect in existing military law today is that the commanding officer appoints the prosecutor; he appoints the defense counsel; he appoints the court; and he reviews the sentence of that court. The court consists exclusively of officers chosen from his command, officers who are absolutely subject to his disposition, who look to him for pay, for promotion, for quarters, and for efficiency ratings. He is completely able to dominate any court and infrequently did so.

GIBSON: Do you believe that strict discipline is essential in the Army?

SPIEGELBERG: I most certainly do Governor.

GIBSON: Now is the power that you have mentioned were taken from the commanding officer some people say it would have a bad effect on discipline. What do you say to that?

SPIEGELBERG: I say that the rule is just the contrary. Discipline is preserved by giving the commanding officer power to prefer or refer the charges, giving him the right to appoint the prosecutor in order to assure a speedy trial, and giving him the right to review for clemency. If you give him more than that you destroy morale. There is no doubt that in the last war any number of men in the service felt and with some good reason that they had no opportunity for a fair trial when they were hailed before a court martial constituted as I have outlined.

GIBSON: Now if we take the power to appoint the court away from command, who would you have appoint the court?

SPIEGELBERG: I would have the JAG appoint the court. He is a member of the same army as the commander. He is as anxious to win the war as the commanding officer, and in his hands you could get a court that would not be dominated by command and that would decide the case in accordance with the issues and not in accordance with the wishes of the commanding officer.

GIBSON: Do you think any such move would interfere with the desire of winning the war?

SPIEGELBERG: I certainly do not.

GIBSON: I have no further question, your honor.

ANSELL: Counsel for the negative in this case is JOHN HARLAN AMON, NY attorney, who served during the war as a colonel of the Army, and prosecutor at the Nuernberg Trials. Do you wish to cross-examine the witness Colonel Amon?

AMON: I do your honor. Col. Spiegelberg do you agree that the ultimate function of an army is to defend the country and win wars, and that any proposed changes in army procedure should be kept secondary to this aim?

SPIEGELBERG: I most decidedly do.

AMON: Do you also agree that the practice of courts appointed by commands dates back to at least 1776 and probably to the Fifth Amendment of the Constitution?

SPIEGELBERG: I believe that that is what I testified under direct examination Col. Amon.

AMON: I believe that it is but I wish to make sure that you were in agreement with me. In connection with the study of this problem made by you and your committee am I correct in assuming that you sought the views of military experts?

SPIEGELBERG: Well, we personally didn't but we had the benefit of such views as expressed in a number of studies that were made since the end of World War II.

AMON: Col. Spiegelberg did you consult Gen. Eisenhower?

SPIEGELBERG: No.

AMON: Did you have the benefit of his views?

SPIEGELBERG: I know perfectly well what his views are.

AMON: Is that why you did not consult him perhaps?

SPIEGELBERG: No. Great as my admiration for General Eisenhower with respect to court martial procedures, he undoubtedly takes the line of the high brass which is to retain the prerequisites which they have always enjoyed.

AMON: And by high brass you mean what?

SPIEGELBERG: I mean the high command from division commanders up.

AMON: Weren't you brass in this last war?

SPIEGELBERG: No, I think I just missed it; if I had gotten the star I'd agree with you.

AMON: Well brass really means staff officers as distinguished from line officers does it not?

SPIEGELBERG: That is an interpretation that apparently is yours and one that I can't say I can agree with.

AMON: It came from the British didn't it colonel?

SPIEGELBERG: I think originally it did and I think actually it comes from the scrambled eggs that used to be worn on the visors of caps of high officers.

AMON: Suppose you tell us what Eisenhower's views are as you understand them?

SPIEGELBERG: As I understand them General Eisenhower says that command should control courts because the administration of justice in the Army is a question of command function necessary in order to insure discipline. I say that that is not the fact, that the insurance of discipline is gained in the manner I outlined in the direct, and the provision of justice or a fair trial for enlisted men is not a necessary function of command.

AMON: Did you also consult General Bradley?

SPIEGELBERG: No.

AMON: Did you have the benefit of his view?

SPIEGELBERG: No, but I am sure that they accord with those of General Eisenhower.

AMON: And did you consult the Secretary of War (sic) Judge Patterson?

SPIEGELBERG: Very briefly.

AMON: And you are familiar with his views?

SPIEGELBERG: His views and mine are completely opposed.

AMON: Don't you think that these three men are experts on this particular problem and have the best interests of our country and our army at heart?

SPIEGELBERG: I'll have to divide your question into two. I haven't any doubt that General Eisenhower and General Bradley have the best interests of our country at heart. I seriously question whether they are experts in the field of military law. Judge Patterson is certainly an expert in the field of military law but I happen to think that his view is incorrect and in that I am backed by more than four fifths(bickering).

AMON: Don't you think that one of the basic grounds of their objection was that the proposed separation was impracticable on an organizational basis?

SPIEGELBERG: No, I don't think so. It has never been tried, and so you can say it is impracticable.

AMON: I was asking about the views of these experts?

SPIEGELBERG: Of their view is to keep in command all the possible power they can. I happen to think this is a power that is in no way necessary to command.

AMON: And isn't it also their view that power would be built up in JAG under your plan which would make it a bureaucratic agency which would not be satisfactory for our army discipline or army organization?

SPIEGELBERG: I have never seen a staff, any staff in the Army that was not a bureaucracy and I speak with experience.

AMON: This certainly would make the JAG the most bureaucratic division in the army would it not?

SPIEGELBERG: No I can't agree with that at all.

AMON: Your witness.

ANSELL: The audience who are now a jury in this court, have heard the testimony and cross examination of Mr. Spiegelberg, the witness for the affirmative in the issue of: Should the courts martial procedures be reformed? The court will recognize Colonel Amon, Counsel for the negative.

AMON: I will call as my witness Mr. Frederick Bernay Weiner, Washington attorney, a colonel in the US Army, and a former Judge Advocate in the Pacific and Caribbean Theaters of Operations.

AMON: Colonel Weiner please state briefly your military experience that might bear on the matters under discussion here.

WEINER: I had over four and half years active duty in the Army, most of that time as a Judge Advocate. I've written some books and articles on the subject and I've carried on extensive litigation in the courts involving questions of military law.

AMON: On the basis of your own study and experience do you regard the proposal to separate military courts and military command to be a desirable or a practical one?

WEINER: I regard it as utterly impractical because it fails to take into account the basic difference between an army and a civilian society.

AMON: And do you consider that this impracticability is based upon the differences between an army and a civilian society and if so will you explain?

WEINER: Yes, sir. First of all the objects are entirely different. The object of a civilian society is to make people live together in peace and reasonable habits. The object ~~of~~ of an army is to win wars not just fight them, but win them. They don't pay off on price in a war. And therefore an army has got to be so organized that it will lead men obediently against the enemy to their deaths if necessary. Now that may be a brutal and unpleasant fact but we'd better face it for it underscores and underlines the impracticability of this proposal.

AMON: How would you resolve the issue insofar as the present separation proposal is concerned?

WEINER: Well sir, the present proposal does something that we have never done and that the founders (unintelligible). The founders recognized the guarantees appropriate for a civilian would be inappropriate for persons in uniform. Thus sailors and soldiers don't have the guarantee of jury trials. A great many acts which are rights in the civil community become military offenses in the armed services, for instance the right to strike becomes mutiny; quitting a job becomes desertion. The concept of the separation of powers which is of course basic in our civilian government doesn't work in an army and never has worked.

AMON: Have you personally ever witnessed any actual instance where court martial jurisdiction was separated from command and if so tell us how it worked out?

WEINER: Well sir, in the South Pacific, in most of the areas there the Island Commander had court martial jurisdiction over all personnel on the island although he didn't command, the air or services elements. The result was that the air or service commanders could not bring their people to trial without the concurrence of somebody outside the chain of command, and when the Island Commanders reviewed the records of trial and found evidences of improper practices or irregularities they had no power to correct them. It just didn't work at all.

AMON: So in practical operation it just didn't work out?

WEINER: Yes, sir, that's correct.

AMON: Do you know whether the courts have ever passed upon the question of the separation of court martial jurisdiction in command and if so what was the decision?

WEINER: Yes sir, the courts have passed on it. And the Court of Claims and the Supreme Court held that the power to appoint courts was an inherent attribute of command. They held that the President had the power to appoint courts martials even in the absence of the statutes because they said that to take that power away from him would practically defeat his constitutional powers as Commander in Chief of the Army and Navy.

AMON: Thank you very much.

ANSELL: The jury has had the direct examination of the witness of the negative in this case. This court now calls upon the counsel for the affirmative Gov. Gibson for cross examination.

GIBSON: You stated that you have been four and a half years in the army mostly in the Judge Advocate's Department?

WEINER: Yes Sir.

GIBSON: And most of that time you were in the prosecuting end of the Judge Advocate's Dept?

WEINER: No sir, I was Staff Judge Advocate. I was the advisor to the commanding general on matter of the reference of cases for trial and on the action to be taken after they were reviewed.

GIBSON: You referred to the court martial procedures in the South Pacific. You were there and I was there.

WEINER: But you were with a division.....

GIBSON: It is perfectly true isn't it that during combat those who were charged with a court martial offense from our division were sent back to an island in the rear while we continued on fighting; that is so isn't it?

WEINER: I don't know if it is or not sir.

GIBSON: And the trial was carried on there and justied was meted out wasn't it?

WEINER: I don't know whether those cases were sent back or whether they were held until the division was ready to try the people themselves.

GIBSON: Well I thought you were over as the chief advisor in the Judge Advocate's Division to the Commanding General in that area?

WEINER: I guess I was too far back, Governor. When I got to some of these islands there wasn't much fighting.

GIBSON: You would say that it wasn't a fact that actually during the early days of war in the South Pacific, on Guadalcanal, New Georgia, Bougainville, that when men were charged with a court martial offense they were sent to a rear island, while the troops continued fighting and were tried by the island command?

WEINER: I don't know whether that is a fact or not?

GIBSON: And you never heard any complaints about that procedure if it took place did you?

WEINER: I have no information about that at all because what I saw was just the opposite. The divisions tried their own people. If they were engaged in combat they waited until combat had subsided. I know that that was the case on Okinawa when I was there for the invasion.

GIBSON: You know of occasions don't you, Col. Weiner, where the commanding generals have told their general court martials exactly what they wanted them to find in the nature of a verdict, or what sentences they wanted imposed?

WEINER: I have heard of such instances but since the first of this month they have been specifically prohibited by the 88th Article of War.

GIBSON: That is the army and you then do realize that that procedure in World War II was wrong?

WEINER: And Congress stopped it.

GIBSON: And it took an Act of Congress to solve that, wasn't that so? But they still can, the commanding general still can, mark down the efficiency rating of an officer for any reason he may see fit, if he is on a general court and the general court doesn't do what the commanding general says?

WEINER: I think that would be a violation of the 88th Article of War.

GIBSON: Is there any way that such an act could be prevented?

WEINER: There is no practical way in which you can prevent an abuse of power. All power can be abused if placed in unworthy hands, that does not mean, sir, that the powers should not be placed in some hands.

GIBSON: Is it perfectly possible to place it in the hands of an independent general court created by a theater commander to try his people in divisions in a given area over which the commanding general of a division would have no jurisdiction?

WEINER: Well the Articles of War have always provided for that, that a superior authority can reserve the appointment of courts to himself.

GIBSON: Isn't it true that the British Army, which has been a model for discipline, have now removed the handling of the general courts martials from the armed services and placed it under the Lord Chaplain (sic) [Chancellor (?)].

WEINER: I've heard that there is a proposal to that effect, but I haven't been informed that it had been adopted. The proposal is pending just as your proposal is pending.

GIBSON: Do you believe it is right for a commanding general to rule his officers by fear?

WEINER: I would say that about 90% of the personnel don't have to be ruled by fear but there is always a small minority in any group that you've got to rule with a whip whether it is a civilian society or not.

GIBSON: I just have one or two more questions. You will agree won't you that an independent judiciary, independent court system is the very backbone of democracy?

WEINER: Not of the military, not of the army of a democracy. It never has been. Why even in your own state, governor, they've had courts appointed by command since the first militia law in 1797.

GIBSON: I think you're quite wrong.

WEINER: No, if you look up the Militia Law of 1797 in the compiled laws of 1804 and look in Section 31 of that law you'll find that the governor and the brigade commanders are (have ?) appointed courts martial over Vermont Militia. Answering your question--I don't think that the American people, as reflected in the views of constitutions and statutes have ever regarded as un-American, or improper, a different system of courts for military organization than they adopted for their civilian society.

GIBSON: That wasn't the question I asked you....Are you aware that 15 commanding generals that were interrogated as to whether or not they had influenced courts and told them what to do, what sentences to give, fully and frankly and freely admitted that they had managed their courts in that manner?

WEINER: I hadn't know that, but they can't do it any more since the amendment to the 88th Article of War.

GIBSON: But it would still be perfectly possible for those fifteen, or any general, wouldn't it, to mark down the efficiency rating of an officer that he didn't like, who had maybe rendered a verdict that he didn't like or had given a sentence he didn't like, or could have transferred out of his command?

WEINER: It is always possible for anybody in any army to violate rules and regulations.

ANSELL:Now we will hear counsel deliver the summation of their cases. Colonel Amon may we have the summation of your case for the negative.

AMON: Col. Weiner has contended that the proposed changes in court martial procedures with particular reference to command control of court martial are undesirable and impracticable on an army organizational basis. He has pointed out that the ultimate function of an army is to defend the country and win wars, and that all proposed changes in army procedure must be kept secondary to this aim. Colonel Weiner has detailed certain basis and essential differences between military and civilian society which make it undesirable and impracticable to operate both on the same basis. He suggests that these differences must have been in the minds of the framers of the Constitution of the US when the right of trial by jury of persons in the armed forces was excluded from the Fifth Amendment and that they have been reflected by legislative enactment dating back to 1776. Furthermore Colonel Weiner in support of his position has detailed the results of personal experience with the problems of the South Pacific during World War II. In brief it was found impossible and impracticable to run an army on the basis of the

separation of these powers. Colonel Weiner has further considered that the proposed recommendations would set up an entirely new and independent division of the Army which would be answerable to neither the commanding general nor even to the Sec. of War, and that any such bureaucratic system within the Army would defeat its own end.

ANSELL: Now we shall hear the summation of the case for the affirmative by Governor Gibson.

GIBSON: Any system of justice that allows opportunity for one who appoints the court to reprimand, to remove, or to punish in any way, by marking down an efficiency rating, the member of a court who renders that verdict or a sentence which he dislikes simply isn't rendering justice. It is pure dictatorship. If I as Governor of Vermont could remove any judge with whom I disagreed I would be a dictator. Independent justice is the foundation stone of freedom. The present courts martial system may look all right to some who live midst the maze of government bureaus in Washington but to we simple people living in rural America it is simply horribly wrong. I speak as one who as a law member of a general court was told what decision our court should render. I resented it then and I resent it now. If the trial of Cardinal Mindzenty was infamous, if it was a trial of a kangaroo court, then so are all the trials of a general courts martial..... (discussion as to time) We prefer to see justice meted out by general courts not appointed by the commanding general. To argue that the present system of injustice is necessary to win a war can't stand the test of logic. It is inhuman. It is un-American and it is dangerous.

ANSELL: Ladies and gentlemen of the jury you have heard the

testimony of the expert witnesses and the argument of distinguished counsel on the question: Should the court martial procedure be reformed. This issue is before our Congress. I want to emphasize that this issue directly affects many millions of our citizens, all those who are in the armed forces and their families and those selected to be in the services at a future time. It is wrong to think that a court martial system affects only those who get into trouble. A just and effective administration is the concern of all Americans. You will please consider these matters.

14 Feb. 1949

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