[No. 37]

UNIFORM CODE OF MILITARY JUSTICE

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES HOUSE OF REPRESENTATIVES

EIGHTY-FIRST CONGRESS

FIRST SESSION

ON

H. R. 2498

A BILL TO UNIFY, CONSOLIDATE, REVISE, AND CODIFY THE ARTICLES OF WAR, THE ARTICLES FOR THE GOVERNMENT OF THE NAVY, AND THE DISCIPLINARY LAWS OF THE COAST GUARD, AND TO ENACT AND ESTABLISH A UNIFORM CODE OF MILITARY JUSTICE

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UNIFORM CODE OF MILITARY JUSTICE

MONDAY, MARCH 7, 1949

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The committee met at 10 a. m., Hon. Overton Brooks (chairman of Subcommittee No. 1) presiding.

Mr. BROOKS. The committee will please come to order.

We have the pleasure of having the distinguished chairman of the committee here—to the right of me—and in view of the fact that the chairman is here I would be very happy for him to take the chair.

Mr. VINSON. Mr. Chairman, before we start the hearing on this bill, I want to suggest that on behalf of the committee Mr. Brooks of Louisiana and Mr. Short of Missouri prepare a suitable resolution expressing the deep sympathy on the passing of our former distinguished chairman, Mr. Andrews, and that they be sent to the members of his family.

I also suggest that the clerk on behalf of the committee secure a suitable floral offering and send that, and to advise the committee what he ascertains is going to be the program with reference to the funeral. I understood that probably there may be some exercise held here and if so, notify all the members so we can attend.

Now, Mr. Chairman, without objection the two gentlemen designated will prepare the resolution.

And before we take up this bill, today is consent calendar and we have three or four bills on the calendar, so we will have to recess at a quarter to 12.

And after we have the testimony of the distinguished Secretary of National Defense and Dr. Morgan—after they are finished—then I hope that the Subcommittee No. 1 will take this bill before its subcommittee and consider it section by section.

And tomorrow the Subcommittee No. 2 takes up the pay bill and will consider that bill.

That is all, Mr. Chairman.

Mr. BROOKS. Thank you very much, Mr. Chairman.

Mr. Clerk, will you call the roll and see if we have a quorum?

Mr. VINSON. I suggest, Mr. Chairman, that it is not necessary to have a quorum to start the hearings.

Mr. BROOK. It is suggested that a roll call be dispensed with. Accordingly, we will proceed.

We are honored today in having the Secretary of National Defense with us, Mr. Forrestal.

Secretary Forrestal, we are very happy to have you, sir. And I think you have a prepared statement here. May I say, in starting,

that this is an extremely important bill. There are very few bills that come closer to my own mind and my heart than does a uniform code for military justice, to cover the armed services.

(H. R. 2498 is as follows:)

[H. R. 2498, 81st Cong., 1st sess.]

A BILL To unify, consolidate, revise, and codify the Articles of War, the Articles of the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a Uniform Code of Military Justice for the government of the armed forces of the United States, unifying, consolidating, revising, and codifying the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, is hereby enacted as follows, and the articles in this section may be cited as "Uniform Code of Military Justice, Article ".

UNIFORM CODE OF MILITARY JUSTICE

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PART I—GENERAL PROVISIONS

Article

1. Definitions.
2. Persons subject to the code.
3. Jurisdiction to try certain personnel.
4. Dismissed officer's right to trial by court-martial.
5. Territorial applicability of the code.
6. Judge advocates and legal officers.

ARTICLE 1. Definitions.

The following terms when used in this code shall be construed in the sense indicated in this article, unless the context shows that a different sense is intended, namely:

(1) "Department" shall be construed to refer, severally, to the Department of the Army, the Department of the Navy, the Department of the Air Force, and, except when the Coast Guard is operating as a part of the Navy, the Treasury Department;

(2) "Armed force" shall be construed to refer, severally, to the Army, the Navy, the Air Force, and, except when operating as a part of the Navy, the Coast Guard;

(3) "Navy" shall be construed to include the Marine Corps and, when operating as a part of the Navy, the Coast Guard;

(4) "The Judge Advocate General" shall be construed to refer, severally, to The Judge Advocates General of the Army, Navy, and Air Force, and, except when the Coast Guard is operating as a part of the Navy, the General Counsel of the Treasury Department;

(5) "Officer" shall be construed to refer to a commissioned officer including a commissioned warrant officer;

(6) "Superior officer" shall be construed to refer to an officer superior in rank or command;

(7) "Cadet" shall be construed to refer to a cadet of the United States Military Academy or of the United States Coast Guard Academy;

(8) "Midshipman" shall be construed to refer to a midshipman at the United States Naval Academy and any other midshipman on active duty in the naval service;

(9) "Enlisted person" shall be construed to refer to any person who is serving in an enlisted grade in any armed force;

(10) "Military" shall be construed to refer to any or all of the armed forces;

(11) "Accuser" shall be construed to refer to a person who signs and swears to the charges and to any other person who has an interest other than an official interest in the prosecution of the accused;

(12) "Law officer" shall be construed to refer to an official of a general court-martial detailed in accordance with article 26;

(13) "Law specialist" shall be construed to refer to an officer of the Navy or Coast Guard designated for special duty (law);

(14) "Legal officer" shall be construed to refer to any officer in the Navy or Coast Guard designated to perform legal duties for a command.

ART. 2. Persons subject to the code.

The following persons are subject to this code:

(1) All persons belonging to a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; all volunteers and inductees, from the dates of their muster or acceptance into the armed forces of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty in or for training in, the armed forces, from the dates they are required by the terms of the call, draft, or order to obey the same;

(2) Cadets, aviation cadets, and midshipmen;

(3) Reserve personnel who are voluntarily on inactive duty training authorized by written orders;

(4) Retired personnel of a regular component of the armed forces who are entitled to receive pay;

(5) Retired personnel of a reserve component who are receiving hospital benefits from an armed force;

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve;

(7) All persons in custody of the armed forces serving a sentence imposed by a court-martial;

(8) Personnel of the Coast and Geodetic Survey, Public Health Service, and other organizations, when serving with the armed forces of the United States;

(9) Prisoners of war in custody of the armed forces;

(10) In time of war, all persons serving with or accompanying an armed force in the field;

(11) All persons serving with, employed by, accompanying, or under the supervision of the armed forces without the continental limits of the United States and the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands;

(12) All persons within an area leased by the United States which is under the control of the Secretary of a Department and which is without the continental limits of the United States and the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

ART. 3. Jurisdiction to try certain personnel.

(a) Reserve personnel of the armed forces who are charged with having committed, while in a status in which they are subject to this code, any offense against this code may be retained in such status or, whether or not such status has terminated, placed in an active-duty status for disciplinary action, without their consent, but not for a longer period of time than may be required for such action.

(b) All persons discharged from the armed forces subsequently charged with having fraudulently obtained said discharge shall be subject to trial by court-martial on said charge and shall be subject to this code while in the custody of the armed forces for such trial. Upon conviction of said charge they shall be subject to trial by court-martial for all offenses under this code committed prior to the fraudulent discharge.

(c) Any person who has deserted from the armed forces shall not be relieved from amenability to the jurisdiction of this code by virtue of a separation from any subsequent period of service.

ART. 4. Dismissed officer's right to trial by court-martial.

(a) When any officer, dismissed by order of the President, makes a written application for trial by court-martial, setting forth, under oath, that he has been wrongfully dismissed, the President, as soon as practicable, shall convene a general court-martial to try such officer on the charges on which he was dismissed. A court-martial so convened shall have jurisdiction to try the dismissed officer on such charges, and he shall be held to have waived the right to plead any statute of limitations applicable to any offense with which he is charged. The court-martial may, as part of its sentence, adjudge the affirmance of the dismissal, but if the court-martial acquits the accused or if the sentence adjudged, is finally approved or affirmed, does not include dismissal or death, the Secretary of the De-

partment shall substitute for the dismissal order by the President a form of discharge authorized for administrative issuance.

(b) If the President fails to convene a general court martial within six months from the presentation of an application for trial under this article, the Secretary of the Department shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issuance.

(c) Where a discharge is substituted for a dismissal under the authority of this article, the President alone may reappoint the officer to such commissioned rank and precedence as in the opinion of the President such former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to position vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and such reappointment shall be considered as actual service for all purposes, including the right to receive pay and allowances.

(d) When an officer is discharged from any armed force by administrative action or is dropped from the rolls by order of the President, there shall not be a right to trial under this article.

ART. 5. Territorial applicability of the code.

This code shall be applicable in all places.

ART. 6. Judge advocates and legal officers.

(a) The assignment for duty of all judge advocates of the Army and Air Force and law specialists of the Navy and Coast Guard shall be subject to the approval of The Judge Advocate General of the armed force of which they are members. The Judge Advocate General or senior members of his staff shall make frequent inspections in the field in supervision of the administration of military justice.

(b) Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is authorized to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with The Judge Advocate General.

(c) No person who has acted as member, law officer, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act as a staff judge advocate or legal officer to any reviewing authority upon the same case.

PART II—APPREHENSION AND RESTRAINT

Article

7. Apprehension.
8. Apprehension of deserters.
9. Imposition of restraint.
10. Restraint of persons charged with offenses.
11. Reports and receiving of prisoners.
12. Confinement with enemy prisoners prohibited.
13. Punishment prohibited before trial.
14. Delivery of offenders to civil authorities.

ART. 7. Apprehension.

(a) Apprehension is the taking into custody of a person.

(b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this code may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it.

(c) All officers, warrant officers, petty officers, and noncommissioned officers shall have authority to quell all quarrels, frays, and disorders among persons subject to this code and to apprehend presons subject to this code who take part in the same.

ART. 8. Apprehension of deserters.

It shall be lawful for any civil officer having authority to apprehend offenders under the laws of the United States or of any State, District, Territory, or possession of the United States summarily to apprehend a deserter from the armed forces of the United States and deliver him into the custody of the armed forces of the United States.

ART. 9. Imposition of restraint.

(a) Arrest is the restraint of a person by an order directing him to remain within certain specified limits not imposed as a punishment for an offense. Confinement is the physical restraint of a person.

(b) An enlisted person may be ordered into arrest or confinement by any officer by an order delivered in person or through other persons subject to this

code. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted persons of his command or subject to his authority into arrest or confinement.

(c) An officer, a warrant officer, or a civilian subject to this code may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated.

(d) No person shall be ordered into arrest or confinement except for probable cause.

(e) Nothing in this article shall be construed to limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

ART. 10. Restraint of persons charged with offenses.

Any person subject to this code charged with an offense under this code shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, such person shall not ordinarily be placed in confinement. When any person subject to this code is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

ART. 11. Reports and receiving of prisoners.

(a) No provost marshal, commander of a guard, or master at arms shall refuse to receive or keep any prisoner committed to his charge by an officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner.

(b) Every commander of a guard or master at arms to whose charge a prisoner is committed shall, within twenty-four hours after such commitment or as soon as he is relieved from guard, report to the commanding officer the name of such prisoner, the offense charged against him, and the name of the person who ordered or authorized the commitment.

ART. 12. Confinement with enemy prisoners prohibited.

No member of the armed forces of the United States shall be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces of the United States.

ART. 13. Punishment prohibited before trial.

Subject to the provisions of article 57, no person, while being held for trial or the results of trial, shall be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to punishment during such period for minor infractions of discipline.

ART. 14. Delivery of offenders to civil authorities.

(a) Under such regulations as the Secretary of the Department may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.

(b) When delivery under this article is made to any civil authority of a person undergoing sentence of a court-martial, such delivery, if followed by conviction in a civil tribunal, shall be held to interrupt the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for his offense shall, upon request, be returned to military custody for the completion of the said court-martial sentence.

PART III.—NON-JUDICIAL PUNISHMENT

Article

15. Commanding officer's non-judicial punishment.

ART. 15. Commanding officer's non-judicial punishment.

(a) Under such regulations as the President may prescribe, any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

(1) upon officers and warrant officers of his command:

(A) Withholding of privileges for a period not to exceed two consecutive weeks; or

(B) restriction to certain specified limits, with or without suspension from duty, for a period not to exceed two consecutive weeks; or

(C) if imposed by an officer exercising general court-martial jurisdiction, forfeiture of one-half of his pay per month for a period not exceeding three months;

(2) upon other military personnel of his command:

(A) withholding of privileges for a period not to exceed two consecutive weeks; or

(B) restriction to certain specified limits, with or without suspension from duty, for a period not to exceed two consecutive weeks; or

(C) extra duties for a period not to exceed two consecutive weeks, and not to exceed two hours per day, holidays included; or

(D) reduction to next inferior grade if the grade from which demoted was established by the command or an equivalent or lower command; or

(E) confinement for a period not to exceed seven consecutive days; or

(F) confinement on bread and water or diminished rations for a period not to exceed five consecutive days; or

(G) if imposed by an officer exercising special court-martial jurisdiction, forfeiture of one-half of his pay for a period not exceeding one month.

(b) The Secretary of a Department may, by regulation, place limitations on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers authorized to exercise such powers, and the applicability of this article to an accused who demands trial by court martial.

(c) An officer in charge may, for minor offenses, impose on enlisted persons assigned to the unit of which he is in charge, such of the punishments authorized to be imposed by commanding officers as the Secretary of the Department may by regulation specifically prescribe.

(d) A person punished under authority of this article who deems his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The officer who imposes the punishment, his successor in command, and superior authority shall have power to suspend, set aside, or remit any part or amount of the punishment and to restore all rights, privileges, and property affected.

(e) The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

PART IV—COURTS-MARTIAL JURISDICTION

Article
16. Courts-martial classified.
17. Jurisdiction of courts-martial in general.
18. Jurisdiction of general courts-martial.
19. Jurisdiction of special courts-martial.
20. Jurisdiction of summary courts-martial.
21. Jurisdiction of courts-martial not exclusive.

ART. 16. Courts-martial classified.

There shall be three kinds of courts-martial in each of the armed forces, namely:

(1) General courts-martial, which shall consist of a law officer and any number of members not less than five;

(2) Special courts-martial, which shall consist of any number of members not less than three; and

(3) Summary courts-martial, which shall consist of one officer.

ART. 17. Jurisdiction of courts-martial in general.

(a) Each armed force shall have court-martial jurisdiction over all persons subject to this code. The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President.

(b) In all cases, departmental review subsequent to that by the officer with authority to convene a general court-martial for the command which held the

trial, where such review is required under the provisions of this code, shall be carried out by the armed force of which the accused is a member.

ART. 18. Jurisdiction of general courts-martial.

Subject to article 17, general courts-martial shall have jurisdiction to try persons subject to this code for any offense made punishable by this code and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code. General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.

ART. 19. Jurisdiction of special courts-martial.

Subject to article 17, special courts-martial shall have jurisdiction to try persons subject to this code for any noncapital offense made punishable by this code and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code except death, dishonorable discharge, dismissal, confinement in excess of six months, hard labor without confinement in excess of three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for a period exceeding six months. A bad-conduct discharge shall not be adjudged unless a complete record of the proceedings and testimony before the court has been made.

ART. 20. Jurisdiction of summary courts-martial.

Subject to article 17, summary courts-martial shall have jurisdiction to try persons subject to this code except officers, warrant officers, cadets, aviation cadets, and midshipmen for any noncapital offense made punishable by this code, but no person who objects htereto shall be brought to trial before a summary court-martial unless he has been permitted to refuse punishment under article 15. Where such objection is made by the accused, trial shall be ordered by special or general court-martial, as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code except death, dismissal, dishonorable or bad-conduct discharge, confinement in excess of one month, hard labor without confinement in excess of forty-five days, restriction to certain specified limits in excess of two months, or forfeiture of pay in excess of two-thirds of one month's pay.

ART. 21. Jurisdiction of courts-martial not exclusive.

The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals.

PART V—APPOINTMENT AND COMPOSITION OF COURTS-MARTIAL

Article
22. Who may convene general courts-martial.
23. Who may convene special courts-martial.
24. Who may convene summary courts-martial.
25. Who may serve on courts-martial.
26. Law officer of a general court-martial.
27. Appointment of trial counsel and defense counsel.
28. Appointment of reporters and interpreters.
29. Absent and additional members.

ART. 22. Who may convene general courts-martial.

(a) General courts-martial may be convened by—

(1) the President of the United States;

(2) the Secretary of a Department;

(3) the commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army;

(4) the Commander in Chief of a Fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the continental limits of the United States;

(5) the commanding officer of an Air Command, and Air Force, an air division, or a separate wing of the Air Force;

(6) such other commanding officers as may be designated by the Secretary of a Department; or

(7) any other commanding officer in any of the armed forces when empowered by the President.

(b) When any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority when deemed desirable by him.

ART. 23. Who may convene special courts-martial.

(a) Special courts-martial may be convened by—

(1) any person who may convene a general court-martial;

(2) the commanding officer of a district, garrison, fort, camp, station, Air Force base, auxiliary air field, or other place where members of the Army or Air Force are on duty;

(3) the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;

(4) the commanding officer of a wing, group, or separate squadron of the Air Force;

(5) the commanding officer of any naval or Coast Guard vessel, shipyard, base, or station; or of any marine brigade, regiment or barracks;

(6) the commanding officer of any separate or detached command or group of detached units of any of the armed forces placed under a single commander for this purpose; or

(7) the commanding officer or officer in charge of any other command when empowered by the Secretary of a Department.

(b) When any such officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened, by such authority when deemed advisable by him.

ART. 24. Who may convene summary courts-martial.

(a) Summary courts-martial may be convened by—

(1) any person who may convene a genreal or special court-martial;

(2) the commanding officer of a detached company, or other detachment of the Army;

(3) the commanding officer of a detached squadron or other detachment of the Air Force; or

(4) the commanding officer or officer in charge of any other command when empowered by the Secretary of a Department.

(b) When but one officer is present with a command or detachment he shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases brought before him. Summary courts-martial may, however, be convened in any case by superior competent authority when deemed desirable by him.

ART. 25. Who may serve on courts-martial.

(a) Any officer on active duty with the armed forces shall be competent to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty with the armed forces shall be competent to serve on general and special courts-martial for the trial of any person, other than an officer, who may lawfully be brought before such courts for trial.

(c) Any enlisted person on active duty with the armed forces who is not a member of the same unit as the accused shall be competent to serve on general and special courts-martial for the trial of any enlisted person who may lawfully be brought before such courts for trial, but he shall be appointed as a member of a court only if, prior to the convening of such court, the accused has requested in writing that enlisted persons serve on it. After such a request, no enlisted person shall be tried by a general or special court-martial the membership of which does not include enlisted persons in a number comprising at least one-third of the total membership of the court, unless competent enlisted persons cannot be obtained on account of physical conditions or military exigencies. Where such persons cannot be obtained, the court may be convened and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

For the purposes of this article, the word "unit" shall mean any regularly organized body as defined by the Secretary of the Department, but in no case shall it be a body larger than a company, a squadron, or a ship's crew, or than a body corresponding to one of them.

(d) (1) When it can be avoided, no person in the armed forces shall be tried by a court-martial any member of which is junior to him in rank or grade.

(2) When convening a court-martial, the convening authority shall appoint as members thereof such persons as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No person shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

ART. 26. Law officer of a general court-martial.

(a) The authority convening a general court-martial shall appoint as law officer thereof an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States and who is certified to be qualified for such duty by The Judge Advocate General of the armed force of which he is a member. No person shall be eligible to act as law officer in a case when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(b) The law officer shall not consult with the members of the court, other than on the form of the findings as provided in article 39, except in the presence of the accused, trial counsel, and defense counsel, nor shall he vote with the members of the court.

ART. 27. Appointment of trial counsel and defense counsel.

(a) For each general and special court-martial the authority convening the court shall appoint a trial counsel and a defense counsel, together with such assistants as he deems necessary or appropriate. No person who has acted as investigating officer, law officer, or court member in any case shall act subsequently as trial counsel assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant defense counsel in the same case. No person who has acted for the prosecution shall act subsequently in the same case for the defense, nor shall any person who has acted for the defenes act subsequently in the same case for the prosecution.

(b) Any person who is appointed as trial counsel or defense counsel in the case of a general court-martial—

(1) shall be a judge advocate of the Army or the Air Force, or a law specialist of the Navy or Coast Guard, or a person who is a member of the bar of a Federal court or of the highest court of a State; and

(2) shall be certified as competent to perform such duties by The Judge Advocate General of the armed force of which he is a member.

(c) In the case of a special court-martial—

(1) if the trial counsel is certified as competent to act as counsel before a general court-martial by The Judge Advocate General of the armed force of which he is a member, the defense counsel appointed by the convening authority shall be a person similarly certified; and

(2) if the trial counsel is a judge advocate, or a law specialist, or a member of the bar of a Federal court or the highest court of a State, the defense counsel appointed by the convening authority shall be one of the foregoing.

ART. 28. Appointment of reporters and interpreters.

Under such regulations as the Secretary of the Department may prescribe, the convening authority of a court-martial or military commission or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission. Under like regulations the convening authority of a court-martial, military commission, or court of inquiry may appoint an interpreter who shall interpret for the court or commission.

ART. 29. Absent and additional members.

(a) No member of a general or special court-martial shall be absent or excused after the accused has been arraigned except for physical disability or as a result of a challenge or by order of the convening authority for good cause.

(b) Whenever a general court martial is reduced below five members, the trial shall not proceed unless the convening authority appoints new members sufficient in number to provide not less than five members. When such new members have been sworn, the trial may proceed after the recorded testimony of each witness previously examined has been read to the court in the presence of the law officer, the accused, and counsel.

(c) Whenever a special court martial is reduced below three members, the trial shall not proceed unless the convening authority appoints new members sufficient in number to provide not less than three members. When such new members

have been sworn, the trial shall proceed as if no evidence had previously been introduced, unless a verbatim record of the testimony of previously examined witnesses or a stipulation thereof is read to the court in the presence of the accused and counsel.

PART VI—PRETRIAL PROCEDURE

Article
30. Charges and specifications.
31. Compulsory self-incrimination prohibited.
32. Investigation.
33. Forwarding of charges.
34. Advice of staff judge advocate and reference for trial.
35. Service of charges.

ART. 30. Charges and specifications.

(a) Charges and specifications shall be signed by a person subject to this code under oath before an officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(2) that the same are true in fact to the best of his knowledge and belief.

(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

ART. 31. Compulsory self-incrimination prohibited.

(a) No person subject to this code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement at all regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this code shall compel any person to make a statement or produce evidence before or for use before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article or by any unlawful inducement shall be received in evidence against him in a trial by court-martial.

ART. 32. Investigation.

(a) No charge or specification shall be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiries as to the truth of the matter set forth in the charges, form of charges, and the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and shall be permitted, upon his own request, to be represented at such investigation by civilian counsel if provided by him, or military counsel of his own selection if such counsel be reasonably available, or by counsel appointed by the officer exercising general court-martial jurisdiction over the command. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted prior to the time the accused is charged with the offense, and if the accused was present at such investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subdivision (b) of this article, no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

(d) The requirements of this article shall be binding on all persons administering this code, but failure to follow them in any case shall not constitute jurisdictional error.

ART. 33. Forwarding of charges.

When a person is held for trial by general court-martial, the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If the same is not practicable, he shall report to such officer the reasons for delay.

ART. 34. Advice of staff judge advocate and reference for trial.

(a) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate or legal officer for consideration and advice. The convening authority shall not refer a charge to a general court-martial for trial unless it has been found that the charge alleges an offense under this code and is warranted by evidence indicated in the report of investigation.

(b) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence may be made.

ART. 35. Service of charges.

The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of the charges upon him, or before a special court-martial within a period of three days subsequent to the service of the charges upon him.

PART VII—TRIAL PROCEDURE

Article

36. President may prescribe rules.
37. Unlawfully influencing action of court.
38. Duties of trial counsel and defense counsel.
39. Sessions.
40. Continuances.
41. Challenges.
42. Oaths.
43. Statute of limitations.
44. Former jeopardy.
45. Pleas of the accused.
46. Opportunity to obtain witnesses and other evidence.
47. Refusal to appear or testify.
48. Contempts.
49. Depositions.
50. Admissibility of records of courts of inquiry.
51. Voting and rulings.
52. Number of votes required.
53. Court to announce action.
54. Record of trial.

ART. 36. President may prescribe rules.

(a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which shall not be contrary to or inconsistent with this code.

(b) All rules and regulations made in pursuance of this article shall be reported to the Congress.

ART. 37. Unlawfully influencing action of court.

No authority convening a general, special, or summary court-martial, nor any other commanding officer, shall censure, reprimand, or admonish such court or any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this code shall attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

ART. 38. Duties of trial counsel and defense counsel.

(a) The trial counsel of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of the proceedings.

(b) The accused shall have the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel duly appointed pursuant to article 27. Should the accused have counsel of his own selection, the duly appointed defense counsel, and assistant defense counsel, if any, shall, if the accused so desires, act as his associate counsel; otherwise they shall be excused by the president of the court.

(c) In every court-martial proceeding, the defense counsel may, in the event of conviction, forward for attachment to the record of proceedings a brief of such matters as he feels should be considered in behalf of the accused on review, including any objection to the contents of the record which he may deem appropriate.

(d) An assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when he is qualified to be a trial counsel as required by article 27, perform any duty imposed by law, regulation, or the custom of the service upon the trial counsel of the court. An assistant trial counsel of a special court-martial may perform any duty of the trial counsel.

(e) An assistant defense counsel of a general or special court-martial may, under the direction of the defense counsel or when he is qualified to be the defense counsel as required by article 27, perform any duty imposed by law, regulation, or the custom of the service upon counsel for the accused.

ART. 39. Sessions.

Whenever a general or special court-martial is to deliberate or vote, only the members of the court shall be present. After a general court-martial has finally voted on the findings, the court may request the law officer and the reporter to appear before the court to put the findings in proper form, and such proceedings shall be on the record. All other proceedings, including any other consultation of the court with counsel or the law officer shall be made a part of the record and be in the presence of the accused, the defense counsel, the trial counsel, and in general court-martial cases, the law officer.

ART. 40. Continuances.

A court-martial may, for reasonable cause, grant a continuance to any party for such time and as often as may appear to be just.

ART. 41. Challenges.

(a) Members of a general or special court-martial and the law officer of a general court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The court shall determine the relevancy and validity of challenges for cause, and shall not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

(b) The accused and trial counsel shall each be entitled to one peremptory challenge, but the law officer shall not be challenged except for cause.

ART. 42. Oaths.

(a) The law officer, all interpreters, and, in general and special courts-martial, the members, the trial counsel, assistant trial counsel, the defense counsel, assistant defense counsel, and the reporter shall take an oath or affirmation in the presence of the accused to perform their duties faithfully.

(b) All witnesses before courts-martial shall be examined on oath or affirmation.

ART. 43. Statute of limitations.

(a) A person charged with desertion or absence without leave in time of war, or with aiding the enemy, mutiny, or murder, may be tried and punished at any time without limitation.

(b) Except as otherwise provided in this article, a person charged with desertion in time of peace or any of the offenses punishable under articles 119 through 132 inclusive shall not be liable to be tried by court-martial if the offense was committed more than three years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

(c) Except as otherwise provided in this article, a person charged with any offense shall not be liable to be tried by court-martial or punished under article

15 if the offense was committed more than two years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command or before the imposition of punishment under article 15.

(d) Periods in which the accused was absent from territory in which the United States has the authority to apprehend him, or in the custody of civil authorities, or in the hands of the enemy, shall be excluded in computing the period of limitation prescribed in this article.

(e) In the case of any offense the trial of which in time of war is certified to the President by the Secretary of the Department to be detrimental to the prosecution of the war or inimical to the national security, the period of limitation prescribed in this article shall be extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

(f) When the United States is at war, the running of any statute of limitations applicable to any offense—

(1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not; or

(2) committed in connection with the acquisition, care, handling, custody, control, or disposition of any real or personal property of the United States; or

(3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with, or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency;

shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

ART. 44. Former jeopardy.

No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.

ART. 45. Pleas of the accused.

(a) If an accused arraigned before a court-martial makes any irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

(b) A plea of guilty by the accused shall not be received in a capital case.

ART. 46. Opportunity to obtain witnesses and other evidence.

The trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, its Territories, and possessions.

ART. 47. Refusal to appear or testify.

(a) Every person not subject to this code who—

(1) has been duly subpenaed to appear as a witness before any court-martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such court, commission or board; and

(2) has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the courts of the United States; and

(3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which such person may have been legally subpenaed to produce;

shall be deemed guilty of an offense against the United States.

(b) Any person who commits an offense denounced by this article shall be tried on information in a United States district court or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, and jurisdiction is hereby conferred upon such courts for such purpose. Upon con-

viction, such persons shall be punished by a fine of not more than $500, or imprisonment for a period not exceeding six months, or both.

(c) It shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, upon the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute any person violating this article.

(d) The fees and mileage of witnesses shall be advanced or paid out of the appropriations for the compensation of witnesses.

ART. 48. Contempts.

A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder. Such punishment shall not exceed confinement for thirty days or a fine of $100, or both.

ART. 49. Depositions.

(a) At any time after charges have been signed as provided in article 30, any party may take oral or written depositions unless an authority competent to convene a court-martial for the trial of such charges forbids it for good cause. If a deposition is to be taken before charges are referred for trial, such an authority may designate officers to represent the prosecution and the defense and may authorize such officers to take the deposition of any witness.

(b) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition.

(c) Depositions may be taken before and authenticated by any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

(d) A duly authenticated deposition taken upon reasonable notice to the other party, so far as otherwise admissible under the rules of evidence, may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or military board, if it appears—

(1) that the witness resides or is beyond the State, Territory, or District in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing; or

(2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing; or

(3) that the present whereabouts of the witness is unknown.

(e) Testimony by deposition may be adduced by the defense in capital cases.

(f) A deposition may be read in evidence in any case in which the death penalty is authorized by law but is not mandatory, whenever the convening authority shall have directed that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial.

ART. 50. Admissibility of records of courts of inquiry.

(a) In any case not capital and not extending to the dismissal of an officer, the sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, may, if otherwise admissible, be read in evidence by any party before a court-martial or military commission if the accused was a party and was accorded the rights of an accused when before the court of inquiry or if the accused consents to the introduction of such evidence.

(b) Such testimony may be read in evidence only by the defense in capital cases or cases extending to the dismissal of an officer.

(c) Such testimony may also be read in evidence before a court of inquiry or a military board.

ART. 51. Voting and rulings.

(a) Voting by members of a general or special court martial upon questions of challenge, on the findings, and on the sentence shall be by secret written ballot. The junior member of the court shall in each case count the votes, which count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

(b) The law officer of a general court martial and the president of a special court martial shall rule upon interlocutory questions, other than challenge, arising during the proceedings. Any such ruling made by the law officer of a

general court martial upon any interlocutory question other than a motion for a finding of not guilty, or the question of accused's sanity, shall be final and shall constitute the ruling of the court; but the law officer may change any such ruling at any time during the trial. Unless such ruling be final, if any member objects thereto, the court shall be cleared and closed and the question decided by a vote as provided in article 52, viva voce, beginning with the junior in rank.

(c) Before a vote is taken on the findings, the law officer of a general court martial and the president of a special court martial shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge the court—

(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in favor of the accused and he shall be acquitted;

(3) that if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no such doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the Government.

ART. 52. Number of votes required.

(a) (1) No person shall be convicted of an offense for which the death penalty is made mandatory by law except by the concurrence of all the members of the court martial present at the time the vote is taken.

(2) No person shall be convicted of any other offense, except by the concurrence of two-thirds of the members present at the time the vote is taken.

(b) (1) No person shall be sentenced to suffer death, except by the concurrence of all the members of the court martial present at the time the vote is taken and for an offense in this code made expressly punishable by death.

(2) No person shall be sentenced to life imprisonment or to confinement in excess of ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.

(3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.

(c) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote. A tie vote on a challenge shall disqualify the member challenged. A tie vote on a motion for a finding of not guilty or on a question of the accused's sanity shall be a determination against the accused. A tie vote on any other question shall be a determination in favor of the accused.

ART. 53. Court to announce action.

Every court-martial shall announce its findings and sentence to the parties as soon as determined.

ART. 54. Record of trial.

(a) Each general court-martial shall keep a separate record of the proceedings of the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the law officer. In case the record cannot be authenticated by either the president or the law officer, by reason of the death, disability, or absence of such officer, it shall be signed by a member in lieu of him. If both the president and the law officer are unavailable for such reasons, the record shall be authenticated by two members.

(b) Each special and summary court-martial shall keep a separate record of the proceedings in each case, which record shall contain such matter and be authenticated in such manner as may be required by regulations which the President may prescribe.

(c) A copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as authenticated.

PART VIII—SENTENCES

Article

55. Cruel and unusual punishments prohibited.
56. Maximum limits.
57. Effective date of sentences.
58. Execution of confinement.

ART. 55. Cruel and unusual punishments prohibited.

Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, shall not be adjudged by any court-

martial or inflicted upon any person subject to this code. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

ART. 56. Maximum limits.

The punishment which a court-martial may direct for an offense shall not exceed such limits as the President may prescribe for that offense.

ART. 57. Effective date of sentences.

(a) Whenever a sentence of a court-martial as lawfully adjudged and approved includes a forfeiture of pay or allowances in addition to confinement not suspended, the forfeiture may apply to pay or allowances becoming due on or after the date such sentence is approved by the convening authority. No forfeiture shall extend to any pay or allowances accrued before such date.

(b) Any period of confinement not suspended included in a sentence of a court-martial shall begin to run from the date the sentence is adjudged by the court-martial.

(c) All other sentences of courts-martial shall become effective on the date ordered executed.

ART. 58. Execution of confinement.

(a) Under such instructions as the Department concerned may prescribe, any sentence of confinement adjudged by a court-martial or other military tribunal, whether or not such sentence includes discharge or dismissal, and whether or not such discharge or dismissal has been executed, may be carried into execution by confinement in any place of confinement under the control of any of the armed forces, or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use; and persons so confined in a penal or correctional institution not under the control of one of the armed forces shall be subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District, or place in which the institution is situated.

(b) The omission of the words "hard labor" in any sentence of a court-martial adjudging confinement shall not be construed as depriving the authority executing such sentence of the power to require hard labor as a part of the punishment.

PART IX—REVIEW OF COURTS-MARTIAL

Article

59. Error of law; lesser included offense.
60. Initial action on the record.
61. Same—General court-martial records.
62. Reconsideration and revision.
63. Rehearings.
64. Approval by the convening authority.
65. Disposition of records after review by the convening authority.
66. Review by the board of review.
67. Review by the judicial council.
68. Branch offices.
69. Review in the office of The Judge Advocate General.
70. Appellate counsel.
71. Execution of sentence; suspension of sentence.
72. Vacation of suspension.
73. Petition for a new trial.
74. Remission and suspension.
75. Restoration.
76. Finality of court-martial judgments.

ART. 59. Error of law; lesser included offense.

(a) A finding or sentence of a court-martial shall not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

(b) Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense.

ART. 60. Initial action on the record.

After every trial by court-martial the record shall be forwarded to the convening authority, and action thereon may be taken by the officer who convened the court, an officer commanding for the time being, a successor in command, or by any officer exercising general court-martial jurisdiction.

ART. 61. Same—General court-martial records.

The convening authority shall refer the record of every general court-martial to his staff judge advocate or legal officer, who shall submit his written opinion

thereon to the convening authority. If the final action of the court has resulted in an acquittal of all charges and specifications, the opinion shall be limited to questions of jurisdiction and shall be forwarded with the record to The Judge Advocate General of the armed force of which the accused is a member.

ART. 62. Reconsideration and revision.

(a) If a case before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action.

(b) Where there is an apparent error or omission in the record or where the record shows improper action by a court-martial with respect to a finding or sentence which can be rectified without material prejudice to the substantial rights of the accused, the convening authority may return the record to the court for appropriate action. In no case, however, may the record be returned—

(1) for reconsideration of a finding of not guilty or a ruling which amounts to a finding of not guilty; or

(2) for increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory.

ART. 63. Rehearings.

(a) If the convening authority disapproves the findings and sentence of a court-martial he may, except where there is lack of sufficient evidence in the record to support the findings, order a rehearing, in which case he shall state the reasons for disapproval. If he does not order a rehearing, he shall dismiss the charges.

(b) Every rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be imposed unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings or unless the sentence prescribed for the offense is mandatory.

ART. 64. Approval by the convening authority.

In acting on the findings and sentence of a court-martial, the convening authority shall approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and determines should be approved. Unless he indicates otherwise, approval of the sentence shall constitute approval of the findings and sentence.

ART. 65. Disposition of records after review by the convening authority.

(a) When the convening authority has taken final action in a general court-martial case, he shall forward the entire record, including his action thereon and the opinion or opinions of the staff judge advocate or legal officer, to the appropriate Judge Advocate General.

(b) Where the sentence of a special court-martial as approved by the convening authority includes a bad-conduct discharge, whether or not suspended, the record shall be forwarded to the officer exercising general court-martial jurisdiction over the command to be reviewed in the same manner as a record of trial by general court-martial or directly to the appropriate Judge Advocate General to be reviewed by a board of review. If the sentence as approved by an officer exercising general court-martial jurisdiction includes a bad-conduct discharge, whether or not suspended, the record shall be forwarded to the appropriate Judge Advocate General to be reviewed by a board of review.

(c) All other special and summary court-martial records shall be reviewed by a judge advocate of the Army or Air Force, a law specialist of the Navy, or a law specialist or lawyer of the Coast Guard or Treasury Department and shall be transmitted and disposed of as the Secretary of the Department may prescribe by regulations.

ART. 66. Review by the board of review.

(a) The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal court or of the highest court of a State of the United States.

(b) The Judge Advocate General shall refer to a board of review the record in every case of trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of an officer, cadet, or mid-

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shipman, dishonorable or bad-conduct discharge, or confinement for more than one year.

(c) In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the board of review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. Otherwise it shall order that the charges be dismissed.

(e) 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.

(f) Otherwise, the Judge Advocate General shall, unless there is to be further action by the President or the Secretary of the Department or the Judicial Council, instruct the convening authority to take action in accordance with the decision of the board of review. If the board of review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(g) The Judge Advocates General of the armed forces shall prescribe uniform rules of procedure for proceedings in and before boards of review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by the boards of review.

ART. 67. Review by the Judicial Council.

(a) There is hereby established in the National Military Establishment a Judicial Council. The Judicial Council shall be composed of not less than three members. Each member of the Judicial Council shall be appointed by the President from civilian life and shall be a member of the bar admitted to practice before the Supreme Court of the United States, and each member shall receive compensation and allowances equal to those paid to a judge of a United States Court of Appeals.

(b) Under rules of procedure which it shall prescribe, the Judicial Council shall review the record in the following cases:

(1) All cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death;

(2) All cases reviewed by a board of review which The Judge Advocate General orders forwarded to the Judicial Council for review; and

(3) All cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Judicial Council has granted a review.

(c) The accused shall have thirty days from the time he is notified of the decision of a board of review to petition the Judicial Council for a grant of review. The Judicial Council shall act upon such a petition within fifteen days of the receipt thereof.

(d) In any case reviewed by it, the Judicial Council shall act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the board of review. In a case which The Judge Advocate General orders forwarded to the Judicial Council, such action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, such action need be taken only with respect to issues specified in the grant of review. The Judicial Council shall take action only with respect to matters of law.

(e) If the Judicial Council sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. Otherwise it shall order that the charges be dismissed.

(f) After it has acted on a case, the Judicial Council may direct The Judge Advocate General to return the record to the board of review for further review in accordance with the decision of the Judicial Council. Otherwise unless there is to be further action by the President, or the Secretary of the Department, The Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the Judicial Council has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(g) The Judicial Council and The Judge Advocate General of the armed forces shall meet annually to make a comprehensive survey of the operation of this code and report to the Secretary of Defense and the Secretaries of the Departments any recommendations relating to uniformity of sentence policies, amendments to this code, and any other matters deemed appropriate.

ART. 68. Branch offices.

(a) Whenever the President deems such action necessary, he may direct The Judge Advocate General to establish a branch office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office one or more boards of review. Such Assistant Judge Advocate General and any such board of review shall be empowered to perform for that command, under the general supervision of The Judge Advocate General, the duties which The Judge Advocate General and a board of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval by the President.

(b) In time of emergency, the President may direct that one or more temporary Judicial Councils be established for the period of the emergency, each of which shall be under the general supervision of the Judicial Council.

ART. 69. Review in the office of The Judge Advocate General.

Every record of trial by general court-martial, in which there has been a finding of guilty and a sentence, the appellate review of which is not otherwise provided for by article 66, shall be examined in the office of The Judge Advocate General. If any part of the findings or sentence is found unsupported in law, or if The Judge Advocate General so directs, the record shall be reviewed by a board of review in accordance with article 66, but in such event there will be no further review by the Judicial Council.

ART. 70. Appellate counsel.

(a) The Judge Advocate General shall appoint in his office one or more officers as appellate Government counsel, and one or more officers as appellate defense counsel.

(b) It shall be the duty of appellate Government counsel to represent the United States before the board of review or the Judicial Council when directed to do so by The Judge Advocate General.

(c) It shall be the duty of appellate defense counsel to represent the accused before the board of review or the Judicial Council—

(1) when he is requested to do so by the accused; or

(2) when the United States is represented by counsel; or

(3) when The Judge Advocate General has requested the reconsideration of a case before the board of review or has transmitted it to the Judicial Council.

(d) The accused shall have the right to be represented before the Judicial Council or the board of review by civilian counsel if provided by him.

(e) The appellate counsel shall also perform such other functions in connection with the review of court-martial cases as The Judge Advocate General shall direct.

ART. 71. Execution of sentence; suspension of sentence.

(a) No court-martial sentence extending to death or involving a general or flag officer shall be executed until approved by the President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence, as approved by him, except a death sentence.

(b) No sentence extending to the dismissal of an officer, cadet, or midshipman shall be executed until approved by the Secretary of the Department, or such Under Secretary or Assistant Secretary as may be designated by him. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of any part of the sentence as approved by him. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person who is so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

(c) No sentence which includes, unsuspended, a dishonorable or bad conduct discharge, or confinement for more than one year shall be executed until affirmed by a board of review and, in cases reviewed by it, the Judicial Council.

(d) All other court-martial sentences, unless suspended, may be ordered executed by the convening authority when approved by him. The convening authority may suspend the execution of any sentence, except a death sentence.

ART. 72. Vacation of suspension.

(a) Prior to the vacation of the suspension of a special court-martial sentence which as approved includes a bad-conduct discharge, or of any general court-martial sentence, the officer having special court-martial jurisdiction over the probationer shall hold a hearing on the alleged violation of probation. The probationer shall be represented at such hearing by counsel if he so desires.

(b) The record of the hearing and the recommendations of the officer having special court-martial jurisdiction shall be forwarded for action to the officer exercising general court-martial jurisdiction over the probationer. If he vacates the suspension, the vacation shall be effective, subject to applicable restrictions in article 71 (c), to execute any unexecuted portion of the sentence except a dismissal. The vacation of the suspension of a dismissal shall not be effective until approved by the Secretary of the Department.

(c) The suspension of any other sentence may be vacated by any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence.

ART. 73. Petition for a new trial.

At any time within one year after approval by the convening authority of a court-martial sentence which extends to death, dismissal, dishonorable or bad-conduct discharge, or confinement for more than one year, the accused may petition The Judge Advocate General for a new trial on grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before the board of review or before the Judicial Council, The Judge Advocate General shall refer the petition to the board or Council, respectively, for action. Otherwise The Judge Advocate General shall act upon the petition.

ART. 74. Remission and suspension.

(a) The Secretary of the Department and any Under Secretary, Assistant Secretary, or commanding officer designated by the Secretary may remit or suspend any part or amount of the unexecuted portion of any sentence, including all uncollected forfeitures, other than a sentence approved by the President.

(b) The Secretary of the Department may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.

ART. 75. Restoration.

(a) Under such regulations as the President may prescribe, all rights, privileges, and property affected by an executed portion of a court-martial sentence which has been set aside or disapproved, except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered and such executed portion is included in a sentence imposed upon the new trial or rehearing.

(b) Where a previously executed sentence of dishonorable or bad-conduct discharge is not sustained on a new trial, the Secretary of the Department shall substitute therefor a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of his enlistment.

(c) Where a previously executed sentence of dismissal is not sustained on a new trial, the Secretary of the Department shall substitute therefor a form of discharge authorized for administrative issuance and the officer dismissed by such sentence may be reappointed by the President alone to such commissioned rank and precedence as in the opinion of the President such former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to position vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and such reappointment shall be considered as actual service for all purposes, including the right to receive pay and allowances.

ART. 76. Finality of court-martial judgments.

The appellate review of records of trial provided by this code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this code, and all dismissals and discharges carried into execution pursuant to sentences by courts-martial following approval, review, or affirmation as required by this code, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73 and to action by the Secretary of a Department as provided in article 74.

PART X—PUNITIVE ARTICLES

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ART. 77. Principals.

Any person punishable under this code who—

(1) commits an offense punishable by this code, or aids, abets, counsels, commands, or procures its commission; or

(2) causes an act to be done which if directly performed by him would be punishable by this code;

shall be punished with the punishment provided for the commission of the offense.

ART. 78. Accessory after the fact.

Any person subject to this code who, knowing that an offense punishable by this code has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct.

ART. 79. Conviction of lesser included offense.

An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.

ART. 80. Attempts.

(a) An act, done with specific intent to commit an offense under this code, amounting to more than mere preparation and tending but failing to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this code who attempts to commit any offense punishable by this code shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

(c) Any person subject to this code may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

ART. 81. Conspiracy.

Any person subject to this code who conspires with any other person or persons to commit an offense under this code shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

ART. 82. Solicitation.

(a) Any person subject to this code who solicits or advises another or others to desert in violation of article 85 or mutiny in violation of article 94 shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct.

(b) Any person subject to this code who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of article 99 or sedition in violation of article 94 shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct.

ART. 83. Fraudulent enlistment, appointment, or separation.

Any person who—

(1) procures his own enlistment or appointment in the armed forces by means of knowingly false representations or deliberate concealment as to his qualifications for such enlistment or appointment and receives pay or allowances thereunder; or

(2) procures his own separation from the armed forces by means of knowingly false representations or deliberate concealment as to his eligibility for such separation:

shall be punished as a court-martial may direct.

ART. 84. Unlawful enlistment, appointment, or separation.

Any person subject to this code who effects an enlistment or appointment in or a separation from the armed forces of any person who is known to him to be ineligible for such enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct.

ART. 85. Desertion.

(a) Any member of the armed forces of the United States who—

(1) without proper authority goes or remains absent from his place of service, organization, or place of duty with intent to remain away therefrom permanently; or

(2) quits his unit or organization or place of duty with intent to avoid hazardous duty or to shirk important service; or

(3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact he has not been so regularly separated, or enters any foreign armed service except when authorized by the United States;

is guilty of desertion.

(b) Any officer of the armed forces who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post at proper duties without leave and with intent to remain away therefrom permanently is guilty of desertion.

(c) Any person found guilty of desertion or attempted desertion shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the desertion or attempted desertion occurs at any other time, by such punishment, other than death, as a court-martial may direct.

ART. 86. Absence without leave.

Any person subject to this code who, without proper authority—

(1) fails to go to his appointed place of duty at the time prescribed; or

(2) goes from that place; or

(3) absents himself or remains absent from his unit, organization, or other place of duty at which he is required to be at the time prescribed;

shall be punished as a court-martial may direct.

ART. 87. Missing movement.

Any person subject to this code who through neglect or design misses the movement of a ship, aircraft, or unit with which he is required in the course of duty to move shall be punished as a court-martial may direct.

ART. 88. Disrespect towards officials.

Any officer who uses contemptuous or disrespectful words against the President, Vice President, Congress, Secretary of Defense, or a Secretary of a Department, a Governor or a legislature of any State, Territory, or other possession of the United States in which he is on duty or present shall be punished as a court-martial may direct.

ART. 89. Disrespect towards superior officer.

Any person subject to this code who behaves with disrespect towards his superior officer shall be punished as a court-martial may direct.

ART. 90. Assaulting or willfully disobeying officer.

Any person subject to this code who—

(1) strikes his superior officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

ART. 91. Insubordinate conduct towards noncommissioned officer.

Any warrant officer or enlisted person who—

(1) strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while such officer is in the execution of his office; or

(2) willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer; or

(3) treats with contempt or is disrespectful in language or deportment towards a warrant officer, noncommissioned officer, or petty officer while such officer is in the execution of his office;

shall be punished as a court-martial may direct.

ART. 92. Failure to obey order or regulation.

Any person subject to this code who—

(1) violates or fails to obey any lawful general order or regulation; or

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the same; or

(3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.

ART. 93. Cruelty and maltreatment.

Any person subject to this code who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.

ART. 94. Mutiny or sedition.

(a) Any person subject to this code—

(1) who with intent to usurp or override lawful military authority refuses, in concert with any other person or persons, to obey orders or otherwise do his duty or creates any violence or disturbance is guilty of mutiny;

(2) who with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person or persons, revolt, violence, or other disturbance against such authority is guilty of sedition;

(3) who fails to do his utmost to prevent and suppress an offense of mutiny or sedition being committed in his presence, or fails to take all reasonable means to inform his superior or commanding officer of an offense of

mutiny or sedition which he knows or has reason to believe is taking place, is guilty of a failure to suppress or report a mutiny or sedition.

(b) A person who is found guilty of attempted mutiny, mutiny, sedition, or failure to suppress or report a mutiny or sedition shall be punished by death or such other punishment as a court-martial may direct.

ART. 95. Arrest and confinement.

Any person subject to this code who resists apprehension or breaks arrest or who escapes from custody or confinement shall be punished as a court-martial may direct.

ART. 96. Releasing prisoner without proper authority.

Any person subject to this code who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any such prisoner to escape, shall be punished as a court-martial may direct.

ART. 97. Unlawful detention of another.

Any person subject to this code who, except as provided by law, apprehends, arrests, or confines any person shall be punished as a court-martial may direct.

ART. 98. Noncompliance with procedural rules.

Any person subject to this code who—

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this code; or

(2) knowingly and intentionally fails to enforce or comply with any provision of this code regulating the proceedings before, during, or after trial of an accused;

shall be punished as a court-martial may direct.

ART. 99. Misbehavior before the enemy.

Any member of the armed forces who before or in the presence of the enemy—

(1) runs away; or

(2) shamefully abandons, surrenders or delivers up any command, unit, place, or military property which it is his duty to defend; or

(3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property; or

(4) casts away his arms or ammunition; or

(5) is guilty of cowardly conduct; or

(6) quits his place of duty to plunder or pillage; or

(7) causes false alarms in any command, unit, or place under control of the armed forces; or

(8) willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy; or

(9) does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies when engaged in battle;

shall be punished by death or such other punishment as a court-martial may direct.

ART. 100. Subordinate compelling surrender.

Any person subject to this code who compels or attempts to compel a commander of any place, vessel, aircraft, or other military property, or of any body of members of the armed forces, to give it up to an enemy or to abandon it, or who strikes the colors or flag to an enemy without proper authority, shall be punished by death or such other punishment as a court-martial may direct.

ART. 101. Improper use of countersign.

Any person subject to this code who in time of war discloses the parole or countersign to any person not entitled to receive it or who gives to another who is entitled to receive and use the parole or countersign a different parole or countersign from that which, to his knowledge, he was authorized and required to give, shall be punished by death or such other punishment as a court-martial may direct.

ART. 102. Forcing a safeguard.

Any person subject to this code who forces a safeguard shall suffer death or such other punishment as a court-martial may direct.

ART. 103. Captured or abandoned property.

(a) All persons subject to this code shall secure all public property taken from the enemy for the service of the United States, and shall give notice and turn over

to the proper authority without delay all captured or abandoned property in their possession, custody, or control.

(b) Any person subject to this code who—

(1) fails to carry out the duties prescribed in subdivision (a) of this article; or

(2) buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or another directly or indirectly connected with himself; or

(3) engages in looting or pillaging;

shall be punished as a court-martial may direct.

ART. 104. Aiding the enemy.

Any person who—

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other thing; or

(2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;

shall suffer death or such other punishment as a court-martial or military commission may direct.

ART. 105. Misconduct as prisoner.

Any person subject to this code who, while in the hands of the enemy in time of war—

(1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or

(2) while in a position of authority over such persons maltreats them without justifiable cause;

shall be punished as a court-martial may direct.

ART. 106. Spies.

Any person who in time of war is found lurking or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces of the United States, or in or about any shipyard, any manufacturing or industrial plant, or any other place of institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.

ART. 107. False official statements.

Any person subject to this code who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing the same to be false, or makes any other false official statement knowing the same to be false, shall be punished as a court-martial may direct.

ART. 108. Military property of United States—Loss, damage, destruction, or wrongful disposition.

Any person subject to this code who, without proper authority—

(1) sells or otherwise disposes of; or

(2) willfully or through neglect damages, destroys, or loses; or

(3) willfully or through neglect suffers to be lost, damaged, destroyed, sold or wrongfully disposed of;

any military property of the United States, shall be punished as a court-martial may direct.

ART. 109. Property other than military property of United States—Waste, spoil, or destruction.

Any person subject to this code who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States shall be punished as a court-martial may direct.

ART. 110. Improper hazarding of vessel.

(a) Any person subject to this code who willfully and wrongfully hazards or suffers to be hazarded any vessel of the armed forces shall suffer death or such other punishment as a court-martial may direct.

(b) Any person subject to this code who negligently hazards or suffers to be hazarded any vessel of the armed forces, shall be punished as a court-martial may direct.

ART. 111. Drunken or reckless driving.

Any person subject to this code who operates any vehicle while drunk, or in a reckless or wanton manner, shall be punished as a court-martial may direct.

ART. 112. Drunk on duty.

Any person subject to this code, other than a sentinel or look-out, who is found drunk on duty, shall be punished as a court-martial may direct.

ART. 113. Misbehavior of sentinel.

Any sentinel or look-out who is found drunk or sleeping upon his post, or leaves it before he is regularly relieved shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the offense is committed at any other time, by such punishment other than death as a court-martial may direct.

ART. 114. Dueling.

Any person subject to this code who fights or promotes, or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall be punished as a court-martial may direct.

ART. 115. Malingering.

Any person subject to this code who for the purpose of avoiding work, duty, or service—

(1) feigns illness, physical disablement, mental lapse or derangement; or

(2) intentionally inflicts self-injury;

shall be punished as a court-martial may direct.

ART. 116. Riot or breach of peace.

Any person subject to this code who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct.

ART. 117. Provoking speeches or gestures.

Any person subject to this code who uses provoking or reproachful words or gestures towards any other person subject to this code shall be punished as a court-martial may direct.

ART. 118. Murder.

Any person subject to this code who, without justification or excuse, kills a human being, when he—

(1) has a premediated design to kill; or

(2) intends to kill or inflict great bodily harm; or

(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson, though he has no intent to kill;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under paragraph (1) of this article, he shall suffer death or imprisonment for life as a court-martial may direct.

ART. 119. Manslaughter.

Any person subject to this code who, without a design to effect death, kills a human being—

(1) in the heat of sudden passion; or

(2) by culpable negligence; or

(3) while perpetrating or attempting to perpetrate an offense, other than those specified in paragraph (4) of article 118, directly affecting the person;

is guilty of manslaughter and shall be punished as a court-martial may direct.

ART. 120. Rape.

(a) Any person subject to this code who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of rape shall be punished by death or such other punishment as a court-martial may direct.

ART. 121. Larceny.

Any person subject to this code who, with intent to deprive or defraud another of the use and benefit of property or to appropriate the same to his own use or the use of any person other than the true owner, wrongfully takes, obtains, or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, or article of value of any kind, steals such property and is guilty of larceny, and shall be punished as a court-martial may direct.

ART. 122. Robbery.

Any person subject to this code who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or the person or property of a relative or member or his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct.

ART. 123. Forgery.

Any person subject to this code who, with intent to defraud—

(1) falsely makes or alters any signature to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; or

(2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered;

is guilty of forgery and shall be punished as a court-martial may direct.

ART. 124. Maiming.

Any person subject to this code who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which—

(1) seriously disfigures his person by any mutilation thereof; or

(2) destroys or disables any member or organ of his body; or

(3) seriously diminishes his physical vigor by the injury of any member or organ;

is guilty of maiming and shall be punished as a court-martial may direct.

ART. 125. Sodomy.

(a) Any person subject to this code who engages in unnatural carnal copulation with another of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

ART. 126. Arson.

(a) Any person subject to this code who willfully and maliciously burns or sets on fire a dwelling in which there is at the time a human being, or any other structure, water craft, or movable, wherein to the knowledge of the offender there is at the time a human being, is guilty of aggravated arson and shall be punished as a court-martial may direct.

(b) Any person subject to this code who willfully and maliciously burns or sets fire to the property of another, except as provided in subdivision (a) of this article, is guilty of simple arson and shall be punished as a court-martial may direct.

ART. 127. Extortion.

Any person subject to this code who communicates threats to another with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity of any description is guilty of extortion and shall be punished as a court-martial may direct.

ART. 128. Assault.

(a) Any person subject to this code who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(b) Any person subject to this code who—

(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

ART. 129. Burglary.

Any person subject to this code who, with intent to commit an offense punishable under articles 118 through 128, inclusive, breaks and enters, in the nighttime, the dwelling house of another, is guilty of burglary and shall be punished as a court-martial may direct.

ART. 130. Housebreaking.

Any person subject to this code who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct.

ART. 131. Perjury.

Any person subject to this code who in a judicial proceeding or course of justice willfully and corruptly gives, upon a lawful oath or in any form allowed by law to be substituted for an oath, any false testimony material to the issue or matter of inquiry is guilty of perjury and shall be punished as a court-martial may direct.

ART. 132. Frauds against the Government.

Any person subject to this code—

(1) who, knowing it to be false or fraudulent—

(A) makes any claim against the United States or any officer thereof; or

(B) presents to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof; or

(2) who, for the purpose of obtaining the approval, allowance, or payment of any claim against the United States or any officer thereof—

(A) makes or uses any writing or other paper knowing the same to contain any false or fraudulent statements;

(B) makes any oath to any fact or to any writing or other paper knowing such oath to be false; or

(C) forges or counterfeits any signature upon any writing or other paper, or uses any such signature knowing the same to be forged or counterfeited; or

(3) who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the armed forces thereof, knowingly delivers to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

(4) who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, makes or delivers to any person such writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States;

shall, upon conviction, be punished as a court-martial may direct.

ART. 133. Conduct unbecoming an officer and gentleman.

Any officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the armed forces.

ART. 134. General article.

Though not specifically mentioned in this code, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this code may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

PART XI—MISCELLANEOUS PROVISIONS

Article
135. Courts of inquiry.
136. Authority to administer oaths and to act as notary.
137. Articles to be explained.
138. Complaints of wrongs.
139. Redress of injuries to property.
140. Delegation by the President.

ART. 135. Courts of inquiry.

(a) Courts of inquiry to investigate any matter may be convened by any person authorized to convene a general court-martial or by any other person designated

by the Secretary of a Department for that purpose whether or not the persons involved have requested such an inquiry.

(b) A court of inquiry shall consist of three or more officers. For each court of inquiry the convening authority shall also appoint counsel for the court.

(c) Any person subject to this code whose conduct is subject to inquiry shall be designated as a party. Any person subject to this code or employed by the National Military Establishment who has a direct interest in the subject of inquiry shall have the right to be designated as a party upon request to the court. Any person designated as a party shall be given due notice and shall have the right to be present, to be represented by counsel, to cross-examine witnesses, and to introduce evidence.

(d) Members of a court of inquiry may be challenged by a party, but only for cause stated to the court.

(e) The members, counsel, the reporter, and interpreters of courts of inquiry shall take an oath or affirmation to faithfully perform their duties.

(f) Witnesses may be summoned to appear and testify and be examined before courts of inquiry as provided for courts-martial.

(g) Courts of inquiry shall make findings of fact but shall not express opinions or make recommendations unless required to do so by the convening authority.

(h) Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signatures of the president and counsel for the court and forwarded to the convening authority. In case the record cannot be authenticated by the president it shall be signed by a member in lieu of the president and in case the record cannot be authenticated by the counsel for the court it shall be signed by a member in lieu of the counsel.

ART. 136. Authority to administer oaths and to act as notary.

(a) The following persons on active duty in the armed forces shall have authority to administer oaths for the purposes of military administration, including military justice, and shall have the general powers of a notary public and of a consul of the United States, in the performance of all notarial acts to be executed by members of any of the armed forces, wherever they may be, and by other persons subject to this code outside the continental limits of the United States:

(1) All judge advocates of the Army and Air Force;

(2) All law specialists;

(3) All summary courts-martial;

(4) All adjutants, assistant adjutants, acting adjutants, and personnel adjutants;

(5) All commanding officers of the Navy and Coast Guard;

(6) All staff judge advocates and legal officers, and acting or assistant staff judge advocates and legal officers; and

(7) All other persons designated by regulations of the armed forces or by statute.

(b) The following persons on active duty in the armed forces shall have authority to administer oaths necessary in the performance of their duties:

(1) The president, law officer, trial counsel, and assistant trial counsel for all general and special courts-martial;

(2) The president and the counsel for the court of any court of inquiry;

(3) All officers designated to take a deposition;

(4) All persons detailed to conduct an investigation;

(5) All recruiting officers; and

(6) All other persons designated by regulations of the armed forces or by statute.

(c) No fee of any character shall be paid to or received by any person for the performance of any notarial act herein authorized.

(d) The signature without seal of any such person acting as notary, together with the title of his office, shall be prima facie evidence of his authority.

ART. 137. Articles to be explained.

Articles 2, 3, 7 through 15, 25, 27, 31, 37, 38, 55, 77 through 134, and 137 through 139 of this code shall be carefully explained to every enlisted person at the time of his entrance on active duty in any of the armed forces of the United States, or within six days thereafter. They shall be explained again after he has completed six months of active duty, and again at the time he reenlists. A complete text of the Uniform Code of Military Justice and of the regulations prescribed by the President thereunder shall be made available to any person on active duty in the armed forces of the United States, upon his request, for his personal examination.

ART. 138. Complaints of wrongs.

Any member of the armed forces who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to any superior officer who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. That officer shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department concerned a true statement of such complaint, with the proceedings had thereon.

ART. 139. Redress of injuries to property.

(a) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that his property has been wrongfully taken by members of the armed forces he may, subject to such regulations as the Secretary of the Department may prescribe, convene a board to investigate the complaint. The board shall consist of from one to three officers and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The order of such commanding officer directing charges herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the damages so assessed and approved.

(b) Where the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in such proportion as may be deemed just upon the individual members thereof who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board.

ART. 140. Delegation by the President.

The President is authorized to delegate any authority vested in him under this code, and to provide for the subdelegation of any such authority.

SEC. 2. If any article or part thereof, as set out in section 1 of this Act, shall be held invalid, the remainder shall not be affected thereby.

SEC. 3. No inference of a legislative construction is to be drawn by reason of the part in which any article is placed nor by reason of the catch lines of the part or the article as set out in section 1 of this Act.

SEC. 4. All offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the effective date of this Act under any law embraced in or modified, changed, or repealed by this Act may be prosecuted, punished, and enforced, and action thereon may be completed, in the same manner and with the same effect as if this Act had not been passed.

SEC. 5. This Act shall become effective on the last day of the twelfth calendar month after approval of this Act, or on July 1, 1950, whichever date is later.

SEC. 6. Articles of War 107, 108, 112, 113, 119, and 120 (41 Stat. 809, 810, 811), as amended are further amended as follows:

(a) Delete from article 107, the words "Article 107."
(b) Delete from article 108, the words "Article 108."
(c) Delete from article 112, the words "Article 112."
(d) Delete from article 113, the words "Article 113."
(e) Delete from article 119, the words "Article 119."
(f) Delete from article 120, the words "Article 120."

These provisions as amended herein shall be construed to have the same force, effect, and applicability as they now have, but shall not be known as "Articles of War."

SEC. 7. (a) AUTHORITY OF NAVAL OFFICERS AFTER LOSS OF VESSEL.—When the crew of any naval vessel or aircraft are separated from their vessel or aircraft by means of its wreck, loss, or destruction, all the command and authority given to the officer of such vessel or aircraft shall remain in full force until such crew shall be regularly discharged or reassigned by competent authority.

(b) AUTHORITY OF OFFICERS OF SEPARATE ORGANIZATION OF MARINES.—When a force of marines is embarked on a naval vessel or vessels, as a separate organization, not a part of the authorized complement thereof, the authority and powers of the officers of such separate organizations of marines shall be the same as though such organization were serving at a naval station on shore, but nothing herein shall be construed as impairing the paramount authority of the commanding

officer of any vessel over the vessel under his command and all persons embarked thereon.

(c) COMMANDERS' DUTIES OF EXAMPLE AND CORRECTION.—All commanding officers and others in authority in the naval service are required to show in themselves a good example of virtue, honor, patriotism, and subordination; to be vigilant in inspecting the conduct of all persons who are placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Navy, all persons who are guilty of them; and to take all necessary and proper measures, under the laws, regulations and customs of the naval service, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.

(d) DIVINE SERVICE.—The commanders of vessels and naval activities to which chaplains are attached shall cause divine service to be performed on Sunday, whenever the weather and other circumstances allow it to be done; and it is earnestly recommended to all officers, seamen, and others in the naval service diligently to attend at every performance of the worship of Almighty God.

(e) REVERENT BEHAVIOR.—All persons in the Navy are enjoined to behave themselves in a reverent and becoming manner during divine service.

OATH OF ENLISTMENT

SEC. 8. Every person who is enlisted in any armed force shall take the following oath or affirmation at the time of his enlistment: "I, ----------, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice." This oath or affirmation may be taken before any officer.

REMOVAL OF CIVIL SUITS

SEC. 9. When any civil or criminal prosecution is commenced in any court of a State of the United States against any member of the armed forces of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the armed forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed by law, and the cause shall thereupon be entered on the docket of such district court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine said cause.

DISMISSAL OF OFFICERS

SEC. 10. No officer shall be dismissed from any of the armed forces except by sentence of a general court-martial, or in commutation thereof, or, in time of war, by order of the President; but the President may at any time drop from the rolls of any armed force any officer who has been absent without authority from his place of duty for a period of three months or more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a Federal or State penitentiary or correctional institution.

SEC. 11. The proviso of section 3 of the Act of April 9, 1906 (34 Stat. 104, ch. 1370), is amended to read as follows:

"*Provided*, That such midshipman shall not be confined in a military or naval prison or elsewhere with men who have been convicted of crimes or misdemeanors; and such finding and sentence shall be subject to review in the manner prescribed for general court-martial cases."

SEC. 12. The following sections or parts thereof of the Revised Statutes or Statutes at Large are hereby repealed. Any rights or liabilities existing under such sections or parts thereof prior to the effective date of this Act shall not be affected by this repeal, and this Act shall not be effective to authorize trial or punishment for any offense if such trial or punishment is barred by the provisions of existing law:

(a) Chapter II of the Act of June 4, 1920 (41 Stat. 759, 787-811, ch. 227), as amended, except Articles of War 107, 108, 112, 113, 119, and 120;

(b) Revised Statutes 1228 through 1230;

(c) Act of January 19, 1911 (36 Stat. 894, ch. 22);
(d) Paragraph 2 of section 2 of the Act of March 4, 1915 (38 Stat. 1062, 1084, ch. 143);
(e) Revised Statutes 1441, 1621, and 1624, articles 1 through 14 and 16 through 63, as amended;
(f) The provision of section 1457, Revised Statutes, which subjects officers retired from active service to the rules and articles for the government of the Navy and to trial by general court-martial;
(g) Section 2 of the Act of June 22, 1874 (18 Stat. 191, 192, ch. 392);
(h) The provision of the Act of March 3, 1893 (27 Stat. 715, 716, ch. 212), under the heading "Pay, Miscellaneous," relating to the punishment for fraudulent enlistment and receipt of any pay or allowances thereunder;
(i) Act of January 25, 1895 (28 Stat. 639, ch. 45), as amended;
(j) Provisions contained in the Act of March 2, 1895 (28 Stat. 825, 838, ch. 186), as amended, under the heading "Naval Academy," relating to the power of the Secretary of the Navy to convene general courts-martial for the trial of naval cadets (title changed to "midshipmen" by Act of July 1, 1902, 32 Stat. 662, 686, ch. 1368), his power to approve proceedings and execute sentences of such courts-martial, and the exceptional provision relating to approval, confirmation, and carrying into effect of sentences of suspension and dismissal;
(k) Sections 1 through 12 and 15 through 17 of the Act of February 16, 1909 (35 Stat. 621, 623, ch. 131);
(l) The provision of the Act of August 29, 1916 (39 Stat. 556, 573, ch. 417), under the heading "Hospital Corps", making officers and enlisted men of the Medical Department of the Navy who are serving with a body of marines detached for service with the Army subject to the rules and Articles of War while so serving;
(m) The provisions in the Act of August 29, 1916 (39 Stat. 556, 586, ch. 417), under the heading "Administration of Justice";
(n) Act of October 6, 1917 (40 Stat. 393, ch. 93);
(o) Act of April 2, 1918 (40 Stat. 501, ch. 39);
(p) Act of April 25, 1935 (49 Stat. 161, ch. 81);
(q) The third proviso of section 6, title I, of the Naval Reserve Act of 1938 (52 Stat. 1175, 1176, ch. 690);
(r) Section 301, title III, of the Naval Reserve Act of 1938 (52 Stat. 1175, 1180, ch. 690);
(s) Act of March 22, 1943 (57 Stat. 41, ch. 18);
(t) Act of April 9, 1943 (57 Stat. 58, ch. 36);
(u) Sections 2, 3, 4, 6 and 7 of the Act of May 26, 1906 (34 Stat. 200, 201, ch. 2556);
(v) The provision of the Act of June 5, 1920 (41 Stat. 874, 880, ch. 235), under the heading "Coast Guard", authorizing the trial of enlisted men in the Coast Guard by deck courts.

Mr. BROOKS. It has been suggested, and I think appropriately, that when Secretary Forrestal finishes his statement we not attempt to burden him with technical questions. If there are any questions of policy, I am sure he will be glad to answer them, but technical questions we ought to reserve for later.

Mr. Forrestal, you have your statement and the committee will be glad to hear it.

STATEMENT OF SECRETARY OF DEFENSE JAMES FORRESTAL

Secretary FORRESTAL. Mr. Chairman, if it is not inappropriate and if I may be permitted to digress for a moment from the substance of this statement, may I say that I would like to join this committee in their expression of profound regret at the death of your former chairman, who was a great patriot, an intelligent and well-informed legislator, a great friend of the armed services, and a very loyal and devoted friend to all of us. If that is not inappropriate, I would like to have your permission to have that inserted in the record.

Mr. BROOKS. It is certainly appropriate, Secretary Forrestal.

Secretary FORRESTAL. And my sympathy to his family, in respect of his memory.

Mr. VINSON. Mr. Chairman, I suggest that when the House meets this morning that as many of the Members who possibly can be on the floor to pay tribute to our former distinguished chairman.

Secretary FORRESTAL. Mr. Chairman, in various recent statements and in my report to the President and the Congress covering the first 15 months of the existence of the National Military Establishment, I have described the more important steps that have been undertaken and the accomplishments which have been achieved.

From the outset, the unification of the court-martial procedures of the Army, Navy, and Air Force has had a high priority in the National Military Establishment because it is a field in which unification is logical and particularly desirable.

We have discovered, in studying many of the fields in which the Military Establishment operates, that unification requires careful, painstaking study. Major problems of complexity cannot be solved and unification achieved at the stroke of a pen. Unifying the Army and Navy court-martial procedures was no exception. It required concentrated hard work and was a most difficult job.

As you know, the Articles of War and the Articles for the Government of the Navy stem from laws adopted early in the history of this country. From the beginning, the articles were marked by basic differences and their growth over the years reflected the varying customs of the services.

As a result, the special committee which undertook to draft the Uniform Code of Military Justice early last summer found differences in nomenclature, organization, function and procedure between the Articles of War and Articles for the Government of the Navy.

While I am far from being an expert in the field—having no legal background—I must admit that when the project started I was sure that the committee would find a considerable number of areas which were not susceptible to uniform treatment.

It is extremely gratifying that the committee reduced those areas to the vanishing point, and we now have submitted to you a proposed code which can be uniformly applicable to all the armed forces in time of peace and war.

Another problem faced by the committee was to devise a code which would insure the maximum amount of justice within the framework of a military organization. We are all aware of the number of criticisms which have been levelled against the court-martial system over the years.

I do not believe it is as bad as it has been painted, nor as good as some of its defenders claim. Many of the criticisms have seemed to me to be without foundation, but many of them have seemed to me to be justified.

The point of proper accommodation between the meting out of justice and the performance of military operations—which involved not only the fighting, but also the winning of wars—is one which no one has discovered.

I do not know of any expert on the subject—military or civilian—who can be said to have the perfect solution. Suffice it to say, we are striving for maximum military performance and maximum justice. I believe the proposed code is the nearest approach to those ideals.

Great credit is, therefore, due to the Army, the Navy, and the Air Force and the members of the committee who represented then Assistant Secretary Gordon Gray of the Army, Under Secretary John Kenney of the Navy, and Assistant Secretary Eugene Zuckert of the Air Force.

Prof. Edmund M. Morgan, of the Harvard University Law School, acted as chairman, and under his leadership a remarkable degree of unanimity was achieved within the committee. I say "remarkable" because, in view of the kind and number of problems before them, they are divided on only three issues. These issues were submitted to me and the proposed code incorporates my decisions on them. Two other provisions have been incorporated at the request of the Bureau of the Budget.

A project of this kind of necessity represents the combined views of a number of people, and each and every participant partially compromised his views on a number of points. Therefore, the proposed code is not the product of one person, nor would it have all its present provisions if written by one person or by one department.

The Army, the Navy, the Air Force, the Coast Guard, Professor Morgan and I each support the many individual provisions with varying shades of enthusiasm, but the committee agreed on all points, except to the extent I have mentioned.

For this reason, I think the proposed code should be analyzed as an integrated whole. On that basis, it is my opinion that the code as set forth in H. R. 2498 is well-designed to protect the rights of those subject to it and to afford more equal and uniform justice to the members of all the armed forces.

I believe it does not interfere with appropriate military functions. Since it has these characteristics, I strongly urge your favorable consideration.

As you know, I am not a lawyer and so will not attempt to explain to you the details of the proposed code. Professor Morgan has agreed to take up that burden on my behalf, and Mr. Felix Larkin of my staff can supply you with the techncal information you may need.

If you desire testimony from the members of the committee, from the Judge Advocate General, or from anyone else in the National Military Establishment, they are available at your call.

Without taking more of your time, I would like to conclude my remarks and introduce Professor Morgan who, as I have said, was the extremely able chairman of the committee which drafted the proposed code.

Mr. BROOKS. Thank you very much, Secretary Forrestal. We appreciate your very fine statement.

Now, if there are no questions on matters of broad comprehensive policy of the Secretary, the committee will call Dr. Edmund M. Morgan, Jr., of the Harvard Law School and also chairman of the committee which framed this proposed legislation.

Dr. Morgan, the committee is very happy to have you appear here.

And, Mr. Secretary, we appreciate your coming down here and thank you most kindly.

Dr. MORGAN. Thank you, sir.

Mr. RIVERS. Mr. Chairman, may I suggest that Mr. Secretary Forrestal may have pressing business and that he be excused, unless he desires to stay.

Mr. BROOKS. Mr. Secretary, you may remain if you care to, but if you have pressing business, it will be all right for you to leave.

Secretary FORRESTAL. I will appreciate the courtesy of the committee if they will excuse me.

Mr. BROOKS. Thank you, Mr. Secretary.

Dr. Morgan?

Dr. MORGAN. Yes, sir.

Mr. BROOKS. Doctor, before you begin your statement, could I ask you about how long you have been working on this measure?

Dr. MORGAN. Yes, sir. The working group began some time in June and I began some time in August. We have just completed it—just a couple of weeks ago. We had very numerous meetings of the committee from August on, and the work group under Mr. Larkin met a great number of times while the committee was not in session. The sessions of the committee would last from a day to 2 days.

Mr. BROOKS. Thank you.

Mr. SHORT. Mr. Chairman, before he begins, I beg to be excused because I have to appear before a subcommittee of appropriations in about 10 or 15 minutes.

Mr. BROOKS. All right.

Mr. VINSON. Mr. Chairman, before we start——

Mr. BROOKS. Mr. Vinson.

Mr. VINSON. While our colleague from Ohio, Mr. Elston, who is a very able lawyer, is not a member of the subcommittee, I do hope that Mr. Elston will try to sit in on all the meetings of the subcommittee when this bill is being presented. I would appreciate it as a personal favor if you will give the committee the benefit of your profound legal knowledge and sit in with the committee.

Mr. ELSTON. Thank you, Mr. Chairman. I will be glad to do so.

Mr. VINSON. And during the last Congress you were chairman of the legal subcommittee. And I hope you will be able to attend each one of these meetings and contribute to the country your valuable assistance with reference to the preparation of a measure of this character.

Mr. ELSTON. Thank you, Mr. Chairman. I will be glad to do it whenever I possibly can.

Mr. BROOKS. Mr. Chairman, we did an able job, too, on that bill. Doctor, will you proceed.

STATEMENT OF PROF. EDMUND M. MORGAN, JR., HARVARD UNIVERSITY LAW SCHOOL

Dr. MORGAN. First I better thank you for the degree which you just conferred upon me.

For this opportunity to appear before you in support of H. R. 2498, I thank you personally and in behalf of the committee which drafted it at the request of Secretary Forrestal. In the hope of putting before you in the shortest time the essential features of the code, I have prepared a statement, which I regret to say is rather long, but which I find impossible to shorten since the bill covers the entire field of military justice. With your permission I shall read it.

H. R. 2498 is the result of an intensive study of the present systems and practices of the several departments or branches of the military forces, of the complaints that have been made against both the

structure and operation of the existing military tribunals, of the explanations and answers of the services to those complaints, of the various suggestions that have been made for modification or reform and of the arguments of representatives of the services as to the practicability of each proposal.

In some instances we found helpful, information concerning the practices of foreign military establishments. Copies of data compiled by the staff of the committee under the direction of Mr. Larkin, assistant general counsel, Secretary of Defense, have been supplied for your use.

You will see them here. Here is a copy of it. So you can see there was really a lot of work done, even though you may conclude that it did not do very much good to some of our intellects. But certainly all the data here were compiled here and summarized, you see.

Our directive, which we endeavored to obey, was to create a code that would be applicable to all the armed forces—Army, Navy, Air Force, and Coast Guard; a code that would operate uniformly for the unified Military Establishment.

We have also tried to phrase the code in modern legislative language and to arrange its provisions in orderly sequence, so that it would be understandable to laymen and to civilian lawyers as well as to men learned in military law.

The code is designed to supersede (*a*) the Articles of War including the amendments contained in the Selective Service Act of 1948, (*b*) the Articles for the Government of the Navy, and (*c*) the Disciplinary Laws of the Coast Guard. As you know, there are at present no separate articles governing the Air Force or the Marine Corps.

If passed, the code will be the sole statutory authority embodying both the substantive and the procedural law governing military justice and its administration. There will be the same law and the same procedure governing all personnel in the armed services.

That this should be so is the settled conviction of most people and I believe no argument is necessary to demonstrate its validity.

In the same way that all persons in this country are subject to the same Federal laws and triable by the same procedure in all Federal courts, so it will be in the armed forces.

The original trial of an accused will be in a court of his own service, except in certain circumstances where he is a member of a force acting jointly with another. The departmental review will follow a similar course.

But the procedure before trial, at the trial, and on review will be the same as if the case had occurred in either of the other armed forces. The final review on the law will be made by the same tribunal for all the Departments of the Military Establishment.

The objective is to make certain not only that justice can be done to the accused but that there be no disparities between the services. A civilian lawyer will have no difficulty in conducting any case at any stage of the proceeding.

You will doubtless consider each of the 140 articles contained in the code and compare it, by cross-reference, with the corresponding provision in the Articles of War and the Articles for the Government of the Navy which it supplants.

Inasmuch as a large portion of the code has its foundation in those two statutes, in many instances there is very little that is new in the

uniform code except the language. There are a number of provisions, however, which were not heretofore contained in either the Articles of War or the Articles for the Government of the Navy and to which you will probably wish to give special consideration.

By a brief summary of the contents of each part of the uniform code, starting at the beginning, I can indicate to you I think those articles which are incorporations of present provisions and practices, those which are incorporations of the amendment of last year to the Articles of War, and those articles which are new.

Part I of the code concerns itself with general provisions which are usually found in modern penal laws. This part contains, in addition to definitions, the general jurisdictional provisions of military law. There is little in this part which is entirely new.

Article 4, however, is a noteworthy change for the Army and Air Force in that it provides that, in cases where an officer is dismissed by the President without trial and in the event he is later exonerated, he may be restored to active duty.

Article 6 extends to the Navy the provisions passed by the Congress at the last session requiring assignments for duty of judge advocates and legal officers to be subject to the approval of the appropriate Judge Advocate General and requiring consultation by convening authorities with staff judge advocates or legal officers in matters relating to the administration of military justice.

Part II, which consists of articles 7 through 14, covers the general subject of apprehension and restraint. It is new only to the extent that the conflicting definitions of the terms used and the different processes have been simplified and made more orderly.

Attention is drawn, specifically, to article 12, which continues the provision enacted by the Eightieth Congress in connection with confinement of members of the armed forces with enemy prisoners and enemy nationals.

Part III consists of one article only—article 15—which deals with nonjudicial punishment imposable by commanding officers. This is commonly called company punishment in the Army, and punishment at mast in the Navy.

As you will notice, the article lists all the punishments now so imposable by both the Army and the Navy. The present practice of the Army differs from that of the Navy. The permitted punishments are different.

The Army practice has been to impose less severe punishment and to give the accused an option to demand trial by court martial. The Navy has imposed somewhat more severe penalties and has given the accused no option.

This diversity in practice is due to two factors: (1) men on shipboard are necessarily in a different situation with reference to freedom of motion and availability of replacement than men in camp; (2) the punishment is imposed at mast by the captain, and a summary court consists of an inferior officer, while in the Army such an incongruity in rank between a commanding officer and a summary court would be virtually unknown.

The committee concluded that these factors justified a difference in treatment. Consequently article 15, first, subjects the imposition of these nonjudicial penalties to complete regulation by the President, and, second, gives the Secretary of each Department discretionary

power to put additional limitations upon them and to provide for an option to the accused to demand a court martial.

One further provision of interest in this article is subdivision (d) which strengthens the present system of appeals from nonjudicial punishment and permits reviewing authorities not only to remit the unexecuted portion of punishment, but to restore rights adversely affected.

Part IV in its article 16 creates three classes of courts martial—general, special, and summary. These correspond to the present courts in the Army. The special court martial under present Navy practice is called a summary court, and the summary court is called a deck court.

The chief difference from the present Army provision is the requirement that a general court shall consist of at least five members and a law officer.

Most of the articles consist of a rewording and revision of provisions found at present in both the Articles of War and the Articles for the Government of the Navy. Article 17, however, is new in that it provides reciprocal jurisdiction of courts martial.

By its terms, each armed force shall have court-martial jurisdiction over all persons subject to the Uniform Code. There is thus provided authority for an Army court martial to try either its own personnel or the personnel of the Navy, the Air Force, or the Coast Guard.

It is felt that this provision is necessary in the light of unification and by virtue of the tendency to have military operations undertaken by joint forces. Inasmuch as it is not possible at this time to forecast the different forms of joint operation which will take place in the future, the exercise of the reciprocal jurisdiction of one armed force over the personnel of other services has been left to the regulations of the President.

In this way a desirable flexibility is attained which will enable the President to prescribe the types of operations in which reciprocal jurisdiction will be exercised.

You gentlemen are probably aware that at the present time the Military Air Transport Service is already practically a permanent joint operation, with an Air general in charge and an admiral next in command, so that there is already one joint operation.

Part V, which has to do with the appointment and composition of courts martial, includes articles 22 through 29. These fix the qualifications of the persons who may convene general, special, and summary courts and the persons who may serve on courts martial.

Article 25 provides for the service of enlisted men on courts which try enlisted men and follows the provision of Public Law 759 of the Eightieth Congress. Articles 26 and 27 deserve special mention. The former, which provides for a law officer on general courts martial, changes the practice of the Navy which has heretofore had no judge on its courts.

It also changes the practice of the Army, which has had a law member, in that this official will now act solely as a judge and not as a member of the court, which becomes much like a civilian jury. The law officer will not retire with the court.

Article 27, which provides for the appointment of trial counsel and defense counsel, changes present Army and Navy law in that it makes it mandatory for each counsel before a general court martial to be

either a judge advocate or a law specialist, or a person admitted to practice in the Federal or the highest court of a State, and to be certified by the Judge Advocate General as competent.

Heretofore, lawyers acted as counsel only if they were found available by the convening authority.

And as you probably know, gentlemen, the decision of the commanding general as to whether they were available was held to be final.

The committee believes that the provisions of these two articles will tend to make the general court martial a more independent tribunal staffed by competent and efficient lawyers.

Part VI covers the provisions governing pretrial procedure and, in the main, the articles in this part follow present Army practice as prescribed in the amendment of 1948. The Navy practice of pretrial investigation is less formal than that of the Army. By the new provisions, both of them will be the same.

Part VII, articles 36–54, covers trial procedure and follows closely the present Army and Navy practices. A good many of the provisions, however, now make uniform a number of minor differences which have heretofore existed.

Article 37 continues the provision passed by the Congress last year prohibiting unlawful influence on the actions of courts martial. The committee believed it most desirable to continue this salutary prohibition, which will do much to eliminate so-called command control.

Article 41, which provides one preemptory challenge of members of general and special courts, follows present Army practice, but changes Navy practice, which heretofore had no provision for preemptory challenges.

Another example of uniformity is found in article 51, which covers the question of voting and rulings. As set out by the provisions of the article, the law officer now becomes more nearly an impartial judge in the manner of civilian courts.

In addition to ruling on interlocutory questions of law during the course of the trial, the law officer is now required to instruct the court, on the record, before it retires as to the elements of the offense and to charge the court on presumption of innocence, reasonable doubt and burden of proof.

In article 52, you will notice that the number of votes required for both conviction and sentence have been made uniform for all the services.

Part VIII, articles 55–58, deals with sentences and has nothing new in it except an authorization to the respective Secretaries to make regulations for carrying into execution any sentence of confinement in any correctional or penal institution under the control of the United States.

This was drafted after consultation with the correctional branches of the services and its purpose is to make available more adequate facilities for rehabilitation of offenders.

Part IX, articles 59–76, provides for the appellate review of court-martial cases. It makes a number of innovations in which I am sure you will be interested. When the committee considered the whole subject of appellate review, it found that the present procedures of the Army and Navy differed widely.

The Army system is exceedingly complex. To the review by the convening authority and the board of review, further review was

added last year by Congress by a Judicial Council composed of three general officers.

The course of review for several types of case is painstakingly spelled out in the Articles of War by reference to and in conjunction with the respective functions of approving and confirming authorities, and is difficult for the uninitiated to diagram or understand.

In studying this system, the Navy felt that it was wholly impracticable for its operations. The Navy system of review, on the other hand, is far more informal and, in the main, rests ultimately with the Secretary of the Navy.

It provides a review by the convening authority, a review in the Office of the Judge Advocate General, and an additional review on sentence by the Bureau of Presonnel and by a sentence review board. The action of all these agencies, however, is advisory only.

The Army thought this system unsuited to its needs. The committee felt obliged to devise a system that would be useful and practical for all services, and would be consonant with the plan of unification.

In essence, the appellate review proposed in the Uniform Code is as follows: There is an initial review by the convening authority covering law, facts, credibility of witnesses and a review of the sentence.

In this respect, it is in all essentials the same as the first review provided at the present time by both the Army and the Navy. Insofar as the convening authority has affirmed a finding or sentence against the accused, a review is provided by a board of review in the Office of the Judge Advocate General of the Department of which accused is a member.

This board of review is a counterpart of the present board of review of the Army. As the amendment of 1948 provides, it reviews the records of the trial for law, facts, and sentence. To this extent, the Navy system is changed.

Following this review, there is a review for errors of law by a single Judicial Council, composed of three civilians. It is apparent that such a tribunal is necessary to insure uniformity of interpretation and administration throughout the armed services.

Moreover, it is consistent with the principle of civilian control of the armed forces that a court of final appeal on the law should be composed of civilians. With your permission I will now stop to to spell out further the many details of this system.

I should prefer to postpone further explanation of it until you take it up formally and in detail. At this time, we can show you some charts of this system and its comparison to the present Army and Navy systems. They will, I think, help you to visualize the whole problem.

Personally, I think I can explain it better without a chart than I can with a chart. I suppose that is because I am no statistician, because whenever you try to plot a curve or make a chart I begin to get confused.

I think I can explain it in language that at any rate a lawyer will understand.

Part IX also provides in article 70 for appellate counsel to assure that the parties will be adequately represented before the boards of review and the Judicial Council. They shall be appointed by the Judge Advocates General with provision for the accused to have his own counsel.

Article 72 provides for hearing before the suspension of a serious sentence can be vacated. Both of these articles are new.

Part X covers punitive articles. In the main, the present punitive articles of the Articles of War and the Articles for the Government of the Navy are retained. There are, however, several interesting features of the present punitive articles.

In the first place, we have set forth some general provisions normally found in modern penal laws and not heretofore contained in the Articles of War or the Articles for the Government of the Navy.

These cover the definitions of a "principal," "an accessory after the fact," "attempts to commit crimes," "conspiracies," and "solicitations."

You will notice as you study the punitive articles that we have consolidated a number of them in the same fashion as we have consolidated a number of other provisions throughout the rest of the code.

An example of this is the crime of desertion, which is now contained in article 85. The same material was heretofore found in Articles of War 28 and 58 and in Articles for the Government of the Navy 10, 4 (par. 6), and 8 (par. 21).

In addition, we have made specific several offenses which were previously punishable under the general article. One of them we designate as "missing movement," which is contained in article 87.

This is an aggravated type of absence without leave and is designed to meet conditions encountered in World War II. The experience of World War II indicates that a large number of military personnel who were legitimately on leave or who left without permission returned after their unit or ship had moved or sailed.

This misconduct caused so much trouble that it was felt necessary to make it a subject of a specific article. Article 105, entitled "Misconduct as Prisoner," is also new and provides for punishment of anyone subject to the code, who while in the hands of the enemy in time of war, either for the purpose of securing favorable treatment for himself or while in a position of authority, mistreats others who are confined with him.

You will recall that a number of instances of this type came to light after the war. They justify the enactment of this specific offense.

The last part, namely part XI, contains a number of miscellaneous articles such as those regulating the procedures before courts of inquiry, those providing for authority to administer oaths, and for complaints against superiors, and for redress for damage done to private property by members of the armed forces.

One important concern of the committee throughout its deliberations was the position of military command in the court-martial system. Secretary Forrestal, in his precept to the committee, instructed us to draft a uniform code, to be uniform in substance and uniform in interpretation and construction, which would protect the rights of persons subject to the code without undue interference with appropriate military functions.

It was recognized from the beginning by the committee that a system of military justice which was only an instrumentality of the commander was as abhorrent as a system administered entirely by a civilian criminal court was impractical.

We had before us, as I have told you, studies made by various committees in the past and also the testimony presented to this committee in the last Congress. We were aware of the criticisms which had been made against the court-martial system and the defenses that have been put forward in its behalf.

We were convinced that a Code of Military Justice cannot ignore the military circumstances under which it must operate but we were equally determined that it must be designated to administer justice.

We, therefore, aimed at providing functions for command and appropriate procedures for the administration of justice. We have done our best to strike a fair balance, and believe that we have given appropriate recognition of each factor.

Because of the military nature of courts martial, we have left the convening of the courts, the reference of the charges, and the appointment of members to the commander. For the same reason, we have preserved the initial review of the findings and the sentence by the commander.

Having done this, we examined ways and means of restricting the commander to his legitimate functions. We have tried to prevent courts martial from being an instrumentality and agency to express the will of the commander.

To make the action of courts martial and the procedure for review free from his influence we have set up an impartial judge for the court martial, made it mandatory that lawyers represent the parties in the general court-martial cases, required the commander to consult before and after trial with his staff judge advocate or law specialist, and prohibited him from either censuring or reprimnading the court.

We have set up a system which resembles the independent civilian court, but we have placed it within the framework of military operations. At the trial and in the review of facts the men who function as counsel, trial judge, and intermediate appellate judges will be skilled in law and in military matters. They will be independent of command and subject to a supreme civilian tribunal on questions of law.

I am aware that there are many schools of thought on military justice, ranging all the way from those who sponsor complete military control, to those who support a complete absence of military participation. I do not believe either of these extremes represents the proper solution.

In closing my formal remarks, I would like to state again—for what it is worth—that I strongly support the uniform code and urge its approval by the Congress. As Secretary Forrestal told you, there was a remarkable unanimity among the members of the committee.

The code as submitted is not exactly what any one of us would have drawn had he been alone and starting without precedent. Many of the provisions on which there was unanimity were compromises. I support all these unanimous decisions, and I also support the decisions made by Secretary Forrestal.

I should be glad to try to answer any questions.

Mr. BROOKS. Thank you very much, Professor Morgan.

Now I would like to call on the Chairman of our full committee to present the questions he has.

Mr. VINSON. I suggest that we go around the room and let the other members finish first.

Of course, I want to take this opportunity of expressing my gratification at the work that the committee has done to bring about a uniform code of procedure and practice in the armed services. I think it is a step that should have been taken years and years ago.

And your committee is to be commended for the outstanding service that you have rendered in enabling us to have a basis to enact the law. I want to thank you very much, Dr. Morgan, for the valuable services you have rendered and the aid you have given to the committee.

Dr. MORGAN. I thank you very much, Mr. Chairman.

Mr. BROOKS. Thank you very much, Mr. Vinson.

I would like to ask you if I may put three questions, and then I would like to turn the questioning entirely over to the committee.

The first one is the reason for the new procedure governing the law member. You touched upon that, but you did not give the behind-the-curtain reasons why the change was made.

Dr. MORGAN. Well, the fundamental notion was that the law officer ought to be as near like a civilian judge as it was possible under the circumstances.

I may say to you that the report of the English committee—which I have discovered since we drew this code—makes exactly the same kind of provision: Heretofore the English had the same—and I suppose they do still, until this recommendation is followed—system that the Army has had with the law member, having the law member rule on interlocutory questions and then charge the court and go out with it and act practically as a member.

They have now recommended—this committee which made a very careful study of the English system—that the law member now act in the same way as the civilian judge and that he do nothing without them.

Their notion was that after he has once done what a civilian judge would do he ought not to then go back and try to influence them on the facts. And we felt the same way. We felt that whatever influence that judge exercised should be on the record.

The charge which he gives them will be on the record—everything that he gives in open court will be on the record. When they go back to deliberate they are like a jury and there is no particular record with reference to that.

The law member, when he retires with the court, may make any kind of statement to them. And it has been stated—I would not say on how good authority—that frequently when he went back there why he said, "Of course the law is this way but you fellows don't have to follow it."

A judge, as you know, in the civilian court, except in a very few States, tells the jury that they have to follow the law as laid down and particularly the law which is in favor of the accused.

Your question was directed, I take it, Mr. Chairman, to the reason why we departed from the Army system.

Mr. BROOKS. Yes. My question was framed for the purpose of opening up that avenue of thought.

Dr. MORGAN. I see.

The Navy has no law officer. And of course the Army law officer now has to be a lawyer. Previously, that is previous to Congressman

Elston's bill, there was no requirement that the law officer should be law-trained.

And I think the 1948 amendment required that he should be law-trained. But he still could go back with the court.

Now the law officer may become sort of a professional juryman, if they kept reappointing the same person, and as you probably know the professional jurymen are the convicting jurymen usually.

If you kept getting the same jurymen all the time the number of convictions is very, very much greater than if you get a new jury.

Mr. BROOKS. Professor, the second question that I wanted to suggest to you is the reasoning behind the changes in reference to command influence. You covered that in the last part of your statement, but you did not give us the reasons why that was necessary—to make the changes.

Dr. MORGAN. In the first place, until the Elston bill that was passed last year, there was no statutory provision preventing command influence. As you probably remember, during the First World War the commanding officer could send the case back for reconsideration of an acquital.

And you probably remember also that when he cut down the sentence or when he ordered the whole thing set aside he reprimanded the court. Also during and after World War II there were a great many complaints.

For instance, Governor Gibson, of Vermont, was very wroth at the treatment that he had received as a member of a court martial, being called in by the commanding officer and reprimanded. And when Mr. Gibson told him that he was a lawyer and that they could not tell him how to decide cases, that the choice was to get him off the court or let him use his conscience on the case, they got him off the court.

So we were sure that you had to have some control over the command. And Mr. Elston's provision specifically forebade any of these so-called skin letters or any censure, of the court for any of its actions. And we continued that.

It has been suggested that that is not sufficient, that that does not of itself prevent it. So we have also made the exercise of improper influence an offense.

We think also that we have lessened the command influence by making for all the services the provision which was in the 1948 bill as to the extent of review by the Judge Advocate General's Office; namely, that they can review for law, fact, and sentence, so that they need approve only so much of it as they think entirely justified.

Now the board of review in the Judge Advocate General's Office will be far away from the scene of the commanding officer who convened the court. Before that 1948 act the Judge Advocate General's Office could act only on questions of law and not on questions of fact.

Now they can act on the facts. We think that a means of lessening command influence. And when it is a question of law, the case then—in the severe cases—will go to the Judicial Council, which will be a civilian court and, of course, entirely outside the influence of any officer.

Is that what you had in mind?

Mr. BROOKS. Yes; that is exactly what I had in mind.

The last question I wanted to present to you is the Judicial Council. Would you mind elaborating on that some?

Dr. MORGAN. Yes.

Mr. KILDAY. Would you mind telling us the section of the bill that covers it?

Mr. SMART. Sixty-seven.

Dr. MORGAN. Well, we provide for a review by this civilian authority.

First, of course, we have the Judicial Council set up in the Military Establishment. The members of the council must be civilians and they are appointed by the President. Their qualifications are set out there.

They have to be admitted to practice before the Supreme Court of the United States. They are really a military court of last resort.

Mr. RIVERS. These are the three civilians you are talking about?

Dr. MORGAN. Yes; that is right. We have called it a Judicial Council, using the language of the Elston bill. It is really a supreme judicial military court and it is composed entirely of civilians.

It must have at least three members. It may be that the number would have to be greater if the work proved to be too heavy for three members.

They review questions of law only. In the cases of death, where there is a death sentence, or where the sentence affects a general officer, an automatic review is provided. In cases where the penalty is as much as a year's imprisonment, then you have the equivalent of certiorari, in the civilian courts.

Before this Judicial Council and before the board of review, there is provision for appellate counsel to be appointed by the Judge Advocate General. They will represent the Government and the defendant.

They are to be trained lawyers, of course. So the accused will be represented on appeal.

We limit the civilian court to the review of questions of law. And I may say here, again, that the recommendation of the English committee—and we had no copy of their report until recently—is to the same effect.

Of course, the English committee had recommended no intermediate review at all, that is no automatic review of any courts-martial proceeding, but has recommended an appeal to a judicial body and that judicial body is composed of the person who used to be practically the Judge Advocate General and his assistants.

That judicial body consists entirely of civilians. The accused may appeal to that body on questions of law. So that committee has reached almost the same kind of conclusion that we have reached. That was composed of three civilians and two military personnel.

Mr. DURHAM. Who passes on the question of law?

Dr. MORGAN. Why the judicial council would. That is, the court of last resort would determine whether it was a question of law or a question of fact. And as you probably know, Congressman, it is a question of law whether there was any evidence upon which the tryer of fact could reasonably find a defendant, as in the civilian court.

Under our system, they would not pass on the weight of the evidence in the sense that they could set aside a finding because they thought it was against the weight of the evidence. They could set aside a finding of guilty only in case there was no evidence——

Mr. DURHAM. Then they would pass on the question of law after the appeal was brought up to them, is that right?

Dr. MORGAN. That is right. They would pass on questions of law just the way the civilian court does.

Mr. DURHAM. And every individual would have the right to appeal to this judicial body, is that right, on every conviction if you wanted to carry it that far?

Dr. MORGAN. Not everybody. First, if the sentence is greater than a year's imprisonment and if the board of review affirms that, then the accused may petition to have it reviewed.

Aud if the petition is like a certiorari petition, he has to show that there are reasonable grounds for belief that there has been an error of law committed which would be likely to prejudice him.

Mr. KILDAY. Mr. Chairman.

Mr. BROOKS. Mr. Kilday.

Mr. KILDAY. Professor, I was on the Elston subcommittee but I am not on this one, so I want to ask you some questions.

Dr. MORGAN. Yes.

Mr. KILDAY. On this provision.

Dr. MORGAN. Yes.

Mr. KILDAY. I notice that you provide for the establishment of a Judicial Council to consist of not less than three.

Dr. MORGAN. Yes.

Mr. KILDAY. Civilians.

Dr. MORGAN. That is right.

Mr. KILDAY. What would your recommendation be on it?

Dr. MORGAN. Well, I will have to tell you that this is one of the provisions that Secretary Forrestal changed at the request of the Bureau of the Budget. You see he said that in his statement.

Mr. KILDAY. Yes.

Dr. MORGAN. It was left doubtful with us. We provided for the appointment of civilians. And we felt that Congress would have to determine the term: Whether or not they should go out with the administration, and so forth.

Mr. KILDAY. I think as good legislative practice we would more clearly have to define this office.

Dr. MORGAN. Yes.

I think the opinion of the committee would have been, because we canvassed this—and certainly it is my opinion—that these men should be appointed in exactly the same way that the circuit court of appeals judges are appointed.

Mr. KILDAY. During good behavior?

Dr. MORGAN. During good behavior, by the President, with the consent of the Senate.

Mr. KILDAY. Now, I notice that you continue the existing system with reference to the review of any case involving dismissal or dishonorable discharge.

Dr. MORGAN. Yes.

Mr. KILDAY. They must automatically go to the board of review?

Dr. MORGAN. Yes, sir.

Mr. KILDAY. But that is not true of the Judicial Council?

Dr. MORGAN. No, no, except the petition.

Mr. KILDAY. The committee specifically considered whether it should be automatically sent to the board of review?

Dr. MORGAN. Yes, we did.

Mr. KILDAY. Now, we had a great deal of trouble with this sort of thing in the last war, you know, under, I think it is article of war 50½, where any judgment of dismissal from the service or dishonorable discharge automatically went to the board of review.

Dr. MORGAN. That is right.

Mr. KILDAY. But if the commanding officer suspended that portion of the sentence as to dismissal or dishonorable discharge until he had completed his sentence, it did not go to the board of review.

Dr. MORGAN. Right.

Mr. KILDAY. So we found in many instances the discharge was suspended and became final without review and then the suspension was lifted and it was carried out. By this device the review was voided.

Dr. MORGAN. We plugged that hole. Whether the sentence of dismissal or discharge is suspended or not, the case has to go to the board of review.

Mr. KILDAY. Now, we had done that as to the Army in our bill last year.

Dr. MORGAN. Yes.

Mr. KILDAY. And you continue that as to all of the services here?

Dr. MORGAN. That is for all the services now, yes, sir.

Mr. KILDAY. Of course, another thing we had in mind there is when you are trying an enlisted man who is probably pretty well broken in spirit and without much advice, and so on, he is likely to waive those rights. That is the reason we wanted it to be automatic.

You do not think that that is true when you get as high as the Judicial Council?

Dr. MORGAN. We provide that the counsel for the defense may send a brief to the board of review if he thinks it appropriate. We did not make it mandatory for fear the board of review would be influenced by the fact that he had not seen particular errors and thought they were not inportant in case defense counsel did not write a brief.

So if counsel for the defense thinks there are errors that the board of review ought specifically to handle he can send a brief up on it, you see. And then before the board of review the soldier can demand that appellate defense counsel be there, in the Judge Advocate General's Office, and appear for him.

And I suppose it would be on the advice of the defense counsel whether he would want to appeal to the Judicial Council, because they would cover only questions of law.

Mr. KILDAY. Now, you all agree that it should be only questions of law?

Dr. MORGAN. Yes, because we thought it would hardly do to have the Judicial Council do more than a court of criminal appeals ordinarily does.

Mr. KILDAY. Well, in my State they review the facts, too.

Dr. MORGAN. They do in England, but they do not in most States, sir.

Mr. KILDAY. That would limit it, then, to a finding that there was no evidence, practically, is that right?

Dr. MORGAN. Yes.

Mr. KILDAY. That would be a question of law, that there is no evidence to support the judgment.

Dr. MORGAN. That is right.

Mr. KILDAY. And that is as far as it can go.

Dr. MORGAN. If there ought to have been a directed verdict of acquittal, then the Judicial Council would have to bust the case.

Mr. KILDAY. So no matter how weak the evidence, or improbable or impossible, still they could not touch it?

Dr. MORGAN. Well, Mr. Kilday, there you get to the question of scintilla evidence: Unless you come from Alabama, that means no evidence. Alabama still has the scintilla rule, but practically every State in the Union has abandoned it. So you have to have more than a scintilla.

Mr. VINSON. Mr. Chairman, I would like to ask a question.

Mr. BROOKS. Mr. Vinson.

Mr. VINSON. Professor, I note with respect to article 17, the reciprocal jurisdiction of courts martial, that you leave that to regulation by the President.

Now, the thought is running through my mind, Why should it not follow the commanding officer? When you have a joint operation and the three services are serving together, the President could prescribe who would have authority to conduct the courts martial; that is, the Army, Navy, or Air Force.

Dr. MORGAN. That is right. You mean who shall be appointed?

Mr. VINSON. That is right.

Now, why should it not say that whenever there is a joint operation that the responsibility should go to the commanding officer? You see, you are writing a code here, that is a code of procedure for uniform justice, but it is going to be dependent in this instance to regulations of the President.

Why should it not be positive, to say that there should be reciprocal authority, but it follows the commanding officer from whatever service he is in. For instance, if an Army officer is in command of a joint operation of the three services, then the Army has a right to conduct the courts martial.

Dr. MORGAN. That is right.

Mr. VINSON. But that is entirely left to the discretion of the President.

Now what harm would there be to say that the reciprocal jurisdiction is tied in with the commanding officer of the branch of service from which he comes?

Dr. MORGAN. That is, you say that the commanding officer should determine——

Mr. VINSON. Well, it is whatever service he comes from. That automatically would cover it.

Dr. MORGAN. Of course, we contemplated that the President would so provide where it was impractical to have the courts martial composed of the men of the service to which the accused belongs.

It would be under those circumstances that he would provide that the court martial might be composed of men of the other services.

For instance, suppose that you had an admiral in the Pacific in the Military Air Transport Service. He is in command. He would have to appoint the court martial, would he not, of this mixed outfit?

Mr. VINSON. That is right.

Dr. MORGAN. Now, is it your idea that it ought not to be by general regulation but that you should allow the commanding officer to determine that?

Mr. VINSON. The commanding officer, of which branch of the service he belongs to. Then the jurisdiction for the courts fall under that branch of the service. For instance, if you have a joint operation of the Army, Navy, and Air Force in the Mediterranean and if it so happens that a naval officer is in command, then the courts martial of the three services fall under the Navy. If you have down in Panama a joint operation of the three services and an Army officer is in command, then the court martial falls under the jurisdiction of the Army.

Dr. MORGAN. I see.

Mr. VINSON. It is based upon the command of the joint operation and not upon the regulations of the President. Because, you see, you are running into this, if there is not some kind of restriction somewhere: You might have it noised around that this Navy boy is going to be court-martialed by the Army or the Army boy is going to be court-martialed by the Navy.

And you will begin to find out rather early that there will be a good deal of criticisms, with the boys saying: "You better not get before the Army, the Army is going to be rough," or "You better not get before the Navy, the Navy is going to be rough."

Dr. MORGAN. Well, if the Navy lad was tried by the Army court-martial the board of review would be the Navy JAG.

Mr. VINSON. That is right.

Dr. MORGAN. So you have that—have we not?

Mr. RIVERS. Of course, you have the same rules of procedure.

Dr. MORGAN. Yes.

Mr. RIVERS. And the same training for the boys.

Dr. MORGAN. Yes.

Mr. VINSON. You have the same rules of procedure, and everything. It is completely uniform. But it should be positive as to when the reciprocal responsibility is imposed, and it should not be discretionary.

Mr. KILDAY. Do you not have this practical situation: The convening authority has to be the authority who is there and who is in command.

Mr. VINSON. That is right, the commanding officer.

Mr. KILDAY. He is the only person who can convene the court and prefer the charges.

Mr. RIVERS. That is right.

Mr. KILDAY. So in the nature of things it is going to depend on who happens to be the over-all commander at the time.

Mr. VINSON. But——

Dr. MORGAN. Suppose you do not have enough officers of a particular branch to compose the court?

Mr. KILDAY. You have no one else there that exercises the functions of command for this purpose.

Dr. MORGAN. Mr. Larkin has conferred with the Navy and Army representatives on this particular provision and I think I will ask him whether he can clarify that a little more——

Mr. RIVERS. You do not provide for change of venue, do you?

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Dr. MORGAN. No, we do not have any change of venue. And we do not have any affidavit of prejudice which is provided in the civilian courts to challenge a particular judge.

Mr. RIVERS. I can conceive that maybe a Navy man would not want to be tried by the Air Force or vice versa.

Mr. LARKIN. It is our notion, Mr. Chairman, that the services would continue to try their own people to the maximum extent.

In observing the tendency of military operations over the last few years and those that we can probably expect in the future, we believe that the tendency is more to joint types of operation.

Mr. VINSON. That is right.

Mr. LARKIN. And on that basis we felt, even though we expect that each service would normally try its own personnel, that there be provisions so that each service could try the personnel of other services who happen to be serving in isolated areas with them, so that there would be an economy in the use of courts and there would be more expeditious trials.

We could not forecast, however, all the different types of possible joint operations in the future. We felt, therefore, it would be more flexible to leave it to the regulations of the President so that when we came upon circumstances in which it was clearly practical to have the top commander, whether of Army, Navy, or Air Force, have jurisdiction over all of the personnel of the other services serving under him then the exercise of that jurisdiction by the Army, if you will, over Navy and Air Force in that circumstance would be conferred.

But we did not feel it practical to provide automatically in advance the jurisdiction to the top commander because we just cannot forecast the composition of the joint forces or joint operations which may take place.

I think this example might help. Take the invasion of Europe, in which General Eisenhower was the top commander. If we provide that the service of the commander of the joint operation have courts-martial jurisdiction and may not try any Air Force or Navy men in that whole operation, why it would have been a provision that was unnecessary because there were plenty of Navy personnel there, that is there were plenty of appropriate naval officers who could convene courts within that whole big operation. There is no reason why they should not, following the idea that each service will normally try its own personnel.

Now, there may be other types of joint operations which we just cannot foresee at this minute in which it will be entirely appropriate for one service to exercise its jurisdiction over the other services and there will be others in which it is not necessary.

We felt, when they come up and when we can appraise them, at that time we can give the right to exercise this jurisdiction over the other services to the major service or the top commander present.

But to give it on a blanket basis when in some instances it is not necessary may create interservice problems there that we just could not foresee.

Now as Professor Morgan stated, more permanent operations by one service are coming into being which are partially staffed by the personnel of several services: MATS, for instance. And I quite agree that we ought in the near future spell out just what reciprocal jurisdiction should be provided for them.

But it is pretty much a case-by-case basis, I think, with the idea that we ought to have each service try its own people in the main, and we just left it in this form.

Mr. VINSON. What you have said, Mr. Larkin, would almost persuade me that you do not need the reciprocal provision, if you are going to have each service trying its men. I would visualize it from a unification standpoint, with one commanding officer being responsible for the whole operation, that he should have the right of courts martial on all services.

If you are not going to carry it out, what is the use of putting it in here, then? If you are going to continue to have each service court martial its own men, then you do not need anything with respect to courts martial reciprocal jurisdiction.

Mr. LARKIN. I think it is desirable, Mr. Chairman, that each service try its own men. I think that will take place in most cases because they usually are serving with a sufficient number of their own services and it is entirely feasible that they do so.

Mr. VINSON. If that is true, what is the use of putting it in this article 17, which is a new article? The theory of it was to have a unification. Yet you nullify it in the next breath.

Mr. LARKIN. Well, the idea was to make sure that we do have this statutory jurisdiction service-wide, but I do not think we are quite in a position at this minute to say that in each and every instance in every place this reciprocal jurisdiction should be and can be exercised by the top commander. I do not think it is quite necessary.

The tendency—and I am no military expert—I think is for more and more joint operations and I dare say by the time we have—if we ever do—complete joint operations or where every operation is a joint one, then we have the authority for one court, say an Army court, to try the personnel of the other services.

And the right to exercise that authority at that time will be conferred by the President. We wanted to make sure that we got the statutory authority in the first place. And we are not just sure of the extent of the exercise of it at this moment.

We feel the exercise of reciprocal jurisdiction is an evolutionary matter.

Mr. BROOKS. Mr. Kilday wanted to ask a question.

Mr. KILDAY. Under existing Articles of War, as to persons serving with troops in the field, even civilians are subject to court martial?

Mr. LARKIN. That is right.

Mr. KILDAY. Now, have the existing Articles of War spelled out ithat if a Navy man happened to be in an Army theater he was not subject to court martial by that service, even though a civilian would have been? Would he have to be turned over to the Navy?

Mr. LARKIN. That is correct, Mr. Kilday. There is one provision—n the Articles of War there is a provision that when marines are detached and serving with the Army they then are subject to the Articles of War.

It is more or less of a permanent detachment. But that is the only provision in the present statutes of any reciprocity at all. The Army cannot try a Navy man or an Air Force man now, and vice versa.

Mr. KILDAY. I have never had the question come up, but knowing so many civilians who served with the troops in the field that were

convicted by court martial in the last war I was just wondering whether there was a prohibition there.

Mr. BROOKS. Mr. Elston.

Mr. ELSTON. I can see a good many reasons why it might be advisable to handle this by regulations rather than write it specifically in the law. If you had, for example, a naval commander in charge of an area it might be that a part of his command would consist entirely of Army men.

Dr. MORGAN. That is right.

Mr. ELSTON. That part of his command may be far removed from his headquarters.

Dr. MORGAN. Yes.

Mr. ELSTON. If the Navy had to try the Army men, by Army personnel because he was in over-all command, it might require the moving around of a great many Army personnel to serve on the court.

Mr. LARKIN. Yes.

Mr. ELSTON. So I can see where it might be advisable for the President by regulations to handle the matter.

Dr. MORGAN. I think that was the view of the services when it was discussed with the representatives of the services, that the only practical way to do it was this way. I acquiesced because I know nothing about the operations, you see.

During World War I, I was safely ensconced in a chair.

Mr. ELSTON. Well, Professor Morgan, I think that you and your committee have done an excellent job. I have not had a chance to read the bill carefully, but I know that you devoted a great deal of time and attention to it and I think you were reaching out and trying to get all the information that would be helpful.

And I think it is particularly commendable that you used one of the members of our staff in your hearings. Mr. Smart, as I understand it, sat with you as an observer of this committee on many occasions.

Dr. MORGAN. Yes.

Mr. ELSTON. And I am quite certain he was helpful to you.

I think you have approached this subject in the right manner.

Now, as I understand it, a man tried in the service today is really given more of an opportunity for the review of his case than a civilian who is tried in the civilian courts?

Dr. MORGAN. Very much more.

Mr. ELSTON. And you have not completely divorced command influence because the commanding officer still has the opportunity to review a case?

Dr. MORGAN. Yes, sir. You see, the commanding officer can do anything in favor of the accused. He cannot do anything against the accused.

Mr. ELSTON. That is right. He could not, for example, increase the penalty.

Dr. MORGAN. No, he cannot.

Mr. ELSTON. But he could decrease it.

Dr. MORGAN. He can decrease it, yes.

Mr. ELSTON. He could set aside entirely.

Dr. MORGAN. Yes. And he could set aside a part of the finding. Or he can bust it for any reason. If he thinks the court martial is spoiling a good soldier, for example, and he wants him back, he can bust it—to use the Regular Army term.

Mr. ELSTON. He can send it back for a new trial, can he not?

Dr. MORGAN. He can send it back for a new trial, except where there is not sufficient evidence in the record to sustain a conviction.

Mr. ELSTON. Now, if the accused is not satisfied with the commanding officer's final decision, as I understand it, he can appeal as a matter of right to the board of review?

Dr. MORGAN. Well, it goes up to the board of review for any affirmation, anything that is affirmed against the accused goes to the board of review in a general courts martial.

Mr. ELSTON. Now, the board of review can set aside cases because it is manifestly against the weight of the evidence?

Dr. MORGAN. Oh, yes. They review the law and facts, as your bill provided, judge the credibility of witnesses, and so on.

Mr. ELSTON. By the time you get through all of those courts there is really no reason for the Judical Council to review anything except questions of law.

Dr. MORGAN. Yes, that is the way we feel about it.

Mr. ELSTON. And that is exactly what a United States circuit court of appeals would do?

Dr. MORGAN. Exactly. We followed along that line.

Mr. ELSTON. I would like to ask you this question. I think it was since you completed your hearings that a case has been decided by the Supreme Court of the United States.

Dr. MORGAN. The Hirschberg case?

Mr. ELSTON. Yes. To the effect that a person who has left the service, that is, who has been separated from the service, cannot be tried subsequently by a military court for an offense committed prior to such separation.

Mr. KILDAY. Even though he has reenlisted?

Mr. ELSTON. Even though he has reenlisted.

Dr. MORGAN. That is right.

Mr. ELSTON. Now, you have not anything in your bill covering that?

Dr. MORGAN. One thing we have about that is in the case of desertion. If he has deserted in the earlier service, then the fact that he has been discharged from a later service does not deprive the court of jurisdiction.

Mr. ELSTON. Yes. He may have even committed a murder within 3 days of his separation from the service.

Dr. MORGAN. That is right. We have not covered that.

Mr. ELSTON. He reenlists and cannot be tried for it.

Dr. MORGAN. That is right.

Mr. ELSTON. I think this committee can write something into the law that will take care of that ridiculous situation.

Dr. MORGAN. Of course, the Supreme Court put it on the basis of the interpretation of the present statute, as I remember it, and that is that Congress did not intend to have the jurisdiction exercised over the man after he had once been discharged.

Mr. ELSTON. Well, I do not think Congress ever intended anything of the kind.

Dr. MORGAN. I know, but that is what they said. There was not anything in the statute which saved the jurisdiction, and, of course, they interpreted it that way.

Mr. ELSTON. Another question, Professor: Is any provision made for reviewing, we will say, World War II cases?

Dr. MORGAN. No. We have not touched that. This is prospective.

Mr. ELSTON. No reference to that at all?

Dr. MORGAN. That is right. This will be prospective.

Mr. ELSTON. Is a separate Judge Advocate General's Corps set up?

Dr. MORGAN. No; we have not touched the corps proposition. That was not in our precept. We have not done anything with reference to what you passed concerning the corps in the Army. We do not touch that. That was a part of the amendment to the National Defense Act.

Mr. ELSTON. I see.

Dr. MORGAN. We did not touch that.

The Navy of course has no separate department, as you know, and the Air Force follows the Navy practice in that respect.

Mr. LARKIN. They have a Department.

Dr. MORGAN. Do they have now?

Mr. LARKIN. Yes.

Dr. MORGAN. Well, the question is whether you think a separate corps should be set up in the various services. That is the point. And as I understood it, the Elston bill inserted that provision on the ground that that was the only effective way of stopping command control.

Mr. VINSON. But that is not dealt with at all in this bill?

Mr. LARKIN. No, sir.

Dr. MORGAN. No, we have not dealt with it.

Mr. BROOKS. That would require additional legislation?

Dr. MORGAN. That will require additional legislation, yes, sir.

Mr. ELSTON. It would not require additional legislation as far as the Army is concerned.

Dr. MORGAN. No, sir.

Mr. ELSTON. It is already provided for in the law that was passed by the last session of Congress.

Just one other question. May I ask what these other budgetary objections were that the Secretary referred to?

Dr. MORGAN. What objection did they have?

Mr. ELSTON. Something about the Budget Bureau objections.

Dr. MORGAN. Well, the first objection was the one that I suggested to you. They thought that our proposal that the appointment by the Judicial Council within the Department rather than by the President was one that they could not pass. I do not know on what basis.

Mr. Forrestal thought that that objection might be well taken and that the appointment ought to be made by the President. And as I told you here, I agree with Mr. Forrestal's decision on that.

Mr. ELSTON. I agree with his decision, but I, for the life of me, cannot see what the Bureau of the Budget has to do with writing a military justice code.

Dr. MORGAN. I am a layman. I could not see it. But I know that that was one of the questions that they raised and Mr. Forrestal——

Mr. RIVERS. Like Mr. Kilday I had the honor of sitting under our distinguished chairman, the gentleman from Ohio, and from what I heard this morning, I am glad to see that the bill which our committee reported out last year had such a large approbation by your group, even though we had the complete opposition of the Army and they brought the largest guns they had, of all caliber, to oppose it.

But we had then the determination, which this committee always has, to do the right thing and I believe we did. We had the American bar behind us and we had the judge advocates from every place you can conceive of.

And with the setting up of independent training for the judge advocate and that separate set-up away from the chain of command, and so forth, it seems to me as if this could be called the Elston bill as amended.

Dr. MORGAN. Well, I am not prepared to deny it.

Mr. RIVERS. And I do recall the subsequent history of the bill, as it went over to the other and lesser body.

We had to even go there and bring it out. To bring credit to my friend, Mr. Elston, it was opposed over there even by the then chairman. So I am glad you brought it in and I can assure you——

Mr. BROOKS. May I interject this thought: I was also a member of the Elston committee.

Mr. RIVERS. That is right, the chairman was a very important member.

So the old saying comes to life: "As long as the light holds out to burn, it is time for the vilest sinner to return."

It makes me feel that the Army has come back and is now helping us, and everybody is happy. I do believe from your say-so this is a good bill, and it makes me feel good.

And I am going to stop with this statement: You established your record from the very beginning and whatever the court says goes down on the record so it can be appealable.

Dr. MORGAN. That is right.

Mr. RIVERS. And it is a good thing.

Mr. BROOKS. Mr. Anderson, do you have some questions?

Mr. ANDERSON. Mr. Chairman, I have a couple of questions which I wish to ask, but I am afraid time will not permit today. I was particularly interested in this subject of enlisted men serving on a court martial and it might become rather involved before we get through with it.

Mr. BROOKS. Professor, could you be back in the morning?

Dr. MORGAN. Yes, sir, if you desire.

Mr. BROOKS. Just proceed, and then we can take up tomorrow——

Mr. VINSON. I suggest, Mr. Chairman, we take a recess now and ask the professor to come back, and we will have other witnesses as well tomorrow. And I would like for the committee to have the benefit of the professor's opinion on these sections as we read the bill a little bit later on.

And I trust we will try to expedite the hearings so as not to inconvenience the professor very much.

So, Mr. Chairman, I suggest we take a recess now until tomorrow.

Mr. BROOKS. Before we do that, Mr. Chairman, may I say this: Our able staff member here has handed me the names of the witnesses tomorrow. We are going to have Professor Morgan and Mr. Arthur Farmer, of the War Veterans Bar Association; Mr. Richard Wels, of New York County Bar Association; Mr. Fred Bryan, of the New York City Bar Association; and Mr. Franklin Riter, of the American Legion. They will all be here tomorrow as witnesses.

We will then adjourn until tomorrow morning at 10 o'clock.

(Whereupon, at 12:45 p. m., the committee adjourned until Tuesday, March 8, 1949 at 10 a. m.)

UNIFORM CODE OF MILITARY JUSTICE

TUESDAY, MARCH 8, 1949

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The committee met at 10 a. m., Hon. Overton Brooks (chairman of Subcommittee No. 1) presiding.

Mr. BROOKS. The committee will come to order.

Yesterday, when the committee adjourned, Professor Morgan was a witness testifying and we adjourned to hear him today. I understand, though, Professor Morgan, that you will be in Washington and would be available at a later date and that some of the witnesses who are here today are from distant points and have remained over and have to go back to their respective homes. If there is no objection and it is all right with Professor Morgan, I would like to proceed to take their statements and then we can go back, unless the committee objects to passing him over.

Mr. ANDERSON. I had several questions that I wanted to ask Professor Morgan, but if it is not inconveniencing him and he will be here then it is perfectly all right to hear the other witnesses.

Dr. MORGAN. Mr. Chairman, I have to leave this evening, but I will come back at any time the committee wants me.

Mr. ANDERSON. The point is I do not want to inconvenience anyone and if there are witnesses here who can only be here today, I think the chairman is right in hearing them first.

Dr. MORGAN. I will be at the command of the committee at any time.

Mr. BROOKS. My thought is this and I leave it to the members of the committee: In the event the House is not in session this afternoon we could meet back in here to hear Mr. Morgan this afternoon.

Mr. ANDERSON. I cannot, Mr. Chairman, because of two other committee meetings that I promised to attend this afternoon.

Mr. BROOKS. Well, you could be back, then, could you, Professor Morgan?

Dr. MORGAN. Yes.

Mr. BROOKS. We are going to need you anyway.

Dr. MORGAN. Whenever you want me to.

Mr. BROOKS. On the consideration of this bill.

Then we can let you know when to come back?

Dr. MORGAN. Yes.

Mr. BROOKS. And if you care to remain around here, it is entirely possible we can reach you before noon.

Dr. MORGAN. All right, I will stay here until noon, at any rate.

Mr. BROOKS. All right, thank you.

The committee then will call Mr. Frederick P. Bryan, chairman, special committee on military justice of the Bar Association.

Mr. Bryan, just have a seat.

Mr. BRYAN. Yes.

STATEMENT OF FREDERICK P. BRYAN, CHAIRMAN, SPECIAL COMMITTEE ON MILITARY JUSTICE OF THE BAR ASSOCIATION

Mr. BRYAN. Mr. Chairman and gentlemen of the committee, I speak here this morning as chairman of the special committee on military justice of the Bar Association of the city of New York. That association is the senior bar association in New York and has more than 4,750 members throughout the greater city. I may say that my remarks here this morning are not alone the views of the committee, but they are endorsed by the association and have been thoroughly debated before that association in open meeting.

Now we have been studying the question of military justice from the viewpoint as practicing lawyers for a very considerable space of time. We have lived through the Elston bill hearings. We have been through very carefully and consulted with many of the boards that have studied this question since the last war. And as lawyers, we are deeply concerned with this bill from the standpoint of administration of justice.

Nevertheless, we are entirely cognizant of the fact that there are practical military necessities and we are well aware that we are not dealing with justice in the abstract but that we are dealing with military justice in the armed services. And I may say in that connection and merely perhaps by way of qualification of my being here that I myself served in the Air Force for three and a half years overseas in the last war. I was deputy chief of the staff of the Second Air Division of the Air Force. We had 1,000 heavy bombers and between 400 and 500 fighters and some 55,000 officers and men engaged in combat operations. And during that period all of the court-martial cases, that is the general courts, passed over my desk as one of my duties. And I, myself, have acted in every capacity in a general court martial: as law member, as trial judge advocate, as defense council, as president of the court, and as member of the court. I say that only because I am not talking pure theory. I think that I and the other members of my committee and the people with whom we consulted on these questions are practical military men.

Now, I do not think there is any serious question any more as to the need for court-martial reform. I am not going into that question. The very fact that your committee is sitting on this proposed code and the very fact that the proposed code has been drawn is indicative of the need. And the question before your committee as we see it is, therefore, whether this proposed code of military justice accomplishes the necessary essential reforms.

Now, we believe that this is a very fine bill. The committee which drew it and its staff—the assistant secretaries on the committee, Professor Morgan and his associates—have done a very remarkable piece of legislative draftsmanship. We think it is a great improvement on all previous legislation of this character. And we believe that in general it provides a workable and uniform code for the admin-

istration of military justice and in this respect alone it fulfills a very long-felt need. It makes a number of important changes in the system, almost every one of which is salutary and good. And it is also as far as clarification and arrangement is concerned a very fine piece of legislation.

Now you wish I could go further and say to you gentlemen that in our judgment this was the ultimate answer to the military justice question. Unfortunately we cannot do that, for reasons which I will come to later. But first I want to comment on a few of the excellent specific provisions of the bill which we think are of great importance here and to repeat again to you gentlemen that this bill is a very good bill as far as it goes and we are behind it, with the exception that I will mention later.

Now one of the major criticisms that appeared in almost every report on military justice and in fact voiced by almost every officer and enlisted man who had intimate contact with it is the frequency with which the accused was represented by defense counsel who did not have the capacity, no matter how good their intentions, to adequately protect the rights of the accused. The selection of defense counsel was often done haphazardly and I am frank to say to you gentlemen from my own experience in many cases you went over the list of officers and you suddenly found a fellow over here who was not doing much of anything useful and you said; "We can spare him and we can throw him in as defense counsel, he hasn't much to do."

Now this bill seeks to correct that situation and correct it very effectively. It provides, as you gentlemen are aware, that the defense council be a qualified legal specialist—a trained lawyer in effect—and he must be fully competent to protect the rights of the accused and to protect his client. That may seem an unimportant thing to you gentlemen, or some of you, but all of you who are lawyers realize how vital it is if you are going to have justice that you have competent representation of the accused. For example, the provision in the bill providing that defense counsel may file briefs on an appeal is a particularly good one and I think will protect the rights of the accused on appeal. The new set-up of the courts, whereby you have a law officer on the one hand who exercises judicial function and the lay members of the court—we will call them that for want of a better name—on the other who in effect perform the functions of a jury, is excellent. I think that that serves again as a measure of protection to the accused. It prevents to some extent a stampeding of the court by undue influence from the commander which sometimes happens, and I am going to discuss that later, and also it makes for a record that is intelligible on an appeal and a record on which a board of review can act and pick out the various rulings of the law on questions of law and on questions of evidence and to proceed on an intelligent appraisement of the course of the trial.

The provisions of the code as to review are in general good. We think particularly they are a great improvement on the review provisions in the Elston bill. The Elston Act we felt had rather cumbersome review provisions which were difficult to understand and we felt would be extremely difficult to operate in practice. The system of having a single board of review with appropriate branches in each of the armed services and a simple review procedure where the board of review can pass upon questions of weight of evidence as well as

questions strictly of law I think is very good. I think there is one minor criticism that might be made there and that is the provision in section 66–E which provides that if the Judge Advocate General disagrees in essence with the finding of a board of review he may then take the matter and refer it to another of his boards of review for reconsideration. That seems to me to be sort of a double-take proposition and I do not think 66–E is a very salutary provision.

Mr. RIVERS. I want to ask in that connection, if you will recall last year, in the Elston bill which we think was pretty good legislation, we wanted to make the judge advocate independent from all the chain of command.

Mr. BRYAN. That is right.

Mr. RIVERS. And I think that is a good thing. But if he is independent and free from any of the genera staff or whatever you want to call it—the hierarchy—he will be more in the position like the Supreme Court. He will be free to give the best of his judgment without any fear of reprisal, so to speak.

Mr. BRYAN. Congressman Rivers, I could not agree with you more——

Mr. RIVERS. Yes.

Mr. BRYAN. On the question of the independence of the judge advocate general's arm. I am going to come to that a little later in more detail.

Mr. RIVERS. Yes.

Mr. BRYAN. But I do feel that the independence of the judge advocate general is of prime importance here.

Mr. RIVERS. Yes.

Mr. BRYAN. In the whole picture.

Mr. RIVERS. That is right, sir.

Mr. BRYAN. I am going to touch on it a little later in another connection, if I may.

Mr. RIVERS. Therefore, if he is independent, maybe there would not be such criticism as might come up under 66–E, as you referred to. Would you not agree with me on that?

Mr. BRYAN. I think that might be so, Congressman.

Mr. RIVERS. There would be that tendency, at any rate.

Mr. BRYAN. I think that might be so, sir.

Nevertheless, I think if the judge advocate general invests in the board of review, particularly when it is composed of a competent board of officers, the authority to pass on a question, you should not have second guessing on it. I think that ought to be final and binding, unless there is something outside of the record that might induce him to do that.

Now we come to the second branch of the review machinery, which is the judicial council. It seems to me to have what is in essence a supreme court of military justice under the National Military Establishment composed of men of judicial caliber, because the requirements for members of the judicial council and the pérquisites and compensation given them give them the position for all practical purposes of United States circuit court of appeals judges, is in my judgment highly salutary.

As you gentlemen know, a bill was introduced in the Senate which was designed to permit appeals to circuit courts of appeals from any person feeling aggrieved by a decision of a court martial in the last war.

I would not comment on the merits of that bill. It opens up a very wide field to our already overburdened circuit courts of appeal if we have that legislation. I mention that in that connection merely because if you have this judicial council of the stature which this bill makes it, then and in that event you are going to limit in my judgment most of the cry for purely nonmilitary review of court-martial decisions. You may very well avoid situations such as have arisen in two United States district courts recently where the Military Establishment has been very severely criticized by sitting judges for prejudice, for injustice, and for domination of the courts by a commanding officer. I, myself, do not feel that we want a general appeal to the civilian courts, but I do think we want a body of qualified judicial officers within the national military establishment of judicial caliber to act as the final court of review, for two reasons: One, in individual cases and two, because with such a body you gradually evolve a system of case law for the Military Establishment which would be of immeasurable value to all of the armed services in the various specific situations that occur.

In other words, no code is the complete answer to a legal picture. You cannot try cases by a code. You have to develop in all law a body of precedents which will govern the various situations that arise in the administration of military justice. Then there is the salutary provision that the supreme judicial council meeting with the various judge advocates of the armed services will make continuous observation of the system and make recommendations for its proper administration and improvement.

Now that again is an excellent thing because you gentlemen who are much more experienced in legislation than I am know very well that any new code requires ironing out of little things which arise through its practical experience, requiring minor amendments here and there and requiring procedural changes. In New York, for example, we have a judicial council for many years which makes recommendations with respect to the New York Civil Practice Act and the administration of justice there. It is making constant improvements in our procedural system and various recommendations as to our substantive system.

Mr. DURHAM. May I ask a question right there?

Mr. BROOKS. Mr. Durham.

Mr. DURHAM. Do you think that this judicial board should go beyond the authority given in the present act in reviewing only the law and not reviewing the facts?

Mr. BRYAN. I am inclined to think, sir, that it is not necessary to have that board review the facts. Let me put it this way: If a situation arises in which there are no facts to sustain a conviction, then as I see it that becomes a question of law anyway.

Mr. DURHAM. Yes.

Mr. BRYAN. Now once you start going beyond that, I think, you place an intolerable burden on the judicial council more than it can possibly handle because everything goes up. We have had the same experience in New York, for instance, with respect to appeals to our court of appeals. If there were not an intermediate court—an appellate division—where we stop at questions of fact a single court of appeals would just be so overburdened even as a practical matter

that they could not handle the load. And I think with a judicial council of this nature and with competent boards of review as intermediate appellate bodies it is not necessary to have the final arbiter review questions of fact. The Supreme Court of the United States does not do that either, of course. Does that not answer your question?

Mr. DURHAM. Yes.

Mr. RIVERS. You appeal from the record anyway, do you not?

Mr. BRYAN. Yes, surely, Mr. Congressman.

Mr. RIVERS. And the record begins from the beginning of the trial, under this act.

Mr. BRYAN. They have the complete record before them.

Mr. RIVERS. That is right.

Mr. BRYAN. Right, sir.

Now, I have said a good deal for this bill. I could say a great deal more, but I know you gentlemen have only limited time.

I now want to come to what I feel is the major deficiency. All of you gentlemen have heard arguments pro and con with respect to this controversial question of command control. We have felt for a long time, in fact all the way through our studies of this problem, that the question of command control was perhaps the most vital single point in military justice reform. For example, we were disappointed, frankly, in the Elston bill in that respect. We felt that the Elston bill, while setting up an independent judge advocate's department, as Congressman Rivers mentioned a moment ago, nevertheless had not transferred to that independent judicial arm the functions that were necessary to remove the possibility of command influencing or dominating the courts.

Now, the fact is, gentlemen, and I do not think it can be seriously contradicted, that on occasion in the past and sometimes with the best motives in the world—and I am not criticizing the motives of commanders—command has influenced or dominated the court, a court composed of officers whose whole military future lies in the hands of the man appointing them.

Mr. ELSTON. May I ask right there—

Mr. BROOKS. Mr. Elston.

Mr. ELSTON. How do you figure a commanding officer could influence a separate judge advocate general's corps?

Mr. BRYAN. I think, sir, it would be very difficult for him to influence the separate judge advocate general's corps. As I understand this bill, it does not create for all of the armed services a separate and independent judge advocate general's corps, in the same sense that the Elston Act did for the Army. But the members of the court of course are not members of the Judge Advocate General's Department. The members of the court under this system are officers under the direct command of the convening authority. They are officers pulled from various units within his command and appointed by him to do a specific job, which is to sit on a court-martial on one or a series of cases.

Now, those officers are dependent on their commanding officer for what? No. 1, for promotion; No. 2, for efficiency reports; No. 3, for leaves; No. 4, for assignments; and No. 5, for that little miscellany of things where the beneficence of a commanding officer toward an officer is of paramount importance.

Mr. ELSTON. How does the pending bill change that?

Mr. BRYAN. The pending bill does not, sir, and that is precisely my point here. The pending bill does not change that and that, sir, I believe to be the major deficiency in the pending bill.

Mr. ELSTON. Well, it would seem to me if you get a separate Judge Advocate General's Corps you remove it from influence much more than you would under the pending bill.

Mr. BRYAN. I think that is so, sir. You have to have two things, though, it seems to me. One is a separate Judge Advocate General's Corps. That gives the Judge Advocate General his measure of independence so he can act in a judicial capacity throughout. Now you have to place in the hands of the independent Judge Advocate General's Corps which you created the functions which will enable him to carry out that judicial function which you have given him. One of those functions, and a very important function, is the appointment of the court itself. And what I advocate here before your committee is that this bill—the uniform code— be modified so that an independent Judge Advocate General's arm will appoint the members of the court. Thus the court will not be appointed by a commander who has complete control over the military future of the men on that court. It will be appointed from panels submitted by various commanders to a Judge Advocate General's convening authority. That panel may be selected from a wide variety of units so as to give a broad selection of court members in specific situations If you do that, sir; and if in addition to that you have the defense counsel appointed by the Judge Advocate General's Department; and, thirdly, withdraw from the commander the initial power of review except as to clemency on the one hand or remission of sentence on the other, then you have an independent branch as you just described, Congressman, with functions which enable it to act in a judicial and objective capacity.

Mr. DURHAM. Suppose you gave the judicial council under this bill the full authority to review all facts and law and everything else; would you not get away from command influence to a large extent?

Mr. BRYAN. I think to some extent, sir. As a matter of fact, this bill has a number of features to it which are designed to protect against command influence. But command influence, sir, is a very subtle thing. A commander, as you gentlemen well know, does not get his court to go in a room and say, "Gentlemen, I want you to bring in a verdict" or "I want you to bring in a sentence of some sort or kind." It is a very subtle process. And the removal of the appointing power—this reviewing power—from command is the thing that is going to cut the Gordian knot, in my opinion.

Mr. RIVERS. We think that Mr. Elston did a very fine job on this particular legislation.

Mr. BRYAN. No question about that.

Mr. RIVERS. He did such as good job that he had to go over to the Senate and help to get through over there.

Mr. BRYAN. Yes.

Mr. RIVERS. And we had the complete unsupport of the military.

Mr. BRYAN. Yes; I know that.

Mr. RIVERS. But we think we got a fine bill, considering the many obstacles that were very beneficently tossed in our unsuspecting path, if you catch the point.

Mr. BRYAN. Yes.

Mr. RIVERS. Mr. Elston did a very good job, we think, and that is why we are making him sit with us. We feel that with your help, and the other people that want to do the right thing, we can put in these safeguards.

Mr. BRYAN. Yes.

Mr. RIVERS. And I say that without any reflection on the military.

Mr. BRYAN. Yes, Congressman; none at all.

Mr. RIVERS. None at all; that is right.

Mr. BRYAN. I know that commanding officers who on occasions felt it was necessary to bring pressure on a court here and there were not doing it with any malice. They were doing it for what they thought was the best interest of their command.

Mr. RIVERS. And self-preservation is just as strong today as it was a million years ago.

Mr. BRYAN. That is right.

Mr. ELSTON. You know, there is much that a Federal judge can do which brings a little pressure on a jury, too, but as long as the case can be reviewed it has always been felt that they could correct any errors thay may have been committed in the district court. You cannot remove a court-martial hearing entirely from every possibility of influence.

Mr. BRYAN. You cannot, sir.

Mr. ELSTON. But, if you have a complete review of law and fact, do you not think that will assure a fair trial?

Mr. BRYAN. I think, if I may use the illustration you used a moment ago, Congressman, the Federal judge and the jury, the great difference between the Federal judge and the jury and the commander and the court is this: If the Federal judge makes any remarks to that jury, they are all made on the record, and that record goes up to the appellate court and is before it. If the commander is inclined to influence his court, (a) the commander is not there at the trial, and (b) the commander is not talking to the court directly or talking to it in the courtroom. Therefore, any attempt by the commander to influence or dominate the court does not appear on the record. So it is difficult, if not impossible, for a reviewing board to catch that and pass on it.

Mr. ELSTON. Well, the record in a trial in a United States court does not indicate the emphasis.

Mr. BRYAN. I agree to that.

Mr. ELSTON. Does not indicate the attitude of the court.

Mr. BRYAN. Yes.

Mr. ELSTON. Does not indicate sometimes that he is a prosecuting officer as well as the court. I think you have seen it yourself.

Mr. BRYAN. I certainly have.

Mr. BROOKS. Besides, Mr. Bryan, the rules of the Federal court permit the trial judge to go very far in expressing himself in criminal cases.

Mr. BRYAN. That is right.

Mr. BROOKS. And frequently he suggests to the jury that if they bring in certain verdicts he will order a new trial.

Mr. BRYAN. But that again is a situation where the judge, who corresponds now to the law officer under this new code, makes certain statements. And I grant you, Congressman Elston, you cannot catch those shadings on the record, as all of us who have tried cases know.

Nevertheless, the words, at least, are on the record. And, when we talk of the commander, the words are not a part of the record at all. They are completely extrarecord, and nobody knows what was said, and no reviewing authority has anything before it.

Now I have taken I think more time perhaps before you gentlemen than I should have. I want to say this to you. It seems to me, as far as the command function is concerned, the requirements of military discipline are completely sad if the following things happen: A commanding officer has an accused arrested, charges are preferred against him, and the case is referred for trial. There is the dividing line. Once the case is referred for trial, no longer has the commander any interest in the case except to see that objective justice is done. It seems to me that the argument for retention in command of the power to appoint the courts is perhaps only for one reason: That the retention of the power carries with it the ability to influence or dominate. Now, that ability to influence or dominate is something that the command disavows.

Mr. ELSTON. May I ask a question right there, Mr. Chairman?

Mr. BROOKS. Mr. Elston.

Mr. ELSTON. What would you do with a commander at an isolated post where it is not easy to assemble a court? If the Judge Advocate General has to do the assignment and has to convene a court from great distance, and particularly during wartime, might not an accused person be compelled to languish in jail for an unreasonable length of time?

Mr. BRYAN. I think it is entirely possible, sir, that where you have an isolated post the accused may conceivably suffer by being in jail a longer period than would normally be the case. I think, however, that is compensated for by this: If a man is accused of a major offense, he is no longer any good to the commander at that point. What the commander wants is to get him out of the way; that is, out of his hair, if you want to put it that way, as rapidly as possible. That is largely a question of transportation. Very rarely do you have a general court martial in a relatively front-line situation. In most cases, almost all cases, the man goes to the rear echelon and is tried there where a court can be summoned from a wide body of men appointed by a Judge Advocate General. I think, Congressman, that is largely a question of transportation rather than languishing in jail. And there may be cases where transportation is so inadequate that there is a long stay in the "hoosegow," if you want to put it that way.

Mr. BROOKS. Let me ask you this——

Mr. BRYAN. Yes.

Mr. BROOKS. Mr. Bryan, would you not lose the element of knowledge of local influence in selecting your personnel if you turn it over to the Judge Advocate General's Corps, we will say, which might be set up at a distant point and not know the temperament and the local environment or the local conditions of the members of the panel?

Mr. BRYAN. I think in the first place, Congressman, that the temperament and local conditions in general are not overly conducive to objective justice.

Mr. BROOKS. We lawyers jealously guard the right to go down the venire and interrogate the talesmen——

Mr. BRYAN. Yes.

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Mr. BROOKS. Of a prospective jury, however. We think that that has a great deal to do with fundamental justice; is that not true?

Mr. BRYAN. I think that is right, sir. But, if I may put it this way, we have also to draw a distinction, I think, Congressman, in our thinking between a local jury and a panel of officers under the direct command of the commander who is directing the trial. In other words, a local jury which was appointed out of the sheriff's office or was appointed out of the public prosecutor's office might be a local jury, but I think you might agree with me, Congressman, when I say that I at least, and I think you would, too; would be reluctant to try the accused before a jury composed of such persons. And that, in my judgement, is the distinction.

Did I answer you?

Mr. BROOKS. Thank you very kindly for that answer.

Mr. BRYAN. I will just finish up here very briefly.

I think we have to realize, gentlemen, and I know you gentlemen do, that the American armed services are no longer the old type of professional Army. They are citizen armed services. Their fighting capacity is dependent on morale. And those gentlemen of you who have heard some of the gripes—and Heaven only knows the American soldier gripes, and I hope he always will, because if he does not gripe there is something wrong with him—are familiar with the criticism that has arisen from men subject to the old court-martial system. In my judgment it was not conducive to the best morale. Morale will never be so high as when the individual American soldier or sailor or airman is convinced that he is going to get a fully square deal if he is accused of a crime or offense and that he is going to be tried under a system of justice which is in accord with the traditional philosophy to which he has been accustomed. That is not going to interfere with his military efficiency. Far from doing that, it is going to increase his military efficiency. And we therefore urge upon this committee the passage of the proposed uniform code of military justice, H. R. 2498, with the addition of the safeguards that I have described to you gentlemen, which is only a comparatively small step forward procedurally but a very large step forward in actual effect. Remove from command the power to appoint the court, the power to appoint defense counsel, and the power to make initial review except for clemency or remission of sentence. As modified, I believe such a bill will be a really monumental piece of legislation.

Thank you for your patience.

Mr. BROOKS. Thank you very kindly, Mr. Bryan, for a very fine statement.

Mr. Anderson, I do not think you asked any questions. Do you have any you want to ask?

Mr. ANDERSON. Mr. Chairman, I want to make it plain to the committee and the witnesses that I am not a lawyer. I am a farmer. I am to sit here and listen to what all the lawyers have to say and then have to come up with an answer.

Mr. BROOKS. Mr. Gavin here is a member of the committee. Mr. Gavin, would you have any questions right now?

Mr. GAVIN. No. I am sorry I did not hear the earlier part of your statement. It was very, very good and I listened with a great deal of interest.

Mr. BRYAN. Thank you, sir.

Mr. BROOKS. We are pleased to have also Mr. Doyle with us. Mr. Doyle, do you have any questions? Mr. Doyle is a lawyer and is from California.

Mr. DOYLE. I appreciate the courtesy of sitting with this subcommittee while not being a member of it. There are two things that occurred to me, Mr. Chairman. I am interested in article 67, which provides that only lawyers who are admitted to practice before the United States Supreme Court shall be appointed to the counsel.

Speaking as a western man, that provision would eliminate from consideration many of the most brilliant lawyers we have, some of whom are west of the Mississippi River. Very few men in the western part of our country are ever admitted to practice before the Supreme Court of the United States. I happen to be, and have been for about 20 years.

But I know that is a practical problem, and I raise the point before the committee that that might be considered as not necessary.

Mr. BROOKS. Do you care to comment on that?

Mr. BRYAN. I have not, frankly, Congressman, given it much thought. I think perhaps I view it from an easterner's point of view. I had not perhaps realized those considerations that you mentioned.

I think the important thing or the object was to get the very top layer of the bar, if you want to call it, by way of qualification. Now, it does not seem to me to be vital that the man be admitted to practice before the Supreme Court of the United States.

I, myself, know a number of very able lawyers that have never been before the Supreme Court.

Mr. RIVERS. Had no reason to be.

Mr. BRYAN. And had no reason to ask to be admitted because they just did not happen to get there.

Mr. DOYLE. I am glad you agree with me.

May I ask this other question, Mr. Chairman. I have never practiced before a court martial, but I am in an area where there are many courts martial, and I have personal knowledge of the fact that many boys are given court-martial judgments of dishonorable discharge.

Mr. BRYAN. Yes.

Mr. DOYLE. Boys of immature age and boys who only commit offenses as the result of stress and strain of war or of unusual circumstances which immaturity is the cause of rather than deliberate design or deliberate intention to commit a serious offense.

I would feel, Mr. Chairman, that under section (e), article 67, which limits the Judicial Council to considering matters of law only—if you will notice subdivision (e).

Mr. BROOKS. Yes.

Mr. DOYLE. I wonder if Mr. Bryan would not differentiate that section for us. It seems to me that opens up the Judicial Council for consideration of facts as well as law, does it not?

Mr. BRYAN. Well, Congressman Doyle, where you have a lack of sufficient evidence to support the findings, for all practical purposes I think that means that there are no facts in law sufficient to support them. In other words, you review the facts.

You might almost say that you apply the old scintilla rule. You say there is not a scintilla of evidence to support these findings. I think that is what that means. That is my impression.

Mr. DOYLE. Would you not feel that in the absence of a review board, being named by the judge advocate's office, that the Judicial Council should also have the power to review the facts as an essential element to get away from the danger of command influence?

Mr. BRYAN. Let me put it this way, Congressman: It would seem to me that the review boards should be appointed by the Judge Advocate General's Department as part of an independent judicial arm.

And if the review boards were so appointed, that it seems to me would fulfill the requirement that you just mentioned. Now in the absence of that it might very well be that this committee would want to give consideration to enlarging the jurisdiction of the Judicial Council.

But what I am afraid of, as I said before, sir, is that you have a court composed of three men and when you have a court composed of three men sitting on a judicial system covering 2,000,000 plus you are going to have them so crowded that I have some concern as to whether they will be able to do the proper job if you enlarge their jurisdiction to that extent.

Mr. DOYLE. May I just make this one statement, Mr. Chairman.

I would feel that it might be a hardship on the Judicial Council, but if there was a miscarriage of justice as the result of the Judicial Council not being enabled to consider the facts and it was your son or my son that was involved, you would not worry about the heavy load on the Judicial Council.

Mr. BRYAN. There is no question about it.

Mr. DOYLE. I would like to make it clear, Mr. Chairman, with your courtesy, that I feel very strongly that a military court is not comparable to a civilian court and that we ought to permit the Judicial Council to review the facts as well as the law.

Mr. BRYAN. I certainly, if I may say so, would have no strong dissent on that score at all. And if I may say one other thing: It does seem to me that the independence of the review board is an important factor in the consideration of how much power, that is how much scope or jurisdiction, you are going to give to the Judicial Council.

Mr. GAVIN. As the gentleman states, he approves of H. R. 2498. You summarized in the latter part of your statement certain recommendations. Would you reiterate those statements again?

Mr. BRYAN. Yes, sir.

We propose the following modifications of the bill as written. No. 1, that the commander who is now the convening authority at whatever level do the following: (a) of course, have the accused arrested; (b) go through the process of having the charges preferred, and (c) refer the case for trial, at which point—the man having been referred to trial—an independent judicial system along the lines of Congressman Elston's very excellent system, take over, and that the independent judicial arm, which we will call the Judge Advocate General's Department, then appoint the court from a panel of officers submitted to it and selected by commanders in the various units under that judicial convening authority; (2) that it appoint defense counsel; and (3) when that record goes up for review it passes through the commander's hands merely for purposes of possible exercise of clemency or remission of sentence, and then passes directly

to a reviewing authority for confirmation or whatever process may take place. That reviewing authority, of course, is a part of the independent judicial arm.

Mr. GAVIN. What is your recommendation for defense counsel for the accused?

Mr. BRYAN. Well, I think that the present provisions as to qualifications of defense counsel are excellent. The thing that concerns me is that defense counsel is still appointed under this bill—article 26 I believe—by the convening authority who is the commander.

In other words, the defense counsel is appointed in effect by the very man who is responsible for preferring the charges. That, I think, is wrong. I do not think the defense counsel should be so appointed.

Mr. GAVIN. What is your recommendation on that?

Mr. BRYAN. My recommendations are that the defense counsel be appointed by the judicial arm—the independent Judge Advocate General's Department. And I may point out to this committee, as I understand it in recent English legislation on this same subject, which I think is going to be discussed before this committee at some length a little later, they set up in the Judge Advocate General's Department, so concerned are they with the rights of the accused, two separate departments: One, a Department of Prosecution and two, a Department of Defense, so that you do not get one unit prosecuting and defending, at the same time. I think that is another matter that your committee wants to study.

Mr. BROOKS. Thank you very much, Mr. Bryan. We are intensely interested in your statement and we appreciate your coming here.

The committee has four more witnesses, by the way, to be heard before noon, and I think if the committee desires, we can proceed rapidly with them so as to hear all of them and so as not to keep them over an extra day.

Mr. BRYAN. May I, Mr. Chairman, express my thanks to your committee for your courtesy and consideration to me. I have enjoyed appearing before you very much, indeed.

Mr. BROOKS. You have made a very fine statement, sir.

Mr. BRYAN. Thank you, sir.

Mr. BROOKS. Mr. Richard H. Wels, chairman of the special committee on military justice of the New York County Bar Association. Mr. Wels.

STATEMENT OF RICHARD H. WELS, CHAIRMAN, SPECIAL COMMITTEE ON MILITARY JUSTICE OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION

Mr. WELS. Mr. Chairman and members of the committee, I shall try to be brief.

I am appearing before you as a representative of the New York County Lawyers' Association and speak to you as a 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 report referred to follows:)

REPORT OF THE COMMITTEE ON MILITARY JUSTICE OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION

Earlier this year Secretary of Defense James V. Forrestal appointed a committee consisting of Prof. Edmund M. Morgan, Jr., of the Harvard Law School as chairman, Under Secretary of the Navy W. John Kenney, Assistant Secretary of the Army Gordon Gray, Assistant Secretary of the Air Force Eugene M. Zuckert, and Felix E. Larkin, assistant general counsel of the Department of Defense, as executive secretary, to draft a Code of Military Justice uniform in substance and uniform in interpretation and application to all of the armed services. In his precept establishing this committee, the Secretary indicated that this uniform code should protect the rights of those subject to the code without impairing the performance of military functions.

Having noted the previous activities of this association in the field of military and naval justice, the Morgan committee on September 27, 1948, invited the association to submit our recommendations with respect to deficiencies in the present Articles of War and Articles for the Government of the Navy. Upon referral of Professor Morgan's letter to our committee, we have carefully reviewed our earlier reports on military justice, the changes effected by the Elston bill enacted in the closing days of the second session of the Eightieth Congress, and the proceedings before the House and Senate Committees on the Armed Services, and have generally studied the problems of military and naval justice.

The limitations and inadequacies of our systems of military and naval justice were graphically portrayed to the public and to Members of Congress during and after World War II by many service men and women, lawyers and laymen alike, who had had first-hand experience with the operation of such systems, and found that resemblance between them and the courts which they knew as civilians was largely coincidental. It was disturbing to them to find that the same official was empowered to accuse, to draft and direct the charges, to select the prosecutor and defense counsel from the officers under his command, to choose the members of the court, to review and alter their decision, and to change any sentence imposed. They were shocked to learn that an offense committed by an officer was subject to different treatment and punishment than the identical offense committed by an enlisted man. They were surprised to find that many of the judges, prosecutors, and defense counsel participating in courts-martial were neither lawyers nor trained in the law, and that, in the naval services, there was not even the minimum requirement that a single law member be on a court.

The reports that came back of these things to the civilian community, together with specific instances of abuse in the court-martial process, initiated a flow of bills into the congressional hopper and an expression of aroused public opinion which gave promise that reforms would be accomplished. The Secretary of War and the Secretary of the Navy each appointed boards of distinguished citizens to review the court-martial systems of their respective services, and to make recommendations for a thoroughgoing revision of military and naval justice. The famous Vanderbilt report, made to Secretary Patterson, and the Ballantine and Keeffe reports, made to Secretary Forrestal, all found substance to the charges which had been leveled at the court-martial systems, and presented definitive recommendations for the elimination of the conditions which made such charges possible.

The jugular vein at which all such boards aimed their recommendations was the domination and control of the court-martial systems by command. All such boards concluded that amendments to the Articles of War and the Articles for the Government of the Navy which correct other inadequacies of military and naval justice, but which failed to check command control, effect only secondary reforms which become meaningless in the absence of the rooting out of the major sources of abuse and injustice. As to this, the Vanderbilt committee said:

"The system of military justice laid down in the Manual for Courts Martial not infrequently broke down because of the denial to the courts of independence of

action in many instances by the commanding officers who appointed the courts and reviewed their judgments; and who conceived it the duty of command to interfere for disciplinary purposes. 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 steps to guard against the break-down 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."

Implementing this finding, the Vanderbilt committee recommended (*a*) the appointment of courts by the Judge Advocate General's Department, instead of by command; (*b*) the assignment of defense counsel by the Judge Advocate General's Department, and the requirement that defense counsel be a trained lawyer; and (*c*) that the initial review of decisions, except for purposes of clemency, be in the hands of the Judge Advocate General's Department, instead of in the commanding officer who initiated the proceedings and convened the court. Corollary proposals provided that the officers in the Judge Advocate General's Department should be qualified lawyers insulated from the indirect influence of command by having their promotions, assignments, leaves, and fitness reports emanating from the Judge Advocate General's Department rather than from command.

It was felt that once command had filed its accusations and placed a man on trial, the judicial machinery should be in the hands of an independent judicial system within the service which, not subject to pressures and influence from command, would insure the accused the same fair trial by competent personnel that he would receive in our criminal courts if he were a civilian. In this recommendation and belief our association concurred, as well as the American Bar Association, the Association of the Bar of the City of New York, the War Veterans Bar Association, and many other veterans and bar groups.

On February 20, 1947, the War Department completely rejected these recommendations. The position of the Army with respect to them was summarized by Secretary of the Army Kenneth Royall in the *Virginia Law Review* for May 1947, where he said:

"The War Department feels that the committee received a rather exaggerated impression of the prevalence or seriousness of pressure exerted on courts martial. However, there were doubtless instances where appointing authorities entirely misconceived their duties and functions and overstepped the bounds of propriety."

Extended hearings on the bills relating to the Army court-martial system were held by the House Committee on Armed Services, but no House hearings have been held on the Navy bills. No hearings at all have been held by the Senate committee. The House committee reported out H. R. 2575, introduced by Representative Elston, of Ohio, at the request of the Army, and this bill in amended form was passed by the House. In the closing days of the second session of the Eightieth Congress, the entire Elston bill was introduced by Senator Kem, of Missouri, as a rider to the Selective Service Act of 1948, and, without the benefit of any Senate hearings, was accepted by the Senate, and signed by the President as Public Law 759 of the Eightieth Congress. It becomes effective on February 1, 1949.

The passage of the Elston bill was hailed on the floor of Congress and in the press as the accomplishment of the reforms in military justice which had been sought by our association, among others. A label of "court martial reform" was placed upon the bill which was scarcely indicative of its contents. Such labeling was highly dangerous in that it gave the public and the press the impression that substantial reforms had been accomplished, and thus reduced the possibility of further congressional action to effect the real reforms which are still lacking. Accordingly, it is important to make clear just what the Elston bill accomplished.

First of all, it must be noted that even such reforms as are effected by the Elston bill have no application to the Navy, the Marine Corps, the Coast Guard, and, probably, the Air Force. Just as the changes in military justice which were adopted in 1921 were restricted in their application to the Army, so the Elston bill is piecemeal legislation.

The most important phase of the Elston bill to our mind is such change as it has effected in the relation of command to the courts-martial systems. Such

change is reflected by section 246 of the bill, amending section 8 of the National Defense Act (10 U. S. C. 61) to provide for a Judge Advocate General's Corps. This provides for a separate corps, headed by a major general and three brigadier generals, which shall have a strength of not less than 1½ percent of the authorized active commissioned-officer strength of the Army, together with such warrant officers and enlisted personnel as may be assigned by the Secretary of the Army. This corps is given its own promotion list, similar to that of the Medical Corps and Chaplains Corps, independent of the line. This was vigorously opposed before Congress by the Army on the ground that thereby too great a preference was given to officers performing legal duties over line officers. It may be significant that the Army has not yet moved to put into operation this or other provisions of the Elston bill.

The establishment of such a corps, with its own promotion list, has been widely hailed as having established "an independent Judge Advocate General's Department," but this is far from the fact. As was said in an editorial appearing in the August 1948 issue of the American Bar Association Journal:

"The new statute accomplishes some desirable improvements in military justice, supplementing those which the Secretary had power to introduce by his own action, along lines recommended by the Vanderbilt committee nominated by our association and appointed by the War Department. The Elston bill creates a Judge Advocate General's Department which is independent in the sense that it has authority to handle its own administrative matters, but, as has been pointed out several times in these columns (33 A. B. A. J. 40, 45, January 1947; 33 A. B. A. J. 319, April 1947; 33 A. B. A. J. 898, September 1947), command remains completely in control of the operation of the Army's courts-martial system."

Under the Elston bill the power to appoint courts remains in command. Under the Elston bill the power to review, in all its aspects, the decisions of courts-martial remains in the commanding officer who convened the court. Under the Elston bill prosecutors and defense counsel are required to be members of th Judge Advocate General's Department or otherwise qualified lawyers only "if available"—a qualification which realistically leaves the situation in status quo. We believe that in all instances and in all the services, the prosecutor and defense counsel should be members of the Judge Advocate General's Department or otherwise qualified lawyers. So far as the basic fundamental matters at which the movement for court-martial reform has been aimed, little is accomplished by the Elston bill.

We have reviewed the history and background of these provisions to clear away the confusion that has been created as a result of the enactment of the Elston bill. We come now to our recommendations with respect to the position of command in the court-martial system.

We do not question that discipline is a proper concern of command, just as the commissions of crime in the civilian community is a concern of the executive authority, represented by the district attorney and the governor. We believe that where a commanding officer has reason to believe that an individual has committed an offense, he must have the authority to file charges against that individual and to order him tried by a court of competent jurisdiction, and to be responsible for the prosecution of the offense, such responsibility including designation of a qualified prosecutor. We believe that it should continue to be the prerogative of command to evaluate the seriousness of the crime, and determine whether the case shall go before a general court-martial, or a court with lesser powers of punishment. We further believe that, just as the civilian executive, the commanding officer should have the power of clemency.

But once the judicial proceedings have been placed in motion, we agree with the opinion expressed by Hamilton in No. 78 of The Federalist that "There is no liberty, if the power of judging be not separated from the legislative and executive powers."

We feel that, once the case has been referred by command for trial, the powers and control of command must end, save for the right to exercise clemency. Accordingly, we recommend that (1) the power of appointing the court and the defense counsel must rest with the Judge Advocate General's Department; (2) that the personnel serving in such capacity must be free from the authority of command directly, or indirectly in matters of appointment, fitness reports, promotions, leaves, etc.; and (3) that judicial review of court-martial proceedings shall be in higher echelons of the Judge Advocate General's Department.

A practical problem of major proportions arises with respect to these recommendations. By law a Judge Advocate General's Department exists in the Regular Army, and the Judge Advocate General, as well as the other officers in

the Department, are professional lawyers. Such is not the case in the naval services or in the Air Force.

While there is a Judge Advocate General of the Navy, neither he not other officers performing legal duties are required to be lawyers. Traditionally, officers assigned to legal duties in the naval services are line officers whose tour of duty in the Judge Advocate General's office generally comes between other assignments.

If there is to be a real system of military or naval justice, it must be administered within each of the services by a corps of legal specialists from whom each Judge Advocate General shall be required to be appointed, and which will provide the law members of the courts, the prosecutors, and the defense counsel, all of whom ought to be trained lawyers. Such a corps is already established by law in the Army, but it has never existed in the Navy and the Air Force, since its division from the Army, has followed Navy practice in this regard.

Establishment of such a specialist corps in the Navy and in the Air Force is not such a departure from precedent as might be imagined. While the legal systems of those services are today administered by officers who, notwithstanding their distinguished records and high professional competence as line officers and aviators, are generally not trained and experienced in the technical duties assigned them, other specialist functions are performed only by specialists. The Bureau of Medicine and Surgery of the Navy and the Office of the Air Surgeon General are manned and headed by physicians and surgeons, who may not be so appointed without a civilian license, and whose life work lies in medicine. The Dental Corps of the services are composed of dentists, and the Chaplains Corps are headed and manned by ordained ministers. There are doctors, dentists, and chaplains who are major generals, rear admirals, and are accepted as an integral part of the service without ever having commanded a regiment or a naval vessel. In addition, as the result of the specialization which comes from modern warfare, in all services there are specialists such as communicators who are trained throughout their careers for a particular specialty. Only in the specialties of law and of intelligence has there been some hesitancy in providing for a specialist corps. Those two specialties have been largely considered as part-time jobs to which senior officers, regardless of their lack of professional training as lawyers or intelligence experts, may be assigned for a brief tour of duty, to return to sea or to aircraft after a few years.

The Navy has never seen fit to establish a legal corps although in recent years it has taken tentative steps in this direction. During wartime it had a group of Reserve officers classified as legal specialists. Commendably, since the end of World War II it has sent a selected group of Regular naval officers to first-line law schools for legal education, and has made such officers the nucleus of its postwar legal program.

If the Navy's hesitation to create such a legal corps stems from a desire, with which we could concur, to have its legal officers deeply imbued with its traditions and needs, the obstacle is not insurmountable. We would endorse a program which would insure that the Navy's lawyers have duty with fleet units, and be as cognizant of and sympathetic with the problems and requirements of the service as its general-duty officers. Such has, in fact, been the history of medical officers, chaplains, and other specialists. We can see no reason why such a program would not be practicable with respect to legal specialists. But we are firmly convinced of the necessity in all services of having billets concerned with legal duties filled by trained and competent personnel. If there is to be any uniformity in the courts-martial systems of the various services, the professional lawyers of the Army must be balanced by professional opposite numbers in the Navy and in the Air Force. Accordingly, we recommend that amendments to the law be adopted providing for a truly independent legal corps within each of the services, the chiefs of such corps should be appointed from the corps, and not, as at present, from general-duty officers. The assignments, leaves, promotions, and fitness reports of officers in such corps should emanate from their superiors within the corps, and the decisions of the courts on which they sit should be reviewed by higher echelons within the corps and not by command. To our mind, such provision is the basic need of military and naval justice. Once it is accomplished, other reforms become mere refinements.

The Elston bill largely restricts its application to general courts martial, and not special courts, which are the Army equivalent to summary courts martial in the Navy. It is our experience that the greater part of the abuses which have occurred in military and naval justice have occurred in Navy summary and Army special courts, rather than in general courts martial. This is so because the commanding officer who has convened the summary or special court does so not

because he has any doubt as to the guilt of the accused, but because he feels that he cannot impose a sufficiently severe punishment at mast or company punishment. Frequently, this is conveyed to the court which the commanding officer appoints from his own command and whose decision he reviews. Too often the court is told that it is expected to find a verdict of guilty, and to impose a particular sentence, regardless of the oath that it takes "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." The result is that, although the court is by statute required to enter upon its duties with an open mind as to the guilt of the accused, its judgment is foreclosed in advance, and there is little question as to the ultimate result. This is much less likely to happen in a general court-martial, which is not ordinarily convened by the commanding officer who has instituted the proceedings and is not subject to his control. General courts martial are normally under the control of a general or flag officer senior to the commanding officer who has initiated the proceedings, and the officers at his headquarters who participate in the proceeding are unlikely to be affected by the views of the subordinate commander who has recommended the court.

We are strongly of the opinion that all that we have said before as to the necessity of independent, competent lawyers serving as law members, prosecutors, and defense counsel on general courts martial is equally as applicable to Navy summary and Army special courts martial. Those who oppose this find it particularly impracticable in the Navy, where commanding officers of smaller units and ships have the power to convene summary courts martial. Actually, however, a large percentage of such courts are convened on larger vessels such as battleships, cruisers, and aircraft carriers (all of which have several thousand personnel aboard) and on bases where there are many thousands of men. In such ships and on such bases there should be no difficulty about providing adequate legal specialists, just as other specialist officers are provided in the allowance list.

At first blush, it sounds convincing that smaller vessels such as landing craft, minesweepers, destroyers, and other vessels which may have no more than half a dozen officers aboard cannot provide and cannot justify such legal specialists. If such smaller craft normally travelled alone, that might well be so. Normally, however, they travel and function in squadrons and divisions, each of which has a flagship aboard which is a squadron commander with a staff duplicating the staff of a fleet commander in miniature. There is no reason why legal specialists cannot be attached to such staffs as are other specialists, and be available for duties in all units of the squadron. We believe that any reform of military and naval justice will be incomplete if it is not applicable to the inferior courts, as well as to the general courts, to the fullest extent practicable.

In the development of a uniform code for all the services, we recommend that a uniform terminology be adopted. Only confusion results from the fact that an Army special court is known to the Navy as a summary court-martial; that an Army trail judge advocate may find as his opposite number a recorder. Adoption of a common terminology will do much toward the development of a uniform approach. Similarly, we recommend that uniform definitions of offenses, and a uniform system of punishments be adopted which will be applicable to all the services.

The Elston bill, in section 210, has made it possible to discipline an officer who has committed an offense by trying him at a special court martial, as well as at a general court martial. This is not as yet true in the Navy where the only punishment that can be meted out to an officer is trial by a general court-martial or a private reprimand from his commanding officer. The effect of this is that where an officer commits a minor offense, he in effect goes unpunished, although an enlisted man committing the same offense is subjected to punishment. Similarly, in the Navy as an administrative measure courts martial are cautioned against confining a petty officer, although a seaman committing an identical offense may and frequently does receive punishment of confinement. We believe that these practices negative our basic concept of "equal justice under law", and we recommend that the law be amended so as to equalize punishments for all service personnel. Such a provision would improve morale and discipline.

The Elston bill has set up a comprehensive and tortuous system of review insofar as Army courts martial are concerned. That system is defective in that it preserves the right of review as to all phases of the case in the commanding officer who convened the court. This is completely at odds with American concepts of justice.

We recommend that a uniform system of review be established within all of the services, under which the commanding officer shall retain the right to review the case only for the purposes of exercising clemency. This, of course, parallels our civilian procedures under which the right of clemency is exercised by the President in Federal offenses, and by the governor in State offenses. The initial review of the case as to legality and as to all aspects other than clemency should vest in the theater area or fleet representative of the Judge Advocate General. Thereafter, further review should be had by a board of review established in the office of the Judge Advocate General and appointed by him, as provided in the Elston bill.

Under present practice, in none of the services do the accused or his counsel participate as a matter of right in review of courts-martial decisions. They rarely file briefs, and rarely do they have an opportunity to argue their case on review. They have no knowledge of the questions that are being raised and discussed by the reviewing officers, and have no opportunity of presenting their point of view.

We recommend that the record of proceedings in any court martial shall include, when forwarded for review, a summary of all objections prepared by defense counsel, and that defense counsel be permitted to submit briefs or other argument to the reviewing authority. If the accused desires, at his own expense, to present oral argument through civilian counsel to the reviewing authority, he should be permitted to do so.

The goal of a uniform code uniformly applied and interpreted in all of the services is obviously difficult of achievement without some top level coordinating agency. Ideally, when real unification of the military services is finally accomplished, there should be a single Judge Advocate General performing all legal duties for the Army, Navy, Air Force, Marine Corps, and Coast Guard. Unification as provided in the National Defense Act falls far short of the unification under which such ideal can be realized. We must gear our recommendations accordingly to the existing situation, and to the advances that are realistically possible.

Accordingly, we recommend that there be established a board of review in the office of the Secretary of Defense, which shall have final power of review in all court-martial cases in all the services, and which will be charged with the development of uniform practices and procedures, much as the Supreme Court of the United States controls the decisions of the Federal courts of appeals. The Secretary of Defense should have the further duty of closely supervising the operations of the various Judge Advocate General Departments, and should have the power of recommending legislation to the Congress and of issuing directives to the services in matters pertaining to military and naval justice. He should have the specific responsibility of advancing unification of the legal functions of the armed services.

Today our country has for the first time a peacetime draft. Large numbers of our young men will in the years ahead serve in a peacetime Army, Navy and Air Force whose mission is the preservation of our American democracy. Under such circumstances it seems to us that there is a paramount obligation to those young men, to their anxious families, and to the basic principles of that American democracy to make full provision for the protection of those young men and to insure that their right to fair trials before qualified and independent courts is not impaired. We have every confidence that the adoption of the proposals made by us will strengthen the morale and discipline of our armed services, in time of war as well as in peacetime.

Respectfully submitted.

RICHARD H. WELS, *Chairman*,
LOUIS C. FIELAND,
JOHN M. MURTAGH,
SIDNEY A. WOLFF,
INZER B. WYATT.

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 the 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 officers 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 Chancelor, 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 Chaplain 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 Air Force will itself frustrate the purposes of the bill before you, since this uniform code cannot receive uniform application when it is administered by

trained specialists in the Army, and by nonspecialist 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 10 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 provison 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—Eightieth Congress, first 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 5 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 the 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.

Mr. ELSTON. Can I interpose right there? You do not make the opening statements of counsel in a civil case a matter of record?

Mr. WELS. No, Mr. Elston. But in civil cases, where the case goes up on appeal, counsel is present to present his case and his theory to the court, whereas in your courts martial the record comes to the reviewing authority without having briefs of counsel.

This is intended to be the vehicle through which counsel presents his theories as he would normally on personal experience and by brief in the civil court.

Mr. ELSTON. Briefs are provided for in this bill and counsel is afforded the accused at any time either in trial before the courts martial or on appeal. So the situation in that respect is the same as in civil courts.

Mr. WELS. Yes; but counsel on an appeal may very well be assigned from the Department, maybe from within the Judge Advocate General's Office, and this is intended to give him the benefit of the theory and the argument the trial counsel had since he frequently may not be the same person.

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 peacetime 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 peacetime 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.

This was pointed out by Congressman Doyle a few moments ago.

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.

Mr. BROOKS. Thank you very much, Mr. Wells.

Mr. BROOKS. Are there any questions to be asked of the witness?

Mr. ANDERSON. I would like to ask Lieutenant Wels—glad to see you again—a question about this bread-and-water provision.

Mr. WELS. Yes, sir.

Mr. ANDERSON. On page 4 you say: "Other punishments are available, however," but you fail to specify what they are.

Mr. WELS. The bill specifically provides other punishments that may be imposed by the commanding officers at mast or at company punishment. It permits him to confine them without bread and water—just ordinary imprisonment.

Mr. ANDERSON. You mean starve them?

Mr. WELS. No, to confine him on full rations. I am just looking for that section number.

Mr. SMART. Article 15 is the article to which you are referring.

Mr. ANDERSON. If what you had in mind there is in the bill, all right. I just wanted to know what you had in mind by your statement——

Mr. WELS. What I had in mind is provided for in the bill.

Mr. ANDERSON. I thought you said: "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."

Mr. WELS. Yes. I think that would be a fair amendment, sir.

Mr. ANDERSON. One other thing here. In referring to article 88, which provides that any officer who uses disrespectful language, and so forth—do you think that ought to be reversed?

Mr. WELS. No.

Mr. ANDERSON. I mean, if the President uses disrespectful language?

Mr. BROOKS. Well——

Mr. ANDERSON. We will take that off the record.

Mr. BROOKS. Any further questions?

We thank you very much——

Mr. RIVERS. It so happens that the President was right when he made that statement.

Mr. WELS. I do not think he was talking about anybody in the service.

Mr. BROOKS. We will not go into that at all.

The next witness is Mr. Arthur Farmer, chairman of the committee on military law of the War Veterans Bar Association.

Mr. Farmer.

STATEMENT BY ARTHUR E. FARMER, CHAIRMAN, COMMITTEE ON MILITARY LAW OF THE WAR VETERANS BAR ASSOCIATION

Mr. FARMER. Mr. Chairman and members of the committee, I am frankly not going to cover everything or nearly everything I have in my statement.

(The prepared statement follows:)

PREPARED STATEMENT OF 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. 50½; 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 underestimate 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 10 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, pp. 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 break-down 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 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, condemning 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 Keeffe 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 nor the power to pass freely upon the guilt or innocense 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, p. 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 courts, 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 commaidnng 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, art. 22) to convene a court with no greater diffi-

culty 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 subdivisions (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 nonjudicial punishment. In the Army an accused has the right, under the provisions of the Manual for Court Martial, to refuse such punishment and demand trail by a court cartial. 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 one-half pay per month for a period up to 3 months, and may in like manner reduce an enlisted man in grade or order him confined on bread and water for 5 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 nonjudicial 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 1 month, nor to reduce an enlisted man in grade. It is hereby earnestly recommended, however, that the nonjudicial 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 32: 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 10 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 15 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 30 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.

You will find, beginning on the bottom of page 7, a series of specific recommendations with respect to amendments of the articles. I do not think I should take the time to go into them. They are available for you. If I touch on them, it will not be in full.

I would like to first state what my experience has been, so you can judge for yourself as to the value of it. I served as an enlisted man in the Army, both in this country and in New Guinea, for 2 years.

I was returned to this country and went to Judge Advocate General's School. I was commissioned in the Judge Advocate General's School.

Mr. NORBLAD. At Ann Arbor?

Mr. FARMER. Yes, and served for a year as an assistant judge advocate in various camps throughout the South. Since the time I was separated from the service there has been no period in which I have not been at work on this particular question of court-martial reform.

Now I would like to say that my position is that this is a practical question. This is not a question merely of legality and of lawyers. The first thing an army has to do, I agree, or a navy, is to win a war and everything must be bent to that end.

So the question comes up: Are any reforms which are being advocated here likely to interfere with the prosecution of the war or the maintenance of discipline? If they are, they have to go.

Now, this code as a code, as far as it goes, is a perfectly splendid piece of work. It does safeguard the rights of the accused insofar as he will have adequate counsel. It does safeguard his rights insofar as he has a real, honest-to-goodness law officer who performs the functions of judge. It has a splendid system of review. And it has many other provisions which I am certainly in accord with.

It does not, however, as the other two gentlemen who preceded me said, remove the influence of command over the courts.

Now, if the influence of command over the courts is necessary for the maintenance of discipline and the winning of wars, then let us have it.

But I have yet to be given any facts which indicate that that is true. As a matter of fact, when the Vanderbilt committee which was appointed by Secretary of War Patterson had the question before him their conclusion was from the testimony which they got of commanding generals, the Secretary of War and various other officers including members of the Judge Advocate General's Department, that the true administration of justice was an aid to the winning of wars because with a failure of honest justice you had a falling off in morale.

There is always a question that I want to put to somebody who says, "We don't want to interfere with the courts, they must be independent." The officers of the court make the statement that they will render justice according to the dictates of their conscience and yet who say nevertheless command must keep control over these courts.

And the question is: For what purpose? "If you don't want to influence them, why should you insist on keeping that command influence?"

Now, what is the situation? Of course you have the same old story that was mentioned by Senator Norris when the Chamberlain bill was before the subcommittee in 1919. You have the commanding general who is in effect if not in law the prosecutor appointing the

court, ordering the case to trial, appointing defense counsel, appointing the trial judge advocate—the prosecuting authority—and when they get all through with it, then initially reviewing the record.

Now, that is an intolerable situation because as a practical matter—no matter how many articles 37 you write forbidding coercion of the courts—so long as there are commanding generals who feel it is their duty to influence the courts because discipline requires it, they are going to find means to do so.

When I was down at Camp Gordon and it was done in one instance very beautifully by putting the officer under arrest by written order instead of the usual way which is by word of mouth.

The court could not have been more influenced if each and every officer was called before him and told, "Look, this man is guilty and make an example of him." In other instances, the way it is done very simply is that there is a heart-to-heart discussion between the general and his operations staff officer.

They discuss the seriousness of the offense, in the hearing of a couple of other officers, and the Army grapevine which functions so beautifully goes into action, and every member of the court knows about it.

In other instances what happens is that the general will call the president of the court in and he will say, "You have a series of very important cases and I want you to consider them most carefully because the entire discipline of the command depends on them."

Now, that could be taken to mean: I want them acquitted, but I do not think it would normally be because you do not call the president of the court for the purpose of saying you want him to be acquitted.

And yet, under article 37, you will not prove a blessed thing that anything improper had been done.

So the only way in which you can prevent command influence on the court is by taking it out of the power of the command to do it.

Now, this does not require any radical revision of the present system. It does require that having set up an independent Judge Advocate General's Department you put the power to appoint the courts and counsel and to conduct the initial review under that group.

Now, how can you do it? All that you have to do is to have the appointing authority and the senior judge advocate and the junior legal specialists attached to the next higher echelon than the one that is ordering the man to trial.

That does not mean that the commanding general or the commanding officer in the Navy loses the power to assign his officers. He will submit a panel of officers who are available for court-martial duty.

Today he simply designates those officers as a court. If the situation which I am making is carried forward, instead of designating that as the court, he will designate these officers as available for court duty.

Then the judge advocate at the next higher echelon will appoint from the panels that come to him from the various commands courts to sit and hear the case.

Now, that does not mean that if a man comes up for trial from the Twenty-second Division he necessarily must be tried by a court appointed from officers from the Fifth Division, or the One Hundredth Division. In the normal course, where your commanding officers keep their hands off the courts, there is no reason in the world why the accused cannot be tried by officers from his own command.

And I would expect that in the normal course the judge advocate at the higher level would appoint a court consisting of officers from that very division.

But there will come cases where feeling runs high in a command, where perhaps there has been some invisible exercise of authority which results in disobedience by an inferior—whether it is an officer or an enlisted man—and it becomes a cause célèbre in that division.

There the authority is being challenged and, by golly, it is going to be vindicated by a conviction whether the man is guilty or not. That is the type of case in which the judge advocate at the higher level should have the power to order trial before a court consisting of officers from some other command.

There may also be instances where it is found that the commanding general is consistently trying to influence his courts. In those cases men should be tried before courts appointed from panels of officers from other divisions or other headquarters.

It may be that you have any number of situations that might come up where the ordinary and expected even-handed dispensation of justice is followed up.

Now, all that this is intended to do is to take care of those situations which are not now being taken care of. You cannot say that we are going to discipline or reprimand or remove a commanding general because he interferes with the court. The purpose of the Army is to win the war.

If you have a good fighting commanding general of a division you are not going to discipline him or destroy his effectiveness by repremanding him because he sticks his fingers into his courts in good faith.

But you do have to do something so that the men in his command do get a fair trial. And the only way you are going to do it is by taking that power away from him. Let him continue as a fighting officer, but also let the officers and men in his division have a fair trial.

Mr. RIVERS. In that connection, do you think it will be easy to incorporate that philosophy or that recommendation in this particular piece of legislation?

Mr. FARMER. Yes; I think it would be very easy, sir.

Mr. RIVERS. Very easy to put it in here. I have not gone into it fully, but I have heard the objection that maybe subsequent legislation should follow this recommended or advocated objective.

Mr. FARMER. Well, sir, the point is this: Here you have under part V—appointment and composition of courts martial——

Mr. RIVERS. Therefore you contend it is not hard to put it in this particular piece of legislation?

Mr. FARMER. No; it is not difficult at all. It can be done very simply.

Mr. RIVERS. All right.

Mr. FARMER. Now the objection to that that comes up is: How about your isolated commands? Well, it was taken care of in the last war. In the north African theater they had many isolated commands and many times where they had a company or separate detachment over somewhere they simply did not try them by a courts martial appointed out of that little bit of a group.

What they did was to have traveling teams. They had a three-man team: Law member, trial judge advocate, and defense counsel. And the command was large enough so that you could expect unprejudiced officers.

They simply sent the team out, and the team tries those cases. Where the command was not large enough you took the accused, you took one of two witnesses—and unless it is a capital case you could take deposition—and you moved them, as was suggested here earlier, by plane to the nearest base and you tried them there.

And there was not any undue delay.

Mr. GAVIN. What were the results from those teams? What was the reaction from them? What kind of work did they do?

Mr. FARMER. Excellent work.

Mr. GAVIN. Excellent work. They were unprejudiced. They went in there and knew nothing except to take the case and handle them clearly, as they saw it.

Mr. FARMER. Yes; that is right. And the best testament to it was it was first started as an experiment and then it was continued and put into common usage. In fact, in this country, in the Sixth Service Command, sir, there was one group of general courts martial at headquarters of the Sixth Service Command.

And at every trial before a general courts martial the accused was brought from wherever he was in the Sixth Service Command to the headquarters to be tried by these independent courts, and they functioned beautifully.

Mr. RIVERS. Who was responsible for that directive creating these independent teams?

Mr. FARMER. That, sir, I cannot answer. But I think it was done in the first instance at the suggestion of the staff judge advocate attached to the north African theater.

Mr. RIVERS. The reason I ask: You recall last year we had opposition from the General Staff, whomever it was, opposing an independent Judge Advocate General. You remember that, sir?

Mr. FARMER. Yes, sir. This I must say, Congressman Rivers, was not a question of an independent Judge Advocate General's Department.

Mr. RIVERS. But——

Mr. FARMER. The way it worked out, it was.

Mr. RIVERS. That is what I am talking about.

Mr. FARMER. And that is one of the better things about moving the power of appointment to the higher echelons. When you get to the higher echelons, you do not have the officers putting their fingers in the court. You do have some independents.

But here, where you had testimony opposing it, I think you had your witnesses speak of those who functioned at the higher echelons and not people I have worked with as an enlisted man, working with a trial judge advocate that was not a lawyer, but who was trying cases when men were on trial for their lives and for manslaughter and for disobedience to orders.

It would mean working right down the division, or some place like Finchhaven where I was, to see how those things worked out.

Mr. BROOKS. You referred to a case where the members moved to the Sixth Service Command Headquarters.

Mr. FARMER. Yes, sir.

Mr. BROOKS. And the cases were tried there.

Mr. FARMER. Yes, sir.

Mr. BROOKS. What do you do about the witnesses?

Mr. FARMER. In most cases, sir, in which an Army offense is involved there are two witnesses—at the most three witnesses.

Mr. BROOKS. Well, you have lots of crimes against the civilian population, where civilian witnesses are necessary.

Mr. FARMER. Where you have civilian witnesses, sir, it was necessary to have them travel from their homes to the place where the trial was being held. Time and time again, at Camp Gordon, we had to bring in civilian witnesses from Kentucky and other parts of Georgia because we had cases there of a statutory rape or an assault case which occurred when the man was AWOL.

Mr. GAVIN. Wherever the witnesses were, they could be brought back anyway.

Mr. FARMER. Certainly.

Mr. GAVIN. Without any difficulty.

Mr. BROOKS. You think that is better than bringing the court to the witnesses?

Mr. FARMER. I do not think, frankly, that makes much difference, whether you bring the court to the witnesses or the witnesses to the court. You still have to have some traveling involved and it is no harder one way than the other.

What I am pointing out here, sir, is that the availability of witnesses does not make impracticable the setting up of the courts under the system which I am suggesting. That does not present a problem.

Mr. ELSTON. As I understand it, you are pretty much satisfied with the provisions of the bill that we passed last year setting up a Judge Advocate General's Corps, except that you possibly feel that even that bill gave too much command influence?

Mr. FARMER. That bill was an excellent bill, sir, but it did not remove the power of command to influence the courts.

Mr. ELSTON. That is what I said. Except for that——

Mr. FARMER. Yes, sir.

Mr. ELSTON. The setting up of a separate Judge Advocate General's Corps as I understand your statement would meet most of your objections?

Mr. FARMER. It would not meet the objection to removal of command control because no matter how independent your Judge Advocate General's Department is, so long as command appoints the courts, the independence of the Judge Advocate General's Corps does not help them.

Mr. ELSTON. Well, with that exception.

Mr. FARMER. Yes, sir.

Mr. ELSTON. It would take care of the matter.

Mr. FARMER. Yes, sir.

Mr. ELSTON. That is the sum and substance of your whole statement.

Mr. FARMER. That is right, sir.

Mr. RIVERS. Let me get that, again. I want to be sure.

Mr. GAVIN. Me, too. I did not hear it.

Mr. RIVERS. As Mr. Elston said, if we were to provide that grant in this bill, that would meet a great deal of the objections which you now speak of as to the deficiencies of this bill?

Mr. FARMER. Congressman Rivers, you now have under the Elston Act an independent Judge Advocate General's Department. This

bill does not touch on that. It does not either destroy it or do anything to it.

Mr. RIVERS. That is right.

Mr. FARMER. So we start with the assumption that we do have an independent Judge Advocate General's Corps.

Now the question is——

Mr. BROOKS. For the Army.

Mr. FARMER. For the Army?

Mr. BROOKS. Yes.

Mr. FARMER. Yes, sir.

I am addressing myself to the problem of the Army because it is correlative in the Navy.

Mr. BROOKS. All right.

Mr. FARMER. And the Air Force.

And there—I do not know—I leave it with you gentlemen whether that should be separate legislation or whether it should not be. It may be you are putting too much in one bill, if you try to accomplish that in one bite at this time.

Mr. RIVERS. That is what I asked you a while ago, and you said it would be simpler to put it in here.

Mr. FARMER. It would be simple to put in the new method of appointing the courts under article 22 and the subsequent sections.

Mr. RIVERS. Yes.

Mr. FARMER. You already have in the Army your independent Judge Advocate General.

Mr. RIVERS. I know that.

Mr. FARMER. And there the independent Judge Advocate General's Department would appoint the courts. In the Navy you do not have that separate corps, but you do have legal specialists who are attached to the staffs of commanders at various levels.

Now it would aid, even though you did not have an independent corps in the Navy and in the Air Force, if you had the power of appointment coming from the echelon above the one where the man is being tried. You still need an independent corps.

Mr. RIVERS. I see.

Mr. FARMER. But what I am pointing out here is if you have your courts appointed from the higher echelon you go a long way to removing command control.

Mr. PHILBIN. Do you have language that you suggest might be incorporated in the bill?

Mr. FARMER. I have not actually drafted language, sir. I have outlined in my statement the method by which it would be done, however.

Mr. PHILBIN. And where would you put it in?

Mr. FARMER. You would put it in in rewriting Part V—Appointment and Composition of Courts Martial.

Now I will add this that, as a practical matter, I think you would have to limit that type of appointment for the most part to general courts martial. But it is the general court which has the power of life and death over your accused and which has the power to give a dishonorable discharge to prejudice his whole life to send him away for 40 or 50 years, as many of the courts did. It is that court which particularly must be safeguarded.

Mr. GAVIN. Why limit it to that? Even it some simple cases there were some very severe sentences that were passed out.

Mr. FARMER. By the general courts?

Mr. GAVIN. Yes.

Mr. FARMER. Yes, sir; there is no question about it.

Mr. GAVIN. So why limit it to a general court?

Mr. FARMER. Well, your special court is a different proposition. The power of the special court to sentence is so limited that although I would like that to go to special court I realize the argument of the Army and the Navy that it is not always practicable to put the appointing authority in a higher echelon.

There, in your special courts, as you will see here, sir——

Mr. SMART. Article 21.

Mr. FARMER. In special courts: Adjudge any punishment except death, dishonorable discharge, dismissal, confinement in excess of 6 months, hard labor without confinement in excess of 3 months, and forefeiture of pay not exceeding two-thirds pay per month for 6 months.

So practically speaking, a special court cannot impose any confinement of more than 6 months.

And I do make a suggestion in my statement here that if the special court is to have the power to adjudge a bad-conduct-case charge, which certainly would prejudice any man in civilian life, that there the accused is entitled to the protection of a legal officer, that is a law officer, on that court. And only in such instances would it be necessary.

Mr. BROOKS. Mr. Farmer, Mr. Norblad would like to ask you some questions.

Mr. NORBLAD. Mr. Farmer, you were speaking of your experience in Judge Advocate General matters. I might say I defended in a number of courts martial during the war. I was judge advocate in a number of cases.

I was also a law member and a staff judge advocate in the Ninth Air Force. I also attended the same school at Ann Arbor that you did. I agree with you 100 percent in what you say.

I think your biggest abuse in the courts martial during the war was command influence. Now, in the Elston bill, under section 37, there was put in a prohibition against that.

Mr. FARMER. Yes, sir.

Mr. NORBLAD. As far as I can see, in the new Courts-Martial Manual that came out a couple of weeks ago, under article 87 I believe it is, the Army has just twisted it around to make a complete change from the intention of Congress. Do you agree with that?

Mr. FARMER. I agree perfectly with that.

What is more, under the Courts-Martial Manual, they completely emasculated article 11 which provided that if the trial counsel is a lawyer and qualified in the specific manner mentioned there, then the defense counsel must be.

Now, by putting in the manual, in paragraph 56, that that only applies to your defense counsel and not to the assistant defense counsel, they have completely vitiated that provision under the regulations they have promulgated which are supposed to implement the Elston Act.

You have a situation, if the manual is to be followed, by which your trial counsel would be a lawyer and qualified. But your defense counsel actually defends the case. The assistant defense counsel does and he does not have to be so qualified.

So when you go to trial what do you have? You have a completely qualified prosecutor and a completely unqualified defense counsel.

Mr. NORBLAD. What is the reference to that, again?

Mr. FARMER. Paragraph 56, Manual for Courts Martial, 1949.

Mr. RIVERS. Of course, that is not surprising because they fought that proposal which we finally incorporated with everything they had in the book, if you remember.

Mr. FARMER. I remember that. That is why this bill must have everything in it and not leave anything, like waiving trial in lieu of nonjudicial punishment, to the services for interpretation.

The bill must be complete in itself. Otherwise it will be interpreted into nothing necessary. Like "if available" used to be in the old bill, where you had to have a member of the Judge Advocate General's Department if available as a law member.

Then the question was, When was he available? Under a recent decision of the Court of Appeals for the Second Circuit "if available" meant if militarily available and not if physically available. So in one case, the Hodges case, which was tried in the second circuit, you had the trial counsel who was a Judge Advocate General officer and the defense counsel was a Judge Advocate General officer, but the law member who was required to be one if available was declared not available.

There was not any Judge Advocate General officer available. So they went to bat without a Judge Advocate General officer as a law member.

Mr. BROOKS. Any more questions, gentlemen?

If not, we certainly thank you, Mr. Farmer, for a very fine statement.

Mr. FARMER. I thank the committee for its courtesy.

Mr. BROOKS. We have two more witnesses, do we not?

Mr. SMART. Yes, sir.

Mr. Chairman, I would like to announce for the benefit of the members of the committee, the remaining witnesses and the interested listeners here that the House will conduct no business today, so the committee is perfectly free to proceed with these remaining two witnesses, both of whom represent the American Legion.

Mr. ELSTON. There is a conference this afternoon, though.

Mr. BROOKS. There will be no business on the floor. However, some of the members have expressed themselves as interested in being present there due to the memorial service.

Mr. ELSTON. Are the witnesses from out of town?

Mr. SMART. Yes. We have one witness from Utah here.

Mr. TAYLOR. But if it pleases the committee, I will have the witnesses remain over and we can come before the committee tomorrow morning at 10 o'clock, if that suits your convenience.

Mr. ANDERSON. I think that would be excellent, Mr. Chairman.

Mr. TAYLOR. In fact, we would appreciate that very much, Mr. Chairman.

Mr. BROOKS. Which witness is that?

Mr. TAYLOR. The one from Utah, and the other one who is right here. I have one witness dealing solely with the Army phase of it and the other dealing solely with the naval phase of it.

Mr. BROOKS. We have 20 minutes now, gentlemen, and we could proceed with the next witness and then adjourn at noon to go over to the floor and take up tomorrow morning at 10 o'clock.

If that is all right with the committtee and it is all right with you, we will proceed accordingly.

Mr. SMART. Which witness would you prefer to proceed with at this time?

Mr. TAYLOR. If you are going to adjourn promptly at 12—I notice it is now a quarter of—I would really like to keep them together because there is continuity——

Mr. BROOKS. That being the case, if there is no objection the committee will stand adjourned until tomorrow morning at 10 o'clock.

Mr. TAYLOR. Thank you very much, Mr. Chairman and gentlemen of the committee.

(Whereupon, at 11:45 a. m., the committee adjourned until Wednesday, March 9, 1949, at 10 a. m.)

UNIFORM CODE OF MILITARY JUSTICE

WEDNESDAY, MARCH 9, 1949

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The committee met at 10 a.m., Hon. Overton Brooks (chairman of Subcommittee No. 1) presiding.

Mr. BROOKS. Gentlemen, the committee will please come to order.

I might say this morning we have these CBS microphones. The entire proceeding in the committee, as I understand, will be recorded, but the idea is that high lights in the testimony will be canned, so to speak, for use at some future time.

So I suggest, gentlemen, that you frame your questions accordingly, with the knowledge that they may later go on out over the air.

Mr. ANDERSON. Mr. Chairman, are you going to make the same suggestion to the witnesses?

Mr. BROOKS. Under that prompting, I make the same suggestion to the witnesses.

We are very happy this morning to have Gen. John Charles Taylor of the American Legion here.

General Taylor has some witnesses he is going to present to the committee. And I want to say, General, that we are always glad to have you before this committee. It is a distinct pleasure to have you. And I want you, if you will to present your witnesses to the committee. Then we can proceed with their testimony.

STATEMENT OF GEN. JOHN CHARLES TAYLOR, REPRESENTING THE AMERICAN LEGION

General TAYLOR. Thank you, Mr. Chairman, and gentlemen of the committee. The Legion certainly appreciates this opportunity. As you know last session, Mr. Chairman, we were helpful, I hope, in the legislation which was favorably reported by the committee and eventually as a result of all of our efforts included in the Selective Service Act when it passed the Senate and so became a part of law.

Presently, however, with unification, the problem has become a broader one. And this is something that the American Legion is deeply interested in. We have three and a half million members in the American Legion.

Two and a quarter million of them are World War II men. And we have over a million members in our American Legion Auxiliary. And this of course is something that has been before us for years. So we welcome this opportunity.

And I have here with me today as our witnesses—because we have divided it into two phases: The one dealing with the Army and Air Force, I will say, and the other phase dealing with the Navy—first of all, Franklin Riter a very outstanding member of the bar of the State of Utah.

In fact, he is a member of the bar in New York, Oregon, California, Utah, and Texas, and a member of the Supreme Court of the United States. He is a member of the Judge Advocate Association and the American Bar Association, and for many years was chairman of the property section of the Utah State bar.

In 1942 he sailed for England as a member of the original cadre which established the branch office of the Judge Advocate General in the European theater of operations, at Cheltenham, England.

And this branch was established, as you know, by order of the President. The office exercised its appeal at jurisdiction over courts martial of the theater until it was terminated by order of the President in February 1946.

He was chairman of the original board of review in the branch office as constituted by the President, and upon the increase of the panels of the court to five he acted as the coordinator of the boards.

He is the only officer who served in the branch office during the entire period of its existence.

And then, I have with me John J. Finn, who is the judge advocate for the American Legion for the District of Columbia and who for 33 months of the time that he served in the Navy was in the Office of the Judge Advocate General. He served on the board of review set up by the Judge Advocate General's office.

He assisted Judge McGuire and his committee in its inquiries which led to the conclusions set out in the report of the committee set up by Mr. Forrestal. He was the recorder and a member of the Ballantine Board then set up for the Navy.

So both of these witnesses are excellent lawyers in private and civilian practice presently, and I think they can give the committee some of the information and some of the facts that they are desirous of knowing.

And in particular, they can present the point of view of the American Legion, and after all that is what we are interested in: The point of view of the veteran as distinguished from the man who is in uniform.

From their long experience and their long actual experience with this entire problem, I know they can be of great assistance to this committee.

And Mr. Chairman and gentlemen of the committee, I certainly express my appreciation for the American Legion for this opportunity to appear before you.

Mr. BROOKS. General Riter, you have a prepared statement?

STATEMENT OF GEN. FRANKLIN RITER ON BEHALF OF THE AMERICAN LEGION

General RITER. I have and it has been filed with the recorder.

Mr. BROOKS. Just have a seat, sir, and proceed.

General RITER. Gentlemen of this subcommittee, I first must express my appreciation of this opportunity of representing the great American Legion. I am commander of the Department of Utah in the Legion today.

Since my return to civilian life after nearly 7 years' service, 4 years of which were overseas in that show, I have continued my interest and study of military justice.

It is not just casual conclusions that I have reached, but during the period of the long armistice I was a service officer and taught in Reserve officer's classes, as well as serving short tours of duty, and during that time observed the functioning of military justice.

Therefore, my conclusions are not hasty.

I want first to indicate to you gentlemen that the American Legion presents no program or ideas that will tear down our armed forces or their efficiency. An Army and a Navy has only one purpose, and that is to fight wars and win battles. They are not a social-service organization. They are not a reform organization.

And the last thing in the world that this great organization to which I belong desires is to do anything that would impair the efficiency of the services as a fighting force. On the other hand, the American Legion visions the new world and the new Army that we are living in and have today.

During that period of the small Army of 150,000 or 160,000 men, I suppose that the 1920 code that came out of that memorable investigation conducted primarily by the late Senator Warren of Wyoming, Senator Lenroot of Wisconsin, and the then Senator Wadsworth of New York, represented a great advance.

The history of that legislation, with the prolonged investigation, which was cut across by the feud between General Crowder and General Ansell, was indicative that as far as 30 years ago the legal profession—the profession to which I belonged and have devoted my life—was fully aware that we were in an evolutionary process and that no longer would the point of view in the approach to this problem be one of a small professional Army.

Let me remind you that there was a thesis that was laid down—and we found that in some of the law cases, even as high as the Supreme Court—that when a man put on a uniform he surrendered some of his rights as a free citizen.

It came into existence under that theory of contract of enlistment that a man did not have to belong to the Army or the Navy unless he voluntarily enlisted, and out of it came that curious theory that he surrendered certain constitutional rights.

Now I for one, from the beginning to the end, have asserted that the fifth and sixth amendments, with all the benefits, privileges, and rights thereunder, was applicable to the armed forces of this Nation except insofar as the provisions in the sixth amendment concerning presentment to the grand jury that our founders wrote into it.

With those exceptions that are stated in the face of it, I believe and I sincerely believe this morning that an American citizen when he proudly puts on the uniform of his country does not surrender those constitutional protections.

And, in my capacity as a member of the board of review in Europe, I have written opinions to that effect. And I have asserted it and I assert it this morning, notwithstanding the curious belief written by General Crowder and filed in the Warren investigation, where he asserted that those constitutional protections did not exist for the soldier or sailor in our forces.

And I want to make it plain to you that my remarks this morning are premised on that proposition that an American citizen when he puts on the uniform does not surrender his constitutional rights. And that is very important in some of the points I am going to discuss.

There is a very serious question of public relations involved in this, because no longer are we going to have a small professional Army of 100,000 or 175,000 men. We are going to have, thank God, a certain number of men who will devote their lives to the matter of national security.

The professional soldier, airman and sailor—we need them. And any of my remarks here today are not in derogation of those fine men in the least.

But I do assert to you that the Army that we will have—and my remarks are primarily devoted to the Army and the Air Force and not the Navy, as my associate, Mr. Finn, will cover that—will be a revolving Army, with men with 3, 4, or maybe 5 years in the service returning again to their civilian occupations.

And, consequently, I make a special plea here this morning that our professionals—our professional sailor men and our professional soldiers—please adjust their viewpoint to the fact that they must maintain a public relationship toward this revolving body of men so that when they return them to civil life they return them as friends and not as enemies.

And that is one of the premises that the American Legion comes here this morning with, because we are devoted to the cause of national defense.

I invite you gentlemen's attention to the fact that, during those dreadful days of pacifism through which we lived in the twenties and early thirties, what little visible force we had was all but destroyed through the subversive forces in America; it was the American Legion that was steadfast and valorous in the cause of an adequate national defense.

And that is why we stand forth as the leading sponsors of universal military training, because we believe that is the democratic process in this land of ours. So, on that premise, I invite you gentlemen's attention in this proposed bill to several matters that I consider of importance.

Now, I listened with great interest to Mr. Bryan's remarks here yesterday. Mr. Bryan and I, a year and a half ago, at the time H. R. 2575 (the Elston bill) was pending, had several personal conferences on this subject.

Now, theoretically, and in the ideas of a perfectionist, I agree with Mr. Bryan that the appointment of the courts—and I direct my remarks primarily to the general courts because Mr. Bryan did—by the Judge Advocate General would be desirable.

But I say to you gentlemen that, after close and careful study, not of a few months but of years, it is imposing an administrative impossibility upon the Judge Advocate General to do that.

Now, Mr. Bryan speaks of having panels submitted to the Judge Advocate General for the selection of the courts by him. That does not mean anything, because those panels would originate at the same sources where the court would be appointed under the present system.

And you may be pretty sure that the desires of the commanding officer of the Fifth Infantry Division or the Normandy Base would

show itself through those panels coming up to the Judge Advocate General. So, you gain nothing by it whatsoever.

And, furthermore, there is the administrative feature. It would require a personnel over here in the Pentagon devoting its entire time to the selection of those men. It is my deliberate opinion that such a plan is physically and practically impossible.

And I reach that conclusion with a good deal of mental travail because I liked Mr. Bryan's idea behind it; but, having lived through this as I did through 7 years, serving a year and half first in Washington here and then another year and a half when I returned from Europe, I am forced to the conclusion that it, from a practical standpoint, will net us nothing.

Furthermore, the other witness that appeared here yesterday discussed having a corps, say, appoint the court for a division, an army for a corps, and so on. It results in the same thing. Let us recognize the fact that probably the commanding general of the division would never see the panel recommended. It would be his chief of staff or one of his staff officers. Let us recognize just what it is.

And when you get all through with it, whether it is appointed directly by the Judge Advocate General's office here in Washington or by the judge advocate of a higher echelon, you get the same men as you would get in the first place, because you may be pretty sure that the same men would be sent up there on those panels as would be appointed if the division commander or the base commander appointed them in the first place.

Mr. RIVERS. In that connection, Mr. Chairman, will the gentleman yield?

Mr. BROOKS. The gentleman from South Carolina, Mr. Rivers.

Mr. RIVERS. General, are you going to suggest an alternative?

General RITER. Yes. I am going to tell you what I will suggest to you. And this will not be a popular one. But I want you to take that section here that prohibits interference or undue pressure with the court—article 37—and I want you to write into it a jail and fine provision enforceable in the United States district court and indictable under the civil law.

And I believe I am the first man that ever suggested that. I can find no other remedy to this situation.

Mr. DOYLE. Page 32.

General RITER. Take your article 37. It is an offense now probably under what we would call 96 or under proposed article 98 for deliberate violation of the provisions of the code. But I do not think that means anything. I agree with Mr. Bryan.

I agree with Mr. Wels. To leave it as it is means nothing, because can you imagine an outraged major or captain who has had visitations placed upon him by the appointing authority filing charges against the division commander? Well, I can't.

And then it would leave it to come from above, and I am pretty sure that, except in some case that invited public attention, no action would be taken. So my best thought on it is that that article 37 be amended so as to make it an indictable offense in the Federal courts, with a jail sentence or fine, or both on top of it.

And you can use the classical $5,000 or 5 years. It would transfer the prosecution into the United States district attorney's office. And

I have no constitutional difficulty with it for an offense committed in France or Italy or Europe because of the Blackner case, you remember, coming out of the Doheny affair, where Mr. Blackner fled to France and committed his offense.

Mr. RIVERS. Now——

General RITER. So, I have no constitutional difficulty with the thing because that would be an offense against the process of justice against the United States.

Mr. BROOKS. General, that would be a requirement that in the event anyone attempted to influence the decisions of any court——

General RITER. Yes, sir.

Mr. BROOKS. In the armed services.

General RITER. Yes, sir.

Mr. BROOKS. That action would then be punishable by fine and imprisonment not to exceed $5,000 or 5 years.

General RITER. I want the jurisdiction spread into the Federal courts. I do not want that left in a military-justice code. Leave it there. It makes duality of jurisdiction. But I want the United States district attorney to say in New York sitting over that thing.

And I will tell you this much: A general would be a fool, with that kind of thing facing him, to go monkeying with it. I admit it is moral pressure, more than practical.

Mr. RIVERS. You better think that through and look at the practical application of that suggestion.

General RITER. I have.

Mr. RIVERS. But let me make this observation, because my mind is just as open as anybody else's. We should also think about the statute of limitations, in preferring these charges, because nobody will have the nerve to even suggest such a thing until he becomes a civilian.

General RITER. I was going to touch on that, sir.

Mr. RIVERS. I see, sir.

General RITER. It is a corollary matter. You have to expand your statute of limitations so your statute starts to run, say, 3 years after the emergency or the war is declared.

Mr. RIVERS. I see.

General RITER. You have to change that. You cannot leave your statute run, allowing it to be barred.

Mr. RIVERS. That is right.

General RITER. Because you are going to be pretty sure that if there is any criminal prosecution instituted it is going to follow at least when the general comes back to the United States.

Mr. RIVERS. That is right.

General RITER. But I cannot, gentlemen, reach any other conclusion on that, because, as much as I like Mr. Bryan's idea, it is the practical aspect of it. And I want to introduce into this a moral pressure, so that a staff judge advocate, when he stands up to his general, will say, "General, I disagree with you. Now, you're boss, but listen; you have a penal provision facing you here."

I know this much: There is not any of us who would not take a second thought on the thing.

Mr. RIVERS. You would not suggest, though, that we abandon the idea of an independent Judge Advocate's office; would you?

General RITER. Oh, well, listen, I am one of the original men that fought for that separate promotion list.

Mr. RIVERS. So, in addition to what you have suggested, have a separate Judge Advocate General's office, too.

General RITER. Yes, but that does not get to this proposition of——

Mr. RIVERS. I mean in addition to this proposition. You would have a double grant.

General RITER. Oh, I am devoted to that. All the power you give to the Judge Advocate General I am for, because I think it is a safeguard. But I want to reach into this problem that the American Legion considers, sir, absolutely critical.

We do not want to destroy the disciplinary powers. We want to as far as possible make it practical. Now let me just give you the picture when General Patton broke through St. Lo and made the rur around the end and squeezed Paris.

General Patton—and this is from my own observations of the records of trial coming up from the Third Army—had the greatest of difficulty himself to convene a court because they were out there fighting a war.

To have Myron Cramer, who is Judge Advocate General, sitting back here in Washington trying to pick a court for George Patton's army making that fast run around the end just presents a physical impossibility.

And then, when you get over to General MacArthur's theater, to think of trying to impose that here at Washington is out of the question. It is impossible. The alternative, as Mr. Wels has suggested, I believe, is at the higher echelon. But you would get back to the same proposition. You would get the same men.

Now, if this Congress can work out a scheme where it is practical, fine. But I do not think it can be done. And I want to see this penal provision written in there. I have stood for it for years, and I believe it is an effective means of serving notice upon civilian and military men alike that these courts of ours in the Navy and in the Army are courts and they are not administrative arms of the generals. We had that fine-spun theory for years. It was very offensive——

Mr. BROOKS. General, would you not make your suggestion cover not only Army personnel, so as not to influence a service court but also anyone else?

General RITER. Certainly. Some of the most invidious things that we have had was the attempted influence of civilians upon military courts. It is something that a lot of us do not like to discuss very much, but it has been there, and it has been abandoned.

And I would make it a penal offense. Why should not the military courts, with the tremendous jurisdiction that they are acquiring, have all the protection that we afford our civil courts as to interfering with the processes of justice? I believe they should.

Mr. RIVERS. Why, of course.

Mr. DURHAM. You mean you would extend it to civilians, too?

General RITER. Yes; I would, indeed. Anybody.

Mr. RIVERS. Surely.

Mr. BROOKS. Mr. Doyle wanted to ask you a question.

General RITER. Yes.

Mr. BROOKS. Mr. Doyle, from California.

General RITER. Yes.

Mr. DOYLE. The general has already answered my question; thanks.

General RITER. Now I come on to another subject here. It was not discussed yesterday either by Mr. Bryan or Mr. Wels. That is this matter of pretrial investigation. It is one of the most bothersome and troublesome problems that they have.

If you will examine the testimony before the Warren subcommittee 30 years ago, you will find suggestions that this pretrial investigation under A. W. 70 of the 1920 code was to be similar to a committing magistrate's hearing in civil life.

Now, very early after the adoption of the 1920 code, the Judge Advocate General, in a series of opinions, held that pretrial investigation after the filing of charges was jurisdictional and that a failure to comply in a substantial, material manner with the requirements of A. W. 70 destroyed the jurisdiction of the general court. That seems to have been the opinion and the law for 15 or 20 years.

Early in the Mediterranean campaign, however, when this matter of pretrail investigation became crucial, we had a board of review opinion approved by the Judge Advocate General that reversed that and held that A. W. 70—the pretrial investigation provision—was directional only, and that the failure to comply in the substantial manner with the provisions of A. W. 70 did not interfere with the jurisdiction of the court.

It was a Judge Advocate General's ruling on an opinion by a board of review sitting in Washington; and all boards of review throughout the world—both the European theater, the CBI, and the Pacific southwest theaters—felt that it was necessary to follow that rule, although it was a complete reversal of 15 or 20 years' standing.

After the war was over and the habeas corpus started to appear—and on my return from Europe I was given special assignment, living in the Federal courts down here defending a number of these habeas corpuses along with Colonel Hughes—we had the notorious Hicks case appear up in the middle district of Pennsylvania, with Judge Biggs, now in the circuit court of appeals, writing the opinion.

Now, the interesting thing about the Hicks case was that Hicks was charged with rape on an Englishwoman. There was enough evidence there, in testing it by my civil standards, that had I been a trial judge I would have sent that case to the jury.

There was a conflict in evidence. There was the whole question of consent and that typical thing in your rape case. But when Hicks landed back here at Lewisburg, under a sentence that had been substantially reduced, he employed counsel and commenced habeas corpus proceedings.

And in the Hicks case—*Hicks* v. *Hyatt*, in 64 Federal Supplement 238—Judge Biggs held that compliance with the pretrial investigation was jurisdictional and that, since there were defects which he discoverd in habeas corpus proceeding, the general court sitting there at the western base section in England had no jurisdiction over Hicks and the judgment of conviction was void.

The Hicks case has produced a tremendous amount of difficulty both for the Department of Justice, the Attorney General, the Solicitor General, and the Judge Advocate General, because, remember, on those appeals on one side it must be conducted by the Solicitor General.

Now, simultaneously we had the same type of proceedings originating out in Kansas, Ohio, Oklahoma, and Georgia. We had a

series of cases that adopted in principle the Hicks doctrine, but found substantial compliance with A. W. 70. There is a great group of those cases today, some of them finding substantial compliance and denying the writ, and others finding lack of compliance and following the theory of the Hicks case and setting the man free. There is the greatest confusion in the law today on it.

Now I note with interest how the draftsmen of this proposed code have met that situation, and I think they have met it bravely, and I approve of it. They declare that noncompliance with the pretrial investigation requirements is not jurisdictional, but that upon being invited to the attention of the court, shall take one of two actions.

It shall either order a further and an additional investigation and report it back to the convening authority, or it shall recess until the accused and his counsel are placed in possession of evidence discovered at the pretrial investigation.

It appears to me that that is the satisfactory answer to that problem, because operating, if you will permit me, with the new discovery provisions of the civil rules of our Federal courts, that right of discovery is an important thing.

I have a case now pending up in Wisconsin where my whole case is built on my ability to go in and discover the records of the defendant company. Otherwise I could not prove my case.

In some of our States that right of discovery has not been elaborated as it has in the Federal rules. But right there is an example where there should be the greatest amount of discovery not only on the part of the prosecution but on the part of the defense.

And all evidence discovered should be readily made available. And, as Mr. Bryan or Mr. Wels suggested, not only the testimony of witnesses but any documents should be turned over to the defense.

We cannot conduct litigation today on the old principle that it is a game of chance. We lawyers are insisting that there be frankness in disclosing your evidence before trial. And I believe that that principle must be carried forward here. And it appears to me that this provision as now written meets that situation.

Now that brings me to my whole pet of the thing, and that is article 44, the double-jeopardy provision, which has been carried forward from the 1920 code. And let me read it to you. It is not long:

> No person shall without his consent be tried a second time for the same offense, but no proceeding in which accused has been found guilty by a court martial upon any charge or specification shall be held to be a trial in the sense of this article until a finding of guilty has been final after review of the case has been fully completed.

That is an archaic provision, gentlemen, that must go, because the day before yesterday there was argued in the Supreme Court, just a few blocks down the street here, the famous Wade case on habeas corpus.

And that case is my pet, because for 30 years this section 44 of the uniform code has been offensive to any lawyer that I have ever talked to. It is archaic in the sense that it keeps only "autre fois acquit; autre fois convict"—the old common law idea that there had to be a verdict before jeopardy could attach.

That is, a man had to be acquitted or he had to be convicted before he could plead. We know that that is not the law under the fifth amendment today—that jeopardy can attach in our civil courts as soon as the jury is sworn and the first witness sworn.

And yet the military courts have attempted to perpetuate that archaic rule. Now Wade was convicted of rape. He had a full trial. The court went into closed session to deliberate upon its verdict.

It came out an hour later and told the judge advocate:

> We want you to bring before the court the father and mother of the complaining witness and want to hear their testimony. And we will adjourn this court until the call of the president. Bring them here.

A few days later the commanding general of that infantry division transmitted the case to another outfit further up on the line and asked him to take jurisdiction and try the man because the witnesses were available at that point. That jurisdiction transmitted it to a third jurisdiction. And Wade was brought to trial on the charges before a new court.

His counsel, Richard Brewster, of Kansas City—and the case is unique in this respect—who was his defense counsel in that court-martial proceeding in Europe, argued his case the day before yesterday in the Supreme Court of the United States.

He has continued that case straight through from beginning to the end. At the second trial he presented a completely extended stenographic record of the first trial and made the plea of double jeopardy.

And it was promptly denied under this archaic article because the general had withdrawn the charges before they had been acted upon.

It came up to the board of review. The board of review No. 4, composed of three very fine lawyers from civil life—one who is now in Washington, one who lives at Scottsbluff, Nebr., and one at Center, Tex.—wrote a memorable opinion on it.

The Assistant Judge Advocate General differed from it in this respect: In his endorsement he did not like this archaic doctrine displaced by this, and for the first time there was introduced into the interpretation of this statute—in order to save the constitutionality of it, we believe—the doctrine of imperious necessity.

We found because of endorsements in the record that there was an imperious necessity in view of a tactical condition on the battlefront that prohibited the production of the witnesses at the first trial.

The curious thing is that Justice Murrow, who wrote the opinion in the trial court—that is, in the district court in the habeas corpus proceeding; I forget who wrote it in the circuit court of appeals reversing Justice Murrow—and the circuit court of appeals both take the same premise, that this statute is not complete and that the doctrine of imperious necessity prevailing in the Federal courts—that is, that jeopardy may attach before verdict—prevails notwithstanding this article in the military courts.

Then the decision goes off, and where Murrow the trial-court judge differed with the circuit court of appeals was whether proof of imperious necessity had been established.

I make a special plea to Congress to take that archaic article away from us and put a modern article in that would——

Mr. BROOKS. General, would you want to suggest changes? Would you submit to the committee any changes?

General RITER. I have not attempted, sir, to draft any statutory changes on the thing. In re Cornero, a circuit court of appeals decision—and undoubtedly it will be cited here in the Supreme Court decision on it—carried language that could be very well carried over into a statutory enactment.

It recognizes the common-law pleas of former conviction former acquittal, and then the proposition that jeopardy may attach before findings. The Wade case is a classical example of what will happen in allowing the convening authority to take two bites at the cherry.

It was obvious there because Wade was charged with another soldier and the other soldier was acquitted, and it was obvious what was going to happen in the Wade case. There was going to be an acquittal.

But the court, with its right, as any court has, to have other testimony brought about, it asked for additional testimony. In the Federal court a district attorney must have his witnesses in court at his peril.

He cannot go ahead and try a lawsuit and put a man in the penitentiary and then, when he sees he is going to get licked, nolle prosse his case and then come back and take a second bite.

No commanding general should be permitted to do that today. He has to try the lawsuit and win or lose it right there. That is consonant with our whole concept of Anglo-American justice. We have to get rid of these archaic provisions in the new Military Justice Code.

Now, there is another thing I want to talk about. I have long been an adherent to the idea and I want to get rid of that vermiform appendix on our military courts called the president.

I do not think there is any purpose for him on the court and I never have believed it. It is just a remnant of the idea that you have to have some boss there, some section boss. Oh, they call him commanding officer.

And I do not like it in a judicial body. I want the law officer given rank by virtue of his office. I do not care if he has a brigadier general on the court. I have asserted it. Now there are lots of civilian lawyers who will not agree with me on this thing, but I assert to you that that is another archaic survival.

That leads me right to this matter of the new function of the law member or law officer. We have many in the role at last, after some of us have advocated it for 25 years, of a judge. We have forbidden him to vote on the court.

Well, if you will get rid of that president of the court and give the law officer rank by virtue of his office, you have accomplished the whole thing. Now some of my associates in the Reserves, civil lawyers I am talking about now, do not like the idea—and I have consulted with them in the last 10 days—of taking the vote away from the law member and prohibiting him from the closed sessions of the court.

There is much to be said in favor of their argument. Now I am not presenting the military aspect. I am talking as a civilian lawyer to you. They take this position, that after all the law officer under the new set-up will be a lawyer—judge—and he is the stabilizing influence on the court and that his presence in the closed session of the court is absolutely necessary because his mandatory instructions here are not like the specific instructions of a trial judge. They are mandatory.

That is highly commendatory and it ought to have been there long before. But they are not all-inclusive of the offense. And to allow

a body of laymen to go into closed session without having some stabilizing influence along with them may produce injustice.

Now I am presenting that other angle to you. I personally prefer to have the law member out of the deliberative session.

Mr. ELSTON. General, what stabilizing influence does a jury have in any criminal case?

General RITER. Now you have answered my end of the argument for me. That is correct on the thing.

Now perhaps this matter of instructions to the jury opens up an interesting question. I do not think that the average jury ever did understand an instruction or a lot of instructions. That is really your trouble.

I am just presenting to you gentlemen the two sides of the argument on this thing. There is a very decided opinion among the civil lawyers who are interested in military justice that that law member should enter the deliberative assembly of that court.

Mr. ELSTON. Well, I agree with you that that is true. When you are defending someone you would rather have the jury decide rather than have the court in the jury room helping you.

General RITER. Yes; that is my personal viewpoint and my filed statement with you advances that theory. But I thought it fair to you gentlemen to invite your attention that there is a division of opinion on that.

But I would like to get rid of that president of the court. Then we have a judicial process there.

Now I am going to tell you something else—why that is. If you can break that command chain in there, by getting rid of that president, you have probably accomplished a lot toward the independency of the court.

Mr. ELSTON. You think you might solve it if you allowed the court to elect their own foreman, as the jury elect their own foreman?

General RITER. I do not know what good it would be.

Mr. ELSTON. I mean, he has no more authority than anyone else except to report the findings of the court.

General RITER. If you wanted to do that. But I do not like that man sitting in there when the chain of command comes on down. And I have never liked it. Why when I went before the Vanderbilt committee on this very thing and suggested it, frankly they did not pay much attention to it.

But I still assert that with the increased power of the law member it is a very necessary reform.

Mr. BROOKS. Well, General, if you did not have a president you would have to have a chairman or some presiding officer in the court.

General RITER. Well, let the law member do it. He is the judge.

Mr. BROOKS. You would allow the law member to go behind the scene and deliberate on the verdict?

General RITER. No; I do not want him there. I do not want a judge in any jury room.

Mr. BROOKS. And if you leave it to selection of the personnel of the court itself, will it not always end up on a basis of seniority?

General RITER. It probably may.

Mr. BROOKS. The senior officer will be the presiding officer of the court.

General RITER. Officially you take that man out of the court. That is the important thing. That is a survival of the idea in the days when the courts were the administrative arm of the commanding general. That is where that came from.

Now to pass on. Mr. Bryan passed on 66 (e), which allows the JAG to take the second bite of the cherry. When he finds one board of review that he cannot agree with he can shop around in his command and get another one. That is an insidious thing.

To refer the case again for reconsideration by the board of review that originally heard the case, yes, because that is nothing more than occurs on a petition for rehearing. But not another board of review.

That is just the kind of thing that has been fought administratively for years in the Judge Advocate General's office.

Now, this brings me to article 67: The setting up of this new court, this new high court. That section is badly drafted. I cannot imagine how the draftsmen let that by. The section as it is is ambiguous. It says nothing about tenure of office. It does not say how many.

And beyond all peradventure if the President appoints it the Senate should confirm those appointments because they are circuit courts of appeal justices. I think the whole section should be rewritten, with before it the provisions of the code relative to the circuit court of appeals and let it parallel it very closely as to the qualification.

Mr. DURHAM. You agree with this section?

General RITER. Oh, a hundred times, but I want the name changed. I want that called military court of appeals. I do not want it called judicial council, because that carries the idea that that is another administrative body set up within the confines of the War Department or the Air Force.

Let us give it its right name and its dignity. And it will have a tremendous influence on the public. Let us call it the military court of appeal—that is what it is—and give it its dignity.

Mr. DURHAM. Would you add the word "civilian" to it?

General RITER. What is that?

Mr. DURHAM. Would you add the word "civilian" to it?

General RITER. No; I do not think it is necessary. I make a special plea that the name be changed.

Now there is one other provision that I should have touched on and that is courts martial records, particularly with reference to exterior matters happening before, at, and after trial. My boards of review in Europe watched constantly for attached papers or suggestions in the record as to undue influence of the general sitting up there.

We were laying for it. Toward the end of the war, when things were established, we began to find in our records where defense counsel did not hesitate to throw into the record the kitchen stove if it involved this matter of undue influence. You see, we passed in this war to the stage where after all the American lawyer was amounting to something final.

We were told at first that this was going to be a war without lawyers in it. By that time we justified ourselves. And the defense counsel came along—and gentlemen we had some marvelous trials—and would throw into the record, oh, orders that would come down from headquarters.

But I would like another provision to supplement this matter of records that would provide definitely and make it mandatory that the records of trial contain copies of all communications or, better, the original communications passing between the general and the court, any communications between the court and the general, including the staff judge advocate, and require that there be attached to the record a summary, or, better, a stenographic report of any oral conversations between the general and his court and get it right there so the board of review can get at it.

That is the thing that impaired us. We could not get behind that and we knew that in some cases that thing existed. Yet we did not have anything before us.

Mr. ELSTON. How would you perfect your records by getting oral conversations between the commanding officer and the court?

General RITER. Well, make him have a stenographer there.

Mr. ELSTON. Well, suppose the oral communication between the commanding officer and the court was out of the presence of a stenographer?

General RITER. Well, that is something again where you are touching over into a practical proposition. Honestly, I do not know the answer to it.

Mr. ELSTON. Section 37 prohibits any effort to use influence.

General RITER. Yes.

Mr. ELSTON. On the court.

General RITER. Yes.

Mr. ELSTON. I do not know just how you would make a record of oral conversation.

General RITER. Well, there have been instances—I have talked with officers about it—where after he has appointed the court he has called them into his office. There should be proper injunction——

Mr. ELSTON. Well, if he does that now under section 37 he would be guilty of an offense.

General RITER. All right. Then, if he is so foolish as to try it, I should think that should be written into the statute. I would like to see that so we can perfect our courts martial records against that kind of thing.

Mr. ELSTON. Of course I am in thorough accord with you that you have a complete record so far as you can.

General RITER. We just could not get some of those things.

Mr. ELSTON. But to require some of the things you just suggested would seem to me to be an impossibility, such as conversations between——

General RITER. I admit, frankly, the practicality of it. But there should be some injunction there that that thing be contained in the record so as to give the appellate tribunals the chance to get at it.

Mr. BROOKS. Well, General, will you not go back to your original suggestions there that you would make all influences which are improperly brought to bear on the court punishable as a crime.

General RITER. Most emphatically; I do.

Mr. BROOKS. And could you not incorporate that idea in the suggestion you made?

General RITER. Exactly. It can be done. It is a matter of draftsmanship.

Now, in conclusion, I believe that if this legislative body sets and enlarges the functions of the Judge Advocate General—and I am devoted to that principle, I believe in it—I think this committee and Congress should examine into very carefully this matter of clemency.

There was in 2575 a much debated little clause: "In the exercise of clemency." As originally conceived by Mr. Elston's committee, the Judge Advocate General exercised that. As I understand it, there were influences brought to bear to write a sweet little clause in there: "Under the direction of the Secretary of War" as originally written and then "Secretary of the Department."

After endowing the Judge Advocate General with those powers of clemency, they proceed to put that circumscribing clause in it. And this exhibits again the jealous desire to take from the Judge Advocate General those powers which he should be endowed with. It is quite obvious here in this draft that they do not intend him to have that.

Now if we are going to be honest, and come right down the line, where Congress says that the functions of the Judge Advocate General are judicial and not executive, then the Executive should exclusively have the power of pardon.

Why put these functions on the Judge Advocate General, if you are going to confine the powers of clemency to the Executive? Why do it?

Mr. DURHAM. We gave the Under Secretary of War statutory authority.

General RITER. Yes; I know it.

Mr. DURHAM. Why should we not give statutory authority to the Judge Advocate General?

General RITER. Fine, if he exercises it independently. But what I am talking about is that little clause: Under the direction of the Under Secretary of War. What that thing meant was that it just robbed the Judge Advocate General of his authority, except in an advisory capacity.

Mr. DURHAM. It is the old idea of chain of command.

General RITER. Sure; and we are going to get rid of that and make the Judge Advocate General with his corps independent of that.

Mr. DURHAM. That is what we have been trying to do.

General RITER. All right. Now that brings me to the petition for rehearing after trial—and I will quit—to the Judge Advocate General. Now I had a hand in bringing that about, at least the provisions for the practice in the manual.

This draft of the thing has emasculated it. It was intended as a relief for the accused and now they say he can file a petition for newly discovered evidence or fraud upon the court.

Why, gentlemen, that will be just a few cases. And the great power given under the 2575, of that power of the Judge Advocate General to relieve an accused who is in the hoosegow by the filing of the petition within 1 year, they have just emasculated and torn all to pieces—by putting it on newly discovered evidence and fraud on the court.

Well that is just holding up a chimerical thing that in practice does not exist. We want those powers that were written in 2575. And I know there are lots of cases where there is not any such thing as newly discovered evidence and there is not any fraud on the court.

But there have been surrounding facts and circumstances on the battle line, such as when that kid an away from the battle line or when he slugged the sergeant or maybe slugged the captain.

There were mitigating influences there which the Judge Advocate General under the 2575 provision had the right to take cognizance of. And this draft robs him of it. I make a plea to put it back.

Thank you.

Mr. BROOKS. Thank you very much, General, for the very fine statement that you have made and which has been most interesting to this committee.

Mr. Doyle asks to ask you a question.

General RITER. Yes, Mr. Doyle.

Mr. DOYLE. General, the reason I left your testimony, I had to go to another subcommittee and testify.

On yesterday I made the statement—I am a lawyer, by the way, at home——

General RITER. I know you are.

Mr. DOYLE. I made the statement that I felt at all times the facts should be reviewable. Am I in error?

General RITER. You are not. Listen—can I just take a minute on that? That touches me all off on this thing. When we set up the boards of review in the branch office of the European theater, we were independent of the command at the ETO. We sat as an independent judicial tribunal under the President as to military justice matters.

All right. That was the fifth paragraph of article of war 50½ that President Roosevelt acted on. And it had been overlooked during all of the years. Now, when that was set up there the internal practice of that reviewing board or court—we functioned as a circuit court of appeals—was not defined.

It was not defined by the statute. The President defined it in setting up the court. As a consequence we found ourselves having to develop our owh principle of law. And I had no place to turn except the circuit court of appeals.

And there we ran against that rule of where there is evidence to support the verdict. We have all lost our case on that. They would not go behind it. And time and again, if we would have had the right—we knew that certain witnesses must have been plain liars that stood there—to judge the credibility of witnesses and weigh the evidence our results would have been different.

And by the way, in that automatic appeal under the New York Constitution, I believe, for capital cases, or that form of automatic appeal that they have there, as I recall the constitutional provision in New York, on capital cases, it specifically gives the court of appeals the right to weigh the evidence and judge the credibility of witnesses.

I am most emphatic on that.

Mr. DOYLE. Thank you very much.

General RITER. Now this new court that we are setting up—you see how that is limited on points of law. Why that is inadequate. That court must have the power to go further than the circuit court of appeals.

Mr. DOYLE. Thank you.

General RITER. There have been too many convictions in the circuit court of appeals because the court would not go any further than say, "There is evidence here, that is enough."

Mr. BROOKS. General, I would like to ask you this question, that has been asked me.

General RITER. Yes.

Mr. BROOKS. Does the American Legion advocate the setting up of a separate Judge Advocate General's Department in the Navy and in the Air Force, as you have in the Army?

General RITER. The American Legion goes further than that. We have a mandate from our executive committee just recently asking that the functions of the Judge Advocate General of the Navy, Air, and Army be consolidated into one. Mr. Finn is going to present that aspect of it.

Mr. BROOKS. And that would be a separate force?

General RITER. Yes. Mr. Finn is going to present that.

Mr. BROOKS. Any further questions? Thank you very kindly, General.

General RITER. Thank you very much.

Mr. BROOKS. Mr. Finn.

Mr. POSTON. I am the associate director of the American Legion Legislative Committee. General Taylor had to leave to go to another committee meeting. I would like at this time to introduce Mr. Finn to you.

Mr. BROOKS. Just have a seat, Mr. Finn. We are very happy to have you, sir. You have a prepared statement, Mr. Finn?

STATEMENT OF JOHN J. FINN ON BEHALF OF THE AMERICAN LEGION

Mr. FINN. I have a prepared statement, sir.

(The prepared statement follows:)

PREPARED STATEMENT OF JOHN J. FINN, JUDGE ADVOCATE, DISTRICT OF COLUMBIA DEPARTMENT OF THE AMERICAN LEGION, CONCERNING H. R. 2498, THE PROPOSED UNIFORM CODE OF MILITARY JUSTICE, MARCH 8, 1949

I. INTRODUCTION OF WITNESS

The witness appears on behalf of the American Legion.

The witness was graduated from Northeastern University, School of Law. He was admitted to the Massachusetts bar in 1929 and was actively engaged in the practice of law in the city of Boston from that time until entry into the Navy in October of 1943. His practice was almost entirely devoted to trial and appellate work defending negligence and contract cases for insurance companies and others with a substantial experience in the defense of criminal cases.

Upon entering the service the witness was commissioned a lieutenant (junior grade) and assigned to the Office of the Judge Advocate General at Washington where he served for approximately 33 months in the review of general court martial cases. For approximately 3 months of that time he served on the board of review set up in the Judge Advocate General's Office near the end of the war. The last 4 months of his service were spent as recorder and member of the Ballantine Board set up by the then Secretary of the Navy, Mr. Forrestal, to review and consider revision of the Articles for the Government of the Navy, the providing of officers to perform law duties and related matters.

The witness also assisted Judge McGuire and his committee in its inquiries which led to the conclusions set out in the report of that committee on, relatively, the same subject.

The witness is a member of the Masssachusetts Law Society, the American Bar Association, the Federal Bar of Massachusetts, the Bar of the United States Court of Claims and of the United States Supreme Court. He is a member of the Reserve Officers Association of the United States. He is presently the judge advocate of the District of Columbia Department of the American Legion.

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II. GENERAL COMMENT

I expect to confine my remarks to three main categories: (1) Personnel concerned with legal duties in the Navy; (2) jurisdiction of naval courts; (3) review of cases—all of this in connection with H. R. 2498, the bill here under discussion.

The present bill is an admirable step forward insofar as military and naval justice is concerned. As will be noted in the commentary of the draftsmen of the bill, much that is contained in the bill is new to the Navy and represents improvements which many have thought long necessary and overdue. The format of the proposed legislation is also very fine and presents a readable, coherent, and readily understandable code which will enable those who are compelled to work with it, if passed, to accomplish their tasks with greater assurance and dispatch than has been the case in the past.

Furthermore, the purpose of the proposed legislation carries out the ideas of the American Legion in putting into one code the law applicable to all the armed services.

No better illustration of the need for such a code can be furnished than the case of *United States ex rel. Hirshberg* v. *Cooke*, decided by the United States Supreme Court February 28, 1949 (17 U. S. Law Wk. 4223).

I have attached to this statement, by way of an appendix, some of the objections which the Legion entertains to the passage of the bill in its present form. Some of these are in addition to those mentioned by Commander Riter.

My comments regarding the bill are furnished from the standpoint of one who has had to work with the Articles for the Government of the Navy, as presently constituted, as a reviewing officer of court-martial cases.

I am mindful of the fact that the purpose of our Military Establishment is to be prepared for war and, if it comes, to fight it efficiently and successfully. To accomplish such a purpose the commanding officers must have discipline and a means of enforcing order. You can't have a debating society holding forth in battle or when a ship is under way.

The question is: Can discipline be enforced without thwarting justice as the American people have come to know the term? It is believed that this can be done and that the present bill goes much further toward accomplishing this objective than has been the case in the past.

The present Articles for the Government of the Navy were adopted, in the main, in 1862 (34 U. S. C., secs. 1200 et seq.). There have been minor changes in the articles since that time, but none of any significance. Thus, it will be seen that the situation is substantially different than that prevailing in the Army where great reforms have been effected as late as 1948 (Public Law 759, 80th Cong.).

The Navy has not been subjected to the volume of criticism that has been the lot of the Army for three reason, in the opinion of this witness. First, it is a smaller and more compact organization; second, because of smaller size it could be more efficiently administered from the legal standpoint; and, Third, its powers to execute, discharge, and dismiss offenders, were not as broad as those granted to the Army.

The American Legion invites attention to a resolution adopted by the National Executive Committee at its meeting in Indianapolis, Ind., May 3, 4, and 5, 1948. The resolution reads as follows:

"Whereas, there has been effected a merger of the armed services; and

"Whereas, under the system of military law and justice presently existing and immediately contemplated, there are or will be a Judge Advocate General in each of the Army, Navy, and Air Force; and

"Whereas, the American Legion, interested not only in the economical but also adequate and capable administration and disposition of legal matters, sees no reason for the maintenance of three separate legal systems in the armed forces: Now, therefore, be it

"*Resolved*, That the Congress of the United States before enacting legislation presently pending in bills presented by the Army revising the Articles of War and by the Navy revising the Articles for the Government of the Navy be called upon to instigate an investigation of the present system to the end that more equitable and just disposition of courts-martial cases be had; that past injustices in the said system may be remedied; that the preferential treatment of offices of the Regular services over officers in the Reserves in the matter of retirement benefits may be abolished; that preferential treatment of officers over enlisted personnel in regard to courts martial be abolished;

"That the boards for the review of discharges and dismissals set up under the GI bill and the boards for the correction of military records for the review of discharges and dismissals set up under the GI bill and the boards for the correc-

tion of military records set up under the Reorganization Act (Public Law 601, 79th Cong., sec. 207) be made to act in accordance with the will of Congress and the people; and

"That consolidation of all legal offices of the armed forces may be effected and in the future be carried out under one head."

The position of the American Legion with regard to control of legal functions is adequately set out in the foregoing resolution. It is presented here and now for the consideration of Congress.

It will be noted that in England there has been a merger of the Air Force and Army Judge Advocate Generals' offices. A civilian has been put in charge. Due to the recent enactment of the legislation which effects this change, the Legion has been unable to look into the matter as deeply as it would like, but refers Congress and this committee to the London Letter in the American Bar Association Journal, page 75, in the January 1949 edition. The following statement appears therein:

"The position of the Judge Advocate General and the organization of his department has been under consideration for some time. The Secretary of State for War, Mr. Shinwell, stated on September 21 in the House of Commons that the Judge Advocate will, in the future, be appointed on the recommendation of and be responsible to the Lord Chancellor, instead of the Secretaries of State for War and Air. The responsibility for acting or not acting on the Judge Advocate General's advice in particular cases will remain with the Secretary of State concerned.

"The Judge Advocate General's Department will be reconstituted so as to separate the functions of pretrial advice and prosecution from functions of a judicial character. The former functions will be transferred to directorates in the Departments of the Secretaries of State for War and Air.

"The Judge Advocate General will also cease to be responsible for the collection of evidence against, and the prosecution of, war criminals. These duties will be carried out in the directorate of the War Office to which the Judge Advocate General's existing military department has been transferred.

"The reorganization took place on October 1, 1948, and a statement showing what are now the main functions of the Judge Advocate General has been circulated. He is to superintend the administration of military and Air Force law in the Army and Air Force, respectively, including the provision of deputies and legal staffs with the principal Army and Air Force commands abroad; provide and appoint judge advocates at trials by courts martial and military courts held in the United Kingdom and abroad; review the proceedings of courts martial and of military courts held pursuant to royal warrant (prisoner of war and war criminals), including the tendering of legal advice on confirmation, review, or petition. In the event of its being necessary to quash the proceedings he will make recommendations to the appropriate Secretary of State or commander in chief with this object. He will have custody of the proceedings of all courts martial and military courts, and will give assistance to each Secretary of State in the formulation of any advice it may be necessary to give regarding the proceedings of courts martial and military courts for the trial of prisoners of war. In his capacity as legal adviser to the Secretaries of State for War and Air, he will advise them on general legal questions affecting the Army and Royal Air Force."

The remainder of the remarks furnished herewith are made without contemplation of this suggestion, but are based upon the code as proposed in H. R. 2498.

III. PERSONNEL

No code can be drawn which will eliminate all abuses. You cannot legislate changes in human nature.

Unlike the Army, the Navy has not now, and never has had, a corps of lawyers. Until the recent war it possessed a very small group of officers who were regular line officers, but who had been sent to law schools. Some of these men were admitted to the bar of various States. Some, if not most, never were admitted to any bar. Of all the Judge Advocates General of the Navy, no more than two, or possibly three, have been lawyers admitted to practice before the bar of a State of the Union after taking a bar examination. This group was augmented by the use of a few civilians.

During the last war this cadre of legally trained officers served mainly in combat or at sea and not in legal capacities. Most legal billets were filled by Reserve officers called for the purpose, or by retired officers who had had some legal training.

After the conclusion of the war and because of the experiences of the war, the Navy, being cognizant of the vital need for the services of lawyers, accepted many Reserve lawyers into the Regular Navy.

All these lawyers are now known as legal specialists. They are officers of the line. Under the present system it is believed that an officer of this classification cannot attain to the position of Judge Advocate General of the Navy unless he has had experience at sea and in command functions.

A line officer who cannot take command of a ship should not expect to progress rapidly or very far if he is competing with officers who have such qualifications.

Hitherto the practice was to send officers to sea for a tour of duty after their legal training. After that tour was completed, they returned to legal duties for a tour in that capacity. This rotating system, in practice, afforded a man an opportunity to do legal work about every other 3-year period of his career.

As a result of the present system, at the start of the last war there was a necessity to create the office of the general counsel of the Office of the Under Secretary of the Navy. This Office took over all contract and legal procurement functions of the Judge Advocate General's office. This Office still functions. In effect, it creates two offices to carry on the legal work of the Navy. Justification for creation of the Office of the General Counsel and its continuance lies in the fact that sufficiently able and qualified lawyers have not been and apparently are not now available in the Office of the Judge Advocate General to carry on the legal business of the Navy.

In the highly complex field of law it is the belief of this witness that only one who devotes his full time to the law can hope to compete on an equal basis with other legal practitioners.

The system presently in vogue is not changed in the proposed code. Apparently it is anticipated that it will be continued. It is earnestly hoped that the Congress will set up in the Navy a system similar to the JAG Corps in the Army. Such a system at least insures that lawyers will do lawyers' work. It will have the further advantage of enabling lawyers, to some extent, to be promoted on their ability as lawyers. They will work as lawyers at all times during their naval career and thus furnish the Navy with a type of lawyer qualified to cope with those outside the service and with whom they must deal in carrying out their naval duties.

Such a system will have the further advantage, in time, of placing all the legal activities of the Navy under one head, instead of two, as is now the case. There will be no divided responsibility, and in all probability great economies can be effected as well as greater efficiency promoted.

The big business in which the Navy is engaged requires the acquisition and use of the best legal brains available. Unless possessors of such qualities can hope to rise to the top, there is no incentive offered them to enter or remain in the Navy.

IV. JURISDICTION

The American Legion calls attention to the expanded jurisdiction conferred upon military courts in the proposed code. It may be that such is necessary. If atomic warfare comes, there is the distinct porbability that within a few hours after the commencement of hostilities, all activities in America would be subject to martial or military law. All people would then become subject to the proposed or a similar code. At least military commissions would take the place of civil courts.

There has been of late a seemingly increasing inclination to widen the jurisdiction of military authority. In the past, Congress has zealously guarded the distinction between the civilian and the military indicated as essential by the writers of the Constitution.

The military has not always been content to remain within constitutional or statutory limits in this regard. Witness the cases of *Duncan* v. *Kahanamoku* (327 U. S. 304); *United States ex rel Hirshberg* v. *Cooke* (17 U. S. Law WK. 4223) *Rosborough* v. *Rossell* (150 F. 2d 809).

The American Legion is certain that the majority of those in the military and naval service intend to carry out their assigned tasks with the American spirit in mind and within limits imposed by statute and the Constitution. However, wherever an authority is granted, there will always be some who will take advantage thereof and abuse it: some through ignorance, and a smaller number through arbitrary willfulness.

With this in mind, it is the position of the Legion that the proposals in H. R 2498 in regard to jurisdiction should undergo the close scrutiny of all concerned before passage.

It may be that with its better facilities for obtaining information, because of world conditions, and possible defects in the present codes, the Congress will believe it proper to enlarge the jurisdiction as proposed or confer it to a greater extent.

In order to provide for temporary situations, and to correct the present codes, however, we should not surrender so much of our liberties that our form of government may or will be endangered.

If Congress, in its wisdom, decides it is necessary to widen jurisdiction, it is believed that professionally trained lawyers should administer the code. There is an almost vital necessity to provide an adequate and foolproof system of review. If jurisdiction is to be enlarged, it behooves us to enlarge the powers of the boards that are to review the actions of military courts and not so to circumscribe the activities of such boards that they are or can be rendered impotent in time of emergency or hysteria.

V REVIEW

The review procedures in the proposed bill are a long advance. It will be noted from the comments of the draftsmen that many of the procedures set up in this respect are entirely new to the Navy.

The Articles for the Government of the Navy make no provision for boards of eview. Late in World War II there was set up in the Office of the Judge Advocate General one such board. Its functions was to review such cases, with a few exceptions, which the officers charged with the duty of primary review in said Office were convinced should be set aside. Said board rarely handled a case which had been passed as legal.

When court-martial cases arrived in the Office of the Judge Advocate General, each was read by a single officer. If he passed it, the case was sent to the Bureau of Personnel for action on the sentence. No other legal review was had. On the other hand, should such officer determine the conviction was improper and seek to set it aside, the case was then reviewed by each of his superiors. If any superior disagreed, the case was passed as legal—sometimes, when passed by an intermediate superior of the first officer, the Judge Advocate General never saw the case. What officer whose fitness reports were to be marked by the intermediate officer would have the temerity to go over his head and appeal to the Judge Advocate General?

Under the system then, and even now, in vogue the officer who found or finds errors of law in a number of cases caused and causes a slow-down in the work turned out. A commanding officer, anxious to make a record for production, is not fully appreciative of the work of one who, because of his belief that legal violations have occurred, insists on writing an opinion. Such a reviewing officer, who in private life might be commended for his meticulous care and devotion to duty, might not receive as satisfactory a fitness report as one who, because of laziness, negligence, or ignorance, passes a case without writing an opinion.

In this connection it is believed that some figures which are to be found in the minority report of the Ballantine Board appointed by the Secretary of the Navy, which reported to the Secretary of the Navy on April 24, 1946, will be of interest to the committee.

Figures

In fiscal year 1945, 27,861 general courts-martial cases were received in the Office of the Judge Advocate General of the Navy. Only 60 of these cases were set aside in toto (0.21 percent) by that Office. Sixty-nine more were set aside in toto by convening authorities (0.24 percent). Thus, in the entire Navy, 129 cases, or 0.4 percent, of general courts-martial trials were set aside in toto. The total number of cases resulting in acquittals, reversals, nolle prosequis, and in which pleas in bar were sustained, were 682, or 2 percent.

The annual report of the Director of the Administrative Office of United States Courts for 1945 under the report of the Judicial Conference of Senior Circuit Judges indicates that 41,653 defendants were indicted in the year 1945. Of these 34,117 were convicted, and 7,536, or 18 percent, were not convicted. Of this 7,536, 6,369 were dismissed and 1,167 acquitted. The same report shows that in appeals in criminal cases in Federal courts, 18.6 percent of the convictions considered in 1945 were reversed.

In short, these figures show that naval courts, composed of legally inexperienced personnel, in considering cases handled by men also generally inexperienced or improperly chosen for their duties, freed only 1.9 percent of the accused brought before them, as compared to the 18 percent in Federal courts, presided over by

lifetime judges considering cases presented by professional lawyers, a ratio of 10 to 1.

In reviews by convening authorities and the JAG office, 0.4 percent of general courts-martial cases were set aside in toto. This must be contrasted with the 18.6 percent of cases set aside by the Federal courts, a ratio of 46½ to 1. If we assume for the sake of argument that 90 precent of the Navy cases were either pleas of guilty or cases where an appeal ordinarily would not be taken, and use only the remaining 10 percent, on the basis of review we find the ratio is still 4½ to 1.

Today the situation has been somewhat improved by the use of "panels" for the review of certain cases. The panels, however, are far removed from the Judge Advocate General, and the possibility of one man overruling the work and views of several still remains. Their use has no legal sanction in that they are not required by law and could be abolished if a Judge Advocate General desired to take such action.

Such a system should not exist and an attempt is made to eliminate it by the proposed code.

It is the belief of the American Legion that the dangers presently and formerly existing have not been effectively prevented in H. R. 2498. The possibility that, in time of emergency, or manpower shortages, real or imagined, the former practices will be reestablished should be effectually barred.

Former Chief Justice and President Taft once said when discussing civilian courts: "It is not only important that justice be done; it is equally important that the public believe that justice is being done."

The people in America have the idea that the Military Establishments are controlled by civilians. The Commander in Chief and the heads of our defense, military and naval departments, are civilians. When our youth is drafted into the service, it is a board consisting of civilians which determines the fact.

However, in cases of those who get into trouble in the armed services, there is no effective civilian control over the type of release the alleged wrong-doer receives.

A man may receive an administrative, bad-conduct, or dishonorable discharge. It is the belief of the American Legion that all such severances from the service should not be effected until a board of civilians has passed upon them.

Many military men have no conception of the effect of one of these discharges. The witness has heard a marine colonel state that a bad-conduct discharge was no more serious than would be the case if a boy after working for some time for an employer, was refused a letter of recommendation upon leaving his job.

We know such is not the case. Many boys have been denied the opportunity to go to school, find employment and enjoy life as others do for an indiscretion committed in the military or naval service, as a result of which they received discharges other than honorable or under honorable conditions.

Generally in civilian life, when one has been convicted and serves his sentence, he has been deemed to have paid his debt to society. The stigma of a bad-conduct, or dishonorable, and some types of administrative discharge follows a boy through life. Such discharges, etc., should only be given if thoroughly deserved.

A review by an officer whose promotion, even career, depends upon his relations to and with his superior officers cannot, in the nature of things, be that type of impartial review which should be afforded to maintain the confidence of the American people that when their boys are drafted or otherwise enter into military or naval service, they will get a fair deal.

When a case gets to the review stage the question of the deterrent effect of the sentence upon them, tempted to commit the same acts and the consequent aid and assistance to the maintenance of discipline, is absent. Generally, at least insofar as the Navy was concerned in the last war, the review takes place months after the conclusion of the trial, and the shipmates of the offender have shipped out or are far removed from the place where the offense took place.

Thus it cannot be successfully and convincingly argued that a proper civilian review would handcuff the command in enforcing discipline.

My comments, in the appendix below, relative to the proposed article 67, are applicable here.

Review by such a group would have a deterrent effect on some commanders. If it is contemplated that wider jurisdiction is to be granted to the armed services, the power and authority of this council intended to be set up should be substantially broadened from that given it in the proposed code.

VI. APPENDIX

Discussion here will be confined, in the main, to matters not touched upon in the statement made by Commander Riter. An attempt will be made to discuss the various articles in their numerical order and as they appear in the proposed code.

Article II, section 1, indicates that persons are subject to the code who are called, etc., "* * * to duty in or for training in, the armed forces, from the dates they are required by the terms of the call, draft, or order to obey the same; * * *."

Instead of making this code consistent with section 12 of Public Law 759, it is believed this section nullified the latter act.

It is not believed that, until a person is actually sworn into the armed forces, a military court should have any jurisdiction over him for offenses which it is believed this clause is attempting to anticipate and provide for. Until a person is actually inducted into the armed forces, he remains a civilian, and he should be tried, if he has committed an offense, by civilian courts. During the past war, the civil courts handled this type of situation adequately.

Article II, section 3, provides that Reserve personnel who are voluntarily on inactive duty training, authorized by written orders are to be subject to the code.

Without further implementation and clarification it is believed that this section as worded is far too broad to accomplish what is apparently in the mind of the draftsman. There is no question but what persons in the Reserve who are using expensive equipment of the armed forces should be subject to such a code for offenses arising out of the use of, or while they are using, the said equipment. As written, the clause allows too great latitude and creates too much uncertainty to be allowed to stand.

Article II, sections 11 and 12, indicate additional persons, mostly civilians, who are to be held subject to the code.

It is realized that presently the armed forces have the power to court martial some of these individuals. It is the position of the American Legion that broadening the jurisdiction to try civilians, as is attempted here, should be very charily extended. If the Congress believes that the armed forces should be allowed to try these people under such a code, the American Legion would not raise too strenuous an objection. We believe, however, that any such right should be closely restricted and circumspectly granted.

Article III (a). Jurisdiction to try certain personnel:

"Reserve personnel of the armed forces who are charged with having committed, while in a status in which they are subject to this code, any offense against this code may be retained in such status or, whether or not such status has terminated, placed in an active-duty status for disciplinary action, without their consent, but not for a longer period of time than may be required for such action."

It is suggested that this section should have a definite time limit inserted for the reason that, as drawn, it creates the possibility of persons being confined without trial for substantial periods of time.

"Article IV (b). If the President fails to convene a general court martial within 6 months from the presentation of an application for trial under this article, the Secretary of the Department shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issuance."

This section as written provides to great latitude and should be furnished with additional safeguards in order that, if a court martial is asked for, it can be had. As written, should the application become lost or pigeonholed and never reach the President within the 6-month period allowed, the service involved could administratively discharge the officer.

In general, with respect to all dismissals not only with regard to officers, but also as to enlisted men, it is the position of the American Legion that at the very least, if there is necessity to administratively discharge and a man is to be discharged administratively, he should be given a hearing before some board set up for the purpose. We have not been furnished with figures, but complaints which have come to our attention indicate that literally thousands of persons received administrative discharges from the armed forces during the last war. Many of these allegedly received no hearing before any type of tribunal, board, or court.

It is not believed that many officers have a true conception of what ultimate effect this type of severance from the armed services has upon the future of the person dismissed. Any severance from the service, other than an honorable discharge or similar action, has deprived boys of the opportunity to go to college, to obtain employment, and generally has created situations which, in many in-

stances, have been grossly unfair. Certainly such procedure is not in accord with American principles of justice.

Article 15 (b) provides that the Secretary of a department may, by regulation, limit the powers granted under this section generally.

Section (c) provides that the Secretary of the Department may, by regulation, specifically prescribe the punishments authorized by the section.

It is believed that the powers and punishments should be subject to the regulation of the President or at least the Secretary of National Defense. One of the complaints leveled at the armed services was the wide disparity in punishments, even in different commands of the same service. Passage of these sections will not remedy, but certainly create additional basis for complaint. If the powers and punishments indicated in this article emanate from one source, such action will insure uniformity of punishment for the same type of offense and a uniform exercise of powers throughout the armed services.

Article 15 (d) provides for an appeal through proper channels, but indicates the person may be required to serve the punishment adjudged in the meantime. In practice, it is believed that this section will prove to be a nullity. Possibly it will serve to clear the record of an individual, however.

Articles 22 through 29 discuss the appointment and composition of courts martial.

It is greatly feared that the matter which has caused the greatest amount of discussion since the close of the last war; namely, control by command over the functions of the courts, has not been remedied by the proposed sections. This aspect is emphasized by article 27, wherein it is provided that for each general and special court martial the convening authority shall appoint trial and defense counsel, etc. It is impossible for me to conceive that a person represented by designated counsel, from the staff of the command which has determined he is to be tried, will be felt to have received the vigorous defense which the American system has indicated one can expect in our courts. Even if the person is most vigorously defended, such a set-up is suspected and, even under the most enlightened administration, if a conviction ensues, criticism will always follow.

The question of availability exists. See comment under article 38 on this point.

Article 29 provides for absent and additional members. The procedures suggested in paragraphs (b) and (c) of said article, for appointment of additional members after the absence of certain members is not conducive to confidence that the conviction, if any, handed down by such a court would be correct. It is the position of the American Legion that once trial has started before a court, if, for any reason, absences among the membership accrue, the remaining members of the court should proceed to a finding. Provision can always be made in regard to general courts martial for having sufficient members appointed to the court to take care of the possibility that a member may not be able to fulfill his duties.

Article 34 (b) reads as follows:

"If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence may be made."

Without additional clarification this clause as it stands is objectionable. If the intent is to allow changes in the charges and specifications if clerical and typographical errors appear, there would be no objection to this section, except that it probably would be simpler to state that that type of error is contemplated and is to be corrected. However, when power is given as it apparently is herein to make changes in the charges and specifications to make them conform to the evidence, it is felt that such power in the hands of unscrupulous persons can lead to great abuses and certainly it is not believed that the committee would authorize a law of this nature. Placing curbs on this power in a manual is not a sufficient guarantee against abuses. The curbs should be specifically set out in the code.

Article 37, which deals with unlawfully influencing the action of the court, has been dealt with at length by Commander Riter. In addition to the comment made by him with which this witness agrees, it is noted that no penalty for violation of this article is set out in the article itself. The notes indicate that article 98 makes violation an offense. It probably would be more effective to indicate in the article itself that it is an offense.

In article 38 (b) it is provided that an accused shall have the right to be represented in his defense among others by military counsel of his own selection if reasonably available.

The provision of reasonable availability has been the cause of most of the criticism which has come to the attention of this witness with relation to the

furnishing of counsel, by the command, to a defendant. If counsel has been reasonably successful in defending culprits, his availability ceases or, in some instances, he has been made what is in this code called trial counsel, and thus obviously has been unavailable to defend cases. It is believed that some effort should be made if humanly possible to remove this restriction, not only in respect to this section, but wherever it appears in other sections and articles of the code.

Article 43 deals with the statute of limitations. Section (f) (3), if it is intended to be confined to military personnel in its application, is probably proper; but if it is intended by this means to enlarge the jurisdiction to make civilians responsible or to acquire jurisdiction over them, it is not believed that the section has any place in a military code of this nature.

Article 44 (d) deals with former jeopardy. In addition to what has been said by Commander Riter, the question arises as to what happens if a finding of "not guilty" is entered. The article, as written, deals only with findings of guilty. In the opinion of this witness, this section, after the first semicolon in line 23, on page 37, should be stricken.

Article 48 deals with contempt. While it is believed that a court of the type indicated or a commission should have the power to punish military personnel guilty of contempts, this section is so broad that it gives latitude for abuse. If counsel who is a civilian appears before such court or commission, he can arbitrarily be held in contempt. It is believed that a more satisfactory section, at least in regard to civilians, could be drawn if certification was made by the military court to a United States attorney as is provided in article 47 (3), (b), and (c). It should be noted that the proposed A. G. N. article 35 makes such a provision.

Article 49 deals with the use of depositions. It seems to the Legion that this section loses sight of the ancient right afforded in English and American justice of the right of confrontation of an accused by his accusers.

It is believed that no greater latitude with regard to the use of depositions should be allowed in the proposed code than is presently allowed under the rules of criminal procedure presently in effect in the United States courts.

In this connection, in the present naval practice, a provision exists for the use of depositions, but, if used, the sentence given is not to exceed one year. In practice in the Navy during the war, if a man was charged with three offenses, the Navy felt that it was justified in using depositions and in sentencing, and approving a sentence, in such a case for the term of 3 years.

It seems that the military services were able to get along from their inception until comparatively recent times without the use of depositions to convict alleged guilty parties. In these days of airplane and other means of rapid transportation, the necessity for the use of depositions seems to be less apparent than ever.

Article 52 deals with the number of votes required for a conviction under various circumstances. In each instance but one, there is a qualification indicative of the fact that the required number of votes is to be determined based upon the number of members present at the time the vote is taken. It is not believed that this qualification is necessary. It is the position of the American Legion that all the persons who sat upon the court should be present at the time of the vote. Such requirement will eliminate any possibility of criticism.

Article 62 (a) is not believed to be proper. Generally speaking, when the charges against the defendant have been dismissed in a criminal trial, such action is tantamount to an acquittal and, in most jurisdictions, a retrial cannot be had. This section, as written, allows the convening authority two bites or more of the apple and leaves wide latitude for abuse. Section (b) under said article also leaves room for abuses in the way of "doctoring" records and, unless safeguards of a substantial nature can be and are inserted in this section, it is not believed that the power should be granted.

Article 63 provides for rehearings if a convening authority disapproves the findings and sentence of a court martial. It is assumed that this gives a convening authority power to order a rehearing in a case where an acquittal has been returned, or that, in a case where a man has been charged with murder, if a manslaughter conviction is returned, after voicing disapproval the convening authority can return the record to the court. In the code, as written, and with the control that the convening authority has over the courts and the officers thereof, this type of section countenances continuance of the abuse complained of so frequently in the last war to the effect that convening authorities ordered the courts to find as he desired. It is believed that, if it is found necessary to have such a provision, section (b) under said article could be more simply stated if it were unequivocably indicated therein that there was to be no rehearing if an acquittal resulted upon the first hearing of the charges.

Article 66 provides for reviews by boards of review. The Navy has never had anything comparable to this procedure. In section (b) of the article, there is indicated the types of cases which are to be referred to such boards. It is felt that the type of cases such boards are to consider should include cases where confinement for 1 year is assessed, so that in line 8, on page 53, it should indicate that the confinement should be "* * * for 1 year or more" rather than "for more than 1 year."

Section (e) in said article has been commented upon at length by Commander Riter. This witness concurs in his views. It is earnestly hoped that the Congress will not pass any law which includes such a provision.

Article 67 sets up the Judicial Council and has been considered by Commander Riter. This is unquestionably a long step forward and may be the means of eliminating many of the abuses and complaints which have plagued the military with reference to court martial. It is believed that the tenure of the members of the council should be firmly established by legislation. The appointments should be by the President, by and with the consent of the Senate. The provision that the members be admitted to practice before the Supreme Court of the United States means very little, the requirements for admission to that Court being solely that one has been admitted to the bar of the highest court of a State. Another criticism is that the type of cases which the said council is to review are, in the opinion of this witness, too limited. It is my firm conviction that if adequate civilian review is had of every case in which a discharge, other than honorable or under honorable conditions, or a dismissal from the service, or in cases where sentences of death or of 1 year or more have been assessed, there will be a substantial lessening in the number of complaints against the type of justice afforded in military courts. I would be tempted to go so far as to say that a board of the type indicated, if established with sufficiently ample powers, could almost be said to eliminate the necessity for any other reform in the court-martial system. With sufficiently broad powers, the boards of review provided for otherwise in this code would be unnecessary.

For these reasons I repeat that the provisions of this section providing for the cases which are to be considered by such a board are too limited.

Article 69 provides for review of cases other than those previously indicated. It merely indicates that such records shall be examined in the Office of the JAG. If previous sections of the proposed code, particularly article 66, section (b) are passed in their present form, the instant section creates the possibility that a person not a lawyer would be passing upon a record of conviction in which a sentence of 1 year had been assessed. In the Office of the JAG of the Navy, it has long been the practice to have law students review court-martial records. It is believed that only persons trained in the law and members of the bar should be allowed to act in this capacity.

It will be noted that only if the findings or sentence are found unsupported in law will records be referred to a board of review and that, if so referred, there will be no further review by the Judicial Council. These limitations are not compatible with the type of review that should be had. In effect, if a law student tries to set a case aside, then and only then will the case be reviewed by trained lawyers. If the untrained individual (in the sense that he is not a lawyer) passes the case, it is assumed that there will be no further review.

The provisions of article 70, providing for appellate counsel, are satisfactory in so far as Government counsel is concerned. It constitutes a forward step in other respects. It is not believed, however, that the JAG should appoint the appellate defense counsel under the system contemplated by this code. It would be fairer and more consonant with American principles if such counsel were appointed by the Judicial Council.

Article 71 provides limitations on the execution of sentences extending to death or involving a general or flag officer. The proviso with regard to death sentences is laudable. That part relating to general or flag officers is a departure from the present Articles for the Government of the Navy. Presently no officer may be dismissed from the service until his conviction and sentence has been approved by the President. This witness sees no reason why there should be any departure from past practice of a restriction as indicated.

Section (b) of said article is also a departure from established practice, at least in the Navy. It is a departure which does not seem to be warranted. Technically, section (c) is a departure from present Navy practice. Now at least technically, the Secretary of the Navy must approve the type of sentence indicated herein. A danger exists in this section in the limitation or proviso that the sentence must be suspended. There does not appear to be any real reason why a change from the present system is warranted.

Article 73 has been previously discussed by Commander Riter, with whose comments I agree.

Articles 74 through 134 list the punitive articles. Many of the punishments available to a court listed in these sections are drastic. It is the view of the American Legion that the Congress should spell out the limitation of punishment and should not leave such a serious matter to the caprice or action of a court which many times may be unaware of the seriousness of the offense charged.

Article 94 indicates that a person under certain circumstances who "creates any violence or disturbance is guilty of mutiny" and is liable to be punished by death. In the opinion of this witness, the quoted words should be stricken from this section for the reason that much too wide latitude is given under the section as written. If a person became involved in an altercation in a public street, and if this section is literally interpreted, he could be held to be a mutineer.

Article 106 refers to "lurking." This is much too broad a proviso in scope and punishment for such an offense. If the section was meant to convey "lurking and acting as a spy," etc., rather than "lurking or acting," etc., there would be no objection, and the American Legion believes there is necessity for such a statute.

Article 107, as written, should also make provision that any person who prepares or makes or directs the preparation of a statement of the nature indicated, in addition to the one who signs such a record, should be punished as indicated.

Article 118, section 3, as written, provides too much latitude to be passed as written. As this witness sees it, a drunken driver could be convicted of murder under this section.

Article 140 provides for delegation of the President's authority and for the subdelegation of such authority. This section is much too broad and in practice it is feared will result in delegation of authority, specifically invested in individuals in the code as written, to too great an extent. In the notes furnished by the draftsman of the bill, it is indicated that this is a provision of law already existent. Such is not believed by this witness to be the case since it will be noted that the reference is contained in title I of Public Law 759, dealing with selective service, whereas the military-law aspects of said law are incorporated in title II.

Mr. BROOKS. Congress is about to go into session.

We can continue for a while, but the time that we can continue will be limited due to the fact that this committee has two bills upon the calendar for consideration today. I just suggest that, with deep regrets.

Mr. FINN. If it pleases the committee, I do not intend to read this statement. But I do want to make one comment with reference to it.

On page 10 and 11 they have included the article 67 in the proposed code. It should be deleted and it should not be a part of my statement.

Mr. BROOKS. If it is all right with the committee, we can run to, we will say, about 11:30.

Mr. ANDERSON. All right.

Mr. BROOKS. And we better plan to adjourn by that time, as there is an appropriation bill ahead and our bills will come up next.

Mr. FINN. I appreciate the committee's position, except the difficulty is that I had so many things to discuss here. I had figured I might have a full hour to do it and I laid my plans accordingly.

Mr. BROOKS. Well, we can meet tomorrow and conclude tomorrow. But, of course, it is not due to the position of the committee, in framing the legislative schedule on the floor of the House. We are helpless there to change the situation.

Mr. FINN. I understand that perfectly.

Mr. FINN. Now on the question that the chairman just asked with relation to one Judge Advocate General, at the May meeting of the national executive committee at Indianapolis there was passed a resolution which is contained on page 3 of my statement in its entirety and in that statement, after preambles and so forth indicating what

the position of the Legion is with relation to all phases of military justice, including discharges, dismissals, boards for the review of discharges and dismissals under the GI bill of rights, and so forth, there is the conclusion that the Legion is in favor of consolidation of all legal officers of the armed forces and that it may be effected and in the future carried out under one head.

Now I appreciate that, perhaps, is a function which is perhaps a basis for additional legislation and perhaps it cannot be considered at this time, but I want to leave and I think the Legion wants me to leave with this committee the impression that we are strongly in favor of that procedure.

We are all the more strongly in favor of that procedure because now the Navy has no such corps, that is no such system whatsoever.

Mr. ELSTON. You contemplate Navy officers trying men in the Army, and vice versa?

Mr. FINN. I cannot see that it would make much difference, sir. The offense that is charged would be the same whether it is the Army or the Navy.

I would say this, frankly: In my statement I have also referred to the London letter to the American Bar Association which appears in the January issue of the American Bar Association Journal, which calls attention to the present system in England, where they have combined the JAG in the Air Force and the Army.

They have not as yet put the Navy into that system. And I have set out there insofar as we are at the present able to ascertain the present system in England with relation to court martial.

As was suggested here yesterday to the committee the Lord Chancellor of England now is in charge of all court-martial functions—a civilian head. The judge advocate general is in his office and reports to him.

Mr. DURHAM. That would carry out further the unification act, certainly.

Mr. FINN. Yes, sir; that is our position in the Legion.

Mr. BROOKS. You are not recommending that the Supreme Court be head of the unified Judge Advocate General's Department, are you?

Mr. FINN. No, sir. And in my comments with relation to this judicial council, I feel I will touch upon some of those positions if I have time.

The suggestion here is emanating from me as an officer who for 33 months reviewed cases in the Office of the Judge Advocate General—and I may say that I was very, very well treated in the Office of the Judge Advocate General, both by Admiral Russell, Admiral Colclough, and Admiral Gatch, under all of whom I served.

You cannot draw up any code that is going to eliminate abuses and you cannot legislate changes in human nature. However, as long as you have a system such as you have in the Navy where you have legal officers or legal specialists as they call them, and no specific corps, you are always going to be confronted with the fear that officers have, that their actions will not meet with the approval of the person who is going to mark their fitness report.

Now that is the thing which permeates this entire system and which is not apparent on the surface. Now I have seen officers in review sections who are mortally afraid of their commanding officers.

That is a system which should be eliminated insofar as it is practicable.

Mr. DURHAM. Once marked, they are never changed.

Mr. FINN. Correct, sir.

Now the main things that I wanted to talk about are these. There are three things: One is the jurisdiction. Another is the personnel. The third is the reviews. I speak of jurisdiction because I note, and I think the committee will note, that in this bill the jurisdiction of naval and military courts generally has been substantially enlarged.

Now it is for this committee and for the Congress to determine whether or not the American people will want that sort of thing. If we have an atomic war, which from all indications we will have in the future, there will be immediately declared martial law in this country.

We will have military commissions acting upon the lawyer. And bear in mind that you cannot, as I see it, by legislation even under the Constitution impose strictures within which the military will confine themselves.

Witness the case of Duncan against Kahanamoku, which was decided by the Supreme Court of the United States, where during the war the Army incarcerated a man who was a stock broker for alleged embezzlement and kept him in jail for 3 years even though the civil courts were functioning. The Supreme Court said that that was wrong.

Witness this Hirshberg case that was decided only a week or so ago where a man had been honorably discharged from the Navy and had subsequently been brought back because he had reenlisted and tried by a naval courts martial. And the Supreme Court set that case aside.

So when you are dealing with jurisdiction and you are going to enlarge the scope of the jurisdiction which you are giving, you should do it, I believe, very carefully and very circumspectly and, if in the wisdom of Congress it is felt it is necessary, the American Legion would have no real objection to that, provided that when you set up your boards of review you give them wide and broad powers to review the facts and the law.

Otherwise I am very fearful for our form of government under this system.

Mr. ELSTON. The board of review under the bill does review the facts. It is the Judicial Council that does not review the facts.

Mr. FINN. Correct, sir; but the board of review, bear in mind, as I understand it, is to be generally consisting of officers, all of whom are generally or at least insofar as the one board of review which has been set up in the Navy is concerned, subject to one head who marks their fitness reports. And if he does not agree with what the board does, then what?

Mr. PHILBIN. Is it your view that the Judicial Council should also review the facts as well as the law?

Mr. FINN. Correct, sir, absolutely. And I believe that the Judicial Council should have its powers so broadened that it will be able to review the facts and the law. And I believe that if they are civilians that is the only way that you will be able to get away from this command influence that has been talked about on the review level.

Now I do not know anything about the command influence on the trial level.

Mr. ELSTON. Do you not think you would get away from that if you had a separate corps, such as a separate Judge Advocate General's Corps in the Army, and they select the board of review and the board

of review review the facts in the case? Does that not remove it from command influence?

Mr. FINN. No, sir; I do not believe so. For example, suppose you and I and Mr. Smart here are members of a board of review. I do not know exactly how it functions in the Army, but I know that perhaps the three of us will be subordinate to an officer who is in charge of all the boards of review.

Now, if you and Mr. Smart here and I adopt a position which is contrary to the position taken by that man who is in charge of all the boards and he does not agree with us and we insist that we are right and we fight our position to a conclusion and we incur his wrath, we will never get anywhere in the service thereafter.

We will get a bad fitness report and every time we come up for promotion that fitness report will be in front of those boards that consider our promotion. So I say I am very fearful, sir, at the very least, that that is not the effective way of giving the type of review which I consider to be necessary.

Mr. ELSTON. Well, the point I am making is if they are all selected in the Judge Advocate General's Department.

Mr. FINN. Yes, sir.

Mr. ELSTON. A separate corps.

Mr. FINN. Yes, sir.

Mr. ELSTON. They certainly would be removed from any command influence, except the influence possibly of the Judge Advocate General himself.

Mr. FINN. You have command there, too, sir.

Mr. ELSTON. You have command, but you only have command so far as law enforcement is concerned.

Mr. FINN. Correct, sir.

Mr. ELSON. And the administration of justice is concerned.

Mr. FINN. Yes, sir. But you still have the fact—and may I digress a moment by making this statement——

Mr. ELSTON. Well, you think that the Judge Advocate General would be apt to have an opinion about any case which he would try to impose on the board of review?

Mr. FINN. No, sir.

Mr. ELSTON. That he himself had nothing to do with the trial of the charges, the preferring of the charges, and the accused was not at any time under his command?

Mr. FINN. I do not exactly say "Yes" or "No" to that, sir. But I do know that there is the possibility existent. Now I do not say that it is always exercised, but I say there is the possibility existent that a Judge Advocate General—not the ones whom I know, but there is the possibility that one can take issue with an officer to such a point that that officer will not be able to progress in his career.

And by giving that officer poor-fitness reports it can be done. Now I say the only way you can eliminate it is to have civilians review these cases where you give a man a discharge of a year or more or where you give him an unconditional discharge or any kind of discharge which is otherwise than honorable or unhonorable conditions.

If you let a man out of the service under these undesirable discharges the type that is handed out in the service, they should have a review of their cases by a civilian board.

Mr. ELSTON. You are referring now solely to what is called the Judicial Council?

Mr. FINN. Yes, sir.

Mr. ELSTON. You would not want the boards of review in the Judge Advocate General's Department to be civilians, would you?

Mr. FINN. No, sir. I have stated in my statement, if I may say to you, Mr. Elston, that in my personal opinion if you created these boards called the Judicial Council and gave them wide enough powers it would almost be unnecessary to change any of the whole military system because that board would exercise a function which is civilian in character and which is more consonant with American principles than you could possibly have when officers administer it.

Mr. ELSTON. Of course, there is no one more in favor of a complete and thorough and fair review than I am.

Mr. FINN. I know you are, sir.

Mr. ELSTON. But I go back to the jurisdiction of the United States Circuit Court of Appeals in criminal cases. They have the authority only to review on questions of law.

Mr. FINN. Yes, sir.

Mr. ELSTON. Now, I would just like to have your viewpoint about why you should make a distinction between a case in the civil courts and a case in the military courts?

Mr. FINN. Yes, sir. I do that for this reason, sir. If I am a young boy of 17 years of age, and I go before a draft board, a group of civilians just like you gentlemen say, "You are the boy that is to go in the service tomorrow."

Now, that induction into the service is solely a civilian proposition. Now you go into the service under civilian aegis, let us say. But do you come out under civilian aegis? Does anybody that is a civilian see what has happened to you when you have been in service?

And suppose you have gotten an undesirable or a dishonorable discharge? It seems to me—and the Legion agrees with this position—that that type of person should have a review by civilians of the discharge which he received.

May I say to you—and I think I have included it in the statement—I talked to a marine colonel who is in charge and has been for a considerable period of disciplinary functions in the Bureau of Naval Personnel, on one of these boards that I served upon, and he said, "Do you know what a bad-conduct discharge means?" and I said, "I do." He said, "All it means is that if I work for the General Motors Corp. and I quit my job they don't give me a letter of recommendation to my next job."

Now that is not the attitude of most people in the service, but the point that I am trying to bring out is that we should eliminate the possibility that a person of that type can with those ideas discharge a person without a review by the same type of people that put him into the service; the civilian, for example.

Now that goes into the question of jurisdiction furthermore. You are enlarging your jurisdiction. You are making naval officers or Army officers who are Reserves subject to this code, under certain circumstances.

You also make the boy who is drafted, for example, subject to it. I believe until he holds up his right hand and swears that he is going to defend the Constitution and gets into the service that there should not be any trial of that boy by a court martial.

But this bill provides for it. And I think that the provisions—which I think is article 2, section 1 or 3 of the proposed code—has the possibility existent in it that that type of boy will be tried by a court martial.

And I do not believe it should be done. I believe that civil courts during this past war took care of that situation adequately and well.

Mr. BROOKS. Let me ask you this, Mr. Finn.

Mr. FINN. Yes, sir.

Mr. BROOKS. You suggest a review all the way down the line of both the law and the facts?

Mr. FINN. No, sir; I would not be too particular about that, provided at the end of the line, sir, in this Judicial Council, where the civilians sit, you would have that type of review.

Mr. BROOKS. Well, of course you meet the situation there that the Judicial Council met long after the trial and away from the witnesses and not have a chance to pass on their credulity or credibility?

Mr. FINN. If you please, sir, during the war—I cannot give you accurate figures, but it seemed to me that the average time that elapsed from the date of the end of the trial to the time the cases were reviewed in the Office of the Judge Advocate General was at least 60 days.

Sometimes it was months—6 months. The argument that you are so far removed from the situation by the time it gets to the Judicial Council to me does not mean a great deal for that reason, that the boards of review do not get the cases until a very substantial time has elapsed.

Now I cannot very well express myself any more forcibly on this question of review by civilians at the end of the line. And as I stated before, if civilians put us into the service civilians should look over the type of discharge we get when we get out of the service.

Mr. BROOKS. Mr. Doyle wanted to ask you a question.

Mr. FINN. Yes, sir.

Mr. DOYLE. Therefore, is it not imperative that there be a complete record of the facts all down the line so that the last board of review—the Judicial Council, say—no matter when it sits, shall have the total factual picture before them?

Mr. FINN. Absolutely correct; yes.

Mr. DOYLE. Am I in error? Are there not a number of cases in your experience where immature boys when they went into the service were given dishonorable discharges for offenses which so far as civilian law was concerned would be inconsequential?

Mr. FINN. That is one of the difficulties I had when I was in the Office of the Judge Advocate General, sir. With the average run of purely military offenses and what happened in the military I have no quarrel whatsoever.

If a boy is absent, and he misses his ship, and he causes some other boy to lose his life, that is one thing; but, when you get into the case where you are trying a man for burglary or rape or housebreaking and things of that sort, where the boy could probably get an entirely different type of trial if he were not in the uniform, that is where I had my worst moments, if I may so express it.

Those are the types of cases where the purely, it seemed to me, military mind had no real, true comprehension of what the elements of the offense that was charged consisted of or what they amounted to.

And all too prevalent was the idea that the boy had to be tried because it was a deterrent to the other boys. And on that score the deterrent factor, so far as I was able to observe, was not present, because by the time the boy was tried the rest of his shipmates were over in the South Pacific and he was here in the United States.

So, in my poor fashion, I was unable to understand where the deterrent factor entered into that situation.

Mr. PHILBIN. You are not asking for a trial de novo before the Judicial Council?

Mr. FINN. No, sir.

Mr. PHILBIN. You want merely a review of the facts on the record as it will be presented?

Mr. FINN. Yes.

Mr. PHILBIN. Following the trial before the trial courts and the other boards of review that are set up by this legislation?

Mr. FINN. That is right, providing everything is expressed on the record so they can see it when they get it.

Mr. BROOKS. What would you think of approaching your problem this way, by permitting the accused in cases which are nonmilitary, more or less, in their nature and which are offenses against society generally to be tried by the Federal court in time of peace?

Mr. FINN. If I may speak for myself, sir, and not for the American Legion.

Mr. BROOKS. Yes.

Mr. FINN. I am 100 percent in favor of that, provided the boy wants it. If the boy himself wants it, all right. Now, I know there are cases where a boy is in a community where the civilian population does not want the military or the naval forces, and they are a little rancorous about the things they do, in which case they sometimes give the boys punishment which they would not get in the Navy or the Army.

However, if the boy desired—and incidentally in England now they can do it—to have a trial by a civilian court, I personally am in favor of that. I cannot speak for the American Legion on that point.

Mr. BROOKS. I think now the practice is one of comity, that in major offenses against society generally the option is given; is that not true?

Mr. FINN. Well, I only served in the Navy during the war, and I do not think that that was true at that time, although I will say that I know of cases where it did happen.

Mr. BROOKS. I mean in time of peace. I do not refer to time of war. I can see, for instance, where in an occupied area in time of war an offense against society would have to be tried by the military. There would be no alternative there.

Mr. FINN. Outside of the United States, of course, such a system would be absolutely impracticable. I do not see how you could work it. But insofar as offenses which occur in the country—and, although I have no figures, I would venture to say that fully 70 or 75 percent of the people who were tried during the war were tried for offenses which occurred in this country.

Mr. GAVIN. This final review board that you mentioned; what type of machinery would you suggest be set up for the determination of those cases?

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Mr. FINN. The outline of it is set up in the code as proposed, I think, sir, except in the view I take of it you probably would have to enlarge it to more than three members because they would have a very substantial number of cases.

Opposed to that there will be presented the idea that it is going to cost a lot of money, but to me that does not mean one blessed thing when you consider the freedom of our boys and what I believe to be the necessity for taking care of them.

We put them in the service, and we should take care of them, if we put them in there, by giving a decent type of review which they would be entitled to if they did not have that uniform on.

After all, they are still American citizens. And I believe that they should have——

Mr. ELSTON. There is never very much hesitation about asking for additional Federal judges?

Mr. FINN. No, sir; and we should not have any hesitancy about asking for additional members of this Judicial Council or military board of review or whatever you please to call it.

Mr. ELSTON. I think we create some new Federal judgeships about every session of Congress.

Mr. GAVIN. We certainly spent a lot of money in the selective-service set-up to induct the boys.

Mr. ELSTON. I just want to ask Mr. Finn about this. It seems to me that, while section 67 indicates that the Judicial Council shall take action only with respect to matters of law, actually the Judicial Council does review the facts because subsection E provides that if the Judicial Council sets aside the findings and sentence it may—

> except where the setting aside is based on lack of sufficient evidence in the record to support the finding, order a rehearing.

Now, that would require a review of the record on the evidence, would it not?

Mr. BROOKS. Does that not refer to a case where there is no scintilla of evidence?

Mr. FINN. Correct; and that is the way I view it.

Mr. ELSTON. You would have to review the evidence to find out whether or not there is a scintilla. And, of course, the scintilla rule does not apply in a civil case.

Mr. FINN. The difficulty always is this: They look the records over, and they say there is sufficient evidence in the record to warrant the verdict of the jury. They then will not inquire into the facts. As a matter of fact, in civil cases, as I understand it, they will not inquire into the facts except and unless all of the information that is presented on the record at the trial is introduced by way of documents or deposition so that the reviewing court can say that they have had or they are equally capable of coming to a conclusion as was the trial judge in the first place. So, as I said to you originally, Mr. Elston, I have no fault to find with this section setting up the Judicial Council except that it does not go far enough, sir.

Mr. PHILBIN. May I bring to the gentlemen's attention subsection D of article 67, which says expressly:

> The Judicial Council shall take action only with respect to matters of law.

Mr. ELSTON. That is what I just stated. But the next subsection indicates that they would necessarily have to review the record to determine whether there was a sufficiency of evidence to support a finding.

Mr. BROOKS. My thought there is—and may I interpose this—that reading the two together you would get the conclusion that, on matters where a directed verdict would lie, the final court reviewing would have that authority.

Mr. FINN. That is all.

Mr. PHILBIN. And only in that case.

Mr. FINN. And only in that case.

Mr. BROOKS. Yes.

Mr. PHILBIN. And not with reference to a general review of facts.

Mr. FINN. Correct. That is my interpretation.

Mr. PHILBIN. And it is necessary to grant a fair and impartial review to the accused.

Mr. FINN. Yes; a fair and impartial review, the type that we think a man ought to have.

Mr. PHILBIN. There is another matter regarding the Judicial Council that I would like to bring to your attention and get your comments on, and that is the provision that confines the eligibility for membership on the Judicial Council to those who have been admitted to practice before the United States Supreme Court. Have you any comments on that particular provision?

Mr. FINN. Yes. I am a member of the United States Supreme Court, and the only reason I am is that I had $25 and was a member of the bar of the Commonwealth of Massachusetts.

Mr. PHILBIN. Can you see any necessity for that particular provision?

Mr. FINN. No, sir.

Mr. ELSTON. As a matter of fact, some of the members of the United States Supreme Court were not members when they were appointed.

Mr. PHILBIN. Precisely.

Mr. FINN. But I do not think that means much. I think the members of this board should be appointed by the President by and with the consent of the Senate, that their salaries should be certain, and that their tenure of office should be certain. That is not provided for here.

Mr. ELSTON. I do not think there is any question about that. I think that that should be in the law. Otherwise, the President could not make the appointment. He would not know how long a period to make the appointment for.

Mr. FINN. Now, if you will bear with me for just 2 minutes, there are two other little things in this bill as proposed which I do object to which I would like to call your attention to. One of them is: In section 106, they say you can get death for lurking—whatever lurking is. "Lurking or spying" is the way it is worded. I assume, although I do not know, that that is based on the case of the Nazi saboteurs. Now, if that wording is changed to "lurking and spying" or "lurking or spying," then the Legion would have no objection, but what lurking actually constitutes is too much in the realm of ethereal——

Mr. ELSTON. Is there any offense in the Articles of War?

Mr. FINN. I do not know.

Mr. PHILBIN. Mr. Larkin says there is.

Mr. FINN. I do not know that, sir.

Mr. BROOKS. You would change that "or" to read "and"?

Mr. FINN. Yes, sir.

Mr. BROOKS. So it would read, "lurking and spying"?

Mr. FINN. Yes, sir; "and spying," so there would not be any question about the necessity of having the lurking also.

And at the end, in section 140, there is a delegation of the authority of the President.

Mr. ELSTON. What section is that?

Mr. FINN. 140, sir.

Mr. SMART. Article 140?

Mr. FINN. Article, I should say. There is a delegation of the authority of the President. I fear that as written that creates a delegation and subdelegation to such an extent that you might have a second lieutenant passing on very, very serious matters which are in the prior section and articles of the code.

Now, there is an allusion made in the notes furnished by the draftsmen that that is prelaw. With that interpretation I do not agree. Your bill, Mr. Elston, was added, I believe, under the Kem amendment, to the selective-service bill last year and became title 2 of that legislation. Now, the reference here as to delegation by the President of his powers occurs in title 1 of that act which deals with the selective-service boards, and so forth. Now, I do not believe that we can use that authority, where the President obviously should have every substantial authority to delegate his powers in section 1, under the selective service, and bring it over into section 2 where we are talking about military justice.

Mr. ELSTON. I think it is a fundamental principle of law that delegated powers cannot be delegated.

Mr. FINN. Well, I think this article 140 is much too broad as presently written.

Now, there is only one other thing I would like to bring to your attention, and that is the various articles with relation to depositions. I do not understand why a military or naval court must have any wider powers to have depositions introduced before them than does a Federal court. The powers given in this code as to depositions are far more extensive than a Federal court can have. I think that starts at article 49.

Mr. BROOKS. Well, in the military is there not a greater degree of mobility than there is in normal society?

Mr. FINN. That is correct.

Mr. BROOKS. That would be one reason.

Mr. FINN. All the more reason why there should not be the use of depositions, sir.

Mr. ELSTON. I think the reason we provided for depositions before in the bill last year was to give the accused a greater opportunity.

Mr. FINN. Give him the opportunity, but do not give it to the prosecution, sir.

Mr. ELSTON. I think you have to give them equal opportunity.

Mr. FINN. Well——

Mr. ELSTON. And the complaint that we had to deal with was that an accused person was often deprived of witnesses. So we wrote into the law that depositions could be taken.

Mr. FINN. Well, as I understand the present Federal program, the accused or defendant can have depositions introduced in his behalf

but the prosecution cannot. This as drawn, sir, is contrary to every concept of Anglo-Saxon and American justice as to the right of the person accused to the confrontation of the witness against him.

Mr. ELSTON. Well, we have a law in the State of Ohio, for example, that permits the State to take depositions, but means and the opportunity must be afforded to the defendant and his counsel to be present at the taking of those depositions.

Mr. BROOKS. That is what we call depositions be ne esse.

Mr. FINN. I see. Now we have airplanes and we have rapid means of transportation. And the military got along without this for 170 years or more and I can see no reason why it is necessary to insert it now.

Mr. BROOKS. Mr. Finn, you cover that, do you not, in your prepared statement?

Mr. FINN. I do, sir.

Mr. BROOKS. Do you make suggestions as to how that should be changed in your prepared statement?

Mr. FINN. I say, in my prepared statement, sir, that the use of depositions should be confined to that use which is allowed in the Federal courts under the Federal rules of criminal procedure.

Mr. BROOKS. Mr. Anderson, do you have some questions?

Mr. ANDERSON. No questions, Mr. Chairman.

Mr. FINN. Starting on page 11 of my statement, I have an appendix which cites the specific objections I have to the various sections of the act.

And I want to thank you gentlemen very kindly for your courtesy.

Mr. BROOKS. Any more questions, gentlemen?

Mr. GAVIN. In your wide experience in these courts-martial cases, after a boy is court-martialed and brought to trial, what kind of a defense do you think these defense counsels put up for the boy? What is your honest and conscientious opinion of how well he is defended? That is what I would like to hear you tell us.

Mr. FINN. Based upon the experience I had as a reviewing officer, reviewing courts martial, it was very very poor—very poor.

Mr. DOYLE. Might I ask just one question?

Mr. BROOKS. Mr. Doyle, go right ahead.

Mr. DOYLE. Might I ask this: On that point—and I have no adequate information I might state in asking you this question except my own personal knowledge of several cases in California—are there a number of cases in your judgment where boys have been given dishonorable discharges, I mean boys of immature age, for alleged offenses which would not be considered nearly so serious in a civilian court so that now were some method of review by a civilian court to be authorized it could go over all these cases and see if more substantial justice could not be given to thousands of cases of boys who are now suffering and being handicapped more or less for life with a dishonorable discharge?

Mr. FINN. Well, I may answer that question by stating to you, sir, that in the Regulations of the National Executive Committee passed last May there is a suggestion that the Congress before enacting the legislation pending look into this question of discharges and so forth. But that is something which is not germane to the present issue and I did not go into that, sir, at this time.

Mr. BROOKS. Now, gentlemen, if there are no further questions, tomorrow we plan to have Maj. Gen. Milton A. Reckord and Col. Melvin Maas as witnesses before the committee.

Mr. SMART. I would like to say, Mr. Chairman, that the schedule for tomorrow also includes Mr. George Spiegelberg, who is the representative of the American Bar Association. He has been particularly scheduled for tomorrow as there has been difficulty in getting him down here. I am hopeful that we can meet until noon so all these gentlemen may have an opportunity to testify fully and the committee to ask all the questions they want.

Mr. BROOKS. Then, if there are no further questions, we thank you very much, Mr. Finn. You have made a very fine statement and we appreciate it. The committee will be adjourned until 10 o'clock tomorrow.

(Whereupon, at 11:45 a. m., the committee adjourned until Thursday, March 10, at 10 a. m.)

UNIFORM CODE OF MILITARY JUSTICE

THURSDAY, MARCH 10, 1949

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The committee met at 10 a. m., Hon. Overton Brooks (chairman of Subcommittee No. 1) presiding.

Mr. BROOKS. The committee will please come to order.

We have this morning two witnesses to be heard.

We have Col. Melvin Maas this morning with us representing the Marine Reserves.

Will you have a seat, Colonel.

STATEMENT OF COL. MELVIN MAAS, NATIONAL PRESIDENT OF THE MARINE CORPS RESERVE ASSOCIATION

Colonel MAAS. Mr. Chairman and gentlemen, our association is very much interested in this pending legislation. On the whole we are for it. We think it is a very progressive step forward.

We are delighted that you are considering it now. And we congratulate the drafters of this legislation.

Mr. BROOKS. Colonel, if I may suggest it, would you put a little bit in the record of your background, for the record?

Colonel MAAS. Yes.

Mr. BROOKS. I think everybody on the committee knows you—knows you well—and knows your background. But I think it would be well if the record shows something of that.

Colonel MAAS. Thank you, Mr. Chairman.

Mr. RIVERS. Your official title and the official title of the association.

Colonel MAAS. I am national president of the Marine Corps Reserve Association and by resolution of a convening of the association I am empowered to speak for the association on all legislative matters.

Incidentally, I am not paid by the association or anybody else for this type of representation.

I served in Congress for 16 years, the last 10 of which was as senior member of the Naval Affairs Committee.

I served in the Marine Corps Aviation in World War I and served in the Reserves between the two wars, and served in Marine Corps aviation again in World War II, from Guadalcanal to Okinawa.

After that I drafted the Reserve program for the Marine Corps and then spent a year as adviser to the House Naval Affairs Committee.

During that period I undertook by direction of the chairman, Mr. Vinson, an intensive study of the naval justice system and made a

considerable recommendation relative to naval justice. So I have had some intimate contact with this subject.

As commanding officer I have meted out all kinds of punishment from reprimands to convening general courts martial.

As deputy commander of Marine air base on the Pacific coast I was also a reviewing authority on disciplinary actions, including general courts martial.

We feel, however, in this specific bill that while in general it is satisfactory and it is certainly in the right direction, it was a compromise and as is inevitable with compromises you get peculiar quirks in it. We think there are some very peculiar quirks in this bill.

I would like to make a few general statements and then I have specific recommendations on a number of sections, with proposed language for amendments. I am also proposing general limitations to sections without attempting to write language.

I would like to point out first of all, gentlemen, that we think that there may be too much emphasis being placed on the desirability of unification of the military-justice system.

We think there is no magic or no particular panacea about having it absolutely uniform between all three services. In fact, we think it is not workable. And we want to point out to you that while this bill is a compromise of the naval justice system and the Articles of War, that there is a definite difference in disciplinary control that is required at sea and the disciplinary control required on land. Therefore the types of punishment may be quite different, of necessity.

A relatively minor infraction of rules at sea may become actually a very major thing from a disciplinary standpoint. A minor infraction may endanger the lives of all those on the ship, and it may involve a whole flotilla of ships. It is very rare that such a situation could exist in any other type of organization.

A man in the crow's-nest of a ship, violating his orders, might very well not spot a hazard or an enemy in time to properly warn the ship and alert it, and the whole crew may be affected.

Therefore, it is necessary for discipline at sea to be very much more rigid and very much more drastic than is necessary on shore. That is recognized, gentlemen, through the ages in maritime law as as well as in naval law.

Now I see no reason why that severity, which I recognize as necessary in the Navy at sea, should be superimposed on the Army and the Air Force. And in many ways that has been done.

You tried to jumble the two to get the magic formula of unification, and I think you are going too far in that direction. I think you have to recognize that there are fundamental differences.

And while we agree with the necessity of these distinctions for sea duty, we do not think these necessarily or even properly should apply to all types of disciplines.

Mr. BROOKS. May I ask you a question, Colonel?

Colonel MAAS. Yes, Mr. Chairman.

Mr. BROOKS. Now, you really represent the Marine Reserve. The Marine Reserve should be acquainted with discipline at sea and on land.

Colonel MAAS. Yes.

Mr. BROOKS. How has that been handled by the Marine Corps in the past? Do they have a different system of rigidity of punishment on sea from what they have on land?

Colonel MAAS. Yes. While the laws governing are, of course, the same as the laws governing the Navy, we handle our own discipline on shore. When we are at sea we come under the same jurisdiction as the Navy, and very properly so.

A contingent of marines on board a capital ship are part of the crew of that ship and they are subject to exactly the same disciplinary control as seamen. But when we are on our own shore based installations we handle our own discipline.

And we know from that experience what would only get a reprimand on shore, fittingly, might very well justify a court martial at sea.

Mr. BROOKS. Well, is that a difference in the code used or is it a difference in the enforcement?

Colonel MAAS. It is a difference in the enforcement to a large extent. However, the Marine Corps does have its own rules and regulations under the general laws governing the Navy.

But we feel that in this you have gone beyond that and you are imposing on the other forces——

Mr. RIVERS. In that connection, I do not want the record to show something that you do not mean. I am referring to that "you." When you say "you," it looks that we wrote this bill.

From your long experience in legislation, you know you have to introduce a bill before you can start to work on it.

Colonel MAAS. Yes, I was holding to the old illusion that Congress wrote legislation.

Mr. RIVERS. Well, you are wrong.

Colonel MAAS. Yes. I know where it comes from.

Mr. RIVERS. This is Professor Morgan's recommendations, and we are going to start from this. And as usual, this committee will come up with the right answer.

Mr. BROOKS. Well, the "you" is an oratorical "you," anyway.

Colonel MAAS. That is correct.

Mr. SMART. Mr. Chairman, may I ask the witness one question here to clarify the record?

Mr. BROOKS. Yes.

Mr. SMART. When the Marine Corps is functioning as a part of the Navy, be it ashore or afloat, it is governed by the Articles for the Government of the Navy. But it may very well become subject to the Articles of War if it is attached to an Army unit.

Colonel MAAS. That is correct. And in World War I the Marine expeditionary forces in Europe were governed entirely by the Articles of War.

Mr. SMART. I merely wanted to point out that the Marine Corps is the only organization within the armed forces that may be subject either to the Articles of War or the Articles for the Government of the Navy.

Colonel MAAS. That is correct. The Marine Corps is an independent military organization and until the Security Act of 1947 was passed actually was directly under the President. It was assgined by Executive order at various times to the Army and to the Navy.

But it was never a part of the Navy. It is still not part of the Navy. The Marine Corps by law is part of the Navy Department now, but it is not part of the Navy. It is still a soverign, independent military organization.

Mr. RIVERS. It is your thought in that connection, about the administration of justice aboard ship, that we better be careful how

we even disturb that because we all must recognize that the master of a ship, whether it be Navy or maritime, must be the absolute boss at all times.

Colonel MAAS. That is correct. And I want to point out in that connection that you must not separate—again the oratorical "you"—disciplinary control from command. I am a very ardent believer in an ultimate appeal from any kind of disciplinary control that involves, or punishment that involves loss of freedom or loss of money.

But the widest latitude must be given to the chain of command in enforcing discipline. A commanding officer who does not control his own discipline is not a commanding officer.

He just does not have command. And that is even much more apparent at sea than it is on land. And you may not be able to add all of the protective features that you would desire for supervising of discipline at sea, or you may ultimately destroy the discipline that is life or death at sea, gentlemen.

And I caution you to be very careful not to upset that balance that we have now.

Mr. GAVIN. You mean command control?

Colonel MAAS. That is correct. Well, you do not command if you do not have discipline.

Mr. GAVIN. That may be true.

Colonel MAAS. If you cannot control your discipline.

Mr. BROOKS. You do not think this bill goes too far, then, in giving command control?

Colonel MAAS. No, I do not.

I have some specific recommendations. But I want to caution the committee against amending the bill in such a manner as to remove from the chain of command basic disciplinary control.

That is the one criticism I had of your revised Articles of War last year. I thought it took from the commanding officer prerogatives that he should have had.

Now, you may have gone a little too far in the other direction in this bill. For instance, I gravely question whether a lesser than a general court martial should award a bad-conduct discharge, even with the reviews that are possible.

The people in the military service generally speaking do not realize the serious consequences in civil life of a bad-conduct discharge. The statement has been made that it was nothing more or less than a refusal to give a letter of endorsement.

That is not so. It bars the individual from working for the Government. It bars him from a civil-service job. It bars him from getting back in the military service. And it bars him nowadays from almost any kind of a decent job.

The young boy of 17 or 18 may have committed an act of indiscretion and in later life be capable of great responsibility and great advancement but be denied that because he has on his record a bad-conduct discharge.

Mr. GAVIN. How are you going to correct that situation?

Colonel MAAS. I think a bad-conduct discharge should be awarded only by a general courts martial. You are depriving a man of most valuable property rights. I am not saying that bad-conduct discharges should not be awarded, but I question whether they should be awarded by a three-man court.

Mr. GAVIN. They were awarded quite freely, were they not, during the war?

Colonel MAAS. Yes, altogether too freely. If this bill—and I am not certain that it does—repeals the present system whereby the Navy at least can correct records administratively, then I think that ought to be thought of very carefully, too.

I am not sure it does, but as I read the bill it appears to me that these things become final and irrevocable and does not leave administrative authority that we sought for so long and finally obtained from Congress for administrative correction of errors that came to light in discharges.

Mr. GAVIN. Well, what are your recommendations along that line now for those that have already received bad-conduct and dishonorable discharges?

Colonel MAAS. Administrative reviews, with authority to correct them administratively.

Mr. RIVERS. They have it.

Colonel MAAS. Yes. But will they have it if this bill passes?

Mr. RIVERS. Under the GI bill of rights.

Colonel MAAS. Yes. We fought for that for many years and it was finally obtained under the GI bill of rights. It is a valuable mechanism. Do not destroy it, gentlemen.

Mr. RIVERS. It is unfortunate, very unfortunate, that the records were not changed. Whenever they rendered a decision, regardless of the after-discovered evidence or whatever you want to call it, they will not change these records. That has been my own expereience.

Colonel MAAS. That is correct. And I have had many years of experience with that, too.

Mr. RIVERS. I had a boy in my own experience—and everybody in Congress has, too—where the Navy reviewed his record. They held him incommunicado—which was not infrequent—at some shore station. And he never did get to see counsel. He finally pleaded guilty to something. He did not know what it was.

Colonel MAAS. Mr. Rivers, it is inherent in the military system that there is always great reluctance to admit a mistake.

Mr. RIVERS. That is right.

Colonel MAAS. Because your future career and your promotion depend on not making mistakes. So it is understandable. However, if you separate authority to review administratively these cases from those who originally had jurisdiction you eleminate a great deal of that.

Mr. RIVERS. That is right.

Colonel MAAS. And I hope you will do nothing that will——

Mr. RIVERS. That might be what Mr. Gavin is talking about. I would like to find some way to do it.

Mr. GAVIN. That is what I would like to find out.

Colonel MAAS. Gentlemen, we had many, many bills when I was on the Naval Affairs Committee to correct the types of discharge. We passed some of them and the President vetoed every one as fast as we passed it.

We finally quit passing any. Nine times out of ten, of course, the reason for asking for the change was that 40 years had gone by and the individual suddenly found out he could not get a pension because he had the wrong kind of a discharge.

Mr. RIVERS. That is right.

Colonel MAAS. And then suddenly his honor was at stake. When I asked all of them the question: "If we pass the bill with the provision that it still would not make you eligible for pension" they lost all interest at the meetings.

As a matter of fact, I do not think there have been a great many injustices from our past system, but those that have been made are serious.

Mr. RIVERS. That is right.

Colonel MAAS. And should be eliminated. And the few that have been made, or the percentage, have thrown the fear into everybody. And this is certainly a tremendous step forward.

I do want to advocate very ardently that if you retain the three separate Judge Advocate General Departments—and I think they should be retained as separate organizations—that you create or see that legislation is properly sponsored to create a separate Judge Advocate General's Department in the Navy, as a separate promotion list, and where fitness reports are marked only by those in the chain of command of the Judge Advocate General's Department.

It is axiomatic that the man who marks your fitness report pretty much controls your actions. And if the fitness report of a defense counsel or the judge advocate—the prosecutor—is marked by the commanding officer who convened the court you have a most unfortunate and unfair situation.

Mr. RIVERS. That would be simple. You know, when you were on the committee we wrote a separate dental bill, you remember.

Colonel MAAS. Yes. We had the same reasons for it, too.

Mr. RIVERS. Yes.

Colonel MAAS. I mean much of the same reasons.

This is a basic question, that your Judge Advocate General's Department must be completely separated from the chain of command, that is of the line command.

Mr. BROOKS. I want to ask you another question along that line. Suppose we pass this bill or some similar bill to this and it becomes a law and it says who shall have final jurisdiction over the question of bad-conduct discharges.

Now, how will that affect the provision of the GI bill of rights in your opinion, which is already law?

Colonel MAAS. This says it is already irrevocable.

Mr. BROOKS. Does this supersede it?

Colonel MAAS. It is a later law and therefore it would supersede any previous law, Mr. Chairman.

Mr. RIVERS. I am sure of that.

Colonel MAAS. Unless you put a saving clause in there.

Mr. RIVERS. Yes.

Mr. BROOKS. So the jurisdiction for administrative review of bad-conducted discharges will be circumscribed by the passage of this act.

Colonel MAAS. Definitely, by the last act passed.

Mr. RIVERS. In that connection, Mr. Chairman, I believe we are strengthened by the suggestion made by the colonel, of having an independent board to put the ultimate O. K. or disapproval on that action.

Colonel MAAS. That is right.

Mr. RIVERS. Because he would be an independent chain of command, as you are talking about.

Colonel MAAS. Yes. They ought to be completely separated and have no connection at all.

Mr. BROOKS. What would you think of this: Putting in a proviso that in spite of provisions for the finality of the jurisdiction under the present act, that the GI boards shall still continue to have jurisdiction for administrative review of discharges.

Colonel MAAS. Yes. Put in a saving clause not to repeal the authority that exists under the GI bill of rights, which I fear otherwise will be done.

We are very much opposed to a single Judge Advocate General's Department for the armed services. They all have their own problems and they need their own understanding and interpretation of discipline and punishment.

When you merge the services into one service—which I hope will come—that will follow automatically. You will then have one Judge Advocate General's Department. I think you are getting a little far afield to separate this completely from the services.

You then do take out of chain of command disciplinary control.

Mr. RIVERS. Right in that connection, it is a little contradictory to me and confusing. While you say in one breath make it independent from the line-officer command, for instance in the Army, that is a chain of command in the Army——

Colonel MAAS. But they will be naval officers, living with naval officers and dealing with naval problems. It is that day-to-day contact so they will understand naval problems, as distinct from a corps that does not understand any military problems.

If you set up a separate Judge Advocate General's Department for three services, as long as you have three services you need three Judge Advocate General Departments.

Mr. RIVERS. I follow you on that. But now you say——

Colonel MAAS. I am just saying that in the Navy do what you have done in the Army and Air Force, and that is to create a separate Judge Advocate General's Department and make it a special career within the Navy.

You set the pattern for that in the Army and Air Force. That is all I am asking.

Mr. GAVIN. Then, they would have three different patterns to operate under.

Colonel MAAS. Within the framework, yes.

Mr. GAVIN. They would all be looking at it from three different ways.

Colonel MAAS. No.

Mr. GAVIN. Well, supposing a group of boys were involved in some minor crime. One group sentences them on this basis, another on another basis, and another on another basis. One might get 3 years, another get 4 years, and another get 5 years, for the same offense.

Colonel MAAS. That may be necessary.

Mr. RIVERS. That happens in civilian life, too.

Mr. PHILBIN. Sure.

Colonel MAAS. That is the very point I am making. That very well may be necessary. An air crewman's negligence in his duty

involves the lives of the flying crew of that airplane. The same type of negligence in an infantry battalion might be a very minor thing.

It might result only in the necessity for a reprimand. Therefore, I do not think you can accomplish the desired purpose very rigidly for all three services as long as they are three separate services.

That is exactly the point I make, Mr. Gavin.

Now I want to urge something on this committee that is perhaps revolutionary. This is the time to consider it, however. That is removing retired personnel from military disciplinary control completely.

Gentlemen, it is an anomalous situation that retired personnel, that is, military retired personnel, should be subject to military discipline. And you have thereby denied to yourselves—to the Congress and to the public—untold valuable information, advice, and wisdom that you might otherwise have gotten if retired officers—and of course the same applies to retired enlisted men—were not still gagged. Now we understand the necessity for it when they are in the active military service.

I have no quarrel or no objection to that at all. I thoroughly agree with it. But if our theory has been correct that retired pay was a deferred emolument of the office of military life, that it was earned during your active time but withheld by the Government, that is saved for you, and was part of your earnings, then there should be no strings tied to it and the receipt of retired pay should not be contingent upon good behavior.

There is not any reason, gentlemen, why a retired officer should not have the same right to criticize the President or the Cabinet or the Congress that any other American citizen has.

It is a God-given right to Americans to criticize anybody and everybody. And as long as it is kept within the bounds of law and does not become libel or slander—and there are adequate civil laws to deal with that—it is a healthy situation.

Where the right to criticize is unfettered, dictatorships cannot exist.

Now, in my opinion—and I have had intimate contacts with the military for 32 years—the majority of retired officers if they felt free to talk, gentlemen, would be principally warning the Congress and the country against the dangers of military dictatorship.

The retired officer is not a militarist and he is in a position to have seen the trends, when they are trends. And most of the retired officers that I know of feel very strongly and they are in a position through their long years of service to warn us in advance of the trend and the dangers that we as civilians do not see toward building a military control and militarism in a country.

Mr. RIVERS. It would make your Reserve organization stronger, because they would have a greater interest in it.

Colonel MAAS. This bill, Mr. Rivers, goes beyond anything ever proposed before in regard to disciplinary control over your Reserves. I am going to discuss that because I do not think you gentlemen realize what has been written in this bill and what the effect would be on Reserves. But I am suggesting this new principle in connection with the retired personnel.

And I want to cite just one illustration. And I know of hundreds of them. In 1942, early in 1942, a former Member of Congress who was a retired enlisted man but with the rank of captain which he won in

World War I was publishing an enlisted man's magazine. He was very critical of Mr. Stimson. It had nothing to do with military security at all. There was no question of security involved.

He was criticizing the War Department's administration of the personnel, particularly as it related to former enlisted men who had become officers. It was very annoying. And Mr. Stimson, by written order, directed that man to immediately cease publication, to have nothing further to do with this magazine, give up his interests in it, and forbade him in writing to write for any publication or to make any public statement under penalty of being court-martialed and losing his retired pay.

Now there was no element of security involved. It was only politically embarrassing. Why did that man not have the same right to criticize the Secretary of War that any of us had or have had?

Gentlemen, the most dangerous thing you can do is to unduly restrict the right to criticize, which is after all the right of freedom of speech.

I believe the country would immensely benefit if retired officers were removed from disciplinary control.

Now on any other matter, if a retired officer uses his status as a retired officer or information he gained while on the active list after he is retired for business purposes improperly, or any other, there are adequate civil laws to deal with him.

Mr. BROOKS. What about Reserve officers? I refer to the provision, for instance, of article 2, section 6, which covers fleet Reserves and fleet Marine Corps Reserves.

Colonel MAAS. Exactly the same thing.

Mr. BROOKS. Same principle?

Colonel MAAS. Exactly the same principle. There is no reason why they should be restricted. It is un-American. It is unfair and it is unnecessary, gentlemen. And we I am sure are denying ourselves a great deal of valuable advice that we would otherwise get.

Mr. RIVERS. Of course, you see the former executive department employees who headed some of these bureaus down there and who had life-and-death control of our economy during the war. I call them brass heads, myself. They have garnered all kinds of information.

And the first thing they will do when they leave is to sit down and write a book. Yet they come before our committee and say, "This is top secret," and then you will see in some big magazine like Collier's or the Saturday Evening Post a story on the thing for which they have been handsomely paid. And that is not at all infrequent.

Colonel MAAS. No. While you may question the propriety of it, there is certainly nothing illegal about it.

Mr. RIVERS. But my point is and I say why deny it to you.

Colonel MAAS. That is right, why deny it to us.

We all know the famous case of a retired officer who wrote a book that was about to be published and which did not involve military security but involved embarrassment to certain military leaders and certain political leaders, and this man was immediately ordered to active duty and then forbidden to publish the book.

I had a little experience myself, gentlemen. When I came back from the South Pacific in 1942, word awaited me at Pearl Harbor, when I came through on my way to return to Congress, that I was to make no public statement whatsoever. Well, I was in uniform

and I said, "Of course I will make no public statement." They said, "That is not what we mean. You are never to make a public statement about what you saw in the South Pacific, even when you get back to Congress." And I just said, "Nuts to you."

They said, "We will keep you on duty until you make such a promise. You will just never get back to Congress." Well, I came back to Congress and I talked abundantly.

Mr. RIVERS. You must remember, you can still be called to active duty, Colonel.

Colonel MAAS. Well, I want to point out that under this bill, gentlemen, on page 4, article 2, line 24, that these articles——

Mr. BROOKS. What section is that, Colonel—I mean the subsection?

Colonel MAAS. Subsection 3.

Mr. BROOKS. All right.

Colonel MAAS. That these articles apply to Reserve personnel who are voluntarily on inactive duty training authorized by written orders.

Now, gentlemen, to personalize this again, at the request of the Marine Corps I organized a Reserve wing staff 6 months ago. I am in command of that wing staff. We are a volunteer organization.

We receive no pay. We do not wear uniforms. The Government furnishes no quarters. We meet once a month, in civilian clothes, for 2 hours, and we study military matters. Under this proposal, if I should happen to make a remark that was considered derogatory of the President or of the Cabinet or of the Congress, anytime within 3 years I can be ordered back to active duty for some alleged remark I made in my civilian capacity and held indefinitely without my own consent for court martial.

Now, gentlemen, if you want to destroy the Reserves we are building up, that will be a fine section to leave in the bill.

Now, we are in complete agreement that Reserves when they are on actual active duty should be subject to the same code as all regulars. But, gentlemen, it is going far afield to apply it to the ROTC and to apply it to Volunteer Reserves. This could actually apply to a man in his own home studying a correspondence course, gentlemen.

If some neighbor stopped in and he made some remark that might be interpreted as being critical of the President, he might be called to account 2 or 3 years later, when he did not even remember of such a remark being made. Gentlemen, that is a very dangerous provision.

It is unnecessary and unworkable and in my opinion will cast reflection upon your whole bill and it will have a tendency to destroy your Reserve—your Volunteer Reserve. It is just inconsistent with our whole fundamental concept, gentlemen.

Mr. RIVERS. Is this the first time such a thing has been proposed?

Colonel MAAS. Why of course it is the first time that such a thing has ever been considered.

Mr. PHILBIN. Mr. Larkin seems to dissent from that statement.

Mr. BROOKS. We will hear from Mr. Larkin later. By the way, I have heard Mr. Larkin discuss this and I think the committee, too, is entitled to his views. He is a witness later on, is he not?

Mr. SMART. On a section-by-section reading of the bill for amendments, Mr. Larkin will explain the position of the national Military Establishment on all sections.

Mr. RIVERS. What is the situation with regard to that prohibition now, as the law exists today?

Colonel MAAS. Well, to the best of my knowledge—and I have had very extensive experience for 32 years in the service and the Reserve—there is no restriction about my making any comments.

Of course I do not expect to commit any acts that would be detrimental to the Military Establishment. But if, when I am sitting down in private quarters merely studying military subjects, every remark is to be subject to court martial, why it does not become very attractive to give my time to training myself further.

I do not think my views are any different than a million other young—younger men.

You know, gentlemen, this almost smacks of attempting to impose thought control in this country. Now I do not have any question about it. I say when a Reserve is on active duty and performing military duty he ought to be subject to all laws.

But think very carefully before you extend it to ROTC and extend it to volunteer training units.

Gentlemen, on page 6, article 3, subsection (a)—you must have some limitation on the time in which personnel can be ordered to active duty for a trial by court martial. If you are going to retain the provision that the Reserves are subject to it, you have to put some other limitation than 3 years.

It is unfair to call a Reserve in as late as 3 years later and say "3 years ago you made a remark about the Secretary of the Navy or the Secretary of Defense or the President or some Congressman."

Mr. BROOKS. Well, that is that Hirshberg case, is it not, that you are getting into now?

Colonel MAAS. No. It was a different type of case. There the man had left the military service. Then he reenlisted. Of course he should not have been triable for something that had happened in his first enlistment because he had become a civilian in the meantime.

Mr. BROOKS. Is that the same principle that you are discussing there: If a man has committed an offense and it is not discovered until he is out of the service——

Colonel MAAS. I think, Mr. Chairman, even if he is still in the Volunteer Reserve for instance, they should not have 3 years in which to charge him with an alleged remark.

Mr. BROOKS. What time would you suggest?

Colonel MAAS. Well, I think it certainly ought not to be more than 3, or at the maximum 6 months, afterward.

Mr. RIVERS. After what?

Colonel MAAS. The alleged offense.

Mr. RIVERS. What about after the declaration of the terminaton of the emergency?

Colonel MAAS. Well, this is not dealing with emergency. This is permanent law. This is peacetime that I am talking about here.

Mr. BROOKS. Would you not put it 6 months after the knowledge of the facts

Colonel MAAS. No. He should be charged immediately. Of course, the best way to do it is to take it out of the bill, as far as the application to training units. That would eliminate that. Otherwise, put in some kind of reasonable limitation.

On page 13, part III, article 15—gentlemen, I want to go back to a remark I made in the opening statement that when a commanding officer's punishment involves loss of pay or restriction of liberty or a

reduction in grade it should be subject to review by a court martial if demanded.

In this case I think you go too far in granting disciplinary control to the commanding officer. Now, there ought to be some check on it somewhere. The defendant ought to have some right of appeal.

Certainly senior noncommissioned officers, who traditionally have had that protection, ought to have that retained.

It also seems pretty drastic to us that a commanding officer can fine an officer half of his month's pay for 3 months. It is only 1 month for an enlisted man, but 3 months for an officer.

Well, I do not see the logic in it. I grant you that an officer ought to be punished more severely for the same thing than an enlisted man, but he is in the loss of half of his month's pay. His commitments are probably as heavy if not heavier than an enlisted man's. I think that is undue authority for a commanding officer.

Mr. RIVERS. Is that a new thing?

Colonel MAAS. Yes; much of this is authority that does not now exist or has not existed at least.

Mr. RIVERS. Of course you realize there will be cases where a man just can be obnoxious—not to point of where a court martial is warranted but where some disciplinary action is needed.

Colonel MAAS. I think without loss of pay.

Mr. RIVERS. The most sensitive nerve in a man's body is his pocket nerve.

Colonel MAAS. We have a tradition, Mr. Rivers, in this country that a man cannot be deprived of the property without due process of law.

Mr. RIVERS. I am familiar with that. I know that happens every day. And I do not advocate its continuation. But there are certain things involved. When a man is in the military he has certain——

Colonel MAAS. That is all right, but every once in a while you will be serving under some commanding officer who is an "s. o. b."—I presume that is a legitimate word now——

Mr. RIVERS. It has been legitimate as far as I am concerned.

Colonel MAAS. I mean in official places.

Mr. BROOKS. You agree to keep that out of the record.

Mr. RIVERS. Seriously, you can see what I am talking about.

Colonel MAAS. Yes.

Mr. RIVERS. I mean just short of the need for some real punishment.

Colonel MAAS. There are other ways of doing it. You can mark the man's fitness report, which will have plenty of effect. You can restrict him to quarters, and other things. But when you start taking his money away from him, it ought to be subject to review.

Mr. GAVIN. You say an officer's commitments are greater than an enlisted man's.

Colonel MAAS. Yes.

Mr. GAVIN. I do not quite agree. An enlisted man might have just as much responsibility on his income as an officer with his income.

Colonel MAAS. Oh, no doubt of it. That is why I say there should be distinction as to the pay. I think the commitments would relatively be about the same.

Mr. BROOKS. Let me ask you this, Colonel: Do you find any fault with regard to this punishment of bread and water for 5 days?

Colonel MAAS. Personally, I do not. And in studying the bill, none of our lawyers in the association made any comment on it. I do not know. It would do most of them good to go on a diet for 5 days, anyway.

I do not have any quarrel with that provision.

I would like to pass, gentlemen, to article 19, page 17, line 14. I questioned before and I want to renew my criticism or at least question the propriety of any court than a general court martial giving a bad-conduct discharge.

I have made my comment on it, but I want to put it in its proper place. I suggest that the bad-conduct discharge be stricken from that authority.

Mr. BROOKS. I would like to ask you this question, too. It occured to me in reference to the provision that you just commented about, the preceding one.

Colonel MAAS. Yes.

Mr. BROOKS. What do you think of the action of so many courts martial in taking away from the dependents of the enlisted man the pay which they are entitled to under our laws for those dependent upon the man?

Colonel MAAS. Well, I have always felt that that was a very cruel and harsh thing to do to, penalize the family.

Mr. BROOKS. For instance, in the last war we drafted men with four and five and six children. Now, if that man gets into trouble in service the court martial can take away all of his pay, even the allowance give to dependents.

Colonel MAAS. Well, that I think is unfortunate. I am not too prepared to state a position for our association on it because, again, as I say, our staff of volunteer lawyers—and we have some very distinguished members of the bar—made no comment.

Personally, I have always felt that that needed correction, that the families should not be penalized for the man, and I think that might well be considered in this bill.

Mr. RIVERS. Right there, in that same article, but over on the next page, 18, it says "A bad-conduct discharge shall not be adjudged unless a complete record of the proceedings and testimony before the court has been made."

Colonel MAAS. I am going to cover that. But I said in my opening statement, I do not think it is adequate anyway, even though it is going to be reviewed. It may get a perfunctory review.

I do not think that the lesser courts—the special court martial—should have the authority to issue a bad-conduct discharge. That is a far more serious thing than people in the military sometimes realize.

Mr. RIVERS. You say change that and make it a general?

Colonel MAAS. I would not permit a bad-conduct discharge to be awarded by less than a general court martial.

Gentlemen, on page 19, under article 21, at the end of line 4, I suggest the additional language: "Provided he is not tried twice for the same offense by different armed-force tribunals."

Now this would apparently permit it. I do not think that anybody should be tried twice by two different armed forces for the same offense.

Mr. RIVERS. Could they not plead double jeopardy?

Colonel MAAS. Well, you permit double jeopardy in this bill, though. I do not think it should. I do not think you should permit double jeopardy. That is a sacred American principle, too.

Mr. RIVERS. Colonel, about that bad-conduct discharge, would you go so far as to say that no court martial save a general court martial should be permitted to render any kind of a discharge?

Colonel MAAS. No, I am saying a bad-conduct discharge is a pretty serious discharge and——

Mr. RIVERS. Well, they can change the names of them. They can get around that.

Colonel MAAS. No, I think that is the least one that will bar you from civil service.

Mr. RIVERS. I say that could be changed. The regulations can be changed.

Colonel MAAS. No. That is provided by law. That term is a legal term.

Mr. RIVERS. I see.

Colonel MAAS. At least it has become so by usage and I am sure it is by legislation. I do not think you would find that happening. You would hear about it very quickly if you did, from us if nobody else.

On page 25, gentlemen, in the second line, after the words "Defense counsel" we suggest that you insert: "Unless defendant waives in writing such qualification." Now we suggest the same insertion in subsections (1) of (c) and in (2).

Now, the purpose of that is that where the prosecutor is a law officer, the defendant can waive the defense being a law officer, that is a trained officer. It ought to be done only if he waives that.

Our next comment on page 28, line 6, after the word——

Mr. BROOKS. What article is that?

Mr. SMART. Article 30.

Colonel MAAS. Yes, article 30.

Mr. RIVERS. Section (b).

Colonel MAAS. Section (b). We suggest that you insert after the word "that" "by reason of his constitutional rights," so that the accused would be advised that he did not have to make any statement and the reason he did not have to is because of his constitutional rights not to have to make them. We think it is quite important that he know the reason he does not have to make them and it is not just some gratuity by a kind-hearted officer.

On page 30, article 34, on line 23, after the word "evidence," we suggest that you insert "beyond a reasonable doubt." We think it is just a little too broad the way it is now: The convening authority shall not refer a charge to a general court martial for trial unless it has been found that the charge alleges an offense under this code and is warranted by evidence." We think the evidence should be beyond a reasonable doubt.

Mr. BROOKS. The same term is used in civilian trials.

Colonel MAAS. Yes.

Mr. PHILBIN. It would not be. In civilian courts it would be prima facie determination.

Colonel MAAS. Well, you put no restriction or qualifying term on this one. You do not even call it prima facie evidence. You just say evidence.

Mr. PHILBIN. I think if you want to conform it to civilian language you should make it prima facie determination.

Colonel MAAS. Well, we will leave that to you gentlemen to work out. We think there should be some qualification.

Gentlemen, on page 32, article 37, we feel very strongly that this article should carry some penalty.

That was dealt with quite adequately yesterday. I do not know as I would go as far as the American Legion did on that. But we certainly feel that it is important that there be a penalty for anyone violating this prohibition against unduly influencing members of the court or the prosecution. A law without a penalty is no law at all.

Mr. RIVERS. General Riter sure put some teeth in it yesterday. He sure suggested some.

Colonel MAAS. Yes. I am sure you will deal with that. We add our support, that there must be some penalty or it becomes meaningless.

On page 33, gentlemen, article 38—we suggest that if the counsel chosen by the accused is not qualified as a lawyer, with equal qualification to the prosecutor, that the qualified counsel appointed for the defense by the convening authority—one who is so qualified—should not be excused.

If the accused elects to ask for a counsel who is not a lawyer and not properly qualified and the convening authority has appointed such a qualified officer, the court should not excuse him.

We feel the interest of the accused whether he wants it or not should be protected by having a trained officer as an associate counsel. So we suggest that you delete the authority to excuse such counsel.

Mr. BROOKS. What line is that?

Mr. GAVIN. Wait a minute. Let me hear you repeat that, again. What did you say?

Colonel MAAS. That if the accused——

Mr. GAVIN. The court appoints——

Colonel MAAS. No. The convening authority——

Mr. GAVIN. Yes.

Colonel MAAS. Appoints a qualified defense counsel, with equal qualifications to the prosecutor.

Mr. GAVIN. Yes.

Colonel MAAS. Now, if the accused elects to select some other officer who is not qualified, this gives authority for the court to excuse the defense counsel who has been appointed by the convening authority.

We think that even though the accused ought to have the right to his own counsel, whether he is qualified or not, that there should be on his side a designated trained legal officer as an associate counsel.

Mr. RIVERS. You say this bill deprives him of his right to employ his own counsel.

Colonel MAAS. No, it does not. But if he does employ his counsel the court can excuse the one that has been appointed by the convening authority.

Mr. RIVERS. You think we should put that in here?

Colonel MAAS. Yes, I do.

Mr. HARDY. You mean even though the defendant does not want him?

Colonel MAAS. That is correct. In my opinion it is the duty of the court equally to protect the defendant as it is to see that the prosecution——

Mr. WINSTEAD. Suppose the defendant feels that appointed counsel would advise him in the wrong direction and he does not want his services?

Colonel MAAS. No. I am suggesting that he be there as associate counsel. He still does not have to follow him, but he has the benefit of his advice. I do not think the court has a right to excuse him. I think the court's obligation is to carry the rights of the accused.

Mr. GAVIN. Would you care to express an opinion as to what you think of the defense counsel that was afforded these boys in the cases that have come to your attention over the past several years? You say you have had 32 years of experience. What do you think of the defense counsel that some of these boys had?

Colonel MAAS. Not too much, frankly. I think most of them were conscientious, Mr. Gavin. There were some of them, in cases that I reviewed, where the defense counsel was not conscientious.

He was thinking about his own promotion. And he was living in the same bachelor officers' quarters with the prosecutor. Too many of them were not trained.

Now, near the end of the war that began to be pretty well corrected. You began to get lawyers in there who began looking on them as a client.

Mr. GAVIN. You think that possibly some of the counsel when appointed by the court would not be satisfactory to the defendant in the case?

Colonel MAAS. Well, he might think he wants them. But I think in addition to that he should have the protection of a trained law officer as associate counsel.

Now, gentlemen, I am going to suggest that you excuse me——

Mr. BROOKS. We are deeply interested in your testimony and we would like to suggest this: That at a later time perhaps since you will be here in Washington, the committee might want to call you back. You will be available.

Colonel MAAS. I have not finished. You have a witness here who has come at considerable trouble and inconvenience, and I am suggesting that you excuse me so that you can hear from him now and not put him to further inconvenience.

And I would like either to come back at a later time and finish my statement or if that is not possible, I will write up the rest of it and submit the other suggestions I have to make.

Mr. BROOKS. You will be available here in Washington?

Colonel MAAS. I will be available and I will keep in touch with Mr. Smart. Thank you very much, gentlemen.

Mr. BROOKS. Thank you very much, Colonel.

Gentlemen of the committee, we have here Mr. George A Spiegelberg, chairman of the special committee on military justice of the American Bar Association.

Where are you from, Mr. Spiegelberg?

Mr. SPIEGELBERG. I am from New York.

Mr. BROOKS. We are glad to have you, sir, and glad to have the statement as representing the views of the American Bar Association.

Mr. SPIEGELBERG. Well, it is a pleasure to appear before you gentlemen.

STATEMENT OF GEORGE A. SPIEGELBERG, CHAIRMAN OF THE SPECIAL COMMITTEE ON MILITARY JUSTICE OF THE AMERICAN BAR ASSOCIATION

Mr. SPIEGELBERG. I perhaps might say that I am a veteran of both wars, in the last one having served on General Eisenhower's staff from December of 1943 until just before the end of the war in Europe.

I am a member of the bar of the State of New York and professor of law at New York University, as well as being the chairman of the special committee on military justice of the American Bar Association.

At the outset, I would like to say I think the congratulations of all those who are interested in adequate courts-martial reform should go to the gentlemen who are responsible for drafting this code.

I do not think that I have ever seen a more carefully drafted code. I think that the first long step forward and a very much needed step was taken when the Elston bill was drafted, although that bill almost necessarily had many defects. Many of those have been corrected in the present bill.

I think particularly the fact that adequate representation of the defendant at all stages of the trial, which was one of the things most strongly urged by the American Bar Association, has been admirably covered in the present bill.

In addition, I think we may have great hopes by the establishment of the Judicial Council—another recommendation most recently adopted by the American Bar Association, on February 1 of this year, in a report which I have submitted to the members of this committee.

There is, however, when all has been said, one fundamental defect, and when I use those strong words, I express the unanimous opinion not merely of my committee, but of the house of delegates of the association itself which has repeatedly stated that the very foundation of adequate courts martial is the divorcing of command control from the courts.

Now I want to make it perfectly clear before very briefly reviewing the history of legislation on that subject that there is no one who has had any connection with the military services who does not believe and believe emphatically that the enforcement of discipline is an absolute essential in any branch of the armed services.

It seems to me, however, there has been a great deal of confusion between the enforcement of discipline and the administration of justice. I do not think that the two have any necessary connection, and I shall attempt to enlarge upon those views in a moment.

I would like to call to the attention of the committee that the War Department's advisory committee referred to most frequently as the Vanderbilt committee appointed in March of 1946, held extensive hearings.

It came out with a report in the middle of December of 1946 and seven pages of recommendations. Four and a half pages concerned themselves with the control command over the courts.

The recommendations of the Vanderbilt committee were subsequently adopted by the entire assembly of the American Bar Association and by the house of delegates on three separate occasions, the last being in February of this year.

The present bill, with all of its admirable aspects, leaves command domination of the courts exactly where it was before, with one exception which must be noted. I think article 37 provides that interference with the court by anyone in particular and by the commander specifically is prohibited. Unlawful interference is prohibited.

And according to my reading of the act, section 98 makes such interference an offense under the act.

Now, gentlemen, the difficulty with the administration of all courts-martial legislation in the services is that there has so often been a wide gap between a bill which is fair on its face, but in the administration of which loopholes have been found through which you can drive a team of oxen.

I think the same criticism may fairly be made of article 37. I do not believe that it will remedy the situation which created the greatest difficulty in World War I and which was questioned at length by among others Professor Morgan, the chairman of the present committee, after World War I.

I would like if I might—and if any of you gentlemen have the time—to recommend the article which Professor Morgan wrote in 29 Yale Journal, in 1919—30 years ago.

That article could have been written just as aptly after World War II because the defects due to command domination which stirred Morgan and others—Chamberlain and Winthrop—after World War I were repeated on an enlarged scale after World War II.

And we believe, that is the American Bar Association believes, that unless corrective legislation, effective corrective legislation, is passed by the Congress, we will have to wait until after World War III before the defects of this legislation become apparent as we believe them.

Mr. GAVIN. Pardon me for interrupting you at this point.

Mr. SPIEGELBERG. Yes.

Mr. GAVIN. Could you submit the article that you referred to for the record, so it could be incorporated in your remarks?

Mr. SPIEGELBERG. I have given Mr. Smart the recommendation of the American Bar Association as well as the statement, Mr. Gavin.

(The information referred to appears at p. 727.)

Mr. RIVERS. You have proposed amendments for this proposal?

Mr. SPIEGELBERG. Well, I have not them with me, Mr. Rivers. I can say this: With respect to the Elston bill we submitted amendments.

Mr. RIVERS. Yes.

Mr. SPIEGELBERG. That is ancient history.

Mr. RIVERS. Yes.

Mr. SPIEGELBERG. It would not be a difficult job and we are certainly willing to undertake the drafting of the corrective or what we hope and believe are corrective amendments and submit them to this committee within a very reasonably short time.

Mr. RIVERS. To the proposed legislation?

Mr. SPIEGELBERG. That is right.

Mr. RIVERS. But for the most part you believe that the proposed legislation is a step in certainly the necessary direction?

Mr. SPIEGELBERG. Without any qualification at all, sir. We think that this is a very fine piece of legislation, speaking generally. And I am directing my remarks to what I regard as the one remaining omission.

Mr. RIVERS. I see, sir.

Mr. SPIEGELBERG. Which none the less we regard as being—the fact that it is only one—of great importance. In fact it is the foundation of the existence of military justice.

Mr. RIVERS. Well, your amendments would not be extensive anyway, would they?

Mr. SPIEGELBERG. They would not be extensive.

Mr. RIVERS. Mr. Chairman, in that connection I ask that Mr. Spiegelberg be asked to submit these.

Mr. BROOKS. Well, he will be glad to do it.

Mr. SPIEGELBERG. I will be very glad to do that, I can assure you, Mr. Rivers.

Mr. BROOKS. Mr. Spiegelberg, may I ask you this question?

Mr. SPIEGELBERG. Yes, sir.

Mr. BROOKS. What do you think of the suggestion made by Colonel Maas who just testified and also by the American Legion: Simply placing a criminal penalty at the end of article 37 to which you have just referred?

Mr. SPIEGELBERG. Well, I understand—and this is rumor and if I am wrong I am sure that you will correct me—that the American Legion even went so far as to suggest civil indictment and trial by a civil court.

Mr. BROOKS. Yes, before a Federal criminal court, as I understand it.

Mr. SPIEGELBERG. Yes.

Mr. BROOKS. With a penalty of $5,000 fine or 5 years in prison.

Mr. SPIEGELBERG. Yes. I think that would be unfortunate legislation. Now I cannot speak for the American Bar Association because we have not considered it, but I do think that you should only have civilian interference with the processes of military justice by your Judicial Council at the top.

In addition to that I think it would be ineffective, and I think it would be ineffective except as a threat, for this reason which is simply stated: The present bill says that the unauthorized influencing of a court is prohibited.

Now if anybody will tell me or tell a commanding officer where the line is to be drawn between authorized and unauthorized influencing of a court, I would be glad to have it. I do not know.

But I do know from experience in two wars that without violating a comma of article 37 I, as a commanding officer, could get any verdict I wanted from any court chosen from my command.

Mr. PHILBIN. How do you propose to close that gap?

Mr. SPIEGELBERG. I would propose to close that gap—when I say "I" I mean the association for which I speak—by an apparently simple procedural method which I can talk about with authority so far as the Army is concerned.

I have hesitation as far as the Navy is concerned because I am not experienced in their procedural difficulties which I understand they are urging.

As far as the Army is concerned, the simple method of doing it would simply be for the establishment of the Judge Advocate General, that is an officer's corps, now independent of command, at no lower than army level.

I am talking about the general case. To that man panels of officers available for court-martial duty would be transferred. That is, names would be transferred by commanding officers.

Obviously the commanding officers would have to have the right to substitute other officers from those on the original list from time to time in order to meet the needs of their command.

If, let us say in the particular Army, an average-size army, there were eight divisions, you would have panels at the Army Judge Advocate General's headquarters from which where necessary—and I stress the "where necessary" and only where necessary—courts could be sent to any division composed entirely of officers from one or more other divisions.

Now, if the situation was serious enough there is not any reason why you could not in a theater, and I do not see why you could not in the zone of interior, raise that if necessary one echelon higher and make it Army group, because whatever anybody may say about the necessity of speedy justice as far as general courts are concerned, I have never heard of a general court being convened and sitting under fire. It is not an instantaneous process.

If you did it from Army group headquarters—and I think that would be necessary if at all in the rarest instances—you could have, for instance, to take an illustration from the last war, officers exclusively from Hodges' First Army sent to Patton's Third Army to try cases.

That was not a very long distance during the war and transportation or the shortness of transportation is in my opinion based on long experience so far as headquarters command are concerned more of a function than a reality.

Mr. BROOKS. Mr. Spiegelberg, let me ask you this: Suppose you have a task force and Navy men attached to an Army command, what would be your suggestions as to the fairness of acquiring all your panels from that Army level which would in effect exclude the Navy men?

Mr. SPIEGELBERG. Well, is that not the situation which you run into whenever you have a group from one arm of the service attached to and subject to the discipline of another arm of the service?

Mr. BROOKS. Well, where you select your panels from your local levels you might include Navy men.

Mr. SPIEGELBERG. You might from the higher, too, if it was a unit sufficient to have an independent command. I am not assuming that the officers should be chosen on this panel from Army commands alone. If there is a Navy command in the theater, subject to Army discipline, it would be the duty of the Navy commander to make his list of officers available just as it would be that of any division commander or area commander.

Mr. RIVERS. In civilian terminology, that would be a constant rotation of veniremen, so to speak?

Mr. SPIEGELBERG. Yes.

Now I want to emphasize the point, Mr. Rivers, that this would be where necessary. And I am not assuming it would be always or nearly always necessary.

But the instances in which commanding officers influenced courts is legion.

Now I am not suggesting they did it intentionally—wrongfully. I think quite the contrary. And I think I can point to pretty definite proof of that. When the Vanderbilt committee interviewed among others 49 general officers—and I think my figures are accurate—16 of those general officers affirmatively and proudly testified that they influenced their courts.

They regarded it as part of their duty. How many of the remaining 33 actually did it, I do not know.

Mr. PHILBIN. What machinery would you suggest to prohibit or punish for that practice?

Mr. SPIEGELBERG. Well, I think punishing for the practice is the answer. I think the way to mee the issue is to take away from the commander the right to appoint the court.

Now I have never been able to see, and I have never heard a convincing argument that doing that would in any way interfere with discipline.

Mr. RIVERS. Well, that is a separate judge advocate set-up, is it not?

Mr. SPIEGELBERG. Well, you have your separate judge advocate set-up, Mr. Rivers. You have that now. And I trust it will be continued.

Mr. RIVERS. Under the Elston bill?

Mr. SPIEGELBERG. Right.

Mr. RIVERS. Yes, sir.

Mr. SPIEGELBERG. But you have no job for that separate corps to do which we had hoped would be the job given it and that is the supervision of the court.

Now the court is an instrument of justice or at least I assume that it is and after the charges have been referred by the commander and the commander appoints the trial judge advocate—the prosecutor—so that a speedy trial will be assured, it seems to me when that has happened the ends of discipline have been satisfied, with one addition, that after the court has reached its verdict the command should have the right to pass on that verdict with a view to clemency, because I think that the commanding general should say: "All right, this man has been convicted of a heinous offense, but he is more important to my command now for Army purposes than he is languishing in jail."

But beyond that why should the court have any further rights?

Now I think the matter can be very easily clarified by three simple questions. Do we believe that men in the armed services should receive a fair trial? The answer to that must be "yes."

We have written into the law now, and the Elston bill and more strongly under the proposed bill, that anyone who influences the court is committing a wrong.

Now if we admit that influencing the court is a wrong, why do we give the power to the commanding officer the only use of which can be to influence the court?

Mr. PHILBIN. But as I intimated before, we provide for punishment for attempting to influence the court or influencing the court.

Mr. SPIEGELBERG. There is a punishment, as I read it, Mr. Philbin, under the present bill. But I do not think that answers it. I just cannot realize—and perhaps my imagination is not vivid enough—any officer in a command preferring charges against the commanding officer under article 37.

I mean I really cannot. Therefore, I think it is ineffective.

Mr. BROOKS. That was the reason I think the Legion suggested it go to the Federal criminal court.

Mr. RIVERS. That is right.

Mr. SPIEGELBERG. Right. Then you really do have an interference, it seems to me, with discipline. Certainly, if you keep this

convening power in the commander, if you have a timid commander, is he not going to say to himself, before he even convenes the court particularly where it is an important case with respect to, let us say an officer of some standing: "I better be pretty careful about this. This man may undertake to go to the civilian courts to have me indicted."

I personally think that in terrorem clause is the way to correct this very real defect in the present law. I do think the way to correct it is to put the supervision of the administration of justice where it belongs and that is in the legal corps.

Mr. RIVERS. In substance, then, Mr. Spiegelberg, you say if you will extend the coverage of that independence to the Elston bill and make it stronger in the proposed bill and stronger than the proposed bill—I am talking about the independence of the judge advocate—that is the way to correct it?

Mr. SPIEGELBERG. Well, the independence of the judge advocate himself, Mr. Rivers, is not the answer. The judge advocate has the independence now. What we should do to the judge advocate now is to say that instead of the commanding officer the Judge Advocate General should be the convening authority for the court.

Mr. RIVERS. I see.

Mr. SPIEGELBERG. In other words, we will give the Judge Advocate General an additional duty.

Mr. RIVERS. That is right.

Mr. SPIEGELBERG. Now, I have been working in this now for 3 years and I have been waiting to hear one argument on principle which will support the proposition that the commanding officer needs the power to appoint the court in order to enforce discipline.

Mr. RIVERS. Now, do you think that was discussed in Mr. Morgan's set-up and do you think that maybe by way of compromise that has not been included, or would you venture to form an opinion?

Mr. SPIEGELBERG. Are you asking me for my guess, Mr. Rivers?

Mr. RIVERS. Well, I do not want to embarrass you, sir.

Mr. SPIEGELBERG. You do not embarrass me because Professor Morgan is on record and has been for 30 years.

Mr. RIVERS. I see.

Mr. SPIEGELBERG. And his views, I believe, have not changed in that time.

Mr. RIVERS. Well, Professor Morgan is a practical man. When you get in these conferences you cannot always get everything you want, as you know.

Mr. SPIEGELBERG. I could not agree more.

Mr. RIVERS. Yes, sir.

Mr. SPIEGELBERG. And I am not for a moment criticizing Professor Morgan because I think he has done a grand job.

Mr. RIVERS. But I am just wondering whether the reason it was not incorporated in this proposal was because he was hitting his head upon a stone wall.

Mr. SPIEGELBERG. Well, if you want my guess, my guess would be that the Navy fancies that there are procedural difficulties involved due in large part to the fact that they have no legal specialist corps and I understand are not particularly anxious to have one, and without one I can see that there would be procedural difficulties.

Mr. RIVERS. You know the old saying: "As long as the light holds out to burn it is time for the vilest sinner to return."

Mr. BROOKS. Well, now, coming back to your suggestions, how would they apply in the Navy and the Air Force?

Mr. SPIEGELBERG. Well, as far as the Air Force is concerned, I see no difference from the Army application. Unfortunately, as far as the Navy is concerned, I cannot speak. But I am sure that there will be no difficulty if you have a legal specialist corps or whatever the appropriate word may be in the Navy to administer these things.

Mr. RIVERS. Of course, we realize the Navy has different problems. For instance, the absolute dictatorship on a vessel is necessary. And I do not believe the establishment of a specialist corps would seriously disrupt the need for such authority when the occasion arises.

Mr. SPIEGELBERG. I heard what Colonel Maas said on that subject, and I cannot admit that discipline is more important in the Navy that it is in the Army.

Mr. RIVERS. Certainly aboard ship.

Mr. BROOKS. Well, justice is justice wherever you get it.

Mr. SPIEGELBERG. There is no question about it.

Mr. RIVERS. That is right. But I think it would not be disrupted by a legal specialist corps if we decide to set one up.

Mr. SPIEGELBERG. I do not know that it would. As I say, I do not speak with authority on the subject because my experience has been entirely in the Army. I do not see why it should.

Now the argument has been made over and over again: Outlying posts and distant stations. I cannot see that that creates any difficulty at all, really. Perhaps there is a slight difficulty as far as transport is concerned.

But I do know in Africa in the last war where you had outlying posts they had traveling courts. If they had it in the last war they can have it in the next.

Mr. RIVERS. That is right.

Mr. SPIEGELBERG. Now, it is true there may be inconvenience, but as the chairman stated, it seems to me that the opportunity of justice is more important than monetary inconvenience or even continuing inconvenience. And, of course, in peacetime there is no question at all. And we always lose sight of that fact.

I think I am correct in saying that the history of this country we have been at war approximately 20 years. That leaves a long time between wars. It seems to me although there may be some excuse for an unfair trial in wartime there is none in peacetime.

I am not justifying an unfair trial in wartime, but conditions are different. But in peacetime I can see no reason for it.

Now I do not want to repeat myself. I do want to say that after the most serious consideration the American Bar Association on four separate occasions has advocated this.

We sincerely hope that it will be written into the law and we will be glad to submit to this committee amendments, the required amendments, to the present bill which would affect that change, which will not be great.

It means simply the transfer from the commanding officer to the appropriate Judge Advocate General's officer of hte right to convene the court and to appoint assigned defense counsel.

If we really stop a moment to consider what the commanding officer does now, I do not see how we can help but be amazed. The com-

manding officer in effect refers the charges. In fact he prefers the charges. Actually he does not make them, but has an officer in his command do that since if he actually made the charges himself he could not appoint the court.

He appoints the prosecutor. He appoints the defense counsel. And how often he has told the court: "You convict, you give him the limit, I'll fix the sentence."

Now, perhaps not in those terms and perhaps not as badly as that, but I am sure that witnesses have appeared before you and have testified to numerous personal experiences that they have had where they have attempted to do their sworn duty and render a just verdict and they either got a skin letter—now prohibited—which became part of their 201 file or at least they were removed from court-martial duty.

Now that should not be permitted and it should be effectively prohibited and as long as you leave in the commanding officer the power to appoint the court you have not effectively prohibited it.

And as I say, I am still waiting to hear the logical reason why the proposal that we advocate will to the slightest extent adversely affect discipline, the enforcement of which is essential in the armed services.

Mr. PHILBIN. Will it involve any undue delay in the trial of these cases?

Mr. SPIEGELBERG. Absolutely not.

Mr. PHILBIN. Did the traveling teams or courts that served in North Africa during the last war that you referred to involve any undue delay?

Mr. SPIEGELBERG. In fact, Mr. Philbin, it is very rare for a general court to have appear in a foreign theater during wartime a man accused of crime within 2 weeks of the time the charges are referred.

I do not say it has not happened. I say it is very rare. And that is a small lapse of time. It frequently runs much longer.

Mr. PHILBIN. Of course, we must keep in mind, too, that while a man is waiting for trial he is under confinement.

Mr. SPIEGELBERG. That is right.

Mr. PHILBIN. For an offense that perhaps he is not guilty of.

Mr. SPIEGELBERG. That is right, but the delay as a matter of fact, again does not interfere with discipline because after the charges are preferred and the man is apprehended he is lost to the command.

He is lost to the command until after the trial and the action of the commanding officer with respect to mitigation of sentence. And it does not make any difference from a time element or discipline element or command element where that man is tried by a court from his own division or from another division, except that if he is tried by a court from another division that court will not be subject to the desires of the command which has referred and preferred the charges.

Mr. BROOKS. Do you have a question?

Mr. HARDY. Mr. Chairman, I just wanted to observe, I think it might be extremely helpful to have Professor Morgan's slant on this particular subject.

Mr. SMART. He will be back here and will be able to give it in person.

Mr. SPIEGELBERG. Perhaps, Professor Morgan gave me the right to refer to a letter which he wrote to the secretary of the American Bar Association as stating his views. He felt that—

It was the opinion of our committee—

and I am reading from his letter—

that it would be impracticable to have such appointments made by the Judge Advocate General's Department without the closest cooperation with the commanding officers concerned. This would necessarily mean that the function would be delegated to the local representatives of the Judge Advocate General's Department. It is unthinkable that he could be permitted to dictate to the commanding officers the assignment of duties of officers under his command.

That deals with the question of the reservation by the commanding officer of his right to substitute the names of officers who are available for court-martial duty from time to time—

In practice—

Professor Morgan says—

the choice would be limited to those officers whom the commanding general designated as available for such service.

There is no question about that.

And the result would be much the same as under the present practice.

That is Professor Morgan's first conclusion.

The professor sent me a copy of this letter and I wrote him stating in substance and perhaps more briefly than I have urged it before you gentlemen here exactly what I have said here.

And he wrote me on March 4:

As to the plan which you propose for eliminating command control, I agree that if each division commander is required to furnish a list of officers for court-martial duty to the Army commander and if there is a statutory provision that the Judge Advocate General will select the court for any division from officers of the other divisions you will secure much more freedom from command control of the trial court.

And he continues:

Otherwise I am still from Missouri.

Well, now, of course the proposition that I urged upon him was the proposition that would allow the officers from other divisions to be sent into the division where the man is to be tried.

And Professor Morgan has said that he believes that that, and I quote:

will secure much more freedom from command control of the trial court.

And that, as I said before, gentlemen, we regard as the sine qua non of justice in the services.

Mr. RIVERS. In that connection, in order to better secure those rights, would there be anything wrong with the fact in some sort of a preamble statement we say we reaffirm or affirm or subscribe to the principles that a man does not surrender his basic constitutional rights once he enters the armed services?

Mr. SPIEGELBERG. I think we might get into pretty serious trouble that way, Mr. Rivers, because he certainly surrenders many of them. If you put that into the preamble it may not do harm, but I think it is likely to confuse. If you put it into the law, he is going to demand a jury trial.

At least I would advise him to if I were representing him, and there was such a provision in the law.

Mr. PHILBIN. Do you think a jury trial in any circumstances is advisable?

Mr. SPIEGELBERG. No, sir. As I said before, Mr. Philbin, I do not think that you should permit civilian interference.

Mr. PHILBIN. I am speaking of a jury trial of his own peers.

Mr. SPIEGELBERG. Oh, you are talking about the enlisted men on the court.

Mr. RIVERS. That is what I am talking about.

Mr. SPIEGELBERG. I am sorry, perhaps I misunderstood you completely. Frankly, and this has been discussed at length in the American Bar Association, we do not think that you get very far by having enlisted men on courts.

Mr. RIVERS. It is not going to hurt.

Mr. SPIEGELBERG. No, absolutely no.

Mr. RIVERS. I do not think so.

Mr. SPIEGELBERG. If it gives the enlisted man a feeling of confidence——

Mr. RIVERS. That is right.

Mr. SPIEGELBERG. That he might be able to have some of his peers on the court——

Mr. RIVERS. That is right.

Mr. SPIEGELBERG. Certainly the experiment can do no harm. But my shrewd guess would be that most of the enlisted men who serve on courts will either be master sergeants or tech sergeants with from 6 years' service up and that they will be more severe in their judgment of the man on trial than would officers.

But I agree completely. It does no harm and it may do good.

Mr. RIVERS. That is right.

Mr. GAVIN. Why would it necessarily have to be a sergeant or a master sergeant?

Mr. SPIEGELBERG. It would not. But, I say, my guess is that you will find in most cases the enlisted men on the court will be either first or second grade.

Mr. PHILBIN. Why should that follow, necessarily?

Mr. SPIEGELBERG. Well, I do not know why except that those are the enlisted men that the commander or the junior officer—the company commanders—know and they are the men that they actually select and recommend as being qualified for court-martial duty.

Mr. PHILBIN. Of course, in doing it, you could see that it would be a fair representation of all enlisted men, of all ranks, and so forth.

Mr. SPIEGELBERG. You could. But I think it is not more than a third now on the court and that would mean at most two on the average court, and it would be pretty hard to administer such a provision.

I do not say it could not be done. I think it is better not to try to specify——

Mr. PHILBIN. Has your group considered the jury trial of capital cases in the armed services? Have you given consideration to that question?

Mr. SPIEGELBERG. None. And, as I say, I cannot speak for the association on that.

Mr. PHILBIN. Well speaking for yourself, give your opinion about it.

Mr. SPIEGELBERG. Speaking for myself, I think it is a mistake. I think it is a mistake to introduce into the military system any civilian control review except at the top. And there I think equally important

with review at the top is the fact that one of the functions of the proposed Judicial Council is to keep in touch with the situation continually and make annual reports on needed changes and reforms in the system.

There is the germ of continuing surveillance and reform. The importance of that cannot be overemphasized.

Mr. PHILBIN. And what sort of review at the top do you contemplate or propose?

Mr. SPIEGELBERG. I think the bill as drawn now is admirable, except for the fact that I would add to the Judicial Council's rights of review the right to review the facts as well as the law.

Mr. PHILBIN. I was going to touch on that.

Mr. SPIEGELBERG. Yes.

Mr. PHILBIN. You believe they should have the right to review the facts?

Mr. SPIEGELBERG. Most definitely.

Mr. PHILBIN. I am of that opinion, myself.

Mr. SPIEGELBERG. And while we are on that subject, I do think—I do not know whether it has been pointed out—that there is one minor defect in the review procedure. I do not think that the Judge Advocate General should be allowed to go shopping around among boards of review as he is under the present bill, that is the present draft, where the first board of review does not do what he wants. He has the right to go to the Judicial Council.

That is the only right he should be given.

Mr. PHILBIN. Can you see any possible objection to providing for a review of the facts?

Mr. SPIEGELBERG. None—if you leave it as it is now, except that in certain cases accepting the case is discretionary with the Judicial Council.

Mr. SMART. Mr. Chairman, may I ask one question?

Mr. BROOKS. Mr. Smart.

Mr. SMART. I want to point out to the committee what the situation is as to corps in respective services as of today. As you know, the Congress created a separate corps with a separate promotion list for the Judge Advocate General of the Army.

Mr. RIVERS. That is right.

Mr. SMART. Almost simultaneously with the signing of that bill, as a matter of fact the day after that bill was signed, the President signed another bill which created the Office of Judge Advocate General of the Air Force. Due to a statutory conflict the question has arisen: Does the Air Force also have a separate corps of judge advocates?

The current interpretation of question is that they do not have a separate corps and the Air Force as of today is not functioning with a corps.

Mr. GAVIN. It is functioning, though, because I have a case up right now.

Mr. SMART. Not as a corps.

Mr. GAVIN. Not as a corps, but they are functioning.

Mr. SMART. Definitely, the Air Force has jurisdiction and is trying all of its own court-martial cases. But it does not have a corps.

Mr. PHILBIN. What legal effect does that have, the fact that they do not have a corps, in the court-martial proceedings?

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Mr. SMART. It has no effect except that Air Force legal officers do not have the same judicial independence as officers in the Judge Advocate General's Corps of the Army.

Now with that preface, I would like for Mr. Spiegelberg to go on record here one way or the other: Does he advocate a corps of judge advocates for the Air Force, the same as we now have for the Army?

Mr. SPIEGELBERG. The answer is that there obviously must be one.

Mr. RIVERS. That is right.

Mr. SPIEGELBERG. You cannot have the Justice Department of the Army divided into two halves: Independent in the Ground Forces—I am still talking in old terms.

Mr. RIVERS. That is right.

Mr. SPIEGELBERG. And subject to the domination of command, completely subject to the domination of command, in the Air Force.

Mr. RIVERS. That is right.

Mr. SPIEGELBERG. If they are independent in one, they should be in all.

Mr. BROOKS. You think that is a house divided against itself?

Mr. SPIEGELBERG. I think it will certainly fall, Mr. Chairman, whether it is a house divided.

Mr. BROOKS. I would like to ask you one question before it is too late. The practice of comity has grown up in time of peace between the armed services and the civilian courts in reference to major crimes.

Mr. SPIEGELBERG. Yes.

Mr. BROOKS. For instance, very often the armed services does not desire to try the individual who may be a member of the armed services but prefer to have the Federal courts do that. Do you think it is necessary to put anything in this Code of Military Justice to cover that situation?

The man who is tried in a Federal criminal court is tried and if he is convicted it seems to me that should constitute jeopardy, and to try him again would be double jeopardy.

Mr. SPIEGELBERG. I should think that would be true without question.

Mr. BROOKS. But I do not think there is anything in the law that says that.

Mr. SPIEGELBERG. I would be amazed if the Supreme Court did not so interpret it. Now that is a horseback opinion.

Mr. RIVERS. Well, if a fellow is convicted in a civil court this automatically discharges him from the service, if he goes to jail.

Mr. SPIEGELBERG. I thought the chairman's point was, could they try him over again in a military court.

Mr. BROOKS. Yes.

Mr. SPIEGELBERG. Now, you have the dual prosecution in that conviction in the Federal court does not necessarily bar prosecution in the State court.

Mr. BROOKS. You have double jeopardy there.

Mr. SPIEGELBERG. But it seems to me the courts martial have been held to be Federal courts by the United States Supreme Court.

Mr. BROOKS. The point I had in mind was this: Do you recommend placing any provisions on this covering that situation?

Mr. SPIEGELBERG. Well, Mr. Chairman, if it is necessary to provide against double jeopardy I certainly think provision should be made. I am not in a position to say whether the present act is not adequate on the subject:

Mr. BROOKS. You would not want to suggest anything covering the field of comity between the Federal court and the military courts in time of peace covering major offenses?

Mr. SPIEGELBERG. Well, now, on the double jeopardy question or on the question of the right of the military court to refer certain crimes for trial to civilian tribunal, always which I think it is a very healthy thing.

Mr. BROOKS. The discretion of a commanding officer to refer it or the discretion of the accused to require it.

Mr. SPIEGELBERG. I think I would rather leave it to the former, rather than the latter.

Mr. BROOKS. You mean to the commanding officer?

Mr. SPIEGELBERG. That is right. I think the discretion should be in the accusing power as to whether the trial should be a military trial or as has been customary and I thought required—I may be in error—in certain cases, of which murder was one, transfer to the civilian courts for trial in peacetime.

Mr. PHILBIN. And you believe double jeopardy, when it relates to the service—in civilian courts or within the service itself—should be prohibited.

Mr. SPIEGELBERG. Absolutely.

Mr. SMART. Mr. Chairman, may I make one more observation before you adjourn. The question of enlisted men on courts was discussed a moment ago. I would like to advise the committee that there have been approximately 15 cases, world-wide, throughout the Army, since February 1 where enlisted men sat as members of the court.

Mr. Larkin or some representative of the Army will advise this committee as to the results of those cases.

I would like to further tell you that during the month of October I made a trip for the committee and went to seven Army and Air Force installations and interviewed 930 enlisted men on the question as to how they felt about enlisted men on courts.

I have all of that information tabulated and will give it to the committee at the appropriate place when we read the bill section by section.

Mr. BROOKS. Any further questions?

Mr. GAVIN. In summing up your presentation here, you think that command control is the most important thing in this whole piece of legislation?

Mr. SPIEGELBERG. Definitely, Mr. Gavin.

Mr. BROOKS. Thank you very much, Mr. Spiegelberg.

Mr. SPIEGELBERG. Thank you, sir.

Mr. BROOKS. You made a very fine statement. We appreciate it.

(A prepared statement follows:)

PREPARED STATEMENT OF GEORGE A. SPIEGELBERG, CHAIRMAN OF THE SPECIAL COMMITTEE ON MILITARY JUSTICE OF THE AMERICAN BAR ASSOCIATION, BEFORE THE SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES, HOUSE OF REPRESENTATIVES, WITH RESPECT TO THE PROPOSED UNIFORM CODE OF MILITARY JUSTICE (H. R. 2498)

Mr. Chairman and members of the committee, my name is George A. Spiegelberg. I appear before this committee as the duly accredited representative of the American Bar Association, being the chairman of that association's special committee on military justice. My remarks will be addressed to the

major reform still required in military justice on the assumption that H. R. 2498 becomes law.

I should say by way of introduction that I am a veteran of both World Wars I and II and that in the latter war I served overseas for 30 months as a staff officer, the last 15 months of such service having been on General Eisenhower's staff; that I was retired from the service for line of duty physical disability and for a year and one-half prior to the time of my retirement I held the rank of colonel, General Staff Corps. I have been a member of the bar of the State of New York since 1922 and a professor of law at New York University since 1924. I am now engaged in the practice of law in New York City.

With the permission of the committee I should like to place in the record a copy of the report submitted to the house of delegates of the American Bar Association by my committee, which report was unanimously adopted on February 1, 1949, by the association at the meeting of its house of delegates held in Chicago, Ill. I should like to direct the attention of this committee to the fact which is made entirely apparent by the annexed report that for the last 3 years the American Bar Association has consistently and repeatedly urged the Congress of the United States to remove court martial from the domination of command.

Before discussing the need for this basic reform I would like briefly to state that except for some minor defects which I have no doubt have already been called to your attention, H. R. 2498 is a very decided step forward in comparison with existing legislation. Without going into detail it is not amiss to point out the following improvements which will be effected if the proposed code is adopted:

(*a*) The basic rules for the administration of justice in all of the armed services are made uniform.

(*b*) The law member and counsel of a general court must be trained lawyers.

(*c*) Grounds for review have been broadened and simplified. The establishment of a civilian judicial council in which is vested the duty of annually surveying the manner in which military law is administered and making recommendations in respect thereto may be particularly noteworthy.

Having said all this the inescapable fact remains that the keystone of the arch of reform has been omitted. I have already alluded to the fact that for 3 years the American Bar Association has pointed out that if a court martial is to be an instrument of true justice it cannot be allowed to remain subject to command control. If we are to achieve justice or an approximation of justice it is essential that the appointment of the court, the prosecutor and assigned defense counsel should not be made by the commanding officer from officers in his own command. That is the system under existing law. It is the system proposed in H. R. 2498. It is wholly indefensible. It vests in the commanding officer the appointment of those who are to act as judge, jury, prosecutor, and defense counsel. The futures of all these men are subject to the control of the commanding officer who has appointed them to discharge these diverse functions. In theory it is too much to hope that command will not bend the views of its subordinates to meet its desires of the moment. In practice there have been and are now such occasions and there will continue to be such occasions under the system proposed in H. R. 2498 which contains no suggestion of the separation of judicial power from the chain of command.

That the influencing of courts by commanding officers is wrong is recognized by the proposed code, section 37, which nominally prohibits such action. The difficulty with the prohibition is that it is not effective.

The power of command to influence the court can only be justified if the use of the power is proper. Article 37 of the proposed code labels the exercise of such power as improper. Only by withdrawing the power to influence the court from command can we be sure that it will not be exercised in the future as it has been in the past. The proposed bill in no way withdraws the power of command to influence the court.

I believe there has been a complete misapprehension as to the nature and effect of the remedy that we suggest in order to correct this basic defect. I trust that my appearance here today may at least, in part, dispel the confusion.

The remedy suggested is a simple one: the power to convene the court, to appoint assigned defense counsel and to order the sentence executed would be taken from the commanding officer and vested in the Army Judge Advocate General's Department or its equivalent in the other services. Commanding officers who under existing law convene the court would be required to make available to Army or higher headquarters a panel of officers available and qualified for court-martial service. From such panel the Judge Advocate General at Army or higher headquarters (or equivalent echelons in other services) would select the

general court to adjudicate the cases in a particular division. That court could, of course, be composed of officers selected entirely from divisions other than the division in which they are assigned to preside. In that way and in that way alone can you have a court composed of officers not subject to the domination of the commander who has directed the trial of a man in his command. The commanding officer would, of course, have the right to add names to or withdraw names from the panel of officers available for court-martial service as required by the needs of his command.

The proposed system would in no way interfere with his command function nor would it in any way interfere with the commander's necessary obligation of enforcing discipline. Influencing a court to find a verdict of guilty on inadequate or no evidence cannot be justified at least in the armed services of this country as a proper method of enforcing discipline. Influencing a court to impose fantastic sentences has no greater justification. Past experience has shown that under the system which H. R. 2498 proposes to continue the commander's power improperly to influence the court has been too often exercised. It is as important that justice is seen to be done as that it is done. So long as the judicial process in the armed services is administered by men entirely dependent for promotion, efficiency rating, leave, and quarters upon the man who appoints them, so long will the judicial system of the armed services be a system of justice in name alone.

Attempts to effect the reforms here urged were made by Chamberlain, Morgan, Winthrop, and Ansell among others immediately after World War I. They failed then because Congress was persuaded by the same arguments now being made that it was unnecessary to control command influence. World War II made it clear beyond question that the passage of time and the "reforms" effected after World War I had done little if anything to make the court-martial system a vehicle for justice. The arguments advanced against reform 30 years ago if now successful will result in the same justifiable complaints in the next war as we have witnessed in the last two. How often must error be repeated before it is corrected?

This committee will bear in mind that with minor changes military justice today is the military justice of eighteenth century England—a system devised for armed services described by the Duke of Wellington in 1811 in the following words: "None but the worst description of men enter the regular service. The scum of the earth who have all enlisted for drink."

Today's system of military justice is as inapplicable to the citizen's armed services of today as the duke's remarks are to the men in those services today.

The critics of reform take the position that the armed services of the country must subordinate everything to the winning of wars. With that argument I have no quarrel except to remark that it is totally inapplicable to the subject under discussion. A court-martial system that does not approximately effect justice, far from enforcing discipline destroys morale. So long as the power wrongfully to influence courts remains in the commander, so long will that system fail to approximate justice. The function of discipline is achieved when a charge has been referred for trial and the commanding officer appoints and controls the prosecutor so as to insure a speedy and effective prosecution. From that point on command interference except to exercise clemency serves neither discipline nor justice.

Critics of reform also point to the fact that the existence of the present system is almost as old as the Republic. That statement is true but it would seem to me that in and of itself the statement indicates the need for reform rather than the retention of a system so old that its age is its only virtue. It seems to me that it would be as reasonable to argue that flogging which was once the common service punishment should be again approved as it is to argue that any outmoded part of the system of military justice such as the domination of courts martial by command should be continued merely because it has always existed.

Finally, I would like to point out that the association for which I speak is interested neither in creating a lawyer's paradise out of the system of military justice nor of permitting civilian interference with the trial of military crimes. The reform advocated does neither.

I have been informed, although I am unable to state on knowledge, that the services do not object in principle to the divorce of command from the control of courts martial. If that be so, no argument remains to prevent this Congress from adopting a system which will permit military justice to be justice in fact as well as name.

For the foreseeable future we are faced by the necessity of maintaining armed forces at least five times greater than those maintained before the recent war. The armed forces of the future, no matter how they may be raised, will be com-

posed of the physically fit youth of the country. The first contact with any judicial system for the overwhelming majority of these young men will be their experience with the administration of military justice. Is it too much to ask that the system to which they are exposed be reasonably designed to achieve justice? Neither the system now in effect nor the one proposed adequately guarantee a proper administration of justice.

I desire on behalf of the American Bar Association and on my own behalf to express my appreciation for your courtesy.

Report of the Special Committee on Military Justice

To the House of Delegates of the American Bar Association:

The undersigned, the Special Committee on Military Justice, of the association appointed by action of the house of delegates, on September 6, 1948, hereby submits its report and a brief statement of the reasons why action is requested at this time.

The War Department Advisory Committee on Military Justice, appointed by the Secretary of War, on March 25, 1946, upon the nomination of this association, made its report on December 13, 1946, advocating certain drastic changes in the existing Articles of War. Certain of the recommendations were adopted in legislation, which subsequently became law, the bill referred to being commonly known as the Elston bill (H. R. 2575, 80th Cong.).

By far the most important recommendations of the War Department's Advisory Committee on Military Justice were, however, totally ignored, and this association, on two subsequent occasions, referred to these omissions and directed the attention of Congress to the necessity of curing the defects in the Elston bill.

On September 26, 1947, the assembly and the house of delegates of this association passed the following resolution:

"*Resolved*, That the American Bar Association urgently recommends the passage, by the Congress, and the approval by the President, of legislation separating military justice from command, and vesting final reviewing authority by the military, and final authority to mitigate, to remit, and to suspend sentences in the Judge Advocate General's Department, without in any way limiting other existing powers to mitigate, remit, or suspend sentences."

On or about February 21, 1948, the house of delegates reiterated the prior resolution and, in addition, adopted the following resolution:

"*Resolved*, That said bill (the Elston bill) should be further amended so that both the trial judge advocate and defense counsel must be lawyers and, where available, members of the Judge Advocate General's Department."

Numerous other groups of veterans and of lawyers supported the stand taken by this association. Nonetheless, the Elston bill became law through its adoption by the Senate of the United States, on June 9, 1948.

In June of 1948, as a result of the bill unifying the armed services, the Secretary of Defense appointed a committee to draft a Uniform Code of Military Justice. That bill has not as yet been published, but it will be published and submitted to the Congress before the 15th of February 1949. We, therefore, submit that it is of the greatest importance that the house of delegates of this association should again, in clear and unmistakable terms, state its position and authorize its appropriate officers and members to use every proper effort to see that a bill effecting real reforms in our court-martial system becomes law. To that end, your committee respectfully submits the following preambles and resolutions, and earnestly recommends their adoption at the current meeting of the house of delegates.

Whereas the Advisory Committee on Military Justice of the War Department, appointed by the Secretary of War, on the nomination of this association, devoted the major part of its report to the recommendation that the conduct of courts martial should be withdrawn from the domination of command: and that the conduct of courts martial should be in the hands of trained lawyers; and

Whereas this association, on September 26, 1947, and on or about February 21, 1948, supported the recommendations of the War Department's Advisory Committee on Military Justice; and

Whereas The War Department substantially ignored those recommendations and succeeded in procuring the adoption of H. R. 2575, commonly known as the Elston bill, which signally fails to provide for the reforms advocated by the War Department's Advisory Committee on Military Justice; and

Whereas, there will, in the immediate future, be introduced into the Congress a new bill for the establishment of a Uniform Code of Military Justice; and

Whereas it is vital to insure a fair and impartial trial of those citizens subject to military justice; and

Whereas the present system of military justice fails so to do in that it is indefensible and contrary to all concepts of justice that the authority to appoint the prosecutor, the defense counsel and the court, and the right to pass upon the judgment of that court be vested in the same person: and

Whereas there can be no justification for the influencing of courts martial by the commanding officer, but there can be no other justification for the rejection of the Advisory Committee's recommendation with respect to the checking of command control, except the continuation of the right to influence courts martial by the commanding officer: Now, therefore, be it

Resolved, That this association urge the Congress of the United States to vest in an independent Judge Advocate General's Department the following powers, now vested in the commanding officer:

(*a*) The exclusive right to appoint general or special courts martial;

(*b*) The exclusive right to appoint assigned defense counsel;

(*c*) The right to review the action of general and special courts martial. A right to mitigate the court's sentence shall remain in the commanding officer. And be it further

Resolved, That in all general courts martial the defense shall be adequately represented in all stages of the proceeding, including trial and review, and appropriate legislation should be enacted to make such representation effective, which legislation should include provision for independent civilian review; and be it further

Resolved, That in all general courts martial, both the prosecutor and assigned defense counsel shall be lawyers: and be it further

Resolved, That, so far as feasible, special courts martial shall be surrounded by all of the safeguards surrounding general courts martial: *Provided further, however*, That no special court may grant a bad-conduct discharge unless all requirements applicable to a general court have been observed: and be it further

Resolved, That this association recommends legislation establishing an Advisory Council in the Office of the Secretary of Defense, consisting of nine civilians having predominantly civilian background and experience, and three service members representing the legal offices of the three services—the civilian members to be appointed by the President of the United States and to serve, without salary, though entitled to a per diem and traveling expenses, which said council shall be required to report annually to Congress, and to that end it shall be supplied, by the Secretary of Defense, with the necessary research and clerical staff: and be it further

Resolved, That for and in the name of this association, its appropriate officers, governors, delegates, and members, its Special Committee on Military Justice do all acts and things necessary and proper including the right to appear before committees of the Congress and any other tribunal, to urge the enactment into law of the amendments above suggested, and such other amendments consistent with the foregoing as will make the courts-martial system of the armed services of the United States a true system of justice, before whose tribunals the citizens of the United States will, so far as may be possible, be assured of a fair and impartial trial.

Respectfully submitted.

GEORGE A. SPIEGELBERG, *Chairman*.
STEPHEN F. CHADWICK.
RICHARD K. GANDY.
DOUGLAS HUDSON.
ARTHUR JOHN KEEFFE.
WILLIAM H. KING, Jr.
JOHN McI. SMITH.

JANUARY 29, 1949.

Mr. BROOKS. The committee is adjourned until Monday morning at 10 o'clock.

(Whereupon, at 11:55 a. m., the committee adjourned until Monday, March 14, 1949, at 10 a. m.).

UNIFORM CODE OF MILITARY JUSTICE

MONDAY, MARCH 14, 1949

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The committee met at 10 a. m., Hon. Overton Brooks (chairman of Subcommittee No. 1) presiding.

Mr. BROOKS. The committee will please come to order.

We are a little slow getting in this morning, gentlemen, but the committee is going right ahead. We will call on Mr. John Williamson, representing the Veterans of Foreign Wars.

Just come forward, Mr. Williamson, and have a seat. We are glad to see you again.

Mr. WILLIAMSON. Glad to see you, sir.

Mr. BROOKS. Glad to have you before the committee.

Mr. WILLIAMSON. Mr. Chairman, I would like to yield my time to Mr. Paul Wolman, a prominent attorney in Baltimore, Md., and a past commander in chief of the Veterans of Foreign Wars and presently chairman of our national security committee. He has a statement that he would like to present.

Mr. BROOKS. Mr. Wolman, will you come forward, sir? Just have a seat, sir.

Mr. WOLMAN. Yes, sir.

Mr. BROOKS. We will be glad to hear from you.

You have a prepared statement, have you not?

Mr. WOLMAN. Yes, Mr. Brooks. I thought it might facilitate time by jotting down the thoughts that I had. And if there are any questions that either you or the members of the committee would care to ask and I can answer them, I will be happy to try my best.

Mr. BROOKS. Fine, sir.

Mr. WOLMAN. For the sake of your record, my name is Paul C. Wolman—W-o-l-m-a-n. I am an attorney, with offices in the city of Baltimore and am a member of the bar of the State of Maryland and also the District of Columbia.

I have served as a commander in chief of the Veterans of Foreign Wars and during the past several years as chairman of some of the other committees. My service was in World War I primarily and in the guard during World War II.

I served as G–2 on the staff of the Maryland Guard.

Mr. BROOKS. And are still very actively interested in the Veterans of Foreign Wars.

Mr. WOLMAN. Yes, sir; I have tried to keep up my activity in that, sir.

STATEMENT OF PAUL C. WOLMAN, BALTIMORE, MD., CHAIRMAN, NATIONAL SECURITY COMMITTEE, VETERANS OF FOREIGN WARS OF THE UNITED STATES

Mr. Chairman and members of the committee, the Veterans of Foreign Wars of the United States is deeply appreciative of the privilege granted by your committee to allow its representatives to appear before you and present the views of its membership, composed as it is of men all of whom have seen foreign service in times of war.

The national security committee, which I have the honor to head, is keenly interested in the promulgation of a uniform code of military justice which will be workable and bring about a fair system for its administration.

My committee, in addition to myself, is made up of Maj. Gen. Charles C. Curtis, of Allentown, Pa., Maj. Gen. Merritt A. Edson, holder of the Congressional Medal of Honor, United States Marine Corps; Brig. Gen. Bonner Fellers, who was in the Pacific during the greater part of the service during the last war; Maj. Gen. William B. Gunther, who served as security officer for the Second Service Command during the last war and who has been in the service for many, many years; Col. Harvey L. Miller, who is retired from the United States Marine Corps and who had service in the Navy likewise; Orville A. Park, Jr., an attorney who has been active in the American Bar Association and also in the International Bar Association—and, by the way, he served as the official representative of the American Bar Association at Geneva during the past summer—and Capt. G. Angus Sinclair, who was recently retired after having had a very fine service. They fairly represent a good cross section of men from the various branches of the armed forces.

It is a recognized fact that H. R. 2498, now under discussion, is a compromise between the Army and Air Forces military justice, where the advances in past years have been comparatively rapid, and the procedure of the Navy, which has made but little progress since the act of 1862. For that reason it would perhaps be unreasonable to expect a well-polished and perfectly smooth organization overnight.

It is our opinion that the proposed code is an improvement over the present system wherein each arm of the service has its own. There are, however, a few observations which we desire to make and we tender them to you in the form of constructive criticisms, with the hope that they may be of some value to you.

We fear that there may be a possibility for injustice in the operation of the authority and power granted under article 4, wherein an officer may be dismissed by administrative order of the President, even after he has been acquitted by a general court martial, particularly in view of the authority granted to the President in article 140, page 93 of H. R. 2498, wherein the President may delegate any authority vested in him under this code and provide for the subdelegation of any such authority.

In part III, article 15, dealing with nonjudicial punishment, it is noted that the same can be meted out without the right to demand trial. While this procedure is now permitted in the Navy, it is not allowed in the Army.

In our judgment, right to trial should never be refused. Then, paragraph (2), subparagraphs D, E, F, and G add punishment "bread

and water." While it is true that an appeal is provided for, it is quite probable that the punishment will have been completed before the appeal could be decided.

Article 17 grants jurisdiction to each armed force over all persons subject to this code. In other words, the Navy would be given general authority to try an Army man and vice versa. It is the opinion of many that a probability of harsh treatment might be meted out as a result thereof, due to a frequent dislike of one service for the other.

Those who have been interested and pleased over the authority to have enlisted persons sitting upon courts martial fear the inclusion of "unless competent enlisted persons cannot be obtained on account of physical condition or military exigencies," as noted in article 25, subparagraph (c). They fear that this provision might keep some officers from placing enlisted men upon court.

In article 32, subsection (c), while the accused is given the right to be represented at investigation, "upon his request," it appears to me that we might follow the procedure used in our Federal courts wherein the accused is definitely advised of his right to have counsel. In that manner there would be no possibility of the accused not getting all of the protection intended for him.

The question has frequently been propounded to me and I would, therefore, pass to you the inquiry as to reason for special consideration being given to "general or flag officers" over all other officers and even enlisted persons, as set forth in article 66 (b), 67 (b) (1), and 71 (a).

The thought has frequently been expressed that it would be advantageous to establish an independent Judge Advocate General's Corps in each of the three services, or one corps operating out of the Department of Defense. Members of such independent corps could operate on most echelons.

As an example, a man may be charged by a regimental commander, whereupon the charges could be referred to the Judge Advocate General on the division level, who could appoint the court from a panel previously submitted to him by the division commander for the whole division, and he could also appoint the trial counsel and the defense counsel unless the accused desires to designate his own counsel.

Such a plan would eliminate the criticism that the commanding officer orders the arrest of the accused, charges the accused, appoints trial counsel, defense counsel, and then reviews the proceedings.

My observations have been made from experience and contact with men in the armed forces, as a member and officer in the Veterans of Foreign Wars of the United States and from my experience as an actively practicing attorney for nearly 30 years, of which time about 5 years were spent as a prosecuting attorney in the city of Baltimore, Md.

It is my hope that the suggestions offered and criticisms made may be of some constructive value to your committee, which is giving its earnest and careful consideration to the uniform code of military justice referred to in our discussions as H. R. 2498.

In conclusion, may I again thank you for your indulgence and hope that the results of your labors will bring about the type of code which will assure full and complete justice to those who may be charged with violations thereof and at the same time result in the preservation of the orderly discipline and smooth operations of the various components which make up our Military Establishment.

Mr. BROOKS. Mr. Wolman, in reference to your first suggestion there regarding the right of a trial in cases where the command is authorized to make limited punishments not exceeding, I think, 7 days——

Mr. WOLMAN. Yes, sir.

Mr. BROOKS. What is your idea further on that? Is your idea that the commanding officer shall have the right to pass judgment in these limited cases, subject to the right of the enlisted man to appeal to a court?

Mr. WOLMAN. No, sir. What I have in mind primarily comes under what we refer to now as company punishment, if that is the part that you are inquiring about, Mr. Brooks.

Mr. BROOKS. That is right; company punishment.

Mr. WOLMAN. Under the company punishment plan the man may ask for a trial under our Army system. And he is entitled to that trial. But under the bill as drafted—as I read it anyhow—he does not have that right to ask for a trial. I think that right to trial should never be taken away from a person.

Even in the most minor offenses in our regular civil courts, the first question that is asked by a police magistrate is: "Do you wish to have a trial by jury or are you satisfied to have me try it?" and so on.

Mr. BROOKS. You would give the commanding officer no right to punishment.

Mr. WOLMAN. I would give him the right to punish, unless the accused desires to be tried. If the accused desires the right to be tried, I do not think that should be taken from him.

Mr. RIVERS. Mr. Wolman, let me get this straight. I think it is your intention—I think it is in article 4——

Mr. WOLMAN. Just a second.

Mr. RIVERS. Anyway, the thought that our chairman brought up: He has a trial as a matter of right unless he waives it.

Mr. WOLMAN. That is right; I think he should have that right.

Mr. RIVERS. And you say that is omitted in the proposed legislation?

Mr. WOLMAN. No, sir. In part III, article 15—that is the one that I referred to in here.

Mr. RIVERS. That is what I am talking about.

Mr. WOLMAN. That is right, sir.

Mr. RIVERS. He has the right to demand trial. He has a trial unless he waives it.

Mr. WOLMAN. He does not under this, as I read this, sir.

Mr. RIVERS. I see, you complain about that omission.

Mr. WOLMAN. That is right, sir.

Mr. RIVERS. In other words, you want us to write in this bill that a trial is forthcoming in the ordinary sequence of events, unless it is waived by accused.

Mr. WOLMAN. That is right.

Mr. RIVERS. And you want that guarantee written in the legislation.

Mr. WOLMAN. Yes, sir; I think that should be.

Mr. RIVERS. I just want to get your contention.

Mr. WOLMAN. Yes, sir; that is my view, sir.

Mr. RIVERS. I see.

Mr. BROOKS. Mr. Elston, any questions?

Mr. ELSTON. No.

Mr. BROOKS. Mr. deGraffenried?

Mr. deGraffenried. No, sir.

Mr. Brooks. Mr. Anderson?

Mr. Anderson. No questions.

Mr. Brooks. We certainly thank you very much for a very fine statement.

I am going to personally study it, because you reach a number of points there that I would like to follow through.

Mr. Wolman. And may I say, sir, that Mr. Williamson, whom I am sure you all know, would be very glad to meet with you or any of the other members of the committee to further expound those thoughts.

Mr. Williamson, by the way, is a captain in the Marine Reserves and has had quite a little experience during the recent war. I feel like an old man on most of those now——

Mr. Rivers. If we call him, is he going to give us what in his opinion is considered the reason that these were omitted? I notice in your written statement you say it is obviously a compromise. I think most legislation is.

Mr. Wolman. Oh, yes.

Mr. Rivers. I accept that.

Mr. Wolman. Mr. Rivers, I have no objections to a compromise. Having practiced law all my adult life, I know that most accomplishments are as a result of a compromise. The only thing that does worry me, sir, and the members of my committee, is the possibility in arriving at a compromise sometimes we are a bit hasty and leave out some rights and privileges that the lowest grade of enlisted man should be entitled to. I do not think we should ever deprive him of that.

Mr. Rivers. For a piece of legislation which contemplates a change of the whole existing system, there is bound to be some place, somewhere, that sections vital to the legislation are omitted.

Mr. Wolman. Oh, very true, sir.

Mr. Rivers. Yes.

Mr. Wolman. And nobody appreciates that any more than I do, sir.

Mr. Brooks. Mr. Williamson will be available and the committee, I know, will be glad to call on him a little later on when they get into this, if they need him.

Thank you very kindly.

Mr. Wolman. Thank you, sir.

Mr. Brooks. I call Mr. Clorety, national vice chairman, American Veterans Committee. Mr. Joseph A. Clorety, Jr.

STATEMENT OF JOSEPH A. CLORETY, JR., VICE CHAIRMAN OF THE AMERICAN VETERANS COMMITTEE

Mr. Clorety. My name is Joseph A. Clorety, Jr. I am the national vice chairman of the American Veterans Committee.

Mr. Chairman and members of the committee, the American Veterans Committee—AVC—heartily endorses H. R. 2498. Representatives of AVC who have testified before previous Congresses on the problem of assuring justice to all of the members of the armed services were extremely critical of such bills as H. R. 2575 in the Eightieth Congress.

They felt that such bills might aptly be described as a new paint job rather than the complete new model which AVC then and now deems indispensable. H. R. 2498 does fulfill our prerequisite, namely, a code uniform in substance, interpretation and application.

We believe that enactment of this bill will fulfill three major purposes. It furthers the fundamental striving of the American people for insuring justice to all citizens, and specifically to those who by reason of wearing their country's uniform particularly merit the benefits of justice.

As veterans, all of whom are honorably discharged, our membership are fully aware of the deterioration of morale, efficiency and effectiveness when justice miscarries in the armed services. This bill will go far to minimize such injustice.

Thirdly, we believe that assurance such as this bill provides of adequate protection of the process of justice combined with modernization of those processes, will serve to stimulate voluntary recruitment.

We recognize that the members of this committee have heard much of the defects in military justice, especially as applied during the last war. I mention those basic aspects which convinced AVC that only sweeping reform would assure true military justice because we believe that this bill substantially eliminates the major faults in the old system.

Among these were the uneven administration of military justice between services, between commands in the same service, and in many cases between units in the same command.

The second major evil corrected by this bill was the complete lack of trained legal counsel which characterized all too many courts martial, and which was particularly aggravated when the accused did not enjoy qualified legal advice and representation despite the fact that the prosecution was conducted by a trained lawyer.

The third major source of injustice lay in the virtually unchecked power of the convening authority to subvert justice to his own concept of the command function. The pending bill does not appear to impair the essential requirement for successful performance of the command function, while surrounding its exercise in disciplinary practices with such safeguards as requirements that the commanding officer receive the advice of legal counsel at each significant step in a case, and otherwise through preventing any misguided commanding officer from exerting improper influence on the members of a courts martial.

In addition to these significant reforms suggested above, AVC is particularly pleased by a provision for a judicial council made up of highly qualified civilian lawyers. In substance, this provision represents fulfillment of a reform which AVC urged most strongly in its testimony before the Vanderbilt commission and before the appropriate congressional committees during the period since the last war.

We trust that the committee will report the bill in substantially its present form and that it may speedily become law.

We recognize that the act cannot become effective within 30 days after approval of this legislation, but we would suggest that the committee consider amending section 5 of article 140 to permit the act to be placed in effect at an earlier date than in contemplated by the present language of the section, if this should be administratively feasible, while retaining the mandatory requirement that the act

in any case shall become effective at the time specified in the language of the present bill.

AVC wishes to express its appreciation to the committee, not only for the opportunity to present our recommendations with respect to H. R. 2498, but also for the expedition with which the committee is considering this vital reform.

We hope that the full committee and the Congress will likewise expedite enactment of the new Uniform Code of Military Justice. In the final analysis, the armed forces, which defend our democracy, should and must maintain democracy within their ranks.

Mr. BROOKS. Thank you very much, Mr. Clorety, for a very strong statement supporting this bill.

Are there any questions, Mr. Rivers?

Mr. RIVERS. No.

Mr. BROOKS. Mr. Elston?

Mr. ELSTON. Aside from the fact that this bill includes all the services and provides for a civilian judicial council, what difference is there between this bill and the bill H. R. 2575, which you say you were extremely critical of?

Mr. CLORETY. As you will recall, our witnesses at that time, Congressman—I did not mean to infer that your effort was not thoroughly in the right direction—came in with a list of criticisms that ran to 8 or 10 pages, which criticized the bill because it seemed to us not to be sufficiently comprehensive.

It seemed to us not to provide as many safeguards anyway as this bill.

Mr. ELSTON. What are they?

Mr. CLORETY. I recall, for example, there was no provision in that bill that there shall be a mandatory, and declared in the act, presumption of the innocence of the accused until proved guilty.

I think that was an underlying assumption, but it was not stated in the bill as I recall. It was for that reason that I referred to H. R. 2575 in the Eightieth Congress. I hope it will not be regarded as in any way critical of the effort that you made in that Congress.

I think we have now had a really outstanding effort made by the armed forces through the committee which has been at work for many months on this which has enabled them to come up with a much more comprehensive proposed act.

Mr. ELSTON. Well, you still have not answered my question. What is there, aside from the two things that I mentioned, that are in this bill that were not in the other bill?

Mr. CLORETY. This bill, it seems to us, provides additional checks in terms of the points at which the convening authority must receive the recommendations of his legal staff, of the Staff Judge Advocate.

Mr. ELSTON. The other bill provided for the same counsel for the accused that the prosecution had?

Mr. CLORETY. It did. That was one of the strong points in the other bill.

Mr. ELSTON. Well, that has not been changed. So aside from the fact that this bill provides for a civilian judicial council and affects all the services, it does not change anything in the previous bill, at least nothing that you are objecting to?

I think before you wanted cases taken into the United States court, did you not? Was it not your organization that wanted courts-martial cases tried in the United States court?

Mr. CLORETY. We wanted an appeal to the Federal courts. We have reviewed the matter since that time, with some change in the personnel of our own committee studying it, and they have come to the conclusion that this bill goes as far as we could reasonably expect at this time.

We are concerned, as all of the veterans' organizations are, that in the endeavor to assure military justice we do not unduly impair the command function and the ability of the armed forces to function.

We believe this bill is a long stride in the right direction. It may well be that after experience under this bill we will wish to come to the Congress seeking provisions for appeal to the courts.

Mr. BROOKS. Any further questions?

Mr. ELSTON. That is all.

Mr. BROOKS. Any questions, Mr. deGraffenried?

Mr. DEGRAFFENRIED. No.

Mr. BROOKS. Mr. Anderson?

Mr. ANDERSON. No.

Mr. BROOKS. Mr. Hardy?

Mr. HARDY. No.

Mr. BROOKS. Any questions, Mr. Gavin?

Mr. GAVIN. No.

Mr. BROOKS. Thank you very kindly, sir. We appreciate your statement.

Mr. CLORETY. Thank you, sir.

Mr. BROOKS. Now we call Col. John Oliver, legislative counsel for the ROA.

We are glad to have you this morning, Colonel, as a witness.

Colonel OLIVER. Thank you very much.

STATEMENT OF COL. JOHN P. OLIVER, JAG, RESERVE, LEGISLATIVE COUNSEL OF THE RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES

Colonel OLIVER. If I may introduce myself, I am Col. John P. Oliver, JAG, Reserve, legislative counsel of the Reserve Officers Association. I want to thank the members of this committee for extending to me the opportunity of appearing before them today to testify on the subject ot the proposed Military Justice Code, H. R. 2498. At any time you wish to interrupt me for a question, it will be entirely agreeable to me.

The Reserve Officers Association requested permission to appear before the Morgan committee at the time that committee was drafting the present bill. We felt that if we had the opportunity to express our views at that time, much of the time of the Armed Services Committee of the House would be saved.

Unfortunately, the Morgan committee did not see fit to accede to our request and we had no opportunity to present our views to them.

As you gentlemen of the committee no doubt know, the Reserve Officers Association of the United States is a voluntary association, composed of Reserve officers of the armed services with some 1,500 chapters located throughout the United States and overseas.

The object of the Reserve Officers Association, as stated in its constitution, is to support a military policy for the United States

that will provide adequate national security and to assist in the development and execution thereof.

If it will not appear immodest, and in order that the committee may be advised as to my experience, may I say that I am a member of the bar of the State of California, the bar of the District of Columbia, and the bar of the Supreme Court of the United States, as well as various Federal district courts in the United States, having practiced law for the last 24 years.

And I might say in that connection that I spent some 7 years as a deputy district attorney of Los Angeles and had the unfortunate experience of having hanged a number of men. And I have spent an equal period of time at the other end of the counsel table, where I had an opportunity to, shall we say, pluck a few pans from the burner.

I entered upon active duty in March of 1941 and from that date until September 1945 served in the capacity of either a staff judge advocate or an assistant staff judge advocate for units in varying sizes from an Army post, a division, a service command, a corps, and an Army.

I might say that in that connection I worked not on the higher review level as the other gentlemen here who have testified, but rather you might say, at the grass roots level.

Throughout this period of time, I was closely associated with the administration of military justice. I have served on courts martials as president, law member, member, trial judge advocate, and defense counsel.

In other words, I have served in every capacity except as that of the accused. How I escaped that, I do not know. As a result of my service as a member of a court martial, may I read at this point a letter addressed to me while I was in the European Theatre.

HEADQUARTERS _____ CORPS,
OFFICE OF THE COMMANDING GENERAL,
APO _____, U. S. ARMY,
12 May, 1945.

Subject Inadequate sentence by court.
To: Lt. Col. John P. Oliver, headquarters _____.

1. I have read a summary of the testimony in the case of Private _____, Company ____, ____th Signal Battalion and am not pleased with the outcome. I do not consider the court to have performed its duty.

2. The decision of the court is the decision of all its members for which all must be held accountable. It would seem the court undertook to determine whether this man should have been tried by general court rather than a determination of his guilt or innocence from the evidence. Then, after finding him guilty of offenses warranting severe punishment, only a minor sentence was imposed. It is not my intention, when a case is referred to a general court martial, that any sentence imposed be one which a special court martial might have given. I desire in the future that this be kept in mind.

_____
Major General, U. S. Army, Commanding.

The Reserve Officers Association of the United States has been on record by resolution passed at its national convention in Miami in 1947 as favoring a reform in the administration of military justice and more recently at its national convention in Denver in 1948, specifically recommending favorable consideration by Congress of H. R. 2575, heretofore referred to in this committee hearing as the Elston bill.

It is perhaps well known also to this committee that the Reserve Officers Association was extremely active in its support of this bill—H. R. 2575—both during the proceedings in the House and in its passage in the Senate, as title II, the Kem amendment to the Selective Service Act.

It is the opinion of the Reserve Officers Association that the military justice reform bill of the Eightieth Congress was a marked improvement over the system of military justice that had prevailed throughout World War II and that for the first time the primary consideration of command control had been met head-on by Congress of the United States.

We are of the opinion still that the Elston Bill is sound legislation and can see no reason why H. R. 2575—Eightieth Congress—including the provisions for a separate Judge Advocate Corps—that is plural—should not be applied equally to the Air Force and to the Navy.

There may be certain minor changes desirable in the Elston bill in its present form but in our opinion these changes are of a minor nature and easily correctable.

One of the chief differences in the proposed military justice code from the provisions of the Elston bill is the interjection of the civil civil review board. If this committee deems such civil board of review desirable, it is suggested that it might be a much better procedure to provide for three additional judges of the United States Court of Appeals for the District of Columbia to meet the work load and provide that appeals for military justice be then channeled to our civil Federal courts for consideration as appeals from the District and other courts of the United States.

Such an appeal to be permitted on both the law and the facts. It does not appear to us desirable to create an additional special civilian court operating under the thumb of the Secretary of Defense which would consider only one type of case.

We feel that the sound legal knowledge and the broad experience of our civil appellate judges will bring to the administration of military justice a breath of fresh air at the top that would be extremely desirable.

Unfortunately, experience has indicated that all too often such special boards have become political footballs and where the tenure of office is not fixed, where the advice and consent of the Senate is not required for appointment, special privilege is extended to some and denied to others. Surely all of the functions of this civilian board could be performed much more adequately by the civilian judiciary of our court of appeals.

To summarize my remarks up to this point, it is the opinion of the Reserve Officers Association, as I previously stated, that we should broaden the provisions of the present Elston bill with minor amendments and including the Judge Advocate Corps for each of the three services.

However, knowing the serious study that your committee is going to make of the present bill, H. R. 2498, may I take the liberty at this time to comment specifically on some of the provisions of that bill as it appears in the present form.

In article 1, subparagraph (5), page 3, "officer" has been defined to refer to a commissioned officer including a commissioned warrant officer, but we do find that he is referred to in article 25 (b), page 22,

line 9. We feel that this definition should be broadened to include the title "warrant officer."

In article 1, page 4, section (13) and (14) defines "law specialist" and "legal officer" but fails to state that these officers should be qualified as lawyers. This article also fails to define the qualifications of a judge advocate. We feel that these definitions should be broadened to set forth equal qualifications for these officers as defined for law officer as contained in article 26.

Article 2, page 4—We feel that the attempt to broaden the base for jurisdiction of military courts is definitely unsound and feel that the converse should be true. The classes of persons subject to military law should be further circumscribed.

The increase of court-martial jurisdiction is the opening of the door to a military dictatorship. With all due regard and respect to the many fine officers in the Judge Advocate General's Department and there are many fine lawyers there, whom I admire and respect and like to consider my friends, I am concerned with two cases reported recently in the public press, as being an illustration of the danger of turning too many classes of people over to the military for trial.

The first has to do with a case tried in the military courts in Europe where it was reported that the name of the accused was charged with having committed, the names of the members of the court, the identity of the witnesses, the sentence imposed, and whether or not the accused had been executed. None of the public was admitted to the trial and all that was known was that there was a trial going on. Such star chamber sessions are repugnant to all our concepts of the administration of justice.

Mr. BROOKS. Now, Colonel, right there, if I may ask you, what is your idea with reference to the case of the saboteurs who were tried here in the middle of the war?

Colonel OLIVER. Mr. Brooks, I cannot comment intelligently on that because I was not here in the United States at that time and I was not able to follow that case closely enough to give you an intelligent answer. I am sorry, I cannot do that.

Mr. BROOKS. It was held then that the interest of the Nation was such that it should not be a public trial.

Colonel OLIVER. Well, there might be a difference of opinion there. I have always had the idea that this expediency to take somebody's life by a so-called judicial process is unnecessary because if your basir for depriving a man of his life is sound he is going to be dead a long time and there is no need to hurry in doing it.

Mr. ELSTON. Well, Colonel, you of course appreciate that no person could be tried in our civil courts through any star chamber proceeding. The Constitution grants a public trial.

Colonel OLIVER. Exactly, Mr. Elston. And I think the Constitution should be extended sufficiently to provide for exactly the same thing in the military courts. And if secrecy is necessary in time of war, let us delay action until such time as secrecy is no longer necessary.

Mr. ELSTON. I certainly think it is a question that deserves very serious consideration.

Colonel OLIVER. Well, I am seriously concerned about it because one of the bulwarks of American justice in my opinion is the insistence of the Constitution on open trials.

Mr. ELSTON. No doubt about it.

Colonel OLIVER. Because the first foothold to be gained by any dictator or anybody who attempts to deprive us of our liberty is to exclude the public from the courts.

Mr. RIVERS. Of course we seem to have subscribed to the Russian doctrine in this country of killing everybody whose country we have defeated in time of war. We have killed all the generals and all the presidents and everybody else.

Colonel OLIVER. Well, Mr. Rivers, I could comment on that at some length. I am not going to take the time of the committee at this time. But the chief quarrel I have with that, frankly—and I am speaking only for myself in this regard—is the hypocracy that was connected with it.

Now as far as shooting the Germans are concerned, who committed those offenses, I have no particular love for them and I say shoot them, but let us not be hypocritical about it and claim, afterwards that we have given them a fair and impartial trial before we shot them when in truth and fact we have not.

Mr. RIVERS. If that policy had been followed after the War Between the States, then every Confederate general and everybody else who participated would have been hanged.

Colonel OLIVER. I do not say there were no injustices, but I think history, generally speaking, has looked with a high regard on the attitude of the Union Government following the War Between the States and the fact that there were so few cases on that.

But as we have seen overseas, as soon as a side is defeated the first thing you do is kill off everybody that disagreed with you.

Mr. BROOKS. However, economically we followed a different policy there.

Colonel OLIVER. I am not prepared to discuss economic policy. I am only speaking of the military aspect of it.

Mr. RIVERS. Of course I am not complaining about the SS troops, because they were a bunch of gangsters.

Colonel OLIVER. That is right.

Mr. RIVERS. But with respect to the man that has given his life to military training and that was all he knew: To follow out orders, it was a little bit hasty. And I think we subscribed to a precedent that will plague us in the future.

Colonel OLIVER. I think we made an unfortunate choice.

The next case to which I would like to refer is the so-called Malmedy massacre case. This case is not an abstraction to me as my division was fighting in that general location at the time this crime was committed.

Regardless of my personal feelings toward the perpetration of murder, I am equally outraged at the reported action of the board of review on that case as reported in the newspapers. According to this report, brutality and trickery was employed to obtain confessions upon which the convictions were had.

Recognizing this brutality and trickery, the board still approved the sentence, saying such brutality and trickery was necessary because it was a hard case to break. Such an excuse might be used by a Nazi court or by the Spanish Inquisition on the ground that the end justifies the means. However, it is not consistent with the American sense of justice.

Particular attention is invited to the words in subparagraph (1) for training in describing officers subject to the code. This might easily include college or high school students of the ROTC in summer training camps. Obviously these young men should not be subject to the articles of this code.

Attention is also invited to subparagraph (3) Reserve personnel who are voluntarily on inactive duty training authorized by written orders. Under the provisions of this subparagraph, Reserve personnel studying a correspondence course from which they could receive points toward retirement under written orders would be subject to these articles of this code. The explanation of the Morgan committee is that this is intended to cover officers who are performing week end and flight training.

However, our experience with the administration of military justice leads us to believe that this jurisdiction under certain circumstances might well be stretched to the ultimate referred to above.

Furthermore, we do not believe it is sound in theory that civilians who engage in a 2-hour troop school one evening per month should be subject to the articles of this code, particularly when it is provided in article 3 (a), page 6 that Reserve personnel, while in a status which they are subject to this code, charged with having committed any offense against the code may be placed on active duty status for disciplinary action without their consent for such period of time as may be necessary to dispose of such proceedings.

The practical effect of this would be to subject any member of the Reserve to be unceremoniously plucked from his civilian pursuits and placed on active duty without his consent in time of peace for an indefinite period at any time within the statute of limitations.

Imagine, if you will, what well might happen to the practice of a physician or surgeon, or a busy lawyer, or an insurance agent, or an automobile mechanic, or a small storekeeper, if the power is placed in the hands of the armed services to take him from his peacetime pursuit at their will or whim. So far as Reserves on extended active duty are concerned, they should be subject to the articles the same as the other members of the armed services.

And may I say in that connection that I cannot urge this point too vigorously, because if there is one thing that is going to strike at the heart of the Reserve program on inactive status it is to put those officers and enlisted men under the military court-martial jurisdiction.

Unfortunately, I found it necessary from time to time to differ in opinion from some members of the Regular service; and, from a purely personal point of view, I can think of no more effective way to shut my mouth than to leave this provision in the bill.

Now, whether that is desirable or not, I am not prepared to argue.

Mr. RIVERS. Isn't this the same thing that Colonel Maas complained about?

Colonel OLIVER. Exactly, and on exactly the same ground.

Mr. RIVERS. Yes.

Mr. BROOKS. Well, did not Colonel Maas complain about subsection (4), rather than (3)?

Mr. RIVERS. He complained about this authority.

Colonel OLIVER. He also mentioned subsection (4), Mr. Brooks. And I think—and I am going to touch on that in just a minute—the primary point he made on the subject of Reserves is practically identical with the point I am making now.

In other words, at any time within the statute of limitations—which, if my recollection serves me correctly, is 3 years—they could reach out and grab me or any other Reserve.

Mr. BROOKS. But do you have any suggested change that might fit that situation?

Colonel OLIVER. The simplest change I could offer, Mr. Brooks—and I offer it in all sincerity—is to strike it out.

Mr. RIVERS. This would have the consequent effect, as he observed, of killing off interest in the Reserves.

Colonel OLIVER. Exactly.

Mr. BROOKS. How would you punish a person in the Reserve on temporary or inactive duty?

Colonel OLIVER. On temporary duty, Mr. Brooks, take him in the civil courts. He is a civilian anyway, except for the fact that for 2 hours he puts on the uniform.

Mr. RIVERS. Well, if he is an aviator and gets out here and runs an airplane, there ought to be some way of discipline.

Colonel OLIVER. A civil court should be adequate for that purpose.

Mr. RIVERS. You mean in all other phases he would not be subject to the Articles of War?

Colonel OLIVER. So long as he is on an inactive-duty status, no, sir.

Mr. RIVERS. Unless it be a breach of the peace or violation of some civilian statute.

Colonel OLIVER. I mean, if the civilian statutes are not broad enough, let us suggest to the Judiciary Committee that they write in such additional provisions as may be required rather than to broaden the base of military control.

Mr. BROOKS. You would treat him, although he might be a part of an over-all, we will say, air command, as a civilian as far as punishment is concerned?

Colonel OLIVER. He is treated in every other respect, Mr. Brooks, as a civilian. He is not an officer of the United States. He is specifically excluded in the statute—that a Reserve officer is not an officer of the United States. In every other respect he is treated as a civilian, so I do not see any particular point to reaching out here in military justice and saying: Well, as to that particular one, we are going to make an exception.

If the civil laws are not broad enough, let us broaden them. But let us not increase the jurisdiction of military courts.

Mr. BROOKS. Would the military courts have sufficient jurisdiction to cover, say, AWOL under those cases?

Colonel OLIVER. An AWOL for 2 hours?

Mr. BROOKS. No. Suppose a Reserve officer should go to Mexico with an Army plane.

Colonel OLIVER. We can charge him, then, with stealing Government property. It would be very simple. I am sure that is denounced by the civil statutes.

Mr. ANDERSON. Mr. Chairman may I ask a couple of questions for clarification?

Mr. BROOKS. Mr. Anderson.

Mr. ANDERSON. At the bottom of page 5, in referring to subparagraph (1), you quote the words "For training in," describing officers subject to the code. You say: "This might easily include college or high-school students of the ROTC in summer training camps."

Now, do you have any objection to the provisions of this bill which cover cadets at the Military Academy or midshipmen at the Naval Academy?

Colonel OLIVER. As to that, Mr. Anderson, I think your midshipman is in a very, very different situation, or the cadet at the Military Academy, because at the time he goes up there he takes an oath to the United States and he is on extended active duty for all intents and purposes.

Mr. ANDERSON. Well, how about a young man who is taking Naval ROTC under the Holloway plan, where he takes a 2 or 3 months' summer training cruise? Is he not subject to the same discipline that a midshipman at the Naval Academy is?

Colonel OLIVER. So far as Reserves on extended active duty are concerned, they should be subject to the Articles of War—the same as any other member of the armed services. In other words, by that, if a man goes to a summer training camp for 2 weeks during the time he is there on extended active duty, he should be subject to the Articles of War; yes.

Mr. ANDERSON. Then, should a young man who is taking ROTC training at a college like Stanford or California under the Holloway plan, and who intends to make the Navy his career, also be subject?

Colonel OLIVER. No, sir; because he still is a civilian.

Mr. ANDERSON. Well, I am trying to get the difference between a midshipman at the Academy and a midshipman in ROTC at one of our colleges or universities where the objective under the Holloway plan is to bring them all under the same basis. They are all entitled to the same commission if they finish their course. They take the summer training course.

Now, I have a nephew who is doing it, and that is why I am making the inquiry.

Colonel OLIVER. Mr. Anderson, I am not prepared to say that military justice should be dependent upon the amount of money you receive from the Government. But I do think the status of a man who goes to the Government academies, either at Annapolis or West Point, is very, very different from a young man who goes to a private university, even though there may be some contribution from the Federal Government.

Primarily he is educating himself.

Mr. ANDERSON. For a point of information there, Mr. Chairman: Does a young man who takes Naval ROTC under the Holloway plan take the same oath when he starts his ROTC training at Stanford University, we will say, as a midshipman who enters the Naval Academy at Annapolis?

Mr. SMART. Captain McDill says he does.

Colonel OLIVER. I think there is a difference in the contract, though.

Mr. ANDERSON. Is there, Captain McDill?

Captain MCDILL. I am Captain McDill, gentleman.

Yes; there is a difference in the contract, sir, to this extent: The specifications are about the same, except the Naval Academy midshipman is not required by law to accept a commission in the Reserves if he declines the commission in the Regular Navy or Marine Corps.

The Naval Academy midshipman does not have to make that promise. The NROTC midshipman does.

Mr. RIVERS. After how many years, though?

Captain McDILL. Up to a certain number of years; a total of 2 years.

Mr. RIVERS. That is right, because he can quit after the first or second year and he has no obligation to the Government under the Holloway plan.

Captain McDILL. That is correct.

Mr. GAVIN. But not the Academy, though.

Captain McDILL. The midshipman can resign at any time. It is an administrative process. He is not compelled to serve more than 2 years at present. That is purely administrative.

Mr. GAVIN. In the Military Academy, he is expected to serve for 4 years.

Captain McDILL. A total of 8, sir, including their Academy time.

Mr. GAVIN. Eight years. Why do we use that differential there between the Military Academy and Naval Academy?

Captain McDILL. It has been historical and traditional in the Navy, as I understand it. We do not wish to retain people who do not desire to hold a commission, particularly aboard ship.

Mr. RIVERS. I think it was Admiral Felix Johnson who brought that bill before our Naval Affairs Committee a few years ago; was he not?

Captain McDILL. I do not recall, sir.

Mr. RIVERS. I think Admiral Johnson said then—if my colleague will yield——

Mr. ANDERSON. Certainly.

Mr. RIVERS. That he was a civilian at all other times that he was not taking his actual contract training under the NROTC.

Captain McDILL. He is actually regarded, sir, as a civilian unless he is on extended active duty.

Mr. RIVERS. That is right.

Mr. ANDERSON. That was the very difference that I was trying to develop here, because I was a little bit confused myself. Thank you very much, and thank you, Captain.

Captain McDILL. As a practical matter, any Naval Reserve midshipman who commits a serious offense is disenrolled. They are not disciplined.

Mr. RIVERS. That is right.

Mr. ANDERSON. Thank you.

Mr. ELSTON. Mr. Chairman, could I ask a question?

Mr. BROOKS. Mr. Elston.

Mr. ELSTON. Colonel, I am wondering if we could not at least improve subsection (a) of article 3 if we provided that Reserve personnel be tried in the civilian courts, provided the act which is claimed constitutes an offense is an offense against the United States outside of the military law, and let the military only try those offenses which are not so defined.

That would certainly limit it to a very few military offenses and would permit the accused to be tried in the United States court on virtually everything else.

Colonel OLIVER. The thing I am concerned with there, Mr. Elston, is not the philosophy. I think your philosophy is sound. But the practical application is something yet again.

Now, for example, being late to a formation is a military offense. And, if I may use a personal illustration, suppose when I go down to

troop school—which meets in my particular branch of the Reserves 2 nights a month—for some reason and, we will say, to make it worse, for no good excuse, I am 15 minutes late in reporting.

Obviously, I have committed a military offense. And supposing that, as a result of that, the Regular services are empowered to arbitrarily and without any consent call me to extended active duty until such time as that case may be disposed of. And sometimes those military cases, when they go up on review, drag on for a long time. They might take me out of my civilian pursuits.

Mr. ELSTON. Well, I can see why you might invest them with authority to dispose of the case without keeping you on active duty.

Colonel OLIVER. Well, if they do not have me on active duty, they have no jurisdiction over me to try me.

Mr. ELSTON. But, to put all these cases in the United States court, you would have to go to the Judiciary Committee to get the law amended, which would be a long and tedious process.

Colonel OLIVER. Mr. Elston, for any serious offense I am confident that the civil laws are adequate. For minor offenses they can dismiss me from the Reserve administratively, which is an adequate punishment in my opinion.

Mr. RIVERS. That is the law in effect today.

Colonel OLIVER. Exactly. In other words, if it is a minor offense, all they have to do is put me before a 74–C Board, as we call it in the Army, and at the discretion of the President my commission is revoked.

Mr. ELSTON. It might not be a serious enough offense to revoke the commission. It may be something that is very trivial.

Colonel OLIVER. Yes.

Mr. BROOKS. Following that point through, too, for a Reservist in training, if he is injured he should be treated as a civilian and not as a military man.

Colonel OLIVER. I do not think it necessarily follows, Mr. Brooks. In other words, I do not think the compensation is the basis for jurisdiction of military courts.

Mr. BROOKS. Any further questions?

Colonel OLIVER. May I proceed?

Mr. BROOKS. Proceed, yes, sir.

Colonel OLIVER. We are also of the opinion that retired personnel referred to in subparagraph (4) having no active duty to perform and with but slight contact with the military should not be subject to this code.

We are further of the opinion that Reserve personnel retired, subparagraph (5) who might inadvertently, while seeking medical treatment by the Veterans' Administration, find themselves in a military hospital should also not be subject to this code.

Likewise, in subparagraph (11) we are of the opinion that civilians who are only under the supervision of the armed forces without the continental limits of the United States should not be subject to this code. Who knows to what stretches of the imagination the wording "supervision" might reach?

And, again in subparagraph (12) we do not believe that the maintenance of discipline in the military service requires that all persons within an area leased by the United States, which is under control of the Secretary of a Department and which is without the continental

limits of the United States should be subject to the Military Justice Code. Render unto Caesar the things that are Caesar's—yes—but preserve the civilians from military courts.

In article 4 (a) we do not deem it advisable that an officer who has been summarily dismissed should be forced to waive any of his rights in order that he may obtain justice. This comment specifically refers to line 7, page 7:

He shall be held to have waived the right to plead any statute of limitations applicable to any offense with which he is charged.

Specifically, further on this same section, we think the provisions for the substitution of a form of discharge authorized for administrative issuance should have a saving clause which would permit an officer to retain such rights to retirement as he may have had prior to the arbitrary dismissal. The form of discharge also should be changed from "administrative discharge" to honorable discharge.

These comments apply equally to subparagraphs (b), (c), and (d) of article 4.

Mr. RIVERS. Let me ask you right there, Colonel: With respect to a civilian who commits a crime in say occupied Japan or occupied Germany—say he commits murder—who would have jusrisdiction of him under your line of reasoning there?

Colonel OLIVER. At the present time they are tried in what used to be referred to as the provost courts or in the civil courts of that country.

Mr. RIVERS. You have no laws in Germany now.

Colonel OLIVER. Well, they had a case—and this is based only on newspaper accounts—of some woman over there recently who killed her soldier husband. And if I read the report correctly, she was tried before the military courts as distinguished from the actual service courts.

But in order to hedge the bets of the prosecution they charged her not only under the laws of Germany but also under the laws of the military commander. And when she was convicted—and again I am only going by newspaper reports—she apparently was convicted on both, with the theory in mind that if the military commander did not have jurisdiction then he would have her under the violation of German law and if the German law did not apply they would have her under the provisions of the military governor.

Mr. RIVERS. What is your suggestion in a case of that nature?

Colonel OLIVER. Well, it is getting a little bit aside from the subject of military justice here. But I think, in view of those two cases I cited previously, as to this particular murder case that I am referring to and a case reported in the newspapers just last week end of some civilian that tangled with some officer over in Japan, this committee might well consider sometime in the future the possibility of drafting a code to apply to the military courts as distinguished from court martial.

Mr. RIVERS. Would that not be a function of the Judiciary Committee, rather than our committee?

Colonel OLIVER. I cannot answer that. I am not sure enough of the division of authority between the committees.

Mr. RIVERS. I do not want to disturb your line of reasoning. I am just wondering. That does present a problem. Whichever committee has the jurisdiction, it might be well to look into it.

Colonel OLIVER. I think it might well be inquired into because I do know from personal experience, which I saw very briefly before I returned from Europe and from what I heard since then, that at the beginning of the occupation there was considerable—and I do not say this unkindly—floundering around on the part of the military authorities in an attempt to develop some sound theory upon which they could base the jurisdiction of the military courts particularly over American civilians when they were first thinking about bringing in the wives and the families of Americans over there.

I was in the Civil Affairs Division of the War Department at the time and we discussed at some length as to whether or not these civilians, who were as I say the families of servicemen over there, should be subject to the German courts or whether or not the American military authority should be broadened sufficiently to cover those.

I think the view was finally adopted to broaden the military courts to cover the cases of those people.

Mr. ELSTON. You could not broaden the jurisdiction of the civilian courts to try cases outside the United States, except in Territories of the United States.

Colonel OLIVER. The Congress of the United States has a great deal of power and I am sure if they sat down to draft laws to do that——

Mr. ELSTON. Well, you may have a constitutional question involved.

Colonel OLIVER. Well, it might be worth the risk.

Mr. BROOKS. The President said the Constitution follows the flag, too.

Colonel OLIVER. Well, I think the President said that, and I think the Supreme Court has been quoted to the contrary. Frankly, I like the President's view on that subject, but I think the Supreme Court has been sound because up to now the Congress has not stated that the Constitution will follow the flag.

Mr. ELSTON. Take the case of treason. The venue is where the accused person lands in this country. And that is why in one of the recent cases they were particular that the plane land at a certain place, because they wanted to invest the court in that particular jurisdiction with authority to try that case.

Colonel OLIVER. May I suggest, Mr. Elston, that the reason that venue lay at that particular place was because Congress wrote the law to say so.

Mr. ELSTON. Well, those who wrote the Constitution also defined treason in the Constitution, and that is the only crime described in the Constitution.

Colonel OLIVER. I think the venue still was an act of Congress subsequent to the drafting of the Constitution.

Mr. BROOKS. Colonel, will you proceed with your statement, sir.

Colonel OLIVER. In article 6, subparagraph (a) the assignment for duty of all judge advocates, and so forth, is subject to the approval of the Judge Advocate General of the armed force of which they are members.

This is done apparently and properly for the purpose of removing the administration of justice from the command influence. However, there is still a fatal defect in that it does not appear that the efficiency reports or fitness reports of these judge advocates are also required to be made by the next superior judge advocate in place of the commanding officer under whom they serve.

The experience of World War II leads us to believe that one of the most effective ways of maintaining command control is through adverse efficiency or fitness reports by the commanding officer under whom the staff judge advocate served. Many an otherwise competent staff judge advocate stultified his conscience and prostituted his profession in the interest of obtaining promotion.

If the efficiency reports and fitness reports and promotions, even temporary promotions, are placed in the hands of the Judge Advocate Corps, this temptation will be removed.

Mr. ELSTON. Colonel, right there, might not the superior officer in the Judge Advocate General's Corps not have knowledge of all of the service of the officer in question and not be able to make a complete fitness report?

Colonel OLIVER. Well, that is true, Mr. Elston. But I found from observation many times the commanding general too does not have the opportunity to make observation of a lot of the fitness reports he makes out.

Mr. ELSTON. Of course, he gets them from other officers. And the Judge Advocate General, if he passes on the fitness report, will get them from the same source, would he not?

Colonel OLIVER. I know, but you get the opinion strained through a different point of view. I mean, it is not perfect, but I think it will be an improvement.

Mr. RIVERS. Do I understand you to say that all fitness reports relating to the individuals who practice before the military courts should be O. K.'d, that is, approved or disapproved by the Judge Advocate General?

Colonel OLIVER. Yes, sir. I do not necessarily mean the Judge Advocate General, but the next higher echelon.

Mr. RIVERS. Whatever organization is created, it should be independent of command?

Colonel OLIVER. Exactly.

Mr. RIVERS. Yes, sir.

Colonel OLIVER. As to subparagraph (c) of article 6, line 8, it is suggested that the words "trial judge advocate" or "trial counsel" be inserted following the words "shall subsequently act as a" and before the words "staff judge advocate or legal officer."

In article 7, subparagraph (b), line 16, page 9, we believe that the words "grounds for" should be inserted between the words "may do so upon reasonable" and the words "belief that an offense had been committed," because a reasonable belief should be based upon reasonable grounds.

In article 9, subparagraph (c), line 23, we feel that it would be better English to transpose the word "only" from the end of that line to the end of line 24, so that the sentence would read—

an officer, a warrant officer, or a civilian subject to this code may be ordered into arrest or confinement by a commanding officer to whose authority he is subject only by an order—

and so forth.

In article 10, page 11, line 17, we believe that the word "offense" should be substituted in that line for the word "wrong" because a man might commit a wrong without having committed an offense.

In article 12, line 8, we are undecided as to the meaning of the words "immediate association" and believe that members of the armed

forces of the United States placed in confinement should be entirely removed from having to associate with enemy prisoners or any other foreign nationals.

We think an additional provision should be added to this article requiring segregation of sexes where the parties are unmarried. And further, that all citizens of the United States, in addition to members of the armed forces, should be extended similar consideration.

Under article 15, page 13, we believe that the unlimited power of commanding officers to impose nonjudicial punishment should be circumscribed rather than broadened and we believe further that no nonjudicial punishment should be imposed without the alternative right to trial by court martial and that such alternative right should be granted by legislation rather than by the grace of the head of a department or other subordinate officer. That is in the case of company punishment.

We further believe that the withholding of privileges for two consecutive weeks is excessive. We further believe that the forfeiture of one-half of his pay per month for a period of 3 months is excessive as well as extra duties for a period of two consecutive weeks.

The viciousness of this system is further revealed on page 14, subparagraph (2) (e) (f), which permits confinement for a period not to exceed seven consecutive days, or confinement on bread and water or diminished rations for a period not to exceed five consecutive days.

I am apprehensive of the results of such unbridled power in the hands of a martinet. There is nothing in article 15 that prohibits the constant and continuous and repeated imposition of this punishment, without interruption, upon any individual.

In other words, he could repeatedly get seven consecutive days for an indefinite period at the whim of the commander, and there are commanders that would do it.

Mr. BROOKS. That is comparable to contempt, is it not, the power of contempt in the Federal court?

Colonel OLIVER. Well——

Mr. BROOKS. Where you have the right to impose repeated sentences following repeated acts?

Colonel OLIVER. That is right. But in this case here—and that is one of the quarrels that I have always had with the staff judge advocate, in trying to hold these boys down to the imposition of company punishment, because it is very, very easy for a company commander to get mad and say, "Give him 7 days"—the choice should be left up to the accused as to whether he wants a court martial or will take company punishment.

My suggestion is that members of the Judge Advocate General's Corps should be qualified as lawyers and not merely be somebody who is arbitararily designated by a commanding officer—by saying: You are a law specialist for the purpose of this case.

Mr. BROOKS. Yes, sir.

Mr. GAVIN. He must be legally trained.

Colonel OLIVER. That is exactly what I mean, sir.

We are further opposed to article 15, subparagraph (c), page 15, which permits an officer for minor offenses, to impose such punishment authorized to be imposed by commanding officers as permitted by the Secretary of the Department. This unbridled opportunity to

impose punishment without the right to demand a trial is pregnant with possible abuses.

So far as article 17 is concerned, we believe that it is basically unsound.

The history of the squabbles between the armed services during this period in which unification has been attempted would make the abstract judicial approach of a court martial composed of officers of one service trying officers of another service extremely doubtful.

The interservice feuding is a sad commentary upon our combined operations in the past war, as evidenced by the famous Smith versus Smith, Richardson versus Smith, Nimitz versus Richardson cases of the Pacific theater.

Articles 18, page 17, again arouses our concern where it is set forth that courts may impose any punishment "not forbidden by the code." It is a primary rule in the administration of justice that a man who commits an offense should know in advance the punishment he is likely to receive and the legal attitude here of permitting any punishment not forbidden, with the forbidden punishments limited only by article 55 of the code will again permit unbridled abuse.

In article 23, page 20, it is suggested that an additional provision be added to permit a superior commander in the exercise of his discretion to reserve special court-martial jurisdiction for himself as provided in the former Articles of War.

And that is so in the case of one command, if he wants to reserve special courts-martial jurisdiction, you have a uniformity of punishment within that one command.

As to article 25, page 22, subparagraph (c), line 19 to the end of the page, we believe that this provision should be rewritten in order to clarify its meaning. The words on line 19 "prior to the convening of such court" do not indicate whether it is the intent of the law that this request should be made prior to the first time a court might convene in some other case or whether it means prior to the convening of the court of the case in which the enlisted man is the accused.

The additional language beginning in line 21—

after such a request no enlisted person shall be tried by a general or special court martial—

and so forth, does not indicate whether the word enlisted man refers to the special enlisted man then on trial or whether it refers to all enlisted personnel who might then be tried by the same court in that or some other case.

As to article 26, page 23, it is suggested that this article be amended to further provide that law members shall be designated by the Judge Advocate General rather than permit a commanding officer to choose such law members as might be amendable to his wishes.

It further should be specifically provided in this section, as it does not appear elsewhere in the code, that no courts martial shall proceed with the taking of testimony or evidence, as proved in the Elston bill, in the absence of a law officer.

As to article 26 (b), we are of the opinion that the law officer should be permitted to retire with the other members of the court for the purpose of voting on the findings and sentence.

Our views might be otherwise if the law officer were extended all of the rights, duties and responsibilities of the Federal judge but where he

is permitted to rule only on interlocutory questions and instruct on the presumption of innocence and the doctrine of reasonable doubt, and so forth, as set forth in article 50 (c), pages 43 and 44, we feel that the services of this valuable officer will be wasted.

Article 27, subparagraph (a), page 24, line 22, and again on line 24, reading as follows:

No person who has acted for the prosecution shall act subsequently in the same case for the defense, nor shall any person who has acted for the defense act subsequently in the same case for the prosecution.

The meaning of the word "acted" is indefinite in our mind and might easily be construed that a person who had been a witness or perhaps even remotedly connected with the case might have "acted."

Again in article 27, subparagraph (b) (1), page 25, the term "judge advocate of the Army or the Air Force," or a "law specialist of the Navy of Coast Guard" is indefinite. We are concerned as to whether or not these officers shall be members of the Judge Advocate Corps of the Army or Air Force, or may they merely be officers designated as such by the commanding officer for the time being. We feel that the law should specifically designate these officers as members of the Judge Advocate Corps in each of the three services.

Mr. RIVERS. In that connection, if we have an independent Judge Advocate General's Corps, it may be possible that he would act one time as a prosecutor and at other times as defense counsel.

Colonel OLIVER. You mean in the same case?

Mr. RIVERS. No; in different cases.

Colonel OLIVER. That is right.

Mr. RIVERS. That does not contemplate a thing of that nature?

Colonel OLIVER. Certainly not.

As to article 29, subparagraph (a), page 26, we feel that this article should specifically state that the law member shall not be excused and in those cases where unable to attend by reason of physical disability or other cause that no proceedings may be had in his absence.

As to article 30, subparagraph (d), page 28, we feel that the term "any unlawful inducement" should be defined. We can find nothing in the proposed military justice code that would indicate what may or may not compose unlawful inducement. We believe that the present article of war 24 presently used by the Army and Air Force should be inserted in place of subparagraph (d).

As to article 32, subparagraph (d), page 30, we find one of the most unusual provisions contained in the entire proposed Military Justice Code. After having recited in some detail the steps that shall be taken to provide a fair and impartial investigation prior to trial, this article ends up with a statement in substance that the failure to follow the provisions thereof will not make any difference.

The explanation given by the Morgan committee in this connection is most enlightening where they say:

Subdivision (d) is added to prevent this article from being construed as jurisdictional in a habeas corpus proceeding. Failure to conduct an investigation required by this article would be grounds for reversal by a reviewing authority under the code and an intentional failure to do so would be an offense under article 98. What nonsense.

If a free and impartial investigation is necessary in the administration of military justice, why should it be jurisdictional and why the concern of the Morgan committee over whether or not a writ of

habeas corpus would lie. This subsection would seem that we can talk out of both sides of our mouth.

As to article of war 35, on page 31, the provision that in time of peace no person shall, against his objection, be brought to trial before a general court martial within a period of 5 days should be broadened to include in time of war.

It is impossible to conceive of a circumstance where the delay of 5 days in a trial would prejudice any military operation. We have the recent case of Shapiro before the court of claims where the accused was brought to trail 1½ hours after having been served with the charges, with the court located 35 miles away from where the accused was at the time.

This article is also inconsistent with article 40, page 34, which provides in substance that a court martial may, for reasonable cause, grant a continuance to any party for such time and as often as may appear to be just. In this latter article, there is no limitation as to peace or war and there should be no limitation in article 35.

As to article 36, subparagraph (a), page 32, we believe that the modes of proof should be included as a part of this code and not left to the discretion of the Secretary concerned. Modes of proof are as much a part of the administration of justice as are the articles that denounce offenses.

As to article 37, page 32, in an attempt to close the front door against unlawfully influencing the court, this bill leaves the back door open. It is our opinion that in line 14, following the words "commanding officer," the additional words "nor anyone" should be added.

This article in its present form might easily be circumvented by having the commanding officer tell his chief of staff or some other person to carry his remarks to the court and thus avoid a violation of the article. In other words, we feel that the attempts to unlawfully influence the action of the court should be prohibited to all and not merely limited to commanding officers.

Article 41 (b), page 35, limits the preemptory challenges, one to the accused and one to the trial counsel. The word accused is both singular and plural. Thus, if three accused were tried for a joint offense, they would have but one preemptory challenge between them that must be jointly exercised. Each accused should have a preemptory challenge.

Article 44, page 37. This article should be corrected to provide that jeopardy attaches when the court is sworn. Many cases are known where an accused has been on trial for his life before a court martial for the same offense merely because the review was not completed.

As to article 50, subparagraph (a), page 42, we are unable to follow the provision that permits the admissibility of records of courts of inquiry and the sworn testimony taken before court of inquiry to any case not capital and not extending to the dismissal of an officer.

We are unable to understand why such testimony might be admissible where the sentence imposed by the court might be life imprisonment or the case of the enlisted man could be a dishonorable discharge.

We cannot feel that the protection of an officer's commission should be considered greater than the protection of an enlisted man against a dishonorable discharge or any confinement in a penitentiary up to the period of life.

Furthermore, this section would permit the introduction of evidence taken by a court of inquiry even though the court of inquiry did not pertain to the subject matter which the trial might be had by a court martial. Or, that the investigation by the court of inquiry might be of a person other than the accused.

As to article 51 (b), page 43, beginning on line 18 through 22, we do not understand the meaning of this provision. It is heretofore provided that certain rulings by the law member shall be final.

It is further provided that the law member may reverse himself. Therefore the final ruling is not a final ruling. What is meant by the words "if any member objects thereto"? We do not know and recommend that this provision be stricken.

As to article 52, subparagraph (c), page 45, the inconsistency of the provisions for tie vote is unusual. In one instance they are for the accused; in another instance they are against the accused; and in a third instance they are again for the accused.

We feel that under the doctrine of reasonable doubt and the presumption of innocence, all the votes should be in favor of the accused.

As to article 52, subparagraph (a) (2), page 44, we believe that in those cases such as the mandatory penalty of death or life imprisonment that such conviction should likewise be unanimous and in any case where the sentence is life imprisonment or confinement in excess of 10 years that the conviction likewise should require the concurrence of three-fourths of the members of the court, as does the imposition of a sentence.

As far as article of war 56, page 47, is concerned, this provision is extremely salutary. However, the experience in World War II indicates that in some jurisdictions where the commanding general was dissatisfied with the limitations of punishment imposed by the President, the practice was adopted of adding an additional charge of AWOL for possibly 15 minutes so that the sentence could be in the discretion of the commanding general.

I am not prepared to offer the draft of an amendment to this section to cover such a situation but I feel that this Armed Services Committee in its reports should perhaps suggest their disapproval of such shystering practices.

Article 59, subparagraph (a), page 49. The previous provision of article of war 37 provided that the finding and sentence, and so forth, should not be disapproved unless the error materially affects a substantial right of the accused. In this present subparagraph, this term "materially affects" the substantial rights of the accused. We feel that the use of this new term would deprive an accused of any right of appeal he might have based on errors committed by the court and feel that the former terminology of "materially affects" should be adequate to protect the Government.

As to article 63, subparagraph (b), page 51, we are concerned with the implied permission granted herein for a court on rehearing to try an accused on another and different charge than the one tried in the first instance.

We feel that if the offense was not considered on its merits in the original proceedings that separate and other proceedings should be had rather than attempt to take another bite at the accused at rehearing.

Article of war 66, subparagraph (c), page 53, as has been stated by many of the other witnesses, we do not feel it sound judicial procedure

to permit the Judge Advocate General who is displeased with an opinion by one board of review, to refer the case back or to another board of review. Surely no board of review can act honestly and independently under such supervision and restriction.

Article of war 67, page 54. My comments on this provision have been made in the early part of my statement, but in the event this committee feels that such a Judicial Council is desirable, I fail to see in subparagraph (b) (1) where cases that "affects a general or flag officer" are of equal importance with a sentence of death of an enlisted man which would give such general or flag officer cases special priority to go to this Judicial Council.

And again in subparagraph (c), we do not feel that 30 days is sufficient time in which to perfect an appeal to the Judicial Council. The experience during the war in overseas stations would indicate that no enlisted man could possibly preserve his rights under such time limitations and it is suggested that this period be extended at least to 1 year.

In all cases, hearings should be had by the Judicial Council as a matter of right to the accused and not at the discretion of the Judicial Council, as provided in subparagraphs (c) and (d).

Mr. ELSTON. Right there, Colonel, do you not think that might really increase the work of the court? In other words, the Supreme Court of the United States today decides what cases it will admit after there has been an argument on an application to be admitted to the court: A petition for a writ of certiorari.

Now, if they all automatically go into the Judicial Council or go in in there simply because the accused requests it as a matter of right, would that not require more than three judicial officers?

In fact, would it not require a tremendous number of them to dispose of all the cases?

Colonel OLIVER. Mr. Elston, I am much more concerned with the time that some man may serve in a penitentiary or the short drop he gets on the end of the rope than I am with the work load of the Judicial Council.

Mr. ELSTON. But we want to give the accused in the trial of a military case at least the same rights that a man has in the civil courts. In the civil courts he is tried before the United States district court.

He appeals to the United States circuit court of appeals, and that court hears his case. As I recall it, that court generally passes on questions of law, rather than questions of fact.

They go to the Supreme Court of the United States and the Supreme Court decides whether they will let him appear on the question of law. Now as to the accused in the military court, the commanding officer first has the opportunity to throw out the whole case if he wants to, to remit the sentence and reduce it, and so forth.

Then he has a complete hearing on the facts, with an automatic hearing before the board of review. There may be more than one hearing before a board of review. There may even be another board of review hearing a case that the Judge Advocate General sees fit to refer.

Then, after all those proceedings, to say that he can go before the Judicial Council as a matter of right and have all the facts gone over again is giving him far more than the fellow gets in the civil court who is indicted for murder or any other offense.

Colonel OLIVER. Well, maybe my perspective is distorted, but I do not think that heretofore the examination of those cases on review has been with the same interest for the accused that our civil courts look on in similar cases.

Mr. ELSTON. Well, that is a matter of administration, rather than the law, is it not?

Colonel OLIVER. And in your bill last year, Mr. Elston, you provided for some additional formal review, without going into the details, which has been taken out of this bill.

Mr. ELSTON. I appreciate that, and that was because we wanted to be certain that there was a complete review.

Colonel OLIVER. That is right.

Mr. ELSTON. Of every case.

Colonel OLIVER. That is right.

Mr. ELSTON. We even provided a review of all World War II cases.

Colonel OLIVER. That is right. I am going to cover that in a minute.

Mr. ELSTON. We wanted to be certain that there was a review on the facts, so that there would be no injustice done at all.

But if the Judicial Council, which is the Supreme Court so far as the military cases are concerned, have to review the facts, too, everybody will go up to that court.

Colonel OLIVER. I think it might be a good idea.

Mr. ELSTON. Well, if it was necessary yes, but I have just a question on it. I do not know whether it is or not. Certainly it has never been considered to be essential in the civil courts that the Supreme Court of the United States review the facts in the case.

Colonel OLIVER. Well, civil courts have always operated very differently than military courts. That is the reason I think it is about time we were perhaps leaning over a little backward on review.

Mr. RIVERS. Of course, the Supreme Court has gone into the legislative business now.

Mr. ELSTON. The Supreme Court of the United States.

Mr. BROOKS. Well, let us proceed, Colonel, if it is all right.

Colonel OLIVER. As to subparagraph (d), it is our opinion that the Judicial Council should inquire into all of the merits of the case and not limit itself merely to issues raised by the accused who might or might not be improperly or ineptly represented by counsel.

As to article of war 71, subparagraph (b), page 59, lines 21 through 23, we believe that a provision permitting an officer to be reduced to enlisted grade is vicious. We recognize that such a provision was contained in the Elston bill but nevertheless are of the view that such punishment, particularly in the case of an officer of mature years with a family, might be far greater than an outright dismissal from the service.

As to article of war 72, subparagraph (a), page 60, line 15, we believe that the provision for a hearing prior to the vacation of a suspension of a sentence is sound. However, it does not appear from this section how such hearing shall be held or before whom, nor the nature of the proceedings. It does not provide whether or not there shall be a record made of the proceedings or, if a record is made, what shall be done with the record.

The delightful indifference of this section intrigues us further by the use of the term "probationer" in line 16. We can find no definition of this term in the proposed Military Justice Code nor can we find it used elsewhere therein.

Does this suggest that the armed services set up a probation system similar to that in operation in the civil courts with the supervision probation officers, records, and so forth? We recommend that this section be clarified.

As to article 73, page 61——

Mr. GAVIN. At that point, what do you think of that idea?

Colonel OLIVER. Well, I think the matter of a hearing is sound in and of itself, so you do not have the arbitrary business of saying "off with his head" to some man who has a suspended sentence.

The only quarrel I have with it is the indefiniteness with which this particular section is drawn. It is quarreling over the wording rather than the principle.

As to article 73, page 61, we are of the opinion that the limitation of a new trial based on grounds of newly discovered evidence or fraud on the court is entirely too narrow. We feel that a new trial should be granted in any instance where the interests of justice will be served thereby.

We further believe that a saving clause similar to that now contained in the article of war 53 of the Elston bill covering cases tried during World War II properly should be included in the present bill.

As to article 76, page 63, we do not believe that this Congress should make final and conclusive courts-martial proceedings even though they may have gone through the mill. We do not believe that by legislation we can or should deprive the Federal courts of the power to act in appropriate cases by writs of habeas corpus or otherwise and as has been previously suggested in our comments, we are firmly of the opinion that the court of final review should be the United States Court of Appeals for the District of Columbia. Subject of course in appropriate instances to the action of the Supreme Court of the United States.

Article 87, page 69, line 19, the term "duty to move" is too indefinite. It is our opinion that this article should be limited to overseas shipments or movements into combat.

As to article 121, page 81, as presently drafted, this article would permit an attorney who brought an action in replevin against an individual to be tried for larceny. That is under a charge of theft, I think.

Under the miscellaneous provision of this bill, article 140, section 7 (c), page 95, we have a directive to commanding officers and others in the naval service. This directive is rather unique to have been contained in a Uniform Code of Military Justice at first, in that it is directed only to officers of the naval service.

Whether the drafters of the bill felt that the officers of the Army and Air Force did not require such a directive or whether doubt as to the capacity of naval officers particularly required this directive does not appear.

While I am quite in agreement with the noble sentiments expressed, I am of the opinion that such instructions are more properly a matter of regulation than a matter of law.

As to article 140, section 7 (d) and (e), pages 95 and 96, I feel they have no place in a Uniform Code of Military Justice. I yield to no

man in my firm belief in a divine being nor in the requirements for reverent behavior during divine services.

On the other hand, it is my opinion that the requirements for divine services and reverent behavior have no place in this code and should be a matter of regulation. Again the question is raised as to why this provision should be particularly required only by the Navy.

In section 10 of this same article, it is stated that no officer shall be dismissed from any of the armed forces except by sentence of courts martial, and so forth. This section seems to be in conflict with section 23 of she National Defense Act, as amended, where an officer may be dismissed during the period of the first 3 years of his commissioned service. I believe that section 10 should be reconciled with section 23 of the National Defense Act.

I am concerned that in the limited time that has been available to me, I may have overlooked many implications contained in other provisions of this bill. The Morgan committee worked on the drafting of this bill for over a year and my opportunity to examine it has been limited to weeks and has been done at odd times in connection with my other activities. If I have neglected or overlooked provisions of this bill that should be commented on, I ask the forbearance of this committee.

To summarize, at a meeting of the national executive committee of the Reserve Officers Association, February 20 through 22, 1949, by resolution passed by that body, the legislative representatives of the Reserve Officers Association were directed to actively question any provisions of the present or proposed legislation relative to military justice that are incompatible to the best interest of the Reserve components of the armed forces.

It is under the authority of that resolution, together with the two resolutions of our national conventions previously referred to, that I appear before your committee this morning. It is the belief of the Reserve Officers Association that the excellent provisions of the Elston bill, together with requirement for separate Judge Advocates Corps should be extended to the three services; that we strenuously should oppose any attempt to depart from the excellent reforms contained in that bill; that the independence of the administration of justice from the influence of command should be strengthened; that provision should be made for rehearings in appropriate cases of courts martial tried during World War II and that the rights of accused should be protected, consistent with requirements of a military operation.

I thank this committee for their courtesy in permitting me to appear before them this morning.

Mr. BROOKS. Colonel, we thank you for a very carefully drawn statement, which indicates a thorough knowledge of the bill.

Now, are there any questions?

Mr. ANDERSON. If he has left out anything, he wants us to accept his apologies.

Mr. BROOKS. I think he made a reservation to include it, if he left it out.

Mr. GAVIN. You say you only worked on this with very limited time——

Colonel OLIVER. Yes, sir.

Mr. GAVIN. Yet you have done a most thorough job.

Mr. ELSTON. I think the colonel and his organization are to be commended for the very thorough manner in which they have taken this bill up section by section. They certainly have given us some suggestions which will require our very careful consideration.

Colonel OLIVER. Thank you.

Mr. RIVERS. In that connection—if my colleague will yield—if they could be incorporated in some sort of a proposed piece of work it would save us a lot of thumbing because I think——

Mr. SMART. They will be.

Mr. BROOKS. We will ask Mr. Smart, if he will, to work with the colonel and work out some arrangement.

Mr. SMART. Yes, sir.

Mr. BROOKS. So when we get ready to read this section by section we will have all these recommendations.

Mr. SMART. I may advise, Mr. Rivers, that not only Colonel Oliver's testimony but the testimony of all witnesses, their recommendations, will be digested for the use of the committee when we get to a section by section reading of the bill.

Mr. RIVERS. Which will entail a powerful lot of work.

Mr. SMART. It will be done.

Mr. BROOKS. We have one more witness this morning, Mr. Richard L. Tedrow.

Mr. Tedrow, would you have a seat, sir. You have a regular statement, have you, Mr. Tedrow?

Mr. TEDROW. No, sir; I have not. I just knew definitely that I was coming over here last Friday, sir. My remarks will be fairly general and they will be confined more or less to my views in regards to the Navy outlook, sir.

Mr. BROOKS. Well, go ahead, sir, and give us a little of your background, if you will, Mr. Tedrow.

Mr. TEDROW. Yes, sir.

STATEMENT OF RICHARD L. TEDROW, ATTORNEY, WASHINGTON, D. C.

Mr. TEDROW. My name is Richard L. Tedrow. I am an attorney in private practice here in the District of Columbia. I have been practicing law since 1934 here, with the exception of 4 years' service with the Navy during the last war.

During my service in the Navy my duties were, at least 90 percent, in legal work, mostly courts-martial work, and I had experience both here in Washington and in the field. I was a special assistant to the Judge Advocate General. I was also the assistant inspector general of naval courts-martial and legal activities.

I served on the Naval Clemency and Prison Inspection Board, as well as on the Naval Disciplinary Policy Review Board and on the special Ballantine Board set up by the Secretary of the Navy toward the end of the war.

My first and most particular concern is that in this bill it is apparently contemplated that there will be at least two different legal systems within the armed services. I gather that the Army is to have a JAG Corps.

Whether that is going to apply to the Air Force or not I cannot say at this time. But they also apparently contemplate that the Navy and the Coast Guard shall have some sort of legal-specialist system.

Now the reason for this divergence in these different types of legal systems within the service is not known to me. It appears to me that either one or the other of the systems must be the more preferable. And whichever this committee may find, I suggest that such system should be applied uniformly to all the services.

This Navy legal-specialist system apparently grew up toward the end of this war. I might state that prior to the war and during most of the war the Navy system in regard to people learned in the law or, at least, law-school graduates, was that a regular naval officer would come here on duty and as part of his duties he would attend law school and while he was attending law school he would also be employed in the Office of the Judge Advocate General reviewing cases, and boards of review and similar matters.

As soon as he graduated from law school and whether or not he passed this bar or any other bar, he would be transferred to sea duty. On most occasions, I would state that it was maybe 8 or 9 years before such officer ever came back to Washington or was assigned to what we would call legal duties.

I believe some of the members of this committee are attorneys and I believe they know that you cannot practice law on a half- or a quarter-time basis. You cannot go to law school and graduate and then take up other duties for 6, 8, or 10 years, and then come back at the end of that time and consider yourself as being a qualified attorney.

Mr. ELSTON. Some Members of Congress have found that out.

Mr. TEDROW. Yes, sir. I was going to suggest at that point that if for some reason a member of this committee were retired from Congress here, sir, and he spent the next 2 years back in his home State entirely engrossed with some other and entirely different occupation he could not come back here at the end of 2, 4, or 6 years and be immediately up to date on all legislation that has been passed in his absence.

Mr. RIVERS. Of course, we are supposed to know everything, you know.

Mr. TEDROW. Sir?

Mr. RIVERS. We are supposed to know everything.

Mr. TEDROW. Yes, sir; I know that.

Mr. ELSTON. A violent assumption.

Mr. TEDROW. Incidentally, I think the committee will also recognize that no boy or man who graduates from law school is an experienced lawyer. However, I think even now, I know during the war and prior to the war, cases in the Office of the Judge Advocate General are passed on by people who are attending law school.

In that connection I might state I recently had a case—civil case—involving many thousands of dollars before the Navy. I had prepared a brief and it took 2 or 3 weeks. There were some very obscure points of law in the case and I went back several hundred years on questions of commandeering, expropriation of property, and the like.

And the Supreme Court's decisions are in conflict on the proposition. I was in the Navy Department on another matter. I stopped in the appropriate office and I found out who was handling the case and I said I would like to see him and discuss it with him.

And the head of the division said, "Well, I am sorry, Commander so and so is going to law school right now." That was the gentleman I was going to discuss that proposition with. So the question of quali-

fied personnel goes not only to the rights and the privileges of these men that are tried by court martial, but I think it goes to a substantial question of property rights of the Navy Department itself.

I think if this committee will review the previous committee hearings back in about 1941 or 1942 you will find that it was because of the alleged failure of the then Judge Advocate General's Office to have qualified legal personnel available that the Office of General Counsel came into being. And all of these matters regarding contracts and almost everything else was taken away from the Judge Advocate General's Office.

Now I think it is proper to state here that I personally have no ax to grind. I certainly have no animosity against the Navy. I have a great deal of affection for the Navy. I had 4 years of excellent duty. I had fine billets.

And I had good commanding officers. And by and large certainly the officers I served with or under would compare favorably with any similar bunch in civilian life. I do not want the committee to think that I am coming up here and trying to knock anybody, because I certainly am not.

I am concerned with the question of qualified personnel first of all, because even if you give a system that we will say is not the best system in the world but if you have capable people handling that system it is going to work out better than the best system in the world if it is handled by inept personnel.

You are not going to have qualified personnel, in my opinion, until you make your legal work in the Navy a full-time work. A man cannot practice law on part time and be any credit to himself or his profession.

Mr. NORBLAD. Are they not doing that generally in the Navy nowadays?

Mr. TEDROW. They have been doing it part time for many years, sir.

Mr. NORBLAD. I mean doing it full time, generally; are they not?

Mr. TEDROW. I would not be prepared to state.

Mr. NORBLAD. I know several officers over there who do nothing but JAG work all the time.

Mr. TEDROW. As law specialists.

Mr. NORBLAD. That is right.

Mr. TEDLOW. They are also subject to assignment as administrative officers in military government, we will say, at Guam or places like that. I think that is entirely appropriate, for an attorney to be engaged in that type of additional work.

Mr. BROOKS. Your recommendations are tantamount to saying that what we need is a Navy JAG Corps?

Mr. TEDROW. Yes, sir.

Mr. GAVIN. A uniform system for all three services.

Mr. TEDROW. I think it should be uniform. If this committee decides—and I say you would decide wrongly—that the specialist system is the most desirable, then at least let us have it for all the services.

But your Navy specialist system at the present is set up in such a way that there is no requirement that those officers shall do full-time legal duty. That particular provision came up before the Ballantine Board—and incidentally I was one of the signers of the

minority report—and the Ballantine Board after considering the pros and cons in effect recommended against having a JAG Corps and apparently preferred the specialist system.

They said that they did not see any reason why an officer who was otherwise a good officer should be lost to the line merely because he was an attorney.

Mr. ELSTON. You know, of course, the Army recommended against a separate JAG Corps, in the Army?

Mr. TEDROW. I have understood that, sir.

Mr. ELSTON. Congress provided for it, nevertheless.

Mr. TEDROW. Yes, sir.

Mr. ELSTON. The only reason they did not include the Navy was not because they did not think the Navy should be included but because the Navy bill had been presented later than the Army bill to us and had never been considered.

Mr. TEDROW. That is correct, sir. That bill was held up;

Mr. ELSTON. We understood that the Navy bill would come along later for consideration, and that was the only reason the Navy provision was not considered simultaneously with H. R. 2575.

Mr. TEDROW. Yes.

Mr. RIVERS. I believe this, as Mr. Elston said: They were next on our list. I believe you can safely assume that whatever is done for the Army and Air Force as far as an organization—I mean you can put it in your book now—it is sure going to be done for the Navy.

Mr. TEDROW. I am glad to hear that, sir.

Mr. BROOKS. Would you rather have a separate corps or would you rather unify them?

Mr. TEDROW. You mean a single corps for the three Departments?

Mr. BROOKS. Yes.

Mr. TEDROW. I question whether you could do that right now, sir. I think eventually it will be most desirable, as unification progresses. But at the immediate time and with the admitted divergence between the services, I suggest they should each have their corps, but the same type of corps for each service.

Then as unification progresses why certainly, if it is then considered desirable, I can see no objection to a single corps.

My objection is: Get your qualified personnel and assure they will remain qualified. And I can state that even if you set up a JAG Corps, unless it is going to be full-time legal duty, you are not going to have the people remain in a qualified position.

I came back from the service after 4 years and I almost had to take a refresher course in law again before I could go out and practice in the civil courts. And if you had a person doing full-time duty as a law specialist and for some reason he is assigned to 3 or 4 years at some other duty, he is not going to be in a position to pass on cases when he comes back to this law duty without extensive refreshing and preparation.

There is one point—I am jumping around here—that I do want to stress also——

Mr. NORBLAD. Before you get off that point.

Mr. TEDROW. Yes, sir.

Mr. NORBLAD. Was not Admiral Colclough, a very excellent officer in charge of the JAG, assigned after several years of JAG duty to submarines in the Pacific?

Mr. TEDROW. Yes.

Mr. NORBLAD. And he was the JAG for several years?

Mr. TEDROW. And he was formerly JAG, for, I believe, almost 3 years.

Mr. NORBLAD. Yes.

Mr. TEDROW. He succeeded Admiral Gatch, I believe, sir.

Mr. RIVERS. That is true of the Army and everybody else, heretofore. We realize we have an opportunity now, as our chairman says, to write a code here that is going to be the catalog for the future on all military justice matters.

And I do not think that any of us are going to miss that opportunity. And I am sure our chairman senses that. And you can bet your bottom dollar we are going to make that effort. I can tell you that.

Mr. TEDROW. I am very pleased, sir. And I may say I was particularly pleased to see the armed services come out with this suggested bill. I think the bill is excellent and it intends to accomplish many things.

It is obviously the subject of compromise in many places. I can tell that after having served on these various boards myself.

I suggest that many of the offenses listed in this bill are offenses under the Federal Code. Now why they should not have been defined in accordance with the Federal definition, I do not know, sir. And why the same Federal limitation of punishment should not be placed on these offenses—robbery, larceny, forgery, and the like—I do not know either.

Mr. GAVIN. I cannot understand that, either.

Mr. TEDROW. The great majority of offenses are left to discretion.

Mr. GAVIN. I understood that in these cases it is left entirely to the discretion of the court.

Mr. TEDROW. That is correct, sir.

Mr. GAVIN. And no consideration is given to a comparable offense in civilian life?

Mr. TEDROW. No, sir. You are correct.

Mr. GAVIN. I just got into a case where ordinarily in civilian life the boy might have been given a suspended sentence and placed on probation. Here he is given a very stiff sentence.

Mr. TEDROW. That is right.

Mr. GAVIN. And I think your ideas there as to establishing some basis on which the sentences in cases may be determined is one that should receive consideration.

Mr. TEDROW. In fairness I must say this, Mr. Gavin: I think it is contemplated that the President at the request of the services will promulgate a maximum penalty in connection with all those offenses.

However, I suggest——

Mr. NORBLAD. It is done by Courts-Martial Manual.

Mr. TEDROW. Before the war.

Mr. NORBLAD. Yes.

Mr. TEDROW. During the war all of those restrictions were lifted.

Mr. NORBLAD. Most of them.

Mr. TEDROW. I see no reason why that should be given to the President when we have a Federal Code that punishes these offenses and gives a limitation of punishment. If they are desirable in our Federal Code I think the same limitation should apply right here in the Articles for the Government of the Navy.

Mr. GAVIN. So do I.

Mr. BROOKS. I am inclined to agree with you. But during the war they were having difficulty in getting cigarettes to the front and no minor punishment would stop the disappearance of those cigarettes, and the boys doing the fighting did not get any cigarettes although we were sending millions of cartons over there.

They disappeared on the way up to the front. To break that up they gave what in my mind were terrific punishments. Subsequently, on a basis of probation for future service, they gave these men a chance to work out of it.

But in time of war I can recognize those unusual situations which require perhaps a good deal of latitude. What do you think about that?

Mr. TEDROW. I think there should be a maximum, sir. I am in favor of the probation system because it had excellent results in the Navy where they set up these various retraining commands; and our clemency boards were responsible for many of these people that were sent to these retraining commands. We used to put the probationary period on them, sir.

Mr. BROOKS. A boy in my district was given 10 years for stealing three or four cartons of cigarettes that were going up to the front, which was a ridiculous punishment. But when I took it up with them, they were fair enough to give that man a chance to volunteer to go up to the fighting front and he took it and he came out with an honorable discharge and a very creditable record.

Mr. TEDROW. Well, I am in favor of anything that will give a man a chance to get a white ticket, Mr. Congressman.

Incidentally, under our Federal Code they can give a man 10 years for grand larceny right now and a Federal court can bring a man in and say: I am going to suspend sentence on you for 5 years or 8 years or whatever it is and put him on probation.

Certainly the services would have the same authority in imposing their penalties.

Mr. GAVIN. During the stress of war it is all right possibly to give some very stiff sentences ot meet conditions, but even in civilian life they are still giving some rather tough sentences.

Mr. TEDROW. That is correct, sir.

Mr. ELSTON. Of course provision was made for equalizing those sentences.

Mr. TEDROW. Yes.

Mr. ELSTON. Whereas in some cases very heavy sentences were pronounced and in other cases they were very light, when the cases were finally reviewed an effort—and I think a very honest and conscientious effort—was made to equalize the sentences and I think in the final analysis the results were good.

Mr. TEDROW. That is correct, sir. At the end of the war both services had board to go over these cases of the men in the penitentiary and tried to reduce the sentences to what they considered appropriate for the offense. We did that on the clemency board also.

I might say if your committee considers it proper to set up a judicial review by civilians, I personally favor it. The present bill provides that the counsel for such committee, both defense and prosecution, shall be appointed by the Judge Advocate General.

I do not consider that a healthy condition, where the same officer appoints both attorneys to present the conflicting sides of the case. I suggest that if your civilian review counsel is considered proper, they should have their own counsel to advise them on the questions of law involved, so that he can advise independently of these things.

I notice also that in my opinion this bill extends far too much control over civilians to the military services. I believe and in the past Congress apparently has believed that if anything—and that is with the exception of the past war—the control over civilians by the military should be severely limited wherever possible.

Under this present bill people in civilian employment merely because they are outside of certain limits of this continental United States—I do not care whether they are a clerk or a division head or a porter—are subject to court martial by the military.

I suggest that, with the exception of civilians where there are actual wartime operations going on, such civilians should be tried by the civil courts. Now I do not care whether it is by the court of a foreign country, if there is no question of diplomatic immunity, or whether they have to send them back to this country to be tried by our Federal courts.

Mr. ELSTON. Do you think our Federal courts here can try offenses committed in Germany?

Mr. TEDROW. Under our Army of Occupation, there is substantial question. I have not gone into it.

Mr. ELSTON. Do you not think the civilians over there would rather be tried by courts martial than by some German court?

Mr. TEDROW. Well, we are allowed to set up our provisional courts over there. Why should not those provisional courts be composed of civilians rather than military?

Mr. ELSTON. Well, the Army is over there because the Army is occupying the territory.

Mr. TEDROW. Yes, sir.

Mr. ELSTON. It is a military occupation. It is not a civilian occupation.

Mr. TEDROW. But I notice it is contemplated that the control will be turned over to the State Department soon.

Mr. BROOKS. Of course a practical question does present itself in some instances where you cannot get the necessary civilian personnel. Suppose you come to an occupied area where you cannot get enough civilian workers to volunteer to come over there.

Mr. GAVIN. Could they not have those traveling teams they are talking about?

Mr. TEDROW. Well, I don't think, gentlemen, it has been in accordance with the tenets of the Constitution that the civilians should be subject to the military. And I believe our Supreme Court has construed even the authority to impose martial law and has limited it strictly. That is my personal feeling. I certainly concede that there may be bugs that might have to be worked out in the thing, but——

Mr. NORBLAD. You mean tried by the local civilian population, that is the local government of the country?

Mr. TEDROW. That would be my recommendation. I can see where at present, as an army of occupation, that would give rise to difficulties.

Mr. NORBLAD. It would not work in New Guinea, would it?

Mr. BROOKS. Or Guam.

Mr. TEDROW. Well, Guam of course is controlled by the Navy.

Mr. BROOKS. Yes, but not——

Mr. TEDROW. Samoa, also.

Mr. BROOKS. But not triable by the local civilian population.

Mr. TEDROW. No, sir. They are tried by the Navy there.

Mr. ELSTON. What about Korea?

Mr. TEDROW. We recognize the southern part of Korea anyway, sir.

I could go through the bill section by section, but as I say, my particular concern is that I think you ought to have qualified personnel. I think you ought to have a JAG Corps for all the services.

I think you should define your punishments and limit the punishment imposed.

And I do not think you are going to have qualified personnel handling these things under a Navy specialist system, because I have seen it work.

Mr. BROOKS. Thank you very much, Mr. Tedrow.

Mr. TEDROW. Thank you, sir.

Mr. BROOKS. If there are no questions, gentlemen—we have a bill from this committee on the floor of the House this morning—we will stand adjourned until tomorrow morning at 10 o'clock.

Mr. SMART. The full committee meets tomorrow, Mr. Brooks. This hearing should continue on Wednesday morning at 10 o'clock.

(Whereupon, at 11:55 a. m., the committee adjourned until 10:00 a. m., Wednesday, March 16, 1949.)

UNIFORM CODE OF MILITARY JUSTICE

WEDNESDAY, MARCH 16, 1949

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The committee met at 10 a. m., Hon. Overton Brooks (chairman of Subcommittee No. 1) presiding.

Mr. BROOKS. The committee will please come to order.

We have with us this morning Maj. Gen. Raymond H. Fleming, of the National Guard Bureau.

General Fleming, would you mind stepping forward and having a seat? We are glad to have you. You have a written statement, have you?

General FLEMING. Yes, sir; I have a prepared statement of Maj. Gen. Kenneth F. Cramer, Chief, National Guard Bureau.

STATEMENT OF MAJ. GEN. KENNETH F. CRAMER, CHIEF, NATIONAL GUARD BUREAU, BY MAJ. GEN. RAYMOND H. FLEMING

General FLEMING. I might preface my remarks by saying in this particular instance I represent the National Guard Bureau and also the National Guard Association, the bureau and the association having worked together in the preparation of this paper.

General Cramer asked me to say to you that he was very sorry, indeed, that he could not be here this morning, having a conflicting engagement, but did appreciate your invitation very much.

I appreciate this opportunity of appearing, at your request, and expressing the opinion of the National Guard Bureau as to H. R. 2498, a bill to provide a uniform code of military justice.

The provisions of this bill would not apply to the National Guard in its present status, but it would, in event the guard were mobilized and inducted, or ordered into Federal service. For that reason, its provisions are of interest to the guard, whose members, in event of a mobilization, would be subject to its terms.

Article 2 of the bill does attempt to extend court-martial jurisdiction to Reserve personnel, which would include the National Guard when engaged in inactive-duty training. This article should not apply to the National Guard except when in Federal service. As proposed, it would be violative of article 1, section 8, clause 16, and the fifth amendment to the Federal Constitution. National Guard personnel should not be subjected to the continuing jurisdiction of Federal courts martial after they have reverted from their active-duty status to

their National Guard status, as proposed in article 3 of the bill. This continuing authority is also violative of constitutional authority insofar as the National Guard or militia is concerned. This conclusion has been recently sustained by the Supreme Court of the United States in the Hershberg case.

More specifically, the National Guard Bureau is not in accord with the following provisions of the bill:

(*a*) The usefulness of summary courts martial is impaired by article 20, which would grant the accused to demand a trial by special or general court martial, unless disciplinary punishment has been refused. It is believed that delays and severe punishments will result (art. 20).

(*b*) Articles 17 and 25 provide that each armed service is to have jurisdiction over the other's personnel. This will be a source of serious friction between the services and will react to the detriment of military discipline.

(*c*) The usefulness of law members of general courts martial is curtailed by not permitting them to vote or consult with members of the court. This would make their status similar to civilian judges without all the authority.

(*d*) Article 43 practically destroys the effectiveness and protection of the statute of limitations, for it tolls the statute by the mere delivery to a commanding officer of charges and specifications.

(*e*) The boards provided for appellate review in the office of the Judge Advocate General may be composed of civilians. These boards of review are to be given extremely wide discretionary powers which will enable them to overrule, with or without legal reasons, the action of courts and of all appointing authorities. The Judge Advocate General is excluded from participation in their decisions except that he may prosecute an appeal to the Judicial Council in the office of the Secretary of Defense. The Judge Advocate General has no power of appeal where findings are set aside or the sentence is reduced on other than legal grounds. The current system of appellate review in the Army by boards of review is highly efficient, insures compliance with the law and through participation in action by the Judge Advocate General, insures justice and prevents undue interference with disciplinary powers of troop commanders (art. 66).

(*f*) The punitive articles are hurriedly drawn and an attempt is made to expressly define offenses. Many incongruities result. For example, article 91 makes it an offense for a warrant officer to be disrespectful in language or deportment toward a noncommissioned officer. The offense of voluntary manslaughter is abolished and the distinctions between murder and manslaughter are left obscure (arts. 118, 119). Larceny is made to include substantially every known misuse of property with or without an intent to commit trespass (art. 121).

The National Guard Bureau considers that the proposal for a Judicial Council, consisting of civilians to review court-martial cases from the three services is a diversion from present procedures which would endanger the security of our country in time of war. The authority for the present legal system that regulates the government of the armed services is specifically provided for in the Federal Constitution and is based on hundreds of years of experience (art. 1, sec. 8, clauses 14 and 16, United States Constitution; art. V amendment, United States Constitution). It has been tested by the exi-

gencies of wars and should not be overturned for a system which would ultimately place the administration of military justice in the hands of civilians except for relative minor offenses.

The bill states (art. 65, sec. (d), p. 56) that this civilian council is only to pass on questions of law, but the next section (3), vests the council with authority to pass on the legal sufficiency of the evidence to support the findings of the review boards. It has always been considered of paramount importance that an individual in the military service has the inherent right to have his case reviewed by military men, qualified and thoroughly cognizant of their military rights. A similar proposal was in existence during the war between the States in this country, and it was determined, at that time, the successful termination of the war required that the administration of military justice be again vested in military personnel. The present system has been continued since that time with slight changes. One of the countries who lost the past war had vested the administration of military justice in civilians, with the result that its jails were crowded with military prisoners, awaiting decisions, and the courts had a backlog of cases running into hundreds of thousands. This system was disastrous to that country in time of war, and it is believed that it would be in this country, if adopted. It is considered that this proposal, as to the composition of the Judicial Council, would jeopardize the security of our Nation in time of an emergency, and would be a hazardous interference with the duties of the proper military authorities. It would also be a deterrent to swift and sure justice in the armed services.

If it is determined that an overriding Judicial Council is necessary, then, it should be composed of military personnel of appropriate rank with a legal background. The bill should than be amended by striking out the words "civilian life," line 22, page 54, and inserting in lieu thereof the following, "qualified general or flag officers from the Army, Navy, and Air Force," and strike out the words "compensation and allowances equal to those paid to a judge of a United States court of appeals," article 67, paragraph (a), line 24, page 54, and line 1, page 55, and insert the following, "the pay and allowances of their grades."

Recommendation:That the bill be favorably considered, provided it is amended as indicated herein.

Now, Mr. Chairman, I have been asked to comment on one other thing, and that is if there should be a separate Judge Advocate General for the Army, Navy and Air Force, it is my opinion that there should be a separate Judge Advocate General Corps for the other services as exists for the Army today.

Mr. BROOKS. General, I would like to ask you if you have any objections to naming the country you point out in this paragraph?

General FLEMING. No, sir. It was Italy.

Mr. BROOKS. That proved disastrous, you say, to the administration of justice by permitting the final appellate court to pass on the facts, as well as the law?

General FLEMING. Yes, sir.

Mr. BROOKS. Your idea there is that the appellate court should not pass on the facts but should pass on the law?

General FLEMING. Mr. Chairman, I have with me Major Van Kirk, who, I believe, served in Italy.

Mr. BROOKS. Major, step forward a moment, if you will. You served overseas in Italy?

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STATEMENT OF MAJ. ROLLA C. VAN KIRK

Major VAN KIRK. I was with the Italian Army 3½ years as liaison officer, and they had a similar system where the civilians were administering the military justice. It was my observation that it was disastrous, as far as getting troops into the front lines.

Mr. BROOKS. Was that because the whole system was administered by civilians or just because the appellate set-up was permitted to pass on the things?

Major VAN KIRK. The whole system was administered by civilians.

Mr. RIVERS. The Italians had no basic constitutional rights like the Americans.

Major VAN KIRK. That is right.

Mr. BROOKS. Any questions, Mr. Hardy?

Mr. HARDY. You are opposed to any civilian review of decisions of military courts?

Major VAN KIRK. It is provided for in this bill that civilians may be appointed to those boards.

Mr. HARDY. I understood you were opposed to that provision.

Major VAN KIRK. It was recommended that they stay in there and then they would be appointed by the Judge Advocate General of the Army, the civilians.

As I see this over-all court, in time of war they could set up the courts in every theater, and it would involve civilians going into every theater and passing on each one of those cases, which, in some instances, involves more than a year's time.

Mr. HARDY. If I understood paragraph (e), I take that to mean that you would oppose the civilian board of review?

Major VAN KIRK. Not as presently constituted in the Army side, that they could appoint civilians in there, but they would be appointed by the Judge Advocate General of the Army or the Air Force or the Navy.

Mr. HARDY. You mean under the Elston bill as it now works?

Major VAN KIRK. Yes, sir.

Mr. BROOKS. Any further questions?

Mr. DEGRAFFENRIED. You say the usefulness of law members to a general court martial is curtailed by not permitting them to vote or consult with members of the court. The law member that the bill has reference to would not actually be a member of the court martial, would he? The member of the court would be there just to advise him just what the law is. Isn't that the status he is contemplated as having?

General FLEMING. Our reaction was that he did have the vote and was participating.

Mr. DEGRAFFENRIED. Say, for example, you had a court martial on which there was nobody except Army men, none of whom were lawyers; that there should be a law member there, not as a member of the court, not as a part of the court, but simply a law member to advise him as to propositions of law that would come up during a court-martial trial.

General FLEMING. Yes, sir; but I still think it would be more effective if he had full membership on the court and could vote.

Major VAN KIRK. This way he cannot vote. He is off by himself and sits more in the capacity of a judge.

Mr. deGraffenried. Don't you think where you have a court-martial hearing, if you just have some lawyer there, who is not taking an active part in the trial, either in the prosecution, he is not prosecuting the case, he is not defending the case, he is not a member of the court, he is merely there to advise them on the propositions of law that might arise during the trial, in a disinterested way, not as a member of the court, not in representing the defendant, not in representing the prosecution, just simply there—for example, suppose some proposition came up and the attorney for the defendant made an objection and there was no lawyer present.

I have been in court-martial hearings where the court martial had to adjourn, where the court had to quit, until they could go and find a lawyer to consult with on a proposition of law that was raised by defendant's counsel. Before they could sustain the objection or overrule the objection, they just simply had to adjourn the court and go find them a lawyer or go get advice as to whether this objection should be sustained or whether it should be overruled before proceeding any further.

Don't you think it is a good idea in all court-martial cases to have a disinterested lawyer present, legal member, who is not a member of the court, not a member of the prosecution or not a member of the defense?

General Fleming. I certainly think it would be extremely valuable to the court. I think he could render that same service and better service by being a member of the court.

Mr. Rivers. He could represent the Judge Advocate General's office and his opinion could be subject to appeal and you would have the record beginning from the date of the trial, and it might be a little more expansive, but it would be worth it if it would guarantee any more proper procedure. I think my colleague might have something.

Major Van Kirk. The legal officer that is sitting there or the Judge Advocate officer that is sitting there should be disinterested in seeing that justice is done. But it was just our notion that he should still have the right to vote and to take part in the deliberations within the jury room. Otherwise he is going to be off by himself and not able to advise with the other members of the court at all times.

General Fleming. Conserve manpower.

Mr. Rivers. If you have a traveling court, like they had in a lot of theaters in one phase of the work—they traveled around with the court martial—it could not hurt.

Mr. deGraffenried. There is one other question I want to ask the general just as a matter of information myself. In looking through these bills I saw some clause in there that provided that the defendant, prisoner, or accused might be placed on bread and water diet for 5 days, not longer than 5 days. Based on your experience, I want to ask you whether you think that any soldier, regardless of the degree of punishment he is entitled to, or what should be done with him in the way of punishment, whether a soldier's health should be jeopardized, whether they should make it legal for him to be placed on a diet of bread and water for a period of 5 days or any other period of time.

General Fleming. You mean as to whether it would hurt his health?

Mr. deGraffenried. I mean as to whether that is a type of punishment that a country like ours, the United States of America, ought to inflict on the members of its armed forces.

General FLEMING. Of course, personally, you hate to do a thing like that. I think, perhaps if a man is in good health, it would not jeopardize his health and it might be one of the ways to bring him around. It is different in dealing with individuals of various types. One type of punishment will succeed where another one will not. I think it could be done to a man in good health without injuring him at all, and it might be the thing that would correct him and put him right. But I think it should be carefully handled and perhaps a medical officer should check the man and see if it would seriously injure him. In case it should, under no condition would I recommend it. That is my personal opinion.

Mr. BROOKS. Mr. Elston, do you have any questions?

Mr. ELSTON. No questions.

Mr. BROOKS. Thank you very much, gentlemen. We appreciate you coming here before the committee.

We now have Col. William A. Roberts, representing the AMVETS.

STATEMENT OF COL. WILLIAM A. ROBERTS, UNITED STATES AIR FORCE RESERVE, REPRESENTING THE AMVETS

Colonel ROBERTS. My name is William A. Roberts. I appear on behalf of AMVETS in support of H. R. 2498. On numerous prior occasions AMVETS has presented its policy supporting principles and methods of administration of military justice which conform to those embraced in the present bill. Particular attention is directed toward our testimony before this committee on April 24, 1947, at page 2140 of House Document 125, the report of subcommittee hearings on H. R. 2575 in that Congress.

We are of the opinion that the present bill is markedly superior to earlier proposals in its provision of a uniform code for all departments of the armed services and in the simplicity and precision of its language.

We particularly approved the steps which have been taken toward the maintenance of a separate appellate procedure and toward the assurance of the assignment of officers skilled in the law, particularly in the appellate process.

Perhaps the most important provisions of the proposed legislation are those intended to establish confidence in the fairness and impartiality of the trial courts through separation of the command and prosecuting channels from the judicial administrative machinery. In our opinion, such interference can be exercised in many ways with more subtility than by direct action. Dilatory conduct by a reviewing authority has the effect of imposing punishment and the failure to make adequate effort to provide the personnel and physical equipment necessary for investigation and preparation can be equally obnoxious.

We would like at a later date to submit a matter of detailed suggestions as to the administration of this act, but believe that it is of paramount importance that this legislation be enacted promptly even though experience may require its subsequent modification. It is a careful, workmanlike job of drafting in which it is apparent that many concessions have been made from the traditional theory of military discipline without impairment of good government of the armed services.

That is our formal statement.

Mr. BROOKS. Thank you very much.

You believe that this measure is so far an improvement over what we have you are willing to go along with it?

Colonel ROBERTS. Very much so.

I would like to take a minute and make a few remarks on the questions that arose just a few minutes ago.

One is with respect to the suggestion that the law member should participate in and vote with the court. I very decidedly disapprove of any suggestion. That would be reverting to the same thing you had before, reverting to command channels, particularly in instances of little consequence, but it is the accumulation of those little instances that caused this bill to be drafted. It has caused the AMVETS, since the war, to urge the revision of the whole theory.

In the first place, I believe the law officers should be so qualified they would be interchangeable between the services. I agree with the separate to flight and separate JAG, of course. But, the officers ought to be qualified to move between the departments.

Mr. RIVERS. This bill would do that.

Colonel ROBERTS. I would permit it to happen. Under those circumstances it would be most important that he not be a member of the court and not vote. We have had experience of the law officers being selected by the command channel and being called out of the courtroom and given instructions about rules of evidence and other matters. There is no doubt that law officer, with the dignity afforded by this bill, will be a strong individual.

Just one more comment. That is with respect to the bill as a whole. The suggestion that traditional military justice is applicable to modern warfare discounts entirely the fact that in any modern warfare, the war we have in our lives, the vast number of personnel are practically operating as civilians. They are not Infantry in the field under the direct command of an individual commander. They are very seldom in contact with the enemy. The greater portion of the personnel-by number, consist of civilians performing civilian functions in warehouses, chemical laboratories, radar stations, and other points of that kind.

I think that it is very important that this approach to military justice be taken right at this time when there will be an opportunity to develop procedures and develop machinery and equipment to have improved military justice consistent with modern warfare conditions.

Mr. RIVERS. In other words, the time to enact this type of legislation is when everybody is not embroiled in strife?

Colonel ROBERTS. Let's pass it first, and if there are some flaws in it, they will be found later.

Mr. ELSTON. You speak in your statement about this bill being markedly superior to earlier proposals. What earlier proposals are you talking about?

Colonel ROBERTS. I referred to a particular bill which, in itself, was a pretty good bill, which was not identical with this but very similar. There were other proposals which were improvements, which were palliative, in my opinion, which attempted to correct the minor procedural matters, which did not approach the appellate action.

Mr. ELSTON. That was established last year and the bill passed in the House.

Colonel ROBERTS. That is true. There was progress. The bill is not law yet and I hope it will be shortly.

Mr. ELSTON. It is the law.

Colonel ROBERTS. I mean this bill is not the law.

Mr. ELSTON. The bill that passed last year is law as far as the Army is concerned.

Colonel ROBERTS. That is correct.

Mr. BROOKS. Thank you very much.

Col. Frederick Bernams Wiener.

STATEMENT OF COL. FREDERICK BERNAMS WIENER, WASHINGTON, D. C.

Colonel WIENER. My name is Frederick Bernams Wiener. I am a practicing lawyer in Washington, D. C. I am a colonel in the Judge Advocate General's Corps Reserve, in the Army. I am commanding officer of the Two thousand nine hundred and thirteenth JAG service training group.

Mr. BROOKS. You were also in the Department of Justice?

Colonel WIENER. I was formerly in the Solicitor General's office in the Department of Justice.

Perhaps I had better state my military qualifications. I was commissioned in the Reserve in 1936, called to extended active duty in March 1941. I was staff judge advocate of the Trinidad sector and base command which comprised a good deal of the United States bases in the West Indies, from April of 1941 to September of 1942. Then I was with the Judge Advocate General's office in Washington and with the Operations Division of the War Department General Staff. Then I went overseas again and was judge advocate general of the First Island Command, which was in New Caledonia; then the forward area, which was Guadalcanal; and then of the Thirteenth Air Force. Then, gentlemen, I was ordered to the United State military mission in Moscow but Joe did not give me a visa, so I never got past Miami Beach. I do not know whether he decided I was not a Commie or whether he was jealous of my whiskers, but, at any rate, I did not get a visa.

Then I was back in Washington in the Judge Advocate General's office, and then went overseas in December of 1944, joined the Tenth Army, made the Okinawa invasion, and was with them in the Military Government Section; and the I got out of the service in December of 1945.

Last year I had a 30-day tour of duty with the General Staff on military justice problems.

I have studied the subject of military law. I have been engaged in litigation in a great many military law cases in the Supreme Court and in the circuit courts and in the district courts of the United States.

Now, I do not have a prepared statement, Mr. Chairman, but I have very carefully prepared notes. Instead of reading something, I will discuss it with you and I hope you gentlemen will interrupt at any time if anything comes up.

What I would like to do first, with your permission, is to concentrate on the fundamentals. Why is this bill being discussed here in the Armed Services Committee instead of the Judiciary Committee? Well, the fundamental there is, and it is often lost sight of, particularly by bar associations, that the Army, or for that matter any armed forces, differs from civilian society. The object of the civilian society is to

make people live together in peace and in reasonable happiness. The object of the armed forces is to win wars, not just fight them, win them, because they do not pay off on place in a war. That being so, the institutions of armies, even in a democratic society like ours, military institutions, necessarily differ from civilian institutions.

Now, our Declaration of Independence proclaims that all men are created equal and one man one vote. We are astounded when we read that in England people have two votes, one for their universal constituency and one for their residency.

You cannot have equality in an Army. The general has got to be more important than the individual. The only kind of real democracy you can have in an Army, and that is the democracy we attained ourselves in the last war, is equality of opportunity. That is real democracy. Everybody starts at the bottom and has an equal chance to work up. When he gets to the top he cannot be considered equal, for military purposes, with the man at the bottom.

Now, our whole civil government is based on the system of checks and balances, but you cannot fight a war or run an army that way. You have got to have a supreme commander. The Russians tried to fight the Finnish war with divided control. You had the unit commander and you had the political commissar. It was after the Finnish war that the Soviets had to get rid of that divided control if they wanted to win.

Our whole notion of government is based on the idea that we will discuss proposals before we enact them. There are discussions in the committee; there will be discussions on the floor; and there will be wide debate. In a war you have got to have a decision.

I came across a lovely expression from Winston Churchill's book about those—

> broad happy uplands where everything is settled for the greatest good by the greatest number by the common sense of most after consultation of all.

That is the way we proceed in our civilian society, but we cannot proceed in an army that way. Look at the generals in American history who have called councils of war. Look at General Meade at Gettysburg calling a council of war because he could not make up his mind.

We elect representatives; we elect our officials. We do not elect our military leaders. We used to elect them. Look at the old militia elections and look at the way the militia used to run.

Military offenses are acts that would be rights in the civilian society. Take the business of telling off the boss, that is an inalienable right of an American citizen. If you tell off the sergeant or a commissioned officer, that is a military offense. In civilian life, if you do not like your job, you quit it. If you do not like your job in the Army and quit, that is called desertion in wartime and it carries very serious consequences. In civilian life, if people decide they do not like working conditions and walk off jointly, that is a strike. In the Army or in the Navy, that kind of an action is mutiny, which is one of the most serious offenses.

We have the guaranty of jury trial in our Federal and most of our State constitutions. We do not have it for the armed services by reason of the exception and the fifth amendment. That was considered so fundamental and so obvious by the founders that when the

fifth amendment passed through Congress there was not a single word of discussion on that feature of it, because the members of the First Congress were veterans of the Revolutionary War and they knew you could not run an army the way you run a civilian society. So, I say that we are up against the stubborn hard fact that the purpose of an armed force is to send men obediently to their death, and that is very carefully designed just for that purpose. That may be a very unpleasant fact, but I think it is fundamental.

Mr. BROOKS. I think we lose sight, too, Colonel, of the fact that sometimes in time of war the order of the commanding officer can be far more serious to the future of an individual, when on the battle front, than a court martial might be. The commanding officer has authority to issue orders which certainly affect the entire future of the individual who takes the orders and carries them out, and sometimes much more so than the court martial would.

Colonel WIENER. That is correct. In that connection, the thing that has always struck me is that in the last three wars in which this country has been engaged, only one man has been shot for desertion in the face of the enemy—one man. Yet think of all the men who died because they did not desert, because they obeyed orders. The objects of military law are different.

With your permission, I would like to read a short passage that General Sherman wrote some 70 years ago. I think even the gentlemen from South Carolina agree that while the General may have been a little bit careless with fire, he was a great military man. As a matter of fact, he was a practicing lawyer before he became a general.

Mr. RIVERS. He did a thorough job on anything he undertook.

Mr. WIENER. This is what the General said in 1879:

> I agree that it will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.
>
> The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.
>
> These objects are as wide apart as the poles, and each requires it's own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its value, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by even grafting on our code their deductions from civil practice.

It is sometimes asked what is the object of military law. It is generally put as a personal question. Do you consider that the object of military law is to maintain discipline or to maintain justice? My answer always is that those are not opposites. You cannot maintain discipline by administering justice. The standards of guilt and innocence in military law are not different from civil law. Possibly there is a little more relaxation on what is harmless error than in the civil courts. But the real difference is the object and the amount of punishment. The object of the civilian criminal court generally is to reform and rehabilitate the offenders. The object of the military law is not vindictiveness. It is to act as a deterrent so that when the first man steps out of line and gets a hard sentence it will deter others.

Mr. RIVERS. In that connection there is no use for us to confuse the basic objective of keeping morale with the ultimate disposition of justice.

Colonel WIENER. Precisely.

Mr. RIVERS. And they need not be opposites.

Colonel WIENER. But the military justice has to be swift and its punishment will frequently be more severe. There is always an irreducible number in any group, particularly in a large number raised by selective service, who can only be ruled by fear and compulsion. If you have a system of military justice which minimizes a possibility that a guilty man can "beat the rap," then you have an effective system of military justice. The more loopholes you inject the more the man feels, "Oh, well, I can get a lawyer; I can appeal it on up; I can get off." To that extent you impair the object of military law. I am not suggesting that anyobdy be sent to the guardhouse on general principles or anything like that. You do have the irreducible minimum that can only be ruled by fear. You do have the necessity for swift and sure punishment, and you do have to have a feeling in the sense of the individual, "Well, maybe I had better not, because dire punishment will follow."

Mr. RIVERS. Isn't that also true in this theory of fraternalization which Doolittle recommended?

Colonel WIENER. I do not think you can run an army on the basis of a great big happy family. We certainly do not run industries like that. The janitor who sweeps up the mill does not sit down at lunch with the board of directors or stand in the same chow line with them. If it be objected that these notions that I have been outlining are regimentation, then I would ask how you can mount an invasion without regimentation. That is the whole notion of an army: that vou direct the armed force of the republic against the enemy.

Well, I have emphasized those because they seem to me fundamental, because they are in line with what Chief Justice Holmes, who was a soldier and judge, said: "We need education in the obvious more than segregation of the obscure."

I would like to make one more observation before I go on to the provisions of the bill. There is a lot of silly, loose talk about the system of military justice being un-American. If it is correct to labe as un-American anything a particular speaker doesn't like, then for some of these gentlemen the present system may be un-American. If it be not un-American to be consistent in line with our traditions, then the system is not un-American because it antedates the Constitution. The basic system of military justice was proposed by John Adams and Thomas Jefferson to the Continental Congress in 1776, and they took it, word for word, from the British Articles. They said: "After all, the British have conquered an empire and that is a pretty good system of military law."

The fifth amendment excepts citizens in uniform from the guaranties which it gives the citizen out of uniform.

Mr. BROOKS. What system was used in the Continental Army by George Washington?

Colonel WIENER. The American Articles of 1776 provided for command appointment of courts. The system was not very unlike the system we had in the last war. It was taken, word for word, from the British system. Of course, the punishments were very severe in line with social notions of that day.

I think for anyone to suggest that the system which we have had in our forces since that time is un-American simply displays the ignorance of the speaker.

Now, with that by way of introduction, I think it is much easier to discuss the specific provisions of the bill. I should say, perhaps, by way of introduction, that while there are good provisions in it, in my judgment it is a distinct retrogression from the Elston bill. I do not agree with all the Elston bill has in it. I think there are one or two points, maybe more, that could be improved by subsequent amendments. By and large, the Elston bill was an improvement over the 1920 Articles. The present bill would be a step backward.

Mr. RIVERS. Mr. Elston's bill removed it from the command.

Colonel WIENER. It did not remove it from the command. What the Elston bill did was to prevent the military commander from influencing the court. It did not take away command appointment. That is what the people are screaming about now.

Mr. GAVIN. Who is screaming about it?

Colonel WIENER. The bar associations.

The command appointment of courts was in the Elston bill and is still in this bill, in articles 22, 23, and 24. I think that is thoroughly sound, basically, because of these differences in an armed force and civilian society. The opposition to command appointment of courts not only disregards that fundamental difference but it also disregards a lot of law. There have been decisions on this. There have been decisions that you cannot take the power of the appointment of courts away from the commander. There is the *Swain* case in 165 United States 355. Swain was a Judge Advocate General of the Army who got in some difficulties and he was tried by a court appointed by the President, and he was convicted and then sued in the Court of Claims for his back pay. One of his points was that the courts were illegally constituted. He said that there was no statute authorizing the President to appoint a general court martial. The Court of Claims and the Supreme Court said, "True, there is no statute, but the President is the Commander in Chief, and if, by mere omission, Congress could take away from him that power of appointing courts which is necessary for the maintenance of discipline, Congress would have within its power to take away the very essential prerogatives as Commander in Chief."

Of course, at the present time that present thing does not arise, because ever since 1916 the Articles of War recognize the President's power to appoint.

Mr. RIVERS. You contend we would be over and above our power?

Colonel WIENER. You certainly could not say that the President could not appoint a court martial as a result of the Swain case.

Mr. RIVERS. I certainly believe it could be reasoned that if we had independent JAG officer—certainly the JAG comes under the Commander in Chief—while it would be an independent commander, he still would be under the President. So, removing it from command and putting it under some other segment directly under the President certainly would not weaken the whole theory of military justice.

Colonel WIENER. No; but would it help?

There is a suggestion on the panel system that has now been watered down. The suggestion is that the Judge Advocate General select the court from the panel. Who selects the panel? The commanding

general. Why shouldn't he select the court? In practice the court is not selected by the commanding general. In practice, and I speak from experience in four jurisdictions, the court is picked by the staff of the Judge Advocate General. He finds out who is available, and he knows the officers at headquarters who have experience and who have the proper judicial temperament, which the Fourth Article of War requires, and he tries to get the ablest and most experienced people possible. You cannot always do it because there are other demands on their time. Basically, it is the staff of the Judge Advocate who appoints the judge.

As a matter of fact, the only time I ever went to the commanding general to get something about the court was not because the commanding general thundered and said, "I want So-and-So on the court." It was because I could not get the Chief of Staff to release So-and-So, because he said, "Oh, he is too busy and he is not available.'

One of the finest provisions of the Elston bill was the requirement of having the lawyer as a law member. I cannot tell you how many times I would sort of hold my breath that this lay member, doing the best he could, would commit reversible error.

Mr. BROOKS. 2498 has the same provision.

Colonel WIENER. Yes.

Mr. RIVERS. Then the provision to train these men is another good thing?

Colonel WIENER. They are trained in peacetime now. The practical difficulty with administering justice in the armed forces in wartime is this: The experienced people who really knew the book—there is an Air Force Army man who is now a general, who served with me in Trinidad. He had been an instructor in law at the Military Academy. He is one person I would not bet with as to what was in the military manual, because he knew it as well as I and sometimes better. You put him in command of an air force and he just is not available. The young captains who used to be defense counsel, they are battalion and regiment commanders, and they are not available. So, you have a delusion of your experience, and you hope that the folks who get to the top know something about it.

I was very fortunate. I worked with men who were older and more experienced officers. They never told a court to convict. They knew better. But, when you take someone who has gone from major to major general in 9 months, and he did not get much experience, and you provide him with a civilian judge advocate whose judgment, perhaps, even on legal matters, is not too sound, you do not get a very good result. The whole difficulty in the services in wartime is spreading that experience and still training them for combat. They have got to learn an awful lot. If you train a man to be an infantry officer, and you want to put him through an OCS course in 6 weeks, you cannot take an awful lot of those 6 weeks to teach him military law. Maybe it is a good argument for military training.

Mr. GAVIN. What chance has the accused man under those circumstances?

Colonel WIENER. I think it is very significant that the Vanderbilt committee, which certainly had on their membership a minimum of military experience, reported that it had been unable to find an authenticated case that an innocent man had been convicted.

Mr. DEGRAFFENRIED. Is it your judgment that under this proposed bill the accused is given too many rights, privileges, and safeguards; that is, he is given so many, in your judgment, it would interfere with the discipline of the Army?

Colonel WIENER. I think that the elaborate system of review, which I will cover more fully later on, with your permission, in this bill is defeated. As a matter of fact, under the 1920 articles the delays in getting a guity person convicted and off to the jailhouse, or getting an innocent person free, were much too great. At Fort Myer in April of 1943 I was trial judge that sent an Ordnance officer to prison for 2 years. There was no question of his guilt. That man was a prisoner from April to September, when the board of review got around to reviewing his case. That is far too long. That is self-defeating.

Where is the deterrent effect? A man runs away in battle. If it takes 2 years from the time he runs away until the sentence is finally confirmed, and the war is over at the end of 2 years, that is pretty close to cold murder shooting him then. Of course, if he has killed his buddy, then that is different. But even so, the delays here in the District of Columbia death house, the delay from the time the murderer is tried until he finally pays his debt is far too long.

The thing I am fearful of is that this will not give any more real security to an accused. It won't really help the innocent man. But it will be of great benefit to the man who is guilty who may have committed some border-line case that engaged the attention of lawyers.

Mr. DEGRAFFENRIED. Even the way the courts martial have been run in the Army, hasn't there also been considerable delay between the time the prisoner was convicted and before his appeal was reviewed?

Colonel WIENER. Yes; and I think too much delay.

The difficulty with the Army system, as I observed it functioning, there was sometimes too much speed between the offense and the trial, because the Judge Advocate General's Office was under the commanding general of the Army Service Forces, and to an engineer a lawsuit is like a bridge—a bridge can be built in so many days, therefore the case can be tried in so many days, regardless of what sort of investigation or effective work it takes. Service command generals were marked on the time it took to try people. Consequently, the case would be rushed to trial before it was fully investigated in order that the average might not go down. Once he was tried, from the time the record left the commanding general until it was finally acted upon by the President, there were very grave delays there.

Mr. BROOKS. You think more effort should be placed in having a complete and fair trial and less time spent on appeal?

Colonel WIENER. Yes. In that connection, I think that the provision to remove the law officer from the deliberations would be very, very detrimental. Now, when you remove him for deliberations, and I have in mind that he is disinterested, and that he is a lawyer and that is a reform for which we are indebted to the Elston bill—by taking him out you take out of the deliberations the one man who can make the most helpful contribution to the deliberations. That, I know, is obvious to any lawyer or any other officer who has sat on any court martial and had the assistance of a trained law member.

I cannot help but think that the provision removing the law member from the deliberations was not the product of anyone who ever sat on

a court, when you consider, gentlemen, that all the grief and all the difficulties and all the confusion, and all the mix-ups to which Mr. Elston and his committee listened 2 years ago resulted from ignorance rather than wickedness. It was mostly ignorance.

That gap was plugged by insuring that the law member had to be a lawyer. Now you remove him just when he is able to do the most good. It is the analogy, gentlemen, of the jury trial, but the law officer does not have the judge's power. It is wholly a false analogy. It is a jury trial without the safeguards. It is an importation from the English practice and it is always dangerous, gentlemen, to transplant instructions. In England the members of the court are officers, military officers. The judge advocate is a barrister, a civilian, not a military man. The judge advocate sits there in his barrister's gown and wig. He instructs the court. Here we have never had that sort of thing. He is a civilian. He does not sit down with officers.

Here you are proposing to make that law officer a member of the military forces. He is not a civilian. Why shouldn't he sit down with the court and give them the additional assistance which his legal knowledge enables him to give? I think this notion of taking the law member out of the court just at the time when they are about to perform their most important function is the most retrograding step in this bill.

Mr. RIVERS. You do not deny that commanding officers have deliberately injected themselves into the result of trials throughout the many, many theaters and openly demonstrated their dislike for the decision rendered in many, many cases?

Colonel WIENER. As to that, Mr. Rivers, I have heard a great deal of testimony to that effect from people whose probity and credibility I have great confidence in, and I believe them. I can only say that it never happened in any of the places that I served, because I was fortunate in serving commanding generals who knew better. They were all great men. However, one of them arranged my law books according to size, all tall books to the left of the shelf and the short books to the right. He knew enough not to tell the court not to convict. The only skin letters that went out I recommended. That now is prohibited and it is not necessary to discuss it.

Mr. RIVERS. You mean under the Elston bill?

Colonel WIENER. It is prohibited in the Elston bill.

If you are going to have a lawyer on the court to assist in the court-martial, do not take him away just when his assistance becomes of essence.

Mr. RIVERS. If he has no fear of any reprisals——

Colonel WIENER. I think that is largely exaggerated. I have seen letters in bar association journals of some timid judge advocate who would not tell the commanding general that he was doing something illegal because he was afraid of not getting a promotion. If any judge advocate is so gutless that he will not stand up and say, "General, this is not in accord with your law," then he has no business being a judge advocate.

Mr. RIVERS. If you start off with that independence at the very beginning, you start off by giving him a hypodermic of guts.

Colonel WIENER. If you have to give him a hypodermic, you had better not use him.

Most generals who are worth anything do not act that way. I know a general who told me that he sent a judge advocate, whom we both knew, out to the Siberian Desert because every time the judge advocate asked for an opinion he would say, "General, how do you want it? I can write it up any way."

I think this notion of the honest lawyer trembling in fear of the brass is exaggerated. They disagree with me. In some cases I think I was right and in others I became very convinced shortly thereafter that I was wrong. Even with the most difficult man I had to work with I never had any difficulty in saying, "General, this is my considered opinion and it is my recommendation that you do such and such."

I would say further, "However, it is your responsibility and if you want to do it the other way, I will draft the necessary orders."

That is the only way you deal with a commanding officer. The notion of the independent judge advocate who has to be given this independence so that he may function is a little bit like the political commissar, who is the independent fellow there, to be sure that word is kept inviolate from the whims of the commanding officer. Suppose the law officer, under the proposed bill, gives an erroneous instruction and as a result a man who is guilty of a very serious offense is acquitted. Under the Elston bill and under this bill the commanding officer cannot do anything, but he can certainly write to the Judge Advocate General and take this fellow away and put him to work reviewing tort claims; he is no good as a law officer. The result would not be any different if he had him sitting in there with the court. If he is wrong, he is wrong. If he is as he should be, a good lawyer, a man who knows the military law, knows the elements of offenses, knows the criminal law, he would not make mistakes and he will be much more helpful to the court sitting in with them at their deliberations.

I think I can say without any fear of contradiction that no lawyer who has ever been in a closed session of a court martial will think differently, and no nonlawyer who has ever been in a closed session with a really good law member will think differently on that.

Am I keeping you gentlemen overtime?

Mr. BROOKS. Yes. The Congress is in session and we have this armed forces composition bill coming up this morning I think, therefore, if there is no objection, we had better adjourn until tomorrow morning at 10 o'clock.

(Whereupon, at 11:15 a. m., the committee adjourned until 10 a. m., Thursday, March 17, 1949.)

UNIFORM CODE OF MILITARY JUSTICE

THURSDAY, MARCH 17, 1949

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The committee met at 10 a. m., Hon. Overton Brooks (chairman of Subcommittee No. 1) presiding.

Mr. BROOKS. Gentlemen of the committee, here is the proposed plan, and if it isn't agreeable, I wish the members would indicate. We want to finish with the general witnesses today. I believe we can by noon. There are three more witnesses this morning. We are going to recall Colonel Wiener to finish with his testimony. He was here testifying yesterday. We will finish with the general witnesses by noon, we believe. Tomorrow, we would like to begin reading the bill section by section.

In reading the bill section by section, we will have the help of our expert assistant here, who sat with the committee and read the bill section by section, and helped to frame it and draft it; and we will have the assistance of Mr. Larkin; and we will have the assistance of others who are intimately acquainted with the sections of the bill.

Mr. HARDY. Mr. Chairman, do you have any idea as to how long a time it will really take us to do this thing section by section? It is going to be a long, drawn-out affair isn't it?

Mr. BROOKS. It depends on the time we put into it. Congress is not in session tomorrow. If the committee so wills it, we can begin by meeting tomorrow morning at 10 o'clock and go on through as far as we want, and we can really take out a big bite tomorrow in this bill.

I think, too, at a time when it is in our minds, and the technical objections that have been explained to the committee are in our minds, it would be a very good time to really get into the reading of it section by section.

Mr. HARDY. I think that is probably correct. Is the staff going to have an analysis of all of these criticisms for us by each witness?

Mr. SMART. That is correct, Mr. Hardy. I have it already prepared through the first 27 sections and will complete the remainder of the bill this afternoon, as to the objections or endorsements of the various and sundry provisions of the bill. A copy of that will be made available to each of you, with the permission of the chairman.

I anticipate, in response to the question you raised a moment ago, that it will probably take about 4 or 5 days of hearings to go through this bill section by section. Many of the sections will go rapidly because no point of objection has been raised. Others, such as article

22, command control, will take a lot of discussion and time. So I believe that it will take 4 or 5 days; and I am hopeful that by perhaps next Friday, we can conclude the committee consideration of this bill and have it ready to report to the full committee.

Mr. HARDY. As far as I am concerned, Mr. Chairman, I believe we would be able to meet this afternoon. The House plans to adjourn early.

Mr. ELSTON. I have a meeting of the Atomic Energy Committee this afternoon.

Mr. BROOKS. I think we can just as well use the afternoon, too, to go over the bill. I think the members of the committee can get a great deal out of the bill by reading it over themselves, because it is so technical that you have to read these articles very slowly to appraise them properly. Since Mr. Elston can't be here this afternoon, I think we had better wait until tomorrow morning to begin.

Mr. ELSTON. Of course, you can go ahead without me.

Mr. BROOKS. We want you, and there is no meeting slated for this this afternoon if we finish these general witnesses.

Mr. ELSTON. I take it, Mr. Chairman, you are going to proceed about like we did last year: Read the bill section by section and have representatives of all the services here while we are doing that, so that they can state their positions?

Mr. BROOKS. That is the general idea. Of course, if it isn't necessary to keep representatives of the different services here, we wouldn't want to detain them unless we feel the need of them.

Mr. ELSTON. I don't believe they mind being here. Colonel Dinsmore was here last year and as we read it section by section they were in position to answer questions that came up in connection with the sections, and it seems to me that we almost have to have them here in order to get their viewpoint, because in a general statement of the whole bill, it is almost impossible for them to cover every particular phase of the bill. If, as we read a section, they can state their position on that section, it was mighty helpful to us last year, and I know it would be this year. I think we might inquire and find out whether or not it would be convenient for them to be here during the time we are reading the bill.

Mr. BROOKS. That is my thought. More than that, though, if we come to a section and we do feel the need of someone to explain it, any branch of the service, or perhaps a patriotic organization, we can pass that section by until we do get the witnesses.

Mr. SMART. Mr. Chairman, I would like to elaborate a little bit on the point that you have just raised. It was my thought, and it is my suggestion, that we proceed section by section, and when we get to such articles as article 22, which raises command control, and again goes into the proposition as to whether or not you are going to provide a JAG Corps—while it is not in the bill, it has been raised by every witness that has testified before this committee—those are matters on which the departments will want to be heard.

I think it may go as high as the Under Secretaries or Assistant Secretaries, and maybe even the Secretaries of the departments who will want to come in and be heard. So I would suggest, on sections like that, that we pass them until the end of the bill; then consolidate those particular sections, bring in the departmental representatives,

and have those things thrashed out completely and thoroughly rather than having those people, who are equally busy, come here each day.

I might further add that Mr. Larkin has, of course, attended all of these sessions. He and I both have extracted all of the points of agreement and disagreement on each of the sections; and he will be prepared to give the departmental positions on most of those things.

Mr. ELSTON. That is what I meant, Mr. Larkin, and possibly Colonel Dinsmore. He helped us a lot last year. And we might have any representatives of any other agency who might want to be heard.

Mr. BROOKS. We will have all the witnesses that members of the committee want present, I assure you of that. We need all the help we can get. I am not jealous and I am sure nobody else is jealous of the learning or information which can be given to the members of the committee.

If that is all right with the committee, then, we will recall Colonel Wiener, Col. Frederick B. Wiener, as a witness.

Mr. BROOKS. Colonel Wiener, you were testifying yesterday when the bell rang, and we had to quit.

STATEMENT OF COL. FREDERICK B. WIENER—Resumed

Colonel WIENER. Yes, sir. I come to article 27 (b) of the bill, which makes lawyers mandatory for trial counsel and defense counsel of all general courts martial in the three services. The requirement in the present bill, article of war 11, is that if there is a lawyer for the prosecution, there must be one for the defense. The present bill also makes that requirement for special courts-martial equality; that is written into the new manual for the Army and the Air Force.

I think it is entirely proper when you have a lawyer for the prosecution that you ought to have one for the defense, although I think it is also fair to point out that the Federal Constitution doesn't require that sort of thing in the States. There has been a persistent drive to get the Supreme Court to hold that the fourteenth amendment requires a State to provide counsel for an indigent prisoner in all circumstances; and up until now that attempt has failed. The cases are *Betts* v. *Brady* (316 U. S.), and *Butt* v. *Illinois* (332 U. S.).

The Supreme Court has never gone that far.

While the equality provision is sound and makes for a greater fairness, the mandatory provision for lawyers for defense counsel and prosecution in every general court martial, such as this bill provides in article 27 (b), is in my judgment unnecessary and thoroughly impractical.

Now, I will document those characterizations.

It is unnecessary because a lot of your cases that go before general courts are really police court cases. A man goes A. W. O. L. for more than 6 months. That is prima facie desertion and it is going to be tried by general court.

A soldier steals a watch worth $50. That is a general court case.

Now, I used to think, why is it necessary to try petty thieves by general court-martial in the service? The answer is that nothing so quickly disrupts the morale as a sneak thief in a barracks. Even if he just takes a pack of cigarettes, you have to stamp that out. Cases like that, desertion, the simple cases of disobedience of orders, the

simple larcenies, those are not cases that require two trained lawyers on both sides.

In fact, in time of peace, in the British Colonial courts, cases like that are prosecuted by police officers and sometimes even by the native police sergeants. You just don't need a law school education to try or defend that kind of a case.

It is worse than unnecessary, it is impractical. You cannot get, in time of peace, the number of lawyers that this bill would require. You cannot get them for the services. I can speak on that with some degree of assurance because last summer I was on duty, active duty in the War Department, and one of my assignments was to study the problem, the personnel problem for the Judge Advocate General's Department of the Army under the provisions of the Elston bill. Where would they get the lawyers in time of peace to be permanent commissioned career officers of the Army to try every case by general court?

Mr. ELSTON. How would you draw a distinction between what is and what is not a serious case?

Colonel WIENER. I would leave it as you have it in the present bill, "if available," and leave it to the good judgment of the staff judge advocate to decide whether he needs a lawyer on both sides. After all, the normal run of cases never reaches the commanding general except for the final approval. It is handled by the staff judge advocate.

Now, if I have a case of murder and I am staff judge advocate, I will see that a lawyer prosecutes and, of course, that means I have to get a lawyer to defend. On the other hand, if it is a simple desertion, or someone just told the officer that he wouldn't go out and dig the ditch, you can get any bright young lieutenant. In time of war, I agree it is a horrible shocking waste of military manpower to take a line officer for those details. In time of war, you can get all the lawyers you want. In time of peace, you just cannot get the lawyers. Now, the lawyers in the Army are almost as difficult to get as doctors are. They just don't come.

Congress has done nothing to make the career of the regular Judge Advocate more attractive. As of the first of this year, they cut his pay by taking away the tax exemption. They have given him a single promotion list, but that list doesn't give him any faster promotion than he had since the Officer Personnel Act was passed. It is just extremely difficult to get the lawyers you need.

Now, if you make it a mandatory requirement that everybody who prosecutes a desertion case at every Army post in the United States, at every naval base in the United States, at every Air Force base in the United States, where are you going to get those lawyers in time of peace as permanent career people?

Mr. HARDY. You may have a practical difficulty involved there, but aren't you running a right serious risk that the accused may not get justice out of the thing, and there may be an element of prejudice involved?

Colonel WIENER. No, sir; and I will tell you why: Because if you have a lawyer for the prosecution, you still have to have a lawyer for the defense. If you have a layman for the prosecution, that is, a young infantry officer, a young artilleryman, a young nonflying Air Force officer, you have a similar person on the defense. You

don't run into any danger. An ordinary desertion case, what is there to it?

Mr. HARDY. How do you distinguish as to who is going to distinguish between the ordinary desertion case and one that may be somewhat involved?

Colonel WIENER. The staff judge advocate because before he recommends that the case go to trial, he has seen the transcript of evidence, or it is a simple case of putting in a report and showing the apprehension a year later.

Mr. HARDY. I have had several cases in my own district where I don't think justice was reaped out to them, and there was at least one lawyer on the court.

Colonel WIENER. I am saying in time of peace, with this bill, you won't get the lawyers. What are you going to do if you don't get the lawyers to try these cases? Either you can't get them tried or they all get out on habeas corpus later. You are up against a practical problem. Where are you going to get the lawyers for your peacetime armed services to try and defend every case by general court martial?

If, by making the career sufficiently attactive, by raising the pay, by giving them even more promotion rights, and so forth, you do attract that kind of lawyer, is it a good use of your military dollar?

Mr. DEGRAFFENRIED. Colonel, you said a minute ago you had to have lawyers in certain cases.

Colonel WIENER. Yes.

Mr. DEGRAFFENRIED. Like murder cases.

Colonel WIENER. Yes.

Mr. DEGRAFFENRIED. Why couldn't those same lawyers handle the larceny cases?

Colonel WIENER. Because the lawyer you get to try the murder cases normally processes claims, reviews boards, and does other legal work, and you get him to try one case. You can't get him to try all the general court-martial cases tried in the Army, Navy and Air Force.

Mr. DEGRAFFENRIED. I could conceive of a larceny case being a very serious case.

Colonel WIENER. There is no question about that.

Mr. DEGRAFFENRIED. It seems to me a man's rights in a larceny case, especially a grand larceny case, should be protected equally as well as in a murder case.

Colonel WIENER. My point is, when you have a grand larceny case, you have the man who is the PX steward, you have the money missing from the safe, you have the money found under his mattress. I say, as a matter of experience in reviewing and handling those cases, you don't need a lawyer to prosecute that PX steward.

Mr. DEGRAFFENRIED. Haven't you a good many involved cases of law come up when grand larceny cases come up?

Colonel WIENER. Yes, but ever since the amendment to the ninety-third article last year, which took out the distinction between larceny and embezzlement, most of those are gone. The easiest way for a thief to get loose in the Army, before the Elston bill, was to commit an offense that was on the borderline between larceny and embezzlement; and if the staff judge advocate guessed one way, that it was larceny, and the board of review guessed the other way, that

it was embezzlement, the fellow went scot free. That has been stopped. "He that takes what is not his'n; he shall certainly go to prison."

When the case is not simple, it is up to the staff judge advocate. You don't need a lawyer to try it. Where are you going to get these lawyers? I had to study the problem last summer, and you just can't get the lawyers; and when you can get them, when you can get these thousands of lawyers for the armed services just to try what really are police court cases, are you really spending your military dollar wisely; when, as I understand it, one of the real problems on the 70-group Air Force is that it is going to cost an awful lot of spending money.

So that to make this a mandatory requirement in time of peace that every general court-martial case has got to have two lawyers on prosecution and defense, it is not necessary; it is not practical. Now, in wartime it is different. In wartime, lawyers are literally a dime a dozen; any and every lawyer wants to get into the service; and it is a shame to take a doughboy, who ought to be training his platoon, or an artilleryman, who ought to be studying up on the tables, and make him try cases. Use the lawyers for that in wartime.

To make it mandatory in time of peace, you are going to make it impossible for these cases to get tried. With your shortage of lawyers, we haven't got the lawyers, and here we have all these cases, and we have to try them by special court, which frequently will defeat this bill.

Mr. BROOKS. Colonel, let me ask you a question on that point. What would you think of handling it as it is handled ordinarily in civilian courts, permit the accused, the defendant to ask for counsel when he wants it, and the court to appoint it?

Colonel WIENER. Well, the Army has been way in advance of that for years. Ever since 1920, anybody appointing a general or a special court has had to appoint defense counsel. In a number of respects, you know, that 1920 Articles did much more for an accused than the civil courts did. They always gave him counsel. It may not have been the most competent counsel, but he had someone there to speak for him. Civil courts didn't always do that. It gave him a transcript of the record; and until the court reporter bill, about 1943, you never got that in the civil courts unless you could pay for it; and they gave him automatic appellate review in every case; and the civil courts didn't give you that.

I have been in Federal courts down in Alabama. I was trying a case in Anniston once. The case ahead of mine involved some bootleggers. The "revenoor" was on the stand, the witness against them; the defendant would take the stand in his own behalf; no transcript; charge to the jury; the jury would come out, bring back the verdict; the man had no lawyer, except someone such as the young fellow the court would appoint, no record, and, of course, he couldn't take an appeal.

Now, the fellow tried for desertion in the Army system would have had a lawyer, would have had a written record, and would have had his record reviewed on appeal by trained people, without his asking for it or without his spending any money. So that the accused, under the Army Articles of War, has had a great many safeguards.

I am just saying, gentlemen, the present provision of the Elston bill, "if available," yes. If you have the lawyers, by all means, use them. If you have a lawyer on the prosecution, you have to balance the thing and make the odds fair by having one for the defense.

Mr. BROOKS. By the same token, in civilian courts, if you get into a local city or local court, they don't provide lawyers for each defendant.

Colonel WIENER. The Constitution says, as now interpreted in *Betts* v. *Brady* and *Butt* v. *Illinois*, that the State doesn't have to furnish them. The Federal Government said that the sixth amendment does require it.

Mr. DEGRAFFENRIED. A great many States have to furnish them in capital cases and not in noncapital cases.

Colonel WIENER. Oh, yes; and my point is, when you have a case that the staff judge advocate feels a lawyer should prosecute, you have to have a lawyer for the defense.

Mr. DEGRAFFENRIED. In all civil cases that I have seen tried in Alabama, there is always a defense counsel appointed to represent the defendant, if he cannot retain one himself.

Colonel WIENER. Since 1938, *Johnson* v. *Zirks*, (304 U. S.), they had to appoint them; but nobody ever supposed so before.

Mr. ELSTON. They always appoint them in Ohio, in the Federal Courts and State courts, too. Any person indicted by a grand jury gets counsel appointed by the court if unable to employ counsel; and in Federal courts they are always appointed for any person charged by indictment or information.

Mr. BROOKS. That is more or less the general rule. In local city courts, municipal courts, that rule doesn't obtain in certain areas I know.

Mr. ELSTON. Of course, there is no provision in the military code for the appointment of counsel in summary court-martial cases, and police court more or less corresponds to summary report.

Colonel WIENER. All I am doing is urging you gentlemen not to put into effect as a strait jacket a requirement which isn't necessary, in fact, and which, in time of peace, would just make it utterly impossible. I mean, you are going to have appropriate money to hire these lawyers to try GCM cases.

Mr. ELSTON. Don't you think an accused person is entitled to counsel in any case wherein he may receive a dishonorable discharge upon conviction?

Colonel WIENER. He gets counsel.

Mr. ELSTON. Well, he may.

Colonel WIENER. He gets counsel.

Mr. ELSTON. He does get counsel, but you are saying that——

Colonel WIENER. And he gets a lawyer if the man prosecuting him is a lawyer. All I am saying is, don't make it mandatory for the services to provide lawyers on both sides of every general court case.

Mr. ELSTON. In any general court-martial conviction, there can be a dishonorable discharge?

Colonel WIENER. That is correct.

Mr. ELSTON. So how does it help the accused any if neither side has a lawyer?

Mr. DEGRAFFENRIED. Suppose he is tried on hearsay testimony or just any kind of testimony?

Colonel WIENER. Well, in the first place, the lay trial judge advocate trying a case will prepare his case sufficiently that he doesn't get hearsay in. In the second place, under the Elston bill you have a trained lawyer as law member who will rule out hearsay; and in the third place, you have his rulings reviewed by the staff judge advocate and by the board of review; and the rule in military law is that failure to object doesn't constitute a waiver. So that in actual practice the possibility of a man going out on hearsay testimony, getting a D. D. on hearsay, is so remote as to not be a possibility.

Oh, it may have happened once; yes. We have had a Federal judge go to jail for bribery. That doesn't mean we can impugn the integrity of the judicial system.

Gentlemen, you are going to have to appropriate an awful lot of money to supply the lawyers that will be necessary to run the simple cases, desertions, and the small larcenies, and the disobedience cases, if this bill goes through.

Now, I would like to turn to the judicial council of three civilians. I don't think it is sound; I don't think it is necessary; and I think it is wholly self-defeating; and I will document those characterizations.

In the first place, you don't provide for Senate confirmation. You don't give fixed terms. The result is that these people will be subject to all sorts of pressure; personal pressure, political pressure.

Mr. DEGRAFFENRIED. What article are you discussing now?

Colonel WIENER. Article 67.

Mr. ELSTON. I think, Colonel, it is going to follow, as a matter of course, if this is adopted, the committee will recommend a certain term and confirmation by the Senate. I am only speaking for myself, but I know in all probability, no member of the committee would want to leave anything as indefinite as that.

Mr. BROOKS. You needn't worry, the Senate will put it in.

Colonel WIENER. All right, assuming they do. You are setting up a specialized court instead of a court of general jurisdiction; and you are staffing it with civilians. Now, the fact of the matter is—and I think we should face it frankly—that the appointments to the specialized courts of our judicial system haven't attracted the same sort of talent that the courts of general jurisdiction have attracted. Some of our experiences with the United States Commerce Court have been rather unfortunate.

However, I think the basic difficulty is the notion that this court shall be composed of civilians. I suppose, simon-pure civilians. I don't know whether, under these provisions, a Reserve officer would be deemed contaminated by his prior service or present status, and so not eligible for this civilian court. But, more important, you take three civilians, three high-minded civilians, learned in the law, and they have the powers that it is proposed to give them in this bill, and first, they come up against a case like that of Gen. Fitzjohn Porter, who wasn't too successful at the Second Battle of Bull Run or, certainly, for the benefit of the chairman, the Second Battle of Manassas.

Mr. BROOKS. Thank you.

Colonel WIENER. Now, the problem and the case of Gen Fitzjohn Porter required a very keen appreciation of military factors. How are you going to get three civilians who are going to know anything about that? Just where are you going to get civilians who are going to be able to pass intelligently on a case like that of Fitzjohn Porter;

or, suppose the cases of those people of Pearl Harbor had been tried. It would have been pretty difficult for the civilians to evaluate all the factors.

Suppose you get a case of desertion in wartime. Well, now, desertion, when it is jumping ship, gangplank fever, when you are absent for a few days just when the boat is about to sail, the man who has been without military experience will say, "Good Lord, this soldier was a. w. o. l. 3 days, and they gave him 40 years." Well, if you are a. w. o. l. from Fort Myer for 3 days in time of peace, that is one thing; but to be a. w. o. l. from your unit just when your unit is sailing, that is something else.

Take a case of misbehavior before the enemy. A man runs away in battle. How can the person with purely civilian experience evaluate that? I was faced with that problem when I was the staff judge advocate of the Thirteenth Air Force; and I wondered just how I was qualified to deal with a case of some fellow with maybe 24 missions behind him, refusing to go on the twenty-fifth. How was I, a country lawyer sitting where lawyers generally sit, qualified to pass on that sort of problem?

Mr. ELSTON. Colonel, I am not passing on whether it be civilian or military. Our bill last year provided for military and that is what we favored at that time.

The point you are making now would hardly come before the judicial council because the judicial council, under this bill, only reviews questions of law.

Colonel WIENER. Well, there has been a question on just this kind of a case I am raising. Now, I didn't have to face the dilemma; I didn't have to make a careful inquiry as to whether I was really cast in a heroic mold or not, because I was released from the Air Force before the case arose.

There was a question of law on which two assistant judge advocates general, in two different theaters, differed. The question was whether at base A in England men sent to bomb the town of X in Germany, when the crew member refuses to go into the plane in England, a thousand miles from the target, is he guilty of misbehavior in the face of the enemy? The two branch officers differed on it. I think it makes an awful lot of difference whether the person deciding that question of law has had military experience.

Now, as a matter of fact, I don't think it is so important whether you say that these people will be picked from among the ranks of the military or civilians, whether they will have civilian status when they are picked. In England they pick a judge advocate general generally from the ranks of the Army, and then he becomes a civilian. But I think it is terribly important to have some sort of provision which is not present here that the people on this judicial council have military experience.

I mean, a man may be a civilian now, if he has been through a war or been through two wars, he has an appreciation of those things. You could commission a person from the cloister or from the university campus and make him a seven-star general; but if he didn't have the experience, he wouldn't be able to appreciate these problems.

I am distressed by the thought that seems to be behind this bill, that somehow a simon-pure civilian is better able to decide military problems than a man with military training or background; and it

seems to me that this whole attempt to drive a wedge between civilians and military people—after all, we are all citizens; we are all civilians and when war comes we put on uniforms; when the war is over, we take them off. Any Army officer doesn't cease to be a citizen because he is an Army officer. It seems to me that this distinction just feeds as grist for the party-line mill, always trying to distinguish between civilians and military men.

Take our conduct of the war: We had a military Chief of Staff, General Marshall; and later he became a civilian and was a very fine Secretary of State. We had a Secretary of War, an eminent man, Henry Stimson, and he had been a colonel of field artillery in the World War. Take the British leadership of the war; Churchill, a civilian, his military chiefs of staff, General Esmay, sort of liaison between them. There was never any question of civilian versus military. After all, we have a civilian Commander in Chief; we have civilian secretaries. That is fine. But why interpose civilians in between and turn over to them for decision matters that are basically military?

Now, look at the delay; look at the delay in the appellate processes provided for in that bill. What is your deterrent effect? You are in the middle of the war and you have a poor unit, and a run—and, unfortunately, even our soldiers run.

I think, possibly, the chairman may have in mind some units of the Union Army that made some great retrograde advances. Now, where is your deterrent effect if you are going to have that kind of appellate review; and what you will get, particularly with this notion of the law officer spreading his charge on the record, is not substantial justice, but all flyspecking and comma chasing; and you will have a system that defeats itself, because the purpose of the system is to maintain the integrity of the Army.

Mr. ELSTON. I don't understand just where you think the delay is going to occur.

Colonel WIENER. The delay is going to occur in going through the right of appeal. I think it is 67 (c).

Mr. BROOKS. The 30 days, you mean, in 67 (c)?

Colonel WIENER. No; I guess it is 67 (b) (3):

All cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the judicial council has granted a review.

That is only 45 days.

Mr. DEGRAFFENRIED (reading):

The judicial council shall act upon such a petition within 15 days of the receipt thereof.

Colonel WIENER. Yes; I see it is only 45 days. The thing I can't see is, what is the valid reason behind this? Now, if we were sitting here as an original proposition, with a completely blank page before us, at the year 1, that would be one thing; but why do we suddenly need to change our entire system of military law?

I mean, after all, trial by jury is not some modern invention like radar or television which the founders didn't know about. They knew about trial by jury; they preserved it for civilians. They knew about courts martial and they decided that was a more suitable system for an armed force.

They say, "Well, we want to have confidence in our system of military justice." Confidence to whom? To the decent proportion of the services or confidence to the fellow that committed the offense?

Mr. ELSTON. What appeal would you have?

Colonel WIENER. I think the present system in the Elston bill, with two modifications, would be just about ideal.

Mr. ELSTON. What two modifications?

Colonel WIENER. Those two modifications are, first, I wouldn't send a bad-conduct discharge to the Board of Review because the whole purpose of a bad-conduct discharge is to provide an exit from the service for the man who isn't criminal, but just is worthless for military service.

Now, he gets two reviews. He has a verbatim record reviewed by the original convening authority; then he gets a review by the staff judge advocate and confirmation by the officer exercising general court-martial jurisdiction.

Mr. ELSTON. Colonel, I can't agree with you on that. A man who gets a bad-conduct discharge. If he is guilty and gets a bad-conduct discharge, he, of course, should not be in the Army. But, you can appreciate that the man discharged to civilian life with that kind of discharge has that hanging around his neck the rest of his life; and he is entitled, whether he is guilty or innocent, to a complete review of his case to see whether or not any error intervened and substantial justice was done in his case; and you probably would not get it unless you had some sort of a board of review that had nothing to do with the original proceeding, to give a complete review to the case.

Colonel WIENER. My point is this, sir: The bad-conduct discharge is new in the Army. The usual exit right for the deserter or petty thief or someone who disobeyed orders, for over 150 years, was a dishonorable discharge. As I understood the purpose of the bad-conduct discharge, when it was recommended by the Vanderbilt Committee, one of whose members had had occasion to review the Navy system, the idea was to provide something which had something less of a stigma. Bad conduct and dishonor are two different concepts.

Mr. ELSTON. I am not arguing against it. I think it was a good idea to have it.

Colonel WIENER. My point is, and perhaps I haven't made it clear, that in order to encourage resort to the discharge which has less stigma, you ought to make it a little easier. As it is, there isn't any incentive to resort to the bad-conduct discharge, because it is just as difficult to get them out as with a dishonorable discharge. That is my thought behind it.

Mr. ELSTON. If you could be in the position of some Members of Congress who have had complaints from men who got bad-conduct discharges about their inability to obtain jobs in civil life because of their record, you would understand why we feel, a great many of us, that there should be a complete review so that no possible injustice can be done.

Colonel WIENER. You take away the incentive to resort to the bad-conduct discharge instead of the dishonorable discharge.

Mr. ELSTON. I don't think so if your commanding officer is conscientious and fair and wants to give the kind of discharge that a man is entitled to.

Colonel WIENER. Well, I mean you have a tradition of 150 years that the deserter goes out on a dishonorable discharge. You are trying to change a habit of thought and I think you will do it more easily if you provide an easier way for eliminating the undesirable men.

Mr. ELSTON. I can't see any harm in a review.

Colonel WIENER. He does have review.

Mr. ELSTON. If the man is guilty, the reviewing court is going to say so. If he is not guilty, they will say so. In any event, the accused has had his day in court; and every person is entitled to that.

Colonel WIENER. He has had his day in court, and he has had double and possibly triple review.

Mr. ELSTON. I am not in favor of the judicial council reviewing on questions of fact; but I do think a review board should.

Colonel WIENER. The second change that I think would be helpful in the Elston bill would be that one member of the judicial council should be a line officer, because after all in the steam of the Elston bill the board of review and the Judge Advocate General have pretty well sifted out the legal problems. When you get to the judicial council, it is a matter of confirmation—whether this lieutenant was so drunk that he ought to be dismissed or whether he was really dishonest when he passed the bad checks or slightly inebriated. You have a disciplinary action. I think it would be helpful if one of the men were a line officer.

Mr. BROOKS. You get into this point: What about combat? Shouldn't one of them be a combat man? You have the Wac's in there. If you try to get representation, you carry it too far.

Colonel WIENER. My point is this: When you get up to confirmation, you have two problems: One is legal and one is disciplinary. I think one of the very helpful things in the present Navy system is that when the general court records go to the Secretary of the Navy, he has the advantage of two reviews. One is by the Judge Advocate General of the Navy for legal features; and one is by the Chief of the Bureau of Personnel, for disciplinary features.

I think that would be particularly helpful when you consider what happened to officer cases in this country in World War II. One of the charges made before the committee 2 years ago was that there was a disparity in the treatment of officers and enlisted men. I think, from my own experience, that that charge had considerable foundation. It was just too hard to try an officer. Knowing how you did get them tried, and we went to the Board of Review, and we went through the Judge Advocate General, and then went to the White House, why, he had a very good chance of getting off. For the most part, there was never anyone who exercised or who presented the disciplinary point of view.

I think it would be helpful if that were done.

Now, reverting to the present bill, there is a provision about jurisdiction over the inactive Reserves in article——

Mr. BROOKS. Before we get to that, I want to ask one question for the record. In the event a bill of this character is passed, what will happen, if anything, to the special board which we appointed to review dishonorable discharges?

Mr. SMART. You mean administrative discharges also?

Mr. BROOKS. Yes.

Colonel WIENER. Just one second. I have a reference here. Under new article 76, page 63, under that provision, the board couldn't pass on any discharge.

Mr. BROOKS. Cease to exist, wouldn't it, in effect?

Colonel WIENER. Yes, except for the older cases.

Mr. BROOKS. Now, what would you think of putting in a proviso there that would say, in time of war, for instance, the Board might serve to review dishonorable discharges?

Colonel WIENER. Well, of course, it would be a curiously inconsistent provision. You have in there that the action shall be binding upon all courts. You are running into a really difficult constitutional question or habeas corpus, as to how far this draft article 46, and its counterpart, article 50–H of the Elston bill, can even bring the Federal courts back to what was the traditional scope of habeas corpus; I say it is inconsistent because on the one hand you say, in terms, that the courts shall not review court martial cases; but you set up a Board to do the same thing.

Mr. BROOKS. Well, I can see, for instance, in time of war where there is a reason for special action in reference to dishonorable discharges; whereas, in time of peace, you don't have a parallel situation, it seems to me. In time of war, you take your men in hurriedly and everything moves rapidly. A man slips up and he is given a dishonorable discharge. He is gone and forgotten about. In time of peace, however, those things are more methodical; and the soldier or the sailor or the airman is prepared to go into service; and by far the majority of them make it a career and expect to remain in service, and they are better versed on the violations.

Colonel WIENER. Well, it seems to me that you have so many safeguards here, you have the Board of Review, you have the Judicial Council, you have a petition for new trial. I would think, myself, that you would want to Review Board only for administrative discharges that didn't go through the system.

Mr. BROOKS. You think it should be retained for administrative discharges?

Colonel WIENER. Yes, because there there is a real possibility of injustice.

Mr. BROOKS. Do we need any change in this bill to cover that?

Colonel WIENER. I don't think you need any change to cover that.

There is a point in article 2 (3) of this bill, on page 4, jurisdiction over Reserve personnel who are voluntarily on inactive duty training authorized by written orders. Well, in the first place, from the Army point of view, that is rather unclear because normally inactive duty training doesn't contain written orders. But I think there is a more serious and more fundamental objection to it. I don't think it is necessary; and I don't think it is very practicable.

If you have a Reserve officer on inactive duty—of course, if he is on active duty, he is like a regular officer for all disciplinary purposes—if you have him on inactive duty, and he commits something which would be a civil offense, such as larceny of Government property, you can deal with him much more expeditiously and easily in the appropriate civil tribunal. On the other hand, if he commits a military offense, or shows he is a pretty worthless fellow and had better get out of the Reserve, then I think you do better to board him, revoke

his commission after having appeared before a board, instead of starting the somewhat cumbersome machinery going.

As to retired officers, I would certainly retain the jurisdiction over them. I think it may be of interest to the committee to recall that in 1916 Woodrow Wilson vetoed the Army appropriation bill because the Articles of War which were attached didn't provide for court-martial jurisdiction over retired officers. I think it might be well for the committee to plug up that little loophole which the Hurtzberg case left, which was based entirely on statutory considerations and, in effect, made an honorable discharge a pardon for undetected crime.

He was a naval chief charged with mistreating American fellow prisoners in the Philippines. His term of enlistment expired in March '46; he was given an honorable discharge; reenlisted the next day, and thereafter his offenses came to light. The courts held there was no jurisdiction to try him after his reenlistment. So, in effect, they gave the honorable discharge which was issued by a 2½ striper at the Brooklyn Navy Yard, who, of course, couldn't know what Hurtzberg had done in the Philippines, in effect, as a pardon. The courts specifically said there was no constitutional question. I think that ought to be buttoned up.

There was one other point I wanted to make, and then I am open to any questions you gentlemen may have. It was suggested by Mr. Rivers yesterday.

Just let's sit back and consider what one of the fighting problems is on this bill: We make a man a multistarred commander. He is generally trained at public expense; he is sent to service schools at public expense; and we give him a command of several millions of men; and he gives the signal to go; and as a result of that signal, thousands of men lose their lives and thousands more are maimed or blinded; and we don't object to that because that is one of the harsh realities of war.

Yet, when it is proposed that that same general, with those incalculable powers of life and death over his fellow citizens, be permitted to appoint a court for the trial of a soldier who has stolen a watch, oh, no, we can't have that; we have to have a panel. Doesn't make sense; does it?

Mr. BROOKS. That was the point I had in mind yesterday, that some of the proper orders of the command can be much more harsh and much more unfair than the results of a court martial.

Colonel WIENER. Certainly; and I say, if you trust him to command, if you trust him with only the lives and destinies of these millions of citizens under his command, that actually with the future of the country, because if he fails, things are going to be rough, you can certainly trust him with the appointment of a court.

Mr. BROOKS. Don't you think this, also, Colonel? That the average commander who has the best interests of the service in mind, and certainly the best interests of his command, knows that by obtaining justice as a result of these courts martial, it is one way to increase the morale of his command and provide greater efficiency?

Colonel WIENER. There is no question about it, Mr. Chairman, at all.

Mr. BROOKS. Are there any questions, gentlemen?

Colonel WIENER. Mr. deGraffenried had one question on bread and water.

Mr. DEGRAFFENRIED. Yes; I did. I would like for you to discuss that.

Colonel WIENER. Of course, 5 days bread and water, when you think of a citizen in the armed forces, is pretty harsh. But look at the problem you are up against sometimes. You have someone in the guard house or in the brig, and he is duly convicted. His case has been reviewed and fly-specked; and there is no question he is going to be in that guard house for quite a spell. Then he just decides, "I have had enough of this;" and he gets an order, and he says, "No."

They say, "You can be tried."

He says, "I have already been tried."

They say, "You can be sent to the guard house."

He says, "I am already in the guard house."

He utterly refuses to cooperate to the extent that he won't leave his cell to go to the latrine. What are you going to do with a man like that? That is not an imaginary case. What are you going to do with a man like that?

Now, one solution would be to look the other way and turn the provost sergeant loose on him to beat the "b'jesus" out of him. That is not a very civilized way of handling it.

Those are actual problems. Five days bread and water may make a citizen of him again.

Mr. BROOKS. Mr. Smart?

Mr. SMART. On that very point, I would like to point out that Colonel Wiener is referring to the punishment of someone who is in confinement. That is a different proposition than the punishment for disciplinary infractions, for a disciplinary infraction that a man has committed not after but before he has been sentenced and confined by a courts-martial. I am not saying that bread and water is a bad punishment; but I do say, I don't see the relevancy of the statement.

Secondly, I would like to advise the committee that Colonel Wiener was the attorney for the Government in the case of *Wade* v. *Hunter* on a question of jeopardy. At that time, I understand he was in the Solicitor General's Office, and represented the warden, Mr. Hunter, in that case, which is still pending. Colonel Wiener is no longer associated with the case; and I know he feels he will be self-serving if he volunteered any information on it; but I think his views on this jeopardy question, which is rather acute here, would be helpful to the committee. That pertains to article 44 of the bill.

Mr. BROOKS. Would you care to make a statement on that, Colonel?

Colonel WIENER. Yes, sir. Article 44:

> No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court martial upon any charge of specification shall be held to be a trial in the sense of this article until the finding of guilty has become final review after review of the case has been fully completed.

The difference between that concept of jeopardy and the fifth amendment is this: The Article of War says, no person shall be tried the second time for the same offense; and that languages goes back to 1806. The language of the fifth amendment is:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

Then the question is, when does jeopardy attach? There are a lot of decisions, fairly mechancial, jeopardy attaches when the jury is sworn; jeopardy attaches when the first witness is called; jeopardy attached when testimony is given. But suppose there is a mistrial because of disagreement of the jury; and you have had the jury sworn; you have had witnesses called; and you have had testimony given; and everybody agrees you can try him again.

Going back to the older cases, the old decisions in the Federal cases, written by judges who were more nearly contemporaneous with the Constitution than any of us, they said:

> Jeopardy in the fifth amendment means conviction or acquittal;

and this is from Mr. Justice Washington, in the case of *United States* v. *Haskell*, Federal Case No. 15321:

> We are clearly of the opinion that the jeopardy spoken of in this acticle

That is the fifth amendment—

> * * * can be interpreted to mean nothing short of the acquittal or conviction of the prisoner and the judgment of the court thereupon. This was the meaning affixed to the expression by the common law. The moment it is admitted that in cases of necessity the court is authorized to discharge the jury, the whole argument for applying this article of the Constitution to a discharge of the jury before conviction and judgment is abandoned because the exception of necessity is not to be found in any part of the Constitution; and I should consider this court as stepping beyond its duty in interpolating it into that instrument if the article of the Constitution is applicable to a case of this kind.
>
> We admit the exception, but we do it because that article does not apply to a jeopardy short of conviction.

That principle has been lost sight of in all the mechanical Corpus Juris decisions; and so I feel that article 44, as it now stands, is a correct statement of jeopardy; and, as a matter of fact, is closer to the original interpretation of the fifth amendment than a good many cases in the civil courts.

Mr. SMART. Then you take the position, Colonel, which is contrary to that announced by most of the witnesses, that once the court is sworn, that jeopardy then attaches?

Colonel WIENER. Well, that just isn't so, because, take a trial for murder in any United States district court: The jury disagrees. Well, now, if that rule of jeopardy attaches were correct, the man couldn't be tried again; and, of course, he can.

Mr. ELSTON. Isn't the rule this, Colonel: That there must be something beyond merely the impaneling and swearing of the jury? The jury must be discharged for some reason other than an act of the accused. Where there is a mistrial, the jury has disagreed; it is obvious he should be tried again; jeopardy didn't attach. But suppose you had a case where the jury was impaneled and sworn; proceeded with the case; got up to the place where they were ready to submit the case to the jury; the prosecution felt, "Well, if I had a little more time, I could make a better case; I could get more witnesses"; and asks the court to dismiss the jury; and then they proceed later on to impanel another jury and try the case. Don't you think that man should be considered to be in jeopardy?

Colonel WIENER. Yes. You can't do it as a matter of convenience, but look at the sort of cases where the discharge of the jury has been held not to bar a second trial; where it appears in the course of a trial that the juror is acquainted with the defendant; or because one of the

petit jurors was a member of the grand jury that returned the indictment; and where the appearance of prejudicial articles in the public press was thought to make a fair trial impossible; or where the trial judge was of the opinion that his own remarks had been prejudicial; or where a juror appeared to be insane after the commencement of the trial; or where the first jury was discharged because the defendant was not rearraigned after the overruling of his demurrer to the indictment.

In all of those cases, they have held he can be tried again.

Mr. ELSTON. You will find a lot of those are regulated by statute. For example, if an accused person becomes insane during the trial, the statute provides that proceedings may be taken to determine his then present mental state.

And most of the other matters to which you refer can be considered on error, after the case has been tried, and be appealed to a higher court.

Mr. BROOKS. Of course, you have the case, too, where some of the jurors in some jurisdictions take sick, and you have to make arrangements for another trial; or a case where, after a verdict is rendered, you find tampering with the jury.

Mr. DEGRAFFENRIED. You find cases where the allegation of the indictment is at variance. The proof might be at variance from the allegations of the indictment. For example, ownership might be laid in a person and when proof was introduced, ownership might be in another person; and even though the defendant had put in a plea of not guilty, and a witness for the State had been on the stand, they have held in those cases, the indictment can be corrected by placing the ownership in the proper place, and defendant can be tried over again because he hadn't been placed in jeopardy of that particular ownership charge.

Colonel WIENER. The real difficulty here which came up in one case I was arguing—I briefed it rather extensively and the court went off on another tack—is this: Suppose an accused is convicted in a civil court, and he appeals. The conviction is reinvestigated; he is tried again. He says, "You are trying me twice; you are placing me in jeopardy." The answer is always, "Well, you took the appeal and, therefore, you can't complain if you were successful and they try you again."

But in the military service, under old article 50½ in the 1920 Articles, and continued in article 50, the appeal is automatic. Does that mean that he is twice in jeopardy on a rehearing? I don't think it should mean that; but the Trono case, in 199 United States, is going to take a lot of talking to get around.

Mr. BROOKS. What would you think of language which would say something like this: No person shall be twice placed in jeopardy?

Colonel WIENER. Well, then, you are going to have an awful lot of litigation.

Mr. BROOKS. You go back to the decision there.

Colonel WIENER. Of what is jeopardy. I would leave the language as it is and concentrate on getting back to Mr. Justice Washington's views on what jeopardy in the fifth amendment means.

Mr. DEGRAFFENRIED. The language in broad terms and leave it to the court to construe.

Colonel WIENER. Use the language in the Articles of War since 1806.

Mr. DEGRAFFENRIED. For example, one court might hold in a rape case, where force had to be proved, and the State was unable to prove force, that the man might later be indicted under carnal knowledge of a girl under 16, where no force had to be used, and tried over again, where he might have been acquitted under the rape charge. Everything except force was identical, and yet the court held he had not been in jeopardy.

Colonel WIENER. I think the notion here is sound. I think the article as it stands is satisfactory; but there are problems there.

Mr. SMART. I had just one more question. I would like for the committee to have the benefit of Colonel Wiener's view on the proposition of having JAG corps, which has been so extensively discussed by previous witnesses; what he thinks about it.

Mr. BROOKS. I wish you would remember this, if you will, and let us have your views on whether or not we should have some statement or some reference to the comity of the use of the Federal civil courts.

Colonel WIENER. You mean like article of war 74?

Mr. SMART. That is it.

Colonel Wiener. I don't recall whether there is such a provision, but I think it would be desirable to have a provision similar, if not identical, with article of war 74, as to who has precedence; and, of course, the basis of that, for the information of the members of the committee, is, basically, that in time of peace, the civil courts have or can exercise prior jurisdiction, if they want to, and not in time of war.

Now, as to the corps, a lot depends on what we mean by a corps. If we mean by a specialized branch of an armed service, such as the Judge Advocate General's corps, or the Medical Corps of the Army and Navy, I think it must be conceded that it is desirable to have such a separate corps.

At the same time, I am bound to say that the Navy, which, until recently, has had no specialization at all—they would train an officer to become Judge Advocate General by sending him to sea in command of a battleship—did produce in Admiral Kolklopp an extraordinarily able Judge Advocate General; and without making personal comparisons, which would be invidious, I will say, I do not know his superior.

He was a submariner originally. He commanded the submarines in the Pacific Fleet. Now, he has been a Judge Advocate General.

The Air Force now has a Judge Advocate General. They say that the first part of the Elston bill applies to them, which is perhaps not too clear; but they say the second part doesn't. Just how they reach that I don't know. Of course, the Air Force has always had a complex about a unitary organization. They tried during the war to do away with the signal insignia, an ordnance insignia, and so forth; so when you went up and saw someone in the propeller and wing, you didn't know whether he was a communications man, ordnance expert, or statistical officer.

They are operating under a set of articles which presupposes a separate Judge Advocate General's corps. I don't see how they can get away from a Judge Advocate General's corps. I think it is rather silly to say, when they get into the slate blue uniforms, if the fellow wears JA insignia, somehow he wouldn't be an Air Force officer.

In the Navy, they now have a corps of officers for legal duties only. I think that is probably a step forward.

Now, the question is, how independent should this corps be? When I went down to Trinidad, just before I went down in April of 1941, I went to say good-by to General Gullian, who was then the Judge Advocate General. The commanding general for whom I was going to work was a Military Academy classmate of his, and very close personal friend. I went in to pay my respects and say good-by. I said, "General, I don't think I have to ask you what I should do as a judge advocate. I think I know that." I turned out to be optimistic; but then youth is always optimistic.

I said, "General, I would like to have you advise me on what I should not do."

And he said, "Always remember this: Your loyalty runs to your commanding general and not to me."

It seems to me that is pretty fundamental in any kind of military organization. It is one thing to provide separate channels for technical communications; and that is helpful. It is a very good thing to put into the law what article 47 of the Elston bill puts in, that the judge advocate shall have direct access to his commanding general, although I think it is a sad commentary on the resourcefulness of previous Judge Advocates General that they couldn't get that privilege for their offices by regulation or by exhortation.

But it is quite another thing to say that you are going to have a separate group of untouchables, with a separate command control. Now, true, a lawyer is a professional man. Of course, a lawyer's independent judgment is the only thing that is worth anything. But isn't that true of doctors? And yet, no one has ever suggested that the surgeon of the command be independent of the commanding general.

Let's turn to civilian life. The general counsel of a corporation, of a large corporation, the general counsel of a Government department, the Attorney General, the chief of each of those lawyers wants that lawyer's independent judgment; but I have never heard it said that the integrity of any Attorney General was impugned because he was subject to removal by the President when the President didn't care for his services any longer. It seems to me that is a most useful analogy.

Now, efficiency reports—I never had any trouble with my efficiency reports, whether I said yes to the old man or no. I discharged my responsibility when I gave him my opinion and my recommendation. He discharged his when he took it or turned it down. So that while it is desirable to have a separate corps, in the sense of a separate corps of specialists, Medical Corps, Civil Engineers Corps in the Navy, Chaplains' Corps, Signal Corps, Transportation Corps, they are still part of a team; and, as I say, it has never been suggested that if you have a good Attorney General, you had to make him independent of the President.

Now, as for separate promotion lists, it is a curious thing that the separate promotion list of the Judge Advocate General's Department of the Army used to be a very fighting subject. Why? Because in the Army, until very recently, all promotion was by senility. If the fellow ahead of you died or retired, then you got promoted; it didn't make any difference what your merits or demerits were. You got promoted when he died.

The medicos, including the horse doctors, got promoted on length of service. There was a considerable basis for saying, "Why doesn't the Army promote its lawyers as fast as it does its horse doctors?"

Time went on. More promotion by length of service was introduced through the 1940 act; and finally in 1947, after the Elston bill passed the House, the Officer Personnel Act came in, and after that, all promotion in all branches was by selection.

When those provisions of the Elston bill became law after the Officer Personnel Act of 1947, with a separate list, which was that great emotional goal toward which all judge advocates were striving, it doesn't give any judge advocate officer any faster promotion than he would have had when the bill went into effect.

Another thing the Elston bill does, curiously enough, is this: As a result of the provision of the Officer Personnel Act of 1947, the Secretary of the Army can go outside the regular service if he deems it necessary or desirable to get a chief of a branch of any department of the Army. During the war, as you gentlemen doubtless recall, that was actually done through juggling of positions, and so forth, in the case of the Finance Department. The Fiscal Director during the war was a Reserve officer. The Chief of Finance sold war bonds.

The last four sections of the Elston bill, passed after the Officer Personnel Act went into effect, makes the Judge Advocate General's corps of the Army the only branch of the Army where the Secretary of War and the President aren't free, if necessary, to go outside the Regular ranks to find a branch chief.

Mr. BROOKS. Are there any further questions?

Mr. SMART. No.

Mr. ELSTON. No.

Mr. BROOKS. If there are no further questions, Colonel, we really thank you very kindly for all of the help you have given the committee. I think you have shown a keen insight into the whole problem. We appreciate it very much.

Colonel WIENER. Thank you, sir.

Mr. BROOKS. We have this morning Congressman Denton, of Indiana, who wants to testify regarding certain features of the bill.

Congressman, we are very happy to have you here this morning, and glad to have your statement.

STATEMENT OF HON. WINFIELD K. DENTON, MEMBER OF CONGRESS FROM THE EIGHTH DISTRICT OF INDIANA

Mr. DENTON. My name is Congressman Denton, from the Eighth District of Indiana. I am appearing in behalf, as you state, of certain provisions which I would like to see added to this H. R. 2498.

Now, briefly, what I want is this: I want to see the Air Corps Judge Advocate's office made a separate corps. As this committee knows, when they amended the Articles of War, they made the Judge Advocate of the Army a separate corps. Then when you set up the Air Judge Advocate's office, I assumed—and most everyone else did—that it would also be a separate corps in the Air Corps; but, apparently, from the way they have construed this matter, it is not operating as a separate corps.

I might say that I was a Judge Advocate in the last war; and I was assigned to the Air Corps. A great many Reserve Air Corps officers

are very disturbed about this feature; and it is working out especially bad for a number of reasons.

In the first place, the Judge Advocate in the Army is a separate corps. Now, that makes it easy for them to get lawyers. The lawyers can go into a branch where they are sure that their training and their ability will be used in accordance with what they have been trained to do, and they go into the Army Judge Advocate's office. On the other hand, in the Air Corps, when a man goes into the Judge Advocate's office in the Air Corps, he is subject to being assigned to any other duty within the Air Force. It is especially acute in the Air Force.

I think I can say this because I was a rated officer in World War I. There is some feeling in the Air Force between flying officers and nonflying officers. The flying officers have certain prerogatives; they have to command installations, and an officer in command of anything must be a flying officer. Now, that puts a nonflying officer in somewhat of an inferior status; and a man doesn't like to go into the Judge Advocate's office of the Army and being in what I might say is an inferior status.

Now, the second point I want to make about it is, if any man ought to be free to give an unbiased opinion, it ought to be a lawyer. I say this from experience I have had myself, as long as a judge advocate has to rely on his commanding officer for his efficiency rating, for his promotion, and a number of other things, if he is under that command and not a separate corps, he is not free to give his opinion as he should do. He is both a judge and an advocate. That is one man and that is one branch of the service that I think certainly should be free.

Now, a third point I want to make is this: This, just from what I have heard of it, is a very good code, in the changes that were made. You can write the finest law in the world, and if it is poorly administered, it is a bad law; and you can write a bad law, and if it is administered well, it is a pretty fair law.

Now, the administration of the military justice is up to the judge advocate. We know in the last war, there were a great many abuses, injustices committed; and I think in this case, if you want to have military justice administered effectively and efficiently, you must have the judge advocate a free agent to give advice just as any other lawyer would. I imagine you men are most all lawyers, and you know, as lawyers, we must be free to give our own opinion. A lawyer is trained, has special knowledge of the law in long years of training; he is familiar with administration of justice. He knows there are certain rules of procedure and certain practices that have to be followed and he must be free, if we are going to have the right kind of justice that we want, to give that advice as he should give it.

Now, I think if we have a separate judge advocate for the Army, we certainly ought to have a separate judge advocate for the Air Corps.

Mr. BROOKS. Don't you think all three services ought to have it?

Mr. DENTON. I think they should. I know very little about the Navy, so I am not talking about it. I do know about the Army and the Air Corps. I think it should be a separate service. We know the doctors are a separate corps; we know the chaplains are a separate corps. I think the Inspector General of the Army operates as a separate corps.

If anything be done, what I recommend would be that a new section be added to this bill which would provide that the provisions of title II of the act of June 24, 1948, that was Public Law 759, shall be construed as within the laws made applicable to the Department of the Army by section 2 of the act of June 25, 1945. That is, you would have a new section. You don't need that for the Army, because you already have it for them. Personally, I would think the same rule would apply to the Navy, although I don't know much about the Navy and I couldn't speak about it.

I know a number of men who served as judge advocates in the Air Corps in the last war who are very anxious to see what I think is an improvement made to the military justice procedure.

Mr. BROOKS. Congressman, do you think it would be better to have three corps than to have unification?

Mr. DENTON. You mean unification of all of them?

Mr. BROOKS. Yes.

Mr. DENTON. Well, I am not prepared to give an opinion on that, because I don't know. Of course, I favor unification as far as you can go, as far as you can have it; but I certainly think that the Air Judge Advocate should be a separate corps, just the same as the Army is. I would like to see unification all the way down the line, of course.

Mr. BROOKS. Mr. Elston?

Mr. ELSTON. No questions.

Mr. BROOKS. Mr. Hardy.

Mr. HARDY. I have nothing.

Mr. BROOKS. Mr. deGraffenried?

Mr. DEGRAFFENRIED. Nothing.

Mr. BROOKS. We certainly thank you very much for your fine remarks. We appreciate it.

Mr. BROOKS. Mr. Robert L'Heureux. Will you just have a seat Mr. L'Heureux?

Mr. SMART. I might say to the chairman that Congressman Ford has requested that he be heard; and he will be here at 15 minutes before 12; and I have so advised the witness.

Mr. BROOKS. Mr. L'Heureux, would you mind giving, for the record, some of your background before you begin with your statement?

STATEMENT OF ROBERT D. L'HEUREUX, CHIEF COUNSEL, SENATE BANKING AND CURRENCY COMMITTEE

Mr. L'HEUREUX. Yes, sir. I will be very brief on that point. With your permission I will file in the record the letter that I sent you on March 4, 1949, which gives it at length.

Mr. BROOKS. If there is no objection, it is so ordered.

(The letter referred to follows:)

UNITED STATES SENATE,
COMMITTEE ON BANKING AND CURRENCY,
March 4, 1949.

Hon. OVERTON BROOKS,
Chairman, Subcommittee No. 1, House Armed Services Committee,
House of Representatives, Washington, D. C.

MY DEAR CONGRESSMAN BROOKS: Pursuant to a recent conversation which I had with my good friend, Robert E. Jones, Jr., of Alabama, I wish to confirm that I have been invited to appear as a witness upon H. R. 2498 pertaining to a uniform code of military justice.

In order to give you and the subcommittee an idea of my background, I am furnishing you with the following information.

I am 36 years of age. I have been granted the following college degrees: A. B., A. M., Litt. B., LL. B., LL. M. I am a member of the Bar of the District of Columbia and of the State of New Hampshire. I have taught constitutional law, criminal law, and statutory law in a law school approved by the American Bar Association for about 5 years. I have practiced law since 1940 with the exception of my military service (1943–46). I was a machine gunner in the Thirtieth Infantry Division and I was wounded in combat with the enemy (January 1945) in Malmedy, Belgium.

Throughout my military service, I was consulted on legal problems in connection with courts-martial. In 1945 and 1946, I served successively as assistant judge advocate, reviewing courts-martial, defense counsel, and trial judge advocate in Marseille and in Paris, France. At that time, Marseille was a redeployment center processing troops for the Asiatic-Pacific theater of war and for return to the United States. Naturally, the volume of general courts-martial work was heavy in that post, and I acquired considerable experience in the prosecution of all types of crimes ranging from murder to extensive black market activities. I was honorably separated from the service on May 17, 1946. I then resumed the practice and teaching of law. In January 1947 I was appointed chief counsel of the Senate Banking and Currency Committee and I have been a member of the professional staff of that committee from that time to the present.

I greatly favor a uniform code of military justice for all the services. I have acquainted myself with the provisions of H. R. 2498 and I would like to offer constructive criticism of some of its provisions in order to improve the legislation. I estimate that I would need at least 1 hour to cover important points, although I would be willing to spend more time with the subcommittee if its members find that I can be of further assistance to them.

Although I am a member of the American Bar Association and of the bars of the District of Columbia and of New Hampshire, I do not appear as a representative of those groups. I appear simply as one experienced with military, civil, and criminal law to offer constructive improvements to the bill.

In that capacity, I believe I could render a more useful service if I were to follow as closely as possible the proponents of the measure on the list of witnesses. If that were done, the members of the subcommittee would have the opportunity to question prior and subsequent witnesses, at an early stage in the legislative process, upon the advisability of the suggestions I will offer.

Would you kindly advise me of the day and time of my scheduled appearance as a witness?

I thank you for your courtesy in offering me this opportunity to do my bit for a better administration of military justice.

Sincerely yours,

ROBERT D. L'HEUREUX.

Mr. L'HEUREUX. I have five college degrees; I have been teaching law, criminal law, constitutional law, and statutes for about 5 years. I am chief counsel for the Senate Banking and Currency Committee.

I have had experience in the Army, mostly as a machine gunner, a combat man in the Army; I got wounded in Malmedy, Belgium, as a combat man.

I never, on my own, applied for a commission. However, toward the end of the war, the commanding officer who needed men for trial judge advocate work, asked me to apply for a commission; and I got it the same day or the next day; and they put me right into court-martial work. I wound up in Marseilles, France, which, as you know, is the gangster land in France. We had a half million troops going through there at all times. We had a record of trying as many as nine murders a week. We had everything from rape to extensive black market activities. One soldier, who had 35 trucks stolen from the Government, and who conducted a great black market activity. We tried all these cases.

In other words, I have had quite a bit of experience both in civil-criminal law and military-criminal law.

Senator Charles W. Tobey of New Hampshire has asked me to state that he is very much interested in this also and that I generally represent his views in this matter. I have only about 15 minutes. I have given you my views in my paper section by section. I will omit the first part where I speak on the general policy; and I will try to take up some of the more important points I have made here. I would suggest on these points, I was very glad to hear the chairman and Mr. Elston remark that there should be somebody here from the three services to go over this point by point and take up the objections made by the witnesses. I think that is an excellent idea. I would suggest that you have the Judge Advocate General in the three branches, the Air Corps, the Navy, and the Army, either come himself or appoint someone from the Judge Advocate's Office who understands these technical questions of law. I am sure they could be very helpful.

I will take them point by point without reading the sections because I don't have time. However, you are familiar with them.

I will first take article 1, subsection 11.

In an attempt to combine in one definition the situations of an accuser or a prosecutor taking part in convening the court or acting as a member of the court martial, the draftsmen of H. R. 2498 have omitted the commanding officer who orders the subordinate to prefer charges.

That is covered in the present manual for court martial. He could not sit as a member of the court, and he could not convene the court. On the other hand, the way they have defined the terms in this bill, that leaves him out. The present manual for courts martial states, regardless of the question of personal bias, if he orders a lower officer, a subordinate, to prefer the charges, he should not sit on the court and he should not convene court.

I pass to article 2, page 4, line 20, which speaks of Reserve personnel who are voluntarily on inactive-duty training authorized by written orders.

That has been covered, in part, by Colonel Wiener, very well indeed; so I will just talk on a few points.

It could conceivably include Reserve personnel voluntarily on inactive duty, meeting once a month for a lecture, and so forth, and such personnel talking back to someone his superior. I am sure you will want to think over that change in the law.

Article 2, page 5, line 3:

> Retired personnel of a Reserve component who are receiving hospital benefits from an armed force.

If that provision is intended to apply to one who is actually in the hospital for treatment, that is not unreasonable; one who is hospitalized, as the term is used, for a day or several days in a hospital bed, or around, you want to make military law applicable to him.

On the other hand, if it applies, as it very well could with the present language, to those who come into the hospital and then leave, or an "out-patient," as he is known, that is quite drastic.

So I say "hospital benefits" could be replaced by the word "hospitalized," which has a very definite meaning.

Article 2, section (8):

> Personnel of the Coast and Geodetic Survey, Public Health Service, and other organizations when serving with the armed forces of the United States.

Under present law, personnel of the Geodetic Survey when serving with the Army come under military law under 33 U. S. C. 855.

The Public Health Service comes under military law under 42 U. S. C. 20.

Both come under military law in time of war only under present law.

The bill continues with the words "and other organizations when serving with the armed forces of the United States." Under this provision of H. R. 2498, the Red Cross in time of peace or war; the U. S. O. hostesses in time of peace; even the Boy Scouts of America when serving with the armed forces, say, for disaster relief within the continental United States; even guards in the Pentagon, could be made subject to court martial.

I am sure you want to restrict that a little and make the words a little less all-inclusive.

Article 2, section 12; that is page 5, line 22.

This provision bears upon subject matter partly provided for in 34 U. S. 1201, but it is applicable in time of peace as well as war.

Thirty-four, United States 1201, provides, in part that persons in leased bases under the Secretary of the Navy, in time of war or military emergency, are subject to military jurisdiction for offenses except those purely military or naval. That is simply declaratory of the law of war, a part of long-established international law.

In contrast to that, article 2, section 12, has no limitation whatever and would make natives or visitors subject to military law. That could possibly create serious international complications. I am sure that the full exercise of this authority would violate a large number of or all existing executive agreements in connection with leased bases. That is contrary to international law. Local civilian courts are supposed to function when peace is restored.

Let's not confuse this subject with our courts, say, in Germany. We have two branches of military law. You have martial law and the law of occupation, the law of war. Under the law of occupation, they have the right to try by court martial. They also have the right to establish or create a military tribunal to try offenses when they are the occupied force. On the other hand, this bill provides in leased bases, where we usually have agreement with the people, and they are presumably friendly people—you should not regard that lease agreements, independent agreements, make these civilians subject to military law for military offenses.

I am sure the State Department would give you their views on that matter. They must have definite views on that matter.

Article 3 (a), page 6, line 5—I hate to go this rapidly, but you understand I have only 20 minutes.

Mr. BROOKS. Go right ahead.

Mr. L'HEUREUX. When you bear in mind how military jurisdiction has been extended under this article 2, and now you add this continuing jurisdiction over such personnel and offenses, you have a constant threat of military discipline hanging over Reserve personnel.

I would suggest that you leave it as at present in A. W. 94, extending jurisdiction only to frauds against the Government. Even that is of doubtful constitutionality. From what I recall, it was tried in lower Federal courts, one district deciding one way, and another district deciding the other way; with some reference to it in the Hurtz-

berg case, but no clear-out definition as to whether it is constitutional to extend military jurisdiction even under the present Articles of War to fraud against the Government. It is an offense you will want to look into.

Article 3, section 2, in this bill, continues jurisdiction for any kind of offense as to Reserve personnel, but not as to United States personnel, nor as to National Guard personnel. In the past, of course, they have been considered as civilians with reference to this particular offense.

When you tie article 2, extending military jurisdiction, to article 3 (a), you really get an abortion. You find they can extend jurisdiction; call them back into the service; try them, and so forth; and it is a great departure from present law.

Article 9 (c), page 10, line 22: The procedure is too cumbersome. This provision should be amended to allow an MP to deliver an order of the commanding officer whether the MP be an officer or not. In other words, you should not disturb present law. I think they are going out a little far. It is a question of enforcement mostly, and I am sure you will want to look up that one.

Article 12, prohibiting confinement with enemy prisoners, and article 13, prohibiting punishment before trial, are more specific than, and constitute a great improvement over, present article of war 16, which is full of questions and ambiguities. Article of war 16 states aliens "not in same jail house or other form of segregation."

Let me say that this is about the only respect in which this bill can be considered at all an improvement over the Elston bill. The Elston bill, to me, was a great advance in military law.

I don't see anything that can be done to improve it from the point of view of the Army or the Navy and to the present status. There are certain matters of opinion as to whether you should allow an appeal, for instance, to a court on questions of law and fact; but I don't think the Members of Congress generally would be in a mood today to even consider that.

I mean, from the practical viewpoint, the Elston bill does a great job. I think when they tried to unite the three services, if they had tried to unite them all under the principles of the Elston bill, you would really have a great piece of work here. On the other hand, they haven't done that, as we will see in these others, as to company punishment, and all.

Where there is a choice of giving bread and water confinement for 5 days, which has worked possibly in the Navy, to one not in the Navy, like myself, it always seems like a form of cruel and unusual punishment. There may be reasons for having it. There should be specified in the bill, if you allow it, that the head of the department in the Navy can have that, but not give the head of each department the authority to put it into effect as to soldiers. I think the test should be, if you have found in the Army where the larger number of draftees go during the war, that it has worked well—and I have heard no criticism that company punishment has not worked well in the Army—if it has worked well with the limited punishment that there is now, why make it arbitrary within the discretion of the department to add to that punishment? If anything, if you want to unite them, restrict it in the Navy rather than extend the severity of the punishment or add to the severity of the punishment in the Army.

I will have to skip over a lot of these points, but I am sure your staff experts here will go through them and you, yourself, may find time to do that and check them as against the bill.

Mr. ELSTON. They are all included in the statement?

Mr. L'HEUREUX. Yes.

Mr. BROOKS. The committee will go over them carefully; you can depend on that.

Mr. L'HEUREUX. Thank you, sir.

Next we have article 14, page 12, line 20.

Under article of war 74, it is mandatory in time of peace for military authorities to hand over to the civilian authorities a man who is charged by civilian authorities except if the accused is being held by the Army for a military offense.

This article 14 in the bill makes it discretionary with the Secretary of the Department to issue regulations allowing him to be given up to civilian authorities or not, regardless of whether he is charged with a military offense. I believe this is illogical. The accused should be given up to the civilian authorities. States will feel better about this. I understand the Navy has used that; and they haven't abused it. It doesn't mean a lot of greenhorn men, as I was, myself, stepping down from a chair in a university and winding up as a private, should be given a responsibility in a short time to decide whether to give him up to a State or not. I might do it well and I might not. Instead of being myself, it might be a blacksmith or someone who has been called in and become an officer, and might have that decision to make—whether to give him up to the civilian authorities or not.

I think the present system, as under the Elston bill, is preferable.

Article 15, page 13, line 9: That is your company punishment which I touched upon in part.

Article 17 (b), page 16, line 20: Let us say you have two accused. One will go up in the Army; the other in the Navy. The Army thinks it is a good case; the Navy will say "No." If you have a case where two are being tried for conspiracy, for instance, and the Army says, "No, it isn't a good conviction"; and the Navy says, "Yes"; the other one who has been found guilty and his case approved, will have to be set aside because you can't commit conspiracy alone.

You may have all sorts of ambiguities and obscurities from that; and I think you should look at that closely.

I will skip over a lot of these points. I would like to come to the substantive articles as to crimes, because I think those are very important; and from the civilian lawyer's viewpoint, I can discuss those with a little more authority than the military.

Mr. BROOKS. You mean the definitions of crime?

Mr. L'HEUREUX. Yes, sir.

Mr. BROOKS. Article 77; isn't that the punitive article?

Mr. L'HEUREUX. Oh, yes, article 77, page 65, line 1.

First, it is just a question of phraseology:

> Any person punishable under this code who commits an offense punishable by this code.

That is kind of begging the question. I think they meant, "any person subject to this code."

That isn't important.

Article 88, page 69, line 21: Disrespect toward officials:

The present law applies to enlisted men alone. Under this provision, only an officer may be punished for using contemptuous or disrespectful words against the President, Vice President, Congress, and so forth. It is all right by me, but why the distinction between officers and enlisted men. You probably will want to make it uniform as under the present bill.

Article 91, subsection 2, page 71, line 2: A warrant officer who willfully disobeys the lawful order of a noncommissioned officer—you will find that there. The whole thing treats of a disrespect toward a subordinate; and I am convinced that whoever drew up this bill did not belong to the Air Corps or Army. I am convinced of that, because he would have caught it right away. A warrant officer is superior to a noncom. That is page 71.

If you have someone from the JAG office of the three services present, they will catch all these points.

We come to Article of war 118, page 80, line 8. The present article of war 98 deals with murder. The Manual for Court-Martial 1949, paragraph 179, gives a simple definition of murder which is substantially the same as the one used in the Manual for Courts-Martial 1928; and it is substantially the definition used throughout the various State courts and the Federal courts.

Murder, with all its ramifications, has a definite meaning both under Federal law and under military law. While commending the draftsman of H. R. 2498 for an attempt at simplification, we find here an instance of the grave danger of glibly modifying the old common-law definitions to dispense with procedural difficulties. I don't think they reached the result that they sought to achieve here.

Under this provision, a killing in the perpetration of simple arson, housebreaking, would not be murder. That has been, I am sure through mistake, left out.

This provision also removes the common law "year-and-a-day rule," which even the States have not set the pattern for. Very few States have tried to tamper with that. It is quite a question of proof as to whether the man died of that offense after a year and a day.

Article 119, page 80, line 23: Manslaughter. Voluntary manslaughter is usually defined as the intentional, unlawful killing of a human being without malice aforethought. This article does away with voluntary manslaughter by defining manslaughter too narrowly as follows:

> Any person subject to this code who, without design to effect death, kills a human being—

The result is obviously not intentional, because the article goes on to say:

> (1) In the heat of sudden passion.

Even if that still included voluntary manslaughter, because "heat of sudden passion" is not limited to the case when it is based upon "adequate provocation," it is still lacking in precision. This provision is lacking in essential respects and should be redrafted with a view to defining voluntary manslaughter also.

You will find that voluntary manslaughter doesn't come under that. We all know what that is: A man walks in, finds his wife in the arms of another man. Both Federal law and the common law

traditionally makes that voluntary manslaughter. This case hasn't been taken care of in this article.

Article 121, page 81, line 16: Larceny. Three offenses, larceny, embezzlement, and obtaining goods or money under false pretenses are now to be termed larceny. However, essential element in all three crimes, the intent to deprive the owner permanently of his property, has been omitted. That article should, by all means, be redrafted. It could, conceivably, be held that a man who borrowed another man's shirt, and intended to return it, and he can prove it, would be proved guilty of larceny. It isn't quite specific enough.

Article 122, page 82, line 3: It is an unprecedented extension of robbery to make fear of injury to property, particularly the property of a relative, an element of robbery. That is further than the great majority of States would even think of changing their law, that you would hold it to be robbery if she says, "Unless you come across with your property, I am going to take care of the property of a relative of yours." That has never been the law. It is impossible to say what sort of property is contemplated. This article is phrased too loosely.

Article 126 (b), page 83, line 25: Simple arson. That takes in property. What kind of property? It could conceivably take in hotfoot, lighting fire, providing there would be a scorching of the shoe. It could come under arson. I am sure that the draftsmen of this legislation didn't intend that; but it should be phrased less loosely.

Article 140, page 93, line 9: Delegation by the President. The President may delegate all his authority, such as approval of death sentences, dismissal of officers without a trial—just any power. He may delegate it to anyone he chooses; and the latter may redelegate, perhaps all the way down to the appointing authority. This goes far beyond the First War Powers Act.

Secretary Forrestal's committee cited Public Law 759, Eightieth Congress, as a precedent. That was not a fair statement. Public Law 759, Eightieth Congress, second session, section 10 (c), June 24, 1948. Title I of that law, which deals with the organization for setting up the draft, contains a similar "delegation clause" but that clause is not in title II, which amended the Articles of War.

That is an entirely different thing, allowing the President to redelegate his authority in selection of personnel of drafts, an entirely different thing from giving him that delegation to redelegate the power of approving the death sentence probably all the way down to the convening authority. There is no limit as to where it stops; it is a dangerous thing.

Do I have more time?

Mr. SMART. The Congressman is here.

Mr. L'HEUREUX. I will leave this with you. As you know, I am with the Senate Banking and Currency Committee. If I can be of any help to the committee and staff, in explaining these things, I will be glad to do it, because I have a very keen interest in the military. I have lived as a GI, as I told you, a combat man; I have lived as an officer; I know their problems; and I want to do all I can, while upholding the military discipline.

Mr. BROOKS. Mr. L'Heureux, the committee is glad to have this information and your ideas; and I suggest, if you will, to keep in touch with Mr. Smart. We will read your statement very carefully.

Mr. L'HEUREUX. Yes, sir.

Mr. BROOKS. Perhaps later on we will ask Mr. Smart to contact you about some of the ideas you have here.

Mr. L'HEUREUX. I thank you very much for your courtesy, all of you. I would appreciate it if you would let my whole statement and summary of it go into the record; also a short statement put in the Congressional Record touching on a few of these points by someone formerly in the JAG.

Mr. BROOKS. No objection, so ordered.

(The statements referred to are as follows:)

TESTIMONY OF ROBERT D. L'HEUREUX BEFORE A SUBCOMMITTEE OF THE ARMED SERVICES COMMITTEE OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES

Armies are established primarily to wage and win wars. None of us would want to interfere in the slightest degree with the discipline required by our armed services to attain that objective. However, armies are composed of human beings made to the image of God, not of mere machines, and the enforcement of discipline cannot be had at the price of a sacrifice of justice.

If your code of military justice is unjust, you will not have discipline, you will invite bitter resentment with which esprit de corps is impossible, you will incite characters who would never have become criminals in civilian life to become felons in the service. That, all of us wish to avoid.

I have read with interest the press release dated February 7, 1949, from the National Military Establishment, Office of Secretary of Defense. That press release states in part:

"Secretary Forrestal asked the committee, appointed last August * * * to prepare a code, uniform in substance and in interpretation and application, that would protect the rights of those subject to it and increase public confidence in military justice without impairing performance of military functions."

The announced objectives could not be improved upon. However, H. R. 2498 falls far short of those objectives. Consider that this bill deprives enlisted men of the Army, for instance, of several important rights which they have enjoyed traditionally or which have been granted to them by the last Congress, without any proof that the enjoyment of these rights have been detrimental to discipline.

Realize that this bill reaches deeply into the civilian ranks to extend the court-martial powers of the armed services to civilians even in peacetime such as Red Cross workers, USO hostesses, and even civilian guards at the Pentagon, when the civilian courts are open daily for business,

Then ponder over the other drastic changes that are included in "sleepers" in the bill, and you will wonder whether a real attempt was made to adhere to the announced objectives or whether this is a disguised, either deliberate or unconscious thirst for additional, arbitrary, military power run riot. I shall proceed with an analysis of the bill.

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Article 1 (11) (p. 3, line 23) [read definition]: See articles 22 (b) (p. 20, line 7) and 25 (d) (2) (p. 23, line 15) for application of this definition.

In an attempt to combine in one definition the situations of an accuser or a prosecutor taking part in convening the court or acting as a member of the court martial, the draftsmen of H. R. 2498 have omitted the commanding officer who orders the subordinate to prefer charges.

Under present law, by the Manual for Courts Martial, such commanding officer is an accuser and cannot appoint a court martial or sit as a member of the court.

Under article 1 (11) of H. R. 2498, such commanding officer could do either.

Under Articles of War 8, 9, 10, he couldn't appoint a court martial.

Under Articles of War 4, he couldn't sit as a member of the court.

The reason for this prohibition is obvious. The one convening and appointing the court or a member of the court should be unbiased and if the commanding

officer orders the subordinate to prefer charges, he has formed more or less views upon the guilt or innocence of the accused.

This change from present procedure should not be made. Anything that is apt to detract from the accused getting a fair, impartial trial is to be carefully avoided. There is no evidence that present procedure is detrimental to Army efficiency.

Article 2 reaches deep into the civilian population. V. g. article 2 (3) (p. 4, line 20) "Reserve personnel who are voluntarily on inactive duty training authorized by written orders": The draftsmen of this provision undoubtedly contemplated some particular type of duty such as "week-end flights." However, the provision is so loosely drawn, that it could include a situation where drill or other duties are provided for by written orders (especially since retirement credit and pay may be involved).

As drawn, it could conceivably include Reserve personnel voluntarily on inactive duty meeting once a month for a lecture, etc. and such personnel "talking back" to someone his superior.

I can't believe the draftsmen of this legislation intended to produce this result.

The bill should be amended to embrace clearly only those situations which were meant to be covered by this provision. If the provision was purposely drawn in a loose form, the members of this subcommittee should ponder deeply before recommending enactment of such a sweeping provision.

Article 2 (5) (p. 5, line 3), "Retired personnel of a Reserve component who are receiving hospital benefits from an armed force": If that provision is intended to apply to one who is actually in the hospital for treatment, that is not unreasonable. However, if it applies to out-patients (those who just come into the hospital for a treatment and then leave) the provision is quite drastic. Such a person could be court-martialed for simply "talking back" to a medical officer.

I would suggest that the words "receiving hospital benefits from an armed force," on page 5, line 4 be stricken from the bill and the words "hospitalized by an armed force" be substituted in lieu thereof.

The words "hospital benefits" are too broad and indefinite. The word "hospitalized" has a definite meaning.

Article 2 (8) (p. 5, line 9), "Personnel of the Coast and Geodetic Survey, Public Health Service, and other organizations when serving with the armed forces of the United States": Under present law, personnel of the Geodetic Survey when serving with the Army come under military law under 33 United States Code 855.

The Public Health Service comes under military law under 42 United States Code 20.

Both come under military law in time of war only under present law.

The bill continues with the words "and other organizations, when serving with the armed forces of the United States."

Under this provision of H. R. 2498, the Red Cross in time of peace or war, the USO hostesses in time of peace, even the Boy Scouts of America when serving with the armed forces, say for disaster relief within the continental United States, even guards in the Pentagon could be made subject to court martial.

The drafters of this bill may contend that under the rule of interpretation called ejusdem generis, the provision applies only to other organizations similar to the Geodetic Survey and Public Health Service, but such important things should not be left to the elastic and often ephemeral rule of ejusdem generis. The rule is of uncertain application and has often been ignored by the courts.

Article 2 (12) (p. 5, line 22) [read the provision]: This provision bears upon subject matter partly provided for in 34 United States 1201, but it is applicable in time of peace as well as war.

34 U. S. 1201 provides, in part, that persons in leased bases under the Secretary of the Navy in time of war or military emergency are subject to military jurisdiction for offenses except those purely military or naval. That is simply declaratory of the law of war, a part of long-established international law.

In contrast to that, article 2 (12) has no limitation whatever and would make natives or visitors subject to military law. That could possibly create serious international complications. I am sure that the full exercise of this authority would violate a large number of or all existing executive agreements in connection with leased bases. That is contrary to international law. Local civilian courts are supposed to function when peace is restored.

Article 3 (a) (p. 6, line 5) [read provision]: When you bear in mind how military jurisdiction has been extended under article 2 and now you add this continuing

jurisdiction over such personnel and offenses, you have a constant threat of military discipline hanging over Reserve personnel.

You'll want to think this one over seriously, gentlemen, before you recommend its enactment. You will want to limit it narrowly to prevent only obvious miscarriages of justice.

Continuing jurisdiction after separation has been extended, in the past, only under A. W. 94 pertaining to frauds against the Government to protect Government property.

Article 3 (a) in this bill continues jurisdiction for any kind of offense as to Reserve personnel, but not as to a United States personnel, nor to National Guard personnel. This will not make Reserve personnel any too happy. In the past, Reserve personnel of the Army were regarded as civilians only subject to military law when on active duty.

When you tie in article 2 (extending military jurisdiction) to article 3 (a), you really get an "abortion."

Great constitutional doubt exists as to these provisions, because of the fifth amendment to the Constitution of the United States which provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces;"

If a fellow commits an offense in the service and is discharged subsequently from the service, does the case arise when the offense is committed or when the prosecution is instituted? He is no longer in the service. Undoubtedly the framers of the Constitution knew the difference between a case and a "cause" (which expression they didn't use).

Article 9 (c) (p. 10, line 22) [read provision]: The procedure is too cumbersome. This provision should be amended to allow an MP to deliver an order of the commanding officer whether the MP be an officer or not.

That is allowed now under paragraph 20 of Manual for Courts Martial.

(The drafters of 9 (c) apparently did not consider the fact that a dishonorably discharged paroled prisoner or trustee is a civilian and an officer would have to deliver the order.)

Article 12 (prohibiting confinement with enemy prisoners) and article 13 (prohibiting punishment before trial) are more specific than and constitute a great improvement over present A. W. 16 which is full of questions and ambiguities. V. g. A. W. 16 states aliens "not in same jail house or other form of segregation." How about alien in the service? Must he be separate? This article removes most ambiguities in A. W. 16.

Article 14 (p. 12, line 20) [read full article]: Under A. W. 74 it is mandatory in time of peace for military authorities to hand over to the civilian authorities a man who is charged by civilian authorities except if the accused is being held by the Army for a military offense.

This article 14 in the bill makes it discretionary with the Secretary of the Department to issue regulations allowing him to be given up to civilian authorities or not, regardless of whether he is charged with a military offense.

Illogical. Should be given up to civilian authorities. States will feel bitter about this. It may have worked well under the Navy, but why leave it to military discretion?

Article 15 (p. 13, line 9). (See article 20, infra.) Refer to subject matter of provision.

Under the present A. W. 104, the commanding officer may impose against enlisted men (including noncoms) of his command minor punishment such as withholding of privilege for 1 week, restriction to certain specific limits for 1 week. The punishment may not include confinement.

Below grade of noncom (private and private first class), extra fatigue or hard labor without confinement for 1 week and that is all.

If they (the accused) consider themselves innocent, they have the right to demand trial by court martial in lieu of company punishment, and they cannot be punished.

With respect to officers: An officer exercising general court-martial jurisdiction, may in connection with reprimands, etc. impose one-half of 1 month's pay for 3 months in time of peace and war up to but not including a brigadier general.

Article 15 of this bill includes all that A. W. 104 does, except that the accused has no right to demand a court martial, unless the Secretary of a Department allows it by regulation.

In addition to that, they include as possible punishment—

1. reduction to next inferior grade, or
2. confinement for 7 days, or

3. confinement on bread and water or diminished rations for 5 days, or
4. forfeiture of one-half month's pay
5. withholding of privileges for 2 weeks, or
6. restriction to specified limits for 2 weeks, etc.

That is a thirst for arbitrary power run riot. Oh, I know that the Navy has had something like this for years and years (it may work in the Navy with voluntarily enlisted personnel—tradition, etc.) but let us not forget that our wars are fought and won with draftees in our age. Tradition has less meaning for them. They are civilians at heart. They'll resent arbitrary power in the company commander. What disciplinary power the company commander has now is already a cause for complaints, but the accused can demand a court martial.

You can't do that to your boys in the service. If you do, you'll never feel right in your hearts about it.

I have never heard of evil effects upon discipline flowing from the present system in the Army. Why give a mere man such arbitrary power?

Article 15 (c) (p. 15, line 4): Compare this with article 17 (summary courts which give any accused except one who has been "permitted" to refuse company punishment the right to demand trial by a general or special court martial).

Article 17 (b) (p. 16, line 20) [read provision].

Let us say you have two accused (one Army and one Navy man) being tried together for an offense. The Army man's case will go up through channels in the Army and let us say, the Army says it's a good conviction.

The other's case goes up through Navy channels, which has slightly different precedents and traditions, and the Navy says the case is no good.

That will not make for much logic.

Let us say that the two are being tried for a conspiracy and both are found guilty. The case goes up to the Army for departmental review, and it is upheld. The other goes through Navy channels and is "busted." The Army man's case will have to be "busted" too, because he can't commit conspiracy alone.

You'll have all kinds of inconsistencies and absurdities.

The appellate review should be lodged in the service which tried the case.

Article 18 (p. 17, line 5) [read p. 17, line 10]: "General courts martial, etc. * * *"

Present A. W. 12 stops with "military tribunal" (on line 12). Art. 18 adds the words: "and may adjudge any punishment permitted by the law of war."

What is the law of war? Difficult to say. You have to be an expert on international law. V. g. dropping prisoners out of planes as punishment in recrimination?

Article 20 (p. 18, line 5), jurisdiction of summary courts martial: May adjudge only two-thirds of 1 month's pay, while company punishment can consist of one-half month's pay.

Those two provisions must have been written by two different persons at two different times.

Still, enlisted men (including noncoms) may demand a special court martial (and may be given special or general court martial whichever appropriate).

Why the distinction with article 15?

N. B. Under present Army procedure the two higher grades of noncoms only have the absolute right to demand a special court martial instead of a summary. Other noncoms may request. Those below grade of noncom must take it.

Article 22 (b) (p. 20, line 7), article 23 (p. 20, line 11), and article 24 (p. 20, line 2): Same objection as to accuser, and so forth referred to at the beginning of my testimony on article 1 (11).

Article 25 (c) (p. 22, line 14) [read A. W. 4]: The language is different. P. 23, lines 1 and 2 unless "on account of physical conditions or military exigencies."

Too broad.

The appointing authority may deprive the accused of his right by saying that physical conditions or military exigencies prevent that being done.

No reason for that. Enlisted men should be more plentiful and less indispensable than officers.

The law should be left as it is in the Army at present; enlisted men must be used even at the front.

Present law provides that enlisted men from the same company or comparable unit (squadron or battery) cannot sit on the court martial.

This bill provides that ship's crew may be a unit, v. g., a battleship (1,500 men unit). The convening authority may say no one in the crew can serve on the court martial and therefore no enlisted men may be members.

Either give the enlisted men the privilege of having fellow enlisted men as they do presently, or refuse it as in the past. Don't hem and haw. Leave the law as it is presently. No evidence of abuse. Good record.

Article 26 (b) (p. 24, line 8) [read provision]: Most doubts upon the law arise during the closed session and the law officer is not given the opportunity to confer with the court during that time, under this provision.

All he can do after the findings is to put their findings in proper form.

V. g., the law officer rules upon the sufficiency of the evidence. One member objects (he was probably a blacksmith in civilian life and he doesn't understand the ruling).

Under present practice in the Army, the court is closed and a full discussion is had. The law member explains his point fully and often the court agrees with his ruling and the trial proceeds. But now, under this provision, after the objection is made, the court is closed and the law member has to absent himself. The whole court must debate and decide the point without the benefit of having the point of law fully explained to them.

There is absolutely nothing to gain by disqualifying the law officer from being a member of the court.

One of the reasons that might have induced the framers of H. R. 2498 to include this provision may have been the analogy to civilian courts where the judge does not sit in on jury deliberations. However, under the civilian-court system, the judge has the power to set aside the verdict of guilty if it is contrary to the weight of the evidence, and this is not a power which the law member possesses.

Furthermore the analogy fails, because the members of the court martial are judge and jury. The law officer is not the judge as in a civilian court.

Article 28 (p. 25, line 22): Appointment of reporters and interpreters: This constitutes an impractical change from the present rules which provide that the president of the court may appoint reporters and interpreters.

Supposing the court martial convenes in Mississippi and the convening authority is at Atlanta, Ga. If the power to appoint interpreters is lodged only in the convening authority, those in charge of the court martial have to confer with the convening authority and get an interpreter or reporter appointed, if an interpreter is suddenly needed or a reporter becomes ill and has to be replaced.

That should be left to the man in the local situation as under present rules. (In practice, the TJA (now called trial counsel) goes out and gets them.)

Article 29 (a) (p. 26, line 8) [read provision]: That has never been in the statute before. What happens if he is absent? I've had that experience before.

In past, provided a quorum was present, the trial could proceed. Now this provision will make for more jurisdictional arguments.

Presumably, the framers did not mean to make absence of a member a jurisdictional defect, but that should be made clear in the bill.

Article 31 (p. 27, line 20): Does not cover the case of a person arrested by civilian police here or in a foreign land and administered truth serum, or beaten, tortured, etc. The evidence could not be used under present rules in the Army, but it could under this provision.

If you want to make that change, you should think about it seriously. V. g. Tortures in Marseille.

Article 31 (d) (p. 28, line 16): "in violation of this article" pertains only to persons subject to this code.

"Unlawful inducement" wouldn't include acts done by State authorities or foreign police.

Present Articles of War 24 forbids use of any statements obtained by coercion even by civilian police.

Article 37 (p. 32, line 12): That article is similar to Articles of War 88 with one change, on page 32, line 16 "or counsel thereof". What if the counsel has been negligent, or guilty of misconduct? This question should be answered.

Compare this article with article 98 on page 73, line 8.

Does it cover gross negligence and other forms of misconduct? That should be seriously considered.

Article 98 (p. 73, line 8): This article is so broad that it is meaningless. "Any person"—"unnecessary delay" intentionally fails to enforce or comply with any provision of this code.

A comparison of article 37 with article 98 makes it obvious that these two articles were written on different days by different people.

Article 39 (p. 34, line 10), Sessions: That is a corollary of article 26 (law officer of a general court martial).

After the damage is done, the court calls in the law officer to put their findings *in proper form.* Note that the law officer couldn't touch up the substance and if the case is already "screwed up"—it is just too bad.

V. g. Suppose the court finds a lesser included offense which isn't included in the greater offense as a matter of law. V. g. He is charged with burglary and the court finds him guilty of disorderly conduct which is not a necessarily included offense, but which the court thought it was. If the finding is substantially illegal, the law officer cannot help the court out. They are through.

Article 41 (b) (p. 35, line 10) [Read provision]: The present Articles of War 18 provides that each side is entitled to one peremptory challenge.

On line 10, "the accused". Is that singular or plural? Is "accused" used collectively in a joint trial?

Under present law, only one peremptory challenge is permissible for all the accused together.

This provision states "the accused". It should state "*each* accused" if that is what the draftsmen meant. That would be just, although a change from present procedure.

If the draftsmen meant to leave the law as it is at present, they should have left the present language alone.

Each accused should have a peremptory challenge because he has disadvantages enough in being tried by a joint trial.

Article 43 (p. 35, line 21), statute of limitations: There are two pages of statute of limitations, but no statute of limitations in the bill.

A. W. 39: The stopping point is the arraignment. Everybody knows there is an arraignment and especially the accused does.

In article 43 of this bill, the stopping point is the filing of sworn charges with an officer exercising summary court-martial jurisdiction.

That is an open invitation to fraud. The sworn charges can be back-dated to one's heart's content and nobody would be the wiser for it.

Or, assuming integrity, let us say one commits a minor offense. The charges are sent to an officer exercising summary court-martial jurisdiction. This officer leaves the charges in his drawer. The accused is not in confinement. The officer keeps the charges in his desk 10 years. Then he pulls out the charges and prosecutes. That is perfectly within the terms of the statute.

NOTE.—The statute stops running when it is filed with an officer exercising summary court-martial jurisdiction.

This officer doesn't have to do anything about it. He doesn't have to tell the accused. He can salt them away for a later date.

Why they go on talking for two pages about the statute of limitations after they do away with, I don't know.

(You could say that the stopping point is service of charges on the accused. That wouldn't be so bad, but under this provision he may never know he is subject to being prosecuted.)

If the accused is under arrest and in confinement, the charges have to be processed in 8 days, but when he is not under arrest or in confinement, the statute of limitations even for general court martial is cut off with the filing of the charges (which the accused may never know about).

See article 30 (b) (p. 27, line 15): Perhaps the officer exercising summary jurisdiction can be punished if he delayed unduly, but that doesn't help the accused. The officer may have thought it wasn't a good case and another officer comes 10 years later and prosecutes.

Article 30 also provides that "accused shall be informed of the charge against him as soon as practicable, but it doesn't provide that, if he isn't, the statute of limitations will run. That is the least that this bill should provide in this respect.

Article 44 (p. 37, line 21), former jeopardy: "Former jeopardy" is a slight misnomer because it deals, as the present law does, with former trial.

Wade v. *Hunter* (72 Fed. Supp. 755 and 169 F. 2d 973) (reversing the district court)). That case is being litigated presently in the Supreme Court.

Congress should make it somewhat similar to the Federal rules. It should provide that any proceeding in which evidence is taken after arraignment but interrupted prior to findings shall constitute a former trial, if it is interrupted for any reasons except for "imperious necessity" (that has been interpreted by the courts).

In *Sanford* v. *Robbins* (115 F. 2d 435, certiorari denied, 312 U. S. 697), it was held that a former trial means a first complete trial and not a justly or unavoidably "interrupted one." That language could be written into the statute, if the subcommittee desires, in order to remove all doubts in the matter.

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Article 45 (b) (p. 38, line 13): "A plea of guilty by the accused shall not be received in a capital case."

If they dealt with the offense rather than the case that would make more sense.

The case is capital if it is punishable by death.

If offense were substituted for case that would mean the accused could plead guilty to committing a noncapital offense with which he is charged, or to a noncapital offense which would be necessarily included in the capital offense for which he is charged.

V. g., wartime desertion is a capital offense. The accused should be able to plead guilty to absence without leave, while denying he meant to leave the service.

Under present law, there is no restriction against his pleading guilty to a capital offense. An accused may not want the evidence before the court and on record; he may prefer to plead guilty.

Article 57 (a) (p. 47, line 7): This article demands much elucidation. It is involved and ambiguous. I find it impossible of interpretation. It is a new portion and new in the law. The armed services should be questioned upon whether they can interpret this section reasonably.

Article 57 (b) (p. 47, line 14) [read provision]: If the sentence is suspended, it does not begin to run from the date the sentence is adjudged by the court marital and the accused does not get credit for the time he serves while it is being reviewed. That may consume months. If the accused "cuts up," say, 6 months later, he goes back and serves the full time from the beginning, getting no credit for the months he spent in confinement.

I know of no precedent which now imposes liability to greater punishment for accepting the benefits of the largesse of the Executive or higher authority.

Article 58 (p. 47, line 19): Under A. W. 42, a convict may be sent to a penitentiary for only serious offenses for which confinement in excess of 1 year is authorized by title 18 of the United States Code or the law of the District of Columbia. For other offenses, accused goes to a disciplinary barracks.

Under the present bill (art. 58) this matter is left to administrative discretion. You can send a man to the penitentiary, with all the opprobrium and lasting effects upon his reputation that penitentiary confinement incur, for any offense, no matter now minor.

Under the present construction by the Army of pertinent statutory law, accused may be sent to a Federal penitentiary or Federal reformatory (v. g., Chillicothe, Ohio) or correctional institution (v. g., Alderson, W. Va.) if the offense is punishable and punished by over 1 year.

Under this bill, the accused may be sent to any penal or correctional institution under the control of the United States or which the United States may be allowed to use. What does that mean? A State penitentiary, a foreign jail?

The accused may be subject to the same discipline and treatment as a person confined or committed by the courts of the United States or State, Territory, District, or place in which the institution is situated. (Relate here the horrors of Marseille jail, for instance.)

The objections might be made that the accused cannot be confined with foreign nationals, under article 2. However, if he is not under custody of the armed forces in a foreign jail, he is not subject to this code. (See art. 2 (7).)

Authorities in the armed services would undoubtedly like to get out of the business of running jails, disciplinary barracks. I can appreciate that desire. However, they are dealing with human beings, people they should attempt to rehabilitate. (Give examples of rehabilitation.)

Young men exposed to the abnormal conditions in foreign lands often commit crimes they would never have committed at home. These men should not be sentenced to a penitentiary or foreign jail and given often a one-way ticket to becoming a hardened criminal.

Article 66 (e) (p. 53, line 24) [read the provision]: I shall not discuss the various steps that are taken before sentence is finally approved, as those are known to the members of this subcommittee and the steps may be discussed with legally trained representatives of the armed services who work daily under the established procedure. However, I do wish to point out that it is highly irregular to allow the Judge Advocate General to send a case to one board of review after another, if he is dissatisfied with a board's findings. The provision states "to the same or another board of review" (p. 54, lines 2 and 3).

Article 67 (p. 54, line 17): I will not take up the time of the subcommittee to discuss in detail the differences between this article 67 and the present law (A. W.

48 and 50). I presume that this will be explained by men skilled in the daily administration of justice in each of the armed services.

Under article 67, there is automatic appeal to the judicial council in all cases involving a sentence to death and general officers.

However, there is no automatic appeal in cases involving sentence to life imprisonment, dismissal of an officer below the grade of general, and suspension of a cadet, such as is provided in A. W. 48. I believe the subcommittee should recommend retaining automatic appeal in these cases, also.

Another difficulty with this, is that when the appeal is not automatic, the accused will often learn too late, if at all, of his right to appeal. He is not in a position to take the initiative. His defense counsel may have been transferred to another command, and the accused loses out in the shuffle.

Article 77 (p. 65, line 1), Principals: "Any person punishable under this code who (1) commits an offense punishable by this code."

That is kind of begging the question. What is meant is undoubtedly "any person subject to this code."

Article 88 (p. 69, line 21), Disrespect toward officials [read provision]: The present law applies to enlisted men also. Under this provision, only an officer may be punished for using contemptuous or disrespectful words against the President, Vice President, Congress, etc. It's all right by me but why the distinction between officers and enlisted men?

Article 91 (2) (p. 71, line 2): A warrant officer who willfully disobeys the lawful order of a noncommissioned officer. That would be the lawful order of a subordinate.

Article 91 (3) treats with contempt or is disrespectful toward a noncommissioned officer. Disrespectful toward an inferior.

That is all right with me, too, but under present law the offense is committed only with respect to superiors noncommissioned or warrant officers (A. W. 65).

That provision had better be explained and understood before enactment.

A. W. 118 (p. 80, line 8): Present A. W. 98 deals with murder. The Manual for Courts Martial 1949, par. 179, gives a simple definition of murder which is substantially the same as the one used in the Manual for Courts Martial 1928.

Murder with all its ramifications has a definite meaning both under Federal law and under military law.

While commending the draftsmen of H. R. 2498 for an attempt at simplification, we find here an instance of the grave danger of glibly modifying the old common law definitions to dispense with procedural difficulties.

Under this provision, a killing in the perpetration of simple arson, housebreaking would not be murder.

This provision also removes the common law year and a day rule.

Article 119 (p. 80, line 23), Manslaughter: Voluntary manslaughter is usually defined as the "intentional, unlawful killing of a human being without malice aforethought." This article does away with voluntary manslaughter by defining manslaughter too narrowly as follows:

"Any person subject to this code who, without design to effect death, kills a human being * * *."

The result is obviously not intentional because the article goes on to say: "(1) in the heat of sudden passion."

Even if that still included voluntary manslaughter, because "heat of sudden passion" is not limited to the case when it is based upon "adequate provocation," it is still lacking in precision.

This provision is lacking in essential respects and should be redrafted with a view to defining voluntary manslaughter also.

Article 121, Larceny (p. 81, line 16): Three offenses, larceny, embezzlement, and obtaining goods or money under false pretenses, are now to be termed larceny. However, essential element in all three crimes, the intent to deprive the owner permanently of his property, has been omitted.

That article should by all means be redrafted.

Article 122 (p. 82, line 3) [read article]: It is an unprecedented extension of robbery to make fear of injury to property, particularly the property of a relative, an element of robbery.

It is impossible to say what sort of property is contemplated. This article is phrased too loosely.

Article 126 (b) (p. 83, line 25), Simple arson: What kind of property? How about a hotfoot?

This article should be more carefully drawn. The type or value of property should be specified. It shouldn't be arson to set fire to a buddy's newspaper.

Article 140 (p. 93, line 9), Delegation by the President: The President may delegate all his authority such as approval of death sentences, dismissal of officers without a trial—just any power. He may delegate it to anyone he chooses, and the latter may redelegate—perhaps all the way down to the appointing authority. This goes far beyond the First War Powers Act.

Secretary Forrestal's committee cited Public Law 759, Eightieth Congress as a precedent. That was not a fair statement. Public Law 759, Eightieth Congress, second session, section 10 (c) June 24, 1948, title I of that law, which deals with the organization for setting up the draft, contains a similar delegation clause, but that clause is not in title II which amended the Articles of War.

Under the First War Powers Act, the President delegated some of his powers in connection with courts martial to the Secretary of War, but that act was temporary. A permanent power of delegation of such sweeping proportions as that present in this bill may mean militarism run riot, given a President who is the least bit negligent.

[From the Congressional Record, February 28, 1949]

MILITARY JUSTICE

Extension of remarks of Hon. Glenn R. Davis of Wisconsin, in the House of Representatives, Monday, February 28, 1949

Mr. DAVIS of Wisconsin. Mr. Speaker, my attention has been called to a letter signed by Maj. Paul S. Davis—no relative or acquaintance—which appeared on the editorial page of the Washington Star. I take this means of calling the contents of the letter to the attention of the members of the House, and particularly to the members of the Committee on Armed Services:

"MILITARY JUSTICE

"To the EDITOR OF THE STAR:

"As a Reserve officer in the Army with several years wartime experience in the Judge Advocate General's Department, I should like to comment on the proposed Uniform Code of Military Justice recently introduced in Congress (S. 857 and H. R. 2498). Your recent editorial (February 12) suggests that it combines the best features of existing laws in each branch of the service, and some other current comments give the impression that it would improve court-martial procedures throughout all the armed services and benefit accused personnel. In fact, however, this bill, if enacted, substantially would curtail the rights now given by law to accused personnel of the Army and Air Force. It would discard many of the constructive changes made in the Army court-martial system since 1916 and particularly in 1948.

"Specifically, the following changes would restrict the rights now given to the accused in the Army and Air Force:

"(1) Under the present law a general court martial must have a trained lawyer as law member who rules on all legal questions. Under the proposed code the law member would no longer sit as a member of the court but would be limited to ruling on evidence and other matters during the trial and advising the court on legal questions. Thus the accused would lose the important safeguard of having an informed lawyer present at all times during the deliberations and voting of the court in closed session.

"(2) The power of immediate commanding officers to impose so-called company punishments would be vastly increased. In the Army and Air Force a commander now can impose only minor punishments such as extra fatigue, reprimand, or restriction or hard labor without confinement for not more than 7 days. Soldiers and airmen need not accept such punishment. If they do not believe themselves guilty, they may demand trial by a court martial. The proposed code would authorize commanders to impose on enlisted men forfeiture of one-half month's pay, confinement for 7 days, confinement on bread and water for 5 days, or reduction in grade. Furthermore, unless specifically authorized by departmental regulation, a soldier would no longer be able to refuse punishment and demand trial.

"(3) The right of a soldier to have enlisted men sit on the court trying him, conferred by the 1948 amendments, would be made subject to decision of the commanding officer as to physical conditions or military exigencies.

"(4) A summary court martial (consisting of one officer) would have complete power to try any noncommissioned officer, even one of long service with the highest rating, and could reduce him to the lowest grade. As the law now stands the higher grades of noncommissioned officers can request trial by special court martial and thereby insure that the case be heard by at least three officers and an adequate record made.

"(5) Reserve personnel during inactive-duty training periods might be subjected to courts martial for absence, tardiness, or other alleged offenses during training periods and could be placed on active duty without their consent in order to stand trial and suffer punishment.

"(6) Under the present Army and Air Force law soldiers may be confined in a penitentiary only for very serious offenses, such as wartime desertion, mutiny, or crimes of a civil nature for which penitentiary confinement is authorized by other Federal laws. The proposed code would authorize penitentiary confinement for any offense, no matter how minor, thus potentially branding a soldier with a penitentiary record even for an insignificant military offense.

"Apparently the proposed bill adopts many provisions of the Naval Code of Justice, which has not been substantially revised since 1862, and attempts to impose them on the Army and Air Force. The 1943 amendments to the Army system were made after 3 years of careful consideration by Congress during which hearings were held and all points of view considered. The new Manual for Courts Martial has just gone into effect, and the Army and Air Force should have a chance to give the new law a fair trial. If more changes are desirable, they can then be made in the light of experience.

"I am not sufficiently familiar with naval problems to know whether the Army system could or should be fully applied in the Navy or to express an opinion as to what changes, if any, should be made in the present Navy code. But whether or not uniformity of procedure between the services is an ultimately desirable goal, it certainly should not be achieved at the cost of destroying wholesome safeguards now existing in the Army and the Air Force system of military justice.

"PAUL S. DAVIS,
"*Major, JAGD (Reserve).*"

Mr. BROOKS. Mr. Ford, we will be very happy to hear from you.

STATEMENT OF HON. GERALD R. FORD, JR., MEMBER OF CONGRESS FROM THE FIFTH DISTRICT OF THE STATE OF MICHIGAN

Mr. FORD. My name is Gerald R. Ford, Jr., Representative of the Fifth District, State of Michigan.

I am here with comments along two lines, Mr. Chairman. They are based upon my experience of some 46 months in the United States Navy during World War II and on a precise situation that has arisen because of the treatment that a constituent of mine has received since I took office on January 3, 1949.

In general, while I was in the service, I always rebelled, and I still think it is true, as far as the manner in which military justice was meted out by the various people in charge of it in the Navy, and otherwise.

It seems to me that a general statement can be made, with all honesty, that in the Navy, at least, justice is sometimes forgotten in order to impose on people in the service punishment of some kind or other.

I am particularly concerned about the fact that in courts martial, too often a court-martial board does not determine the guilt or innocence of the accused; but rather seeks to award punishment of one sort or another.

I can recall hearing conversations between members of boards along this line: "What does the Old Man want us to do?"

Now, that only illustrates the fact that these court-martial boards are not attempting to decide one way or another—is the man guilty or innocent. They are only trying to find out what the captain of a ship, or the commanding officer of a station, wants done with the man.

It was my experience on board ship to attend captain's mass and executive officer's mass, and then see what punishment was given out; and I also participated in various courts martial; and the whole system is fundamentally wrong; and I am particularly pleased to see something being done about it.

I am not familiar with the exact legislation here, but I think that I reflect the attitude of many civilians who served in the armed forces during the last war.

Now, that is a general comment.

Since I have been in office, and even prior to that, a matter was called to my attention that occurred to in regard to the Air Force. Gentlemen, this is an extremely serious matter; and I think it is also an indication that you have got to do something, and you have got to do it quickly.

I contacted Mr. Symington about this; and I have talked with the people on his staff. This may take a few minutes, but it is vital. Here are the facts:

A young man by the name of Lester Bunker, whose serial number is AF16084179, was a private, I think, maybe a sergeant now, in the Air Force during the last war. He was discharged as of November 2, 1945. He goes to a home; he lives in the town or near the town of Holland, Mich. He gets married; has a child; he takes the benefits of the GI bill; buys a home under the GI mortgage provisions; he gets schooling under the GI bill.

Almost 3 years later, the FBI comes into his home at noon time, takes him by the nape of the neck; and takes him down to the local jail and says, "You are a deserter." Mind you, almost 3 years after he was allegedly discharged.

Mr. ELSTON. Did he have his honorable discharge?

Mr. FORD. Absolutely; honorable discharge. Living in his community for almost 3 years; going through the ordinary ways of life, just as you and I.

Well, I was in the position of being a nominee; wasn't elected until November 2.

Citizens of that community became rather aroused; contacted Senator Ferguson; he got in touch with people down here in Washington; and for a short period of time, he was released.

The Air Force contends that he, on November 3, 1945, the day after he was discharged, reenlisted. He absolutely and irrevocably denies it. Now, it so happens that any of us who went through the process of being discharged or released from service, probably had a stack of papers that high [indicating], if not higher, to sign; and I know, from personal experience, that I may have signed a reenlistment myself in the hurry to get out. But he denies that he did it. By mistake, perhaps he might have; I don't know.

Furthermore, I can't see why it took them 3 years to finally apprehend a man who has never been out of his own community, for all intents and purposes.

Mr. BROOKS. Was he tried on that point?

Mr. FORD. I am just coming to that point. Here is what happened: He is taken down to Selfridge Field, which is, I guess, the only Air Force base in the lower peninsula of Michigan. He is put in the guardhouse; he receives no pay.

In the meantime, he has had to give up his home; he has practically lost the home that he was purchasing on a GI mortgage, and would have if the bankers in the community hadn't given him some consideration. He is away from his wife and 2-year-old child.

The citizens of that community can't understand this abritrary action; and I don't blame them.

Well, after January 3, when I came to Washington, I tried to get into the matter and find out why, at least, he wasn't being brought up for trial. Let me state at this time that he still hasn't been brought up for trial.

Mr. BROOKS. Did he go to the Federal court for a habeas corpus?

Mr. FORD. I am coming to that, sir, because I think if he had had the funds, that he absolutely had the right to get a habeas corpus release; but after all, we must remember he is just an ordinary workingman and he has lost every dime he ever had.

Now, because of the treatment that he received at Selfridge Field, it finally became necessary for them to send him down to an Army hospital in Battle Creek, Mich., and put him in a mental ward.

Here is an individual who was an honest, upright citizen; and it is quite possible that the treatment that he has received in 4 or 5 months may very well make him a charge on society for the rest of his life. In other words, because of their dilatory tactics, because of their tactics of having him in the guardhouse and under confinement without a trial, we now have a possible mental case.

If they had tried him right after he was picked up, the whole thing would have been resolved—was he guilty or innocent? But in the meantime, this boy, who thinks he is innocent, except for limited periods of time he was allowed to go home, has been in the guardhouse or in a mental hospital.

Finally, on February 7, after considerable concern on my part, I wrote Mr. Symington; and I will leave a copy of the letter.

(The letter referred to is as follows:)

FEBRUARY 7, 1949.

Hon. W. STUART SYMINGTON,
The Secretary of the Air Force,
Pentagon Building, Washington, D. C.

DEAR SIR: I am writing to inquire as to the status of Pvt. Lester Bunker, AF16084179, who is at Selfridge Field Air Force base, Detroit, Mich. Senator Homer Ferguson has contacted you before and your office forwarded to him certain information but I write at this time because it appears that recent developments have taken place that should be called to your personal attention.

From the facts in my possession it appears that the Air Force has handled this matter poorly to say the least. As I will point out in this letter, and as you will find from a thorough examination of the situation, a young man's future health and happiness may well be destroyed by a lack of proper administration down the line in your Department. From my own experiences covering 46 months in the United States Navy during the last war I can appreciate just what is happening at Selfridge Field. It is typical of military justice. In the case of most courts martial, the enlisted man's guilt is a foregone conclusion, the extent of his punishment being the only issue. I rebelled against the system while in the service and it appears even more unfair now that I am a civilian.

The following facts are indisputable: (1) Lester Bunker was discharged from the Air Force November 2, 1945, at Lowry Field.

(2) He has lived from that date to September 27, 1948, in the vicinity of Holland, Mich., either with his parents or with his wife, except for a limited time at East Lansing, Mich., while he was attending Michigan State College.

(3) He was married March 26, 1946, and now is the father of a young child and he and his wife have purchased a small home with the aid of a GI loan. I believe they have had to either dispose of this home by selling or renting because since September he has been incarcerated and without income while being detained by the Air Force.

(4) Between November 2, 1945, and September 27, 1948, he had been regularly employed either on his father's farm, at odd jobs in local industries, or on the maintenance staff of Hope College, Holland, Mich.

(5) He has received educational training under the GI bill at Michigan State College after being duly certified by the Veterans' Administration.

(6) On September 27, 1948, the FBI on instructions from the Air Force seized him and since that date he has been either in the Holland city jail, the guardhouse at Selfridge Feld, or the mental ward at the Army hospital at Fort Custer, Mich. For several weeks during the Christmas season he was allowed to be home.

The following facts are alleged to be true: (1) The Air Force originally contended Lester Bunker reenlisted November 3, 1945, but now contends he may be accused of illegally accepting service pay. I am informed he denies both charges.

(2) The Air Force, after waiting nearly 3 years to apprehend a person who was always at his home, now claims the reason for the 5-month delay in bringing the man to trial is the need for more time in gathering evidence and preparing for trial.

(3) The Air Force officials at Selfridge Field have used brutal tactics in trying to obtain a confession from Mr. Bunker. This incessant grilling has made Mr. Bunker ill mentally and as a result he has been a patient on several occasions at the Army hospital, Fort Custer, Mich.

(4) The Air Force officers assigned to defend the accused in contacting various people in Mr. Bunker's home town have adopted the attitude that he was guilty instead of seeking information to show his innocence.

Frankly, it appears that Mr. Bunker must seek the aid of the civilian courts by a writ of habeas corpus unless the Air Force acts promptly and with a due regard for justice and equity. I have analyzed the charges to the best of my ability and as a lawyer I believe he probably should have his rights litigated in a Federal court, particularly if the Air Force does not show some regard for the due process of law.

I am sending copies of this letter to Mr. Bunker, the attorney who may represent him in the civilian courts, and several interested citizens in his home town. I hope it will not be necessary for the accused to resort to such action for the protection of his fundamental rights but unless action of some sort is immediately taken I shall advise the parties accordingly.

I look forward to a full report on this matter without delay.

Sincerely,

GERALD R. FORD, Jr.

Mr. FORD. Since that time, I have gotten more consideration and so has the boy; but he is still incarcerated. I am told that he is presently to come up before some board which will determine whether or not his activities since November 3, 1945, are such that he is unable to decide between right and wrong and, therefore, he ought to be given a discharge.

I don't understand that procedure in the Air Force; but apparently it is being done.

Now, there are also some other things that the Air Force claims, and I want to state them. They say that he received some pay while he was at home during this 3-year period. He admits he received some pay, but it was back pay that wasn't paid to him when he was discharged.

They also say, and this is amusing, that he went back to Selfridge Field some time in '46; checked in and checked out, after spending 1 night there. That is true; he did. He went back to Selfridge Field to reenlist, to seek overseas duty. He got there, and some-

time during the day talked to some people; and they said he could reenlist but they couldn't assign him overseas. Well, it was late in the day and he checked to see if he could get some equipment—or whatever they called it in the Air Force—to stay overnight. They issued it to him.

The next day, after getting the answer that I indicated, he left. Here was a man that was for 3 years supposedly a deserter; and he goes right back to the Air Force base to reenlist.

Well, it is such a sordid case, Mr. Chairman, that I cannot help but come before this committee; and I intend to bring it up on the floor of the House at the time this bill comes up for consideration, because it is a gross example of how military justice can operate.

Mr. BROOKS. Would you call that military justice or injustice?

Mr. FORD. I think you understand what I meant.

Mr. BROOKS. That is right.

Mr. FORD. It seems to me that here is a case of a perfectly honorable and upright citizen who has been deprived of his rights as a citizen of this country, after having served 3 or 4 years attempting to defend this country; and anything that you gentlemen can do to obviate this kind of situation certainly has my wholehearted sympathy and support.

We talk about freedom. I meant to get up yesterday on the floor of the House and bring this up, but after talking to Mr. Elston, I decided not to do it. The bill was up yesterday for five hundred-some-thousand men in the Air Force to be authorized. If they can't treat one man better than the treatment this man has gotten in my humble estimation, whoever is in charge is incapable of treating five hundred-some-thousand individuals. If there are any questions I will be glad to answer them.

Mr. BROOKS. Mr. Ford, we appreciate your statement very much.

Mr. Hardy, do you have any questions?

Mr. HARDY. No.

Mr. BROOKS. Mr. deGraffenried?

Mr. DEGRAFFENRIED. No, sir.

Mr. BROOKS. Mr. Elston?

Mr. ELSTON. Of course, you understand, Mr. Ford, the very purpose of writing this bill is to take care of cases like that, and all other cases where there might be an injustice, and to insure to an accused person a speedy trial. I don't believe what you have testified to could happen after a bill of this kind would be passed, because the accused would be entitled to an early trial, entitled to counsel, entitled to have pretrial investigation, at which he could be present and have counsel present; know the nature of the charges against him; have an opportunity to investigate the matter. All those things we are trying to take care of in this bill. I think the case that you have cited largely arises because we didn't have the kind of bill we are trying to enact.

Mr. FORD. That is right. I am so happy that some action is being taken, because this kind of situation cannot continue without having an unfavorable reaction as far as our armed forces are concerned; and I, for one want the armed forces to be looked up to and not to be looked down at, because the treatment of individuals who are good citizens of our community.

Mr. BROOKS. Mr. Ford, I suggest this: If there are any additional details that come to your mind, that you might communicate them to

Mr. Smart. We will check over the provisions of the bill which was passed last year to see whether or not there were any omissions in it which would close up such a situation that you explain. We certainly thank you very much for coming here. We appreciate your testimony.

Mr. ELSTON. The provisions of the bill, Mr. Ford, are contained in the Selective Service Act which, of course, applies to the Air Force.

Mr. BROOKS. Now, if there are no further questions or business, the committee will stand adjourned until 10 o'clock tomorrow morning when we will begin a section-by-section reading of the bill.

(Whereupon at 12:10 p. m., the committee adjourned pursuant to reconvening Friday, March 18, 1949, at 10 a. m.)

UNIFORM CODE OF MILITARY JUSTICE

FRIDAY, MARCH 18, 1949

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The subcommittee met at 10 a. m., Hon. Overton Brooks (chairman) presiding.

Mr. BROOKS. The committee will please come to order.

This morning, gentlemen of the committee, we found that one witness asked for 10 minutes' time. He is Mr. Thomas King, national judge advocate of the Reserve Officers Association. Since he has had the experience of trying cases under the Elston bill, I felt like the committee would want to hear him 10 minutes.

Mr. ANDERSON. Yes.

Mr. BROOKS. So, Mr. King, we appreciate your appearance here this morning.

Do you have a prepared statement?

Mr. KING. No, sir; I do not have.

Mr. BROOKS. All right, sir, just proceed, sir.

STATEMENT OF THOMAS H. KING, LIEUTENANT COLONEL, J. A. G. RESERVE, NATIONAL JUDGE ADVOCATE OF THE RESERVE OFFICERS' ASSOCIATION AND PRESIDENT OF THE DISTRICT DEPARTMENT

Mr. KING. My name is Thomas H. King, Lieutenant Colonel J. A. G. Reserve, national judge advocate of the Reserve Officers Association and president of the District department of that association.

There are four points which we feel should be emphasized in this bill: The judicial council, the law member sitting with the court, the inactive training duty reserve section under article 2, and the Judge Advocate Corps in the three services.

Insofar as the judicial council is concerned, we feel that for a person to sit on a military courts-martial case he should have experience with his subject. If you get a lawyer to handle a matter involving corporation law you get one who is experienced with corporations and the law pertinent to it.

If you get a lawyer who is to handle an insurance problem, you want an insurance lawyer to do it. We feel that there should be military lawyers concerned with military cases.

We feel that a man who has no experience in the service should not say what goes on in the service because he does not have the background to do it.

And we feel that the judicial council as set up under the Elston bill will be a very practical council. A difficult problem in passing this particular bill would be that the various sections of the Judge Advocate General's Department would for the next few years be involved in handling courts-martial under three entirely different systems, because you had the system in existence prior to the passage of the Elston bill, and you have the system set up under the Elston bill and you will have the system set up under this bill.

Furthermore, it is our opinion that by changing the council there will be rights and privileges which are presently given to the accused under the Elston bill which will be taken away.

Under the Elston bill you have set up a council of general officers with the same privileges as the board of review, and that is to consider the evidence. Now those people who are more experienced in their respective positions because of their grade and their time in the service certainly should be given the same rights as a board of review of lesser ranging officers.

Now the question of the law member sitting with the court. To me it is inconceivable that the law member not sit with the court. We talk about endeavoring to take from command authority the right to control a court. But what do we do? We take the one man who is certified by the Judge Advocate General as qualified to sit on a court and take him out of it.

He is the one man who is not subject to command influence if there is any, because he has been especially certified to sit as the law member of that court or the law officer or whatever his title may be.

To us who have tried a few of these cases—and I had the experience in February of trying one under the Elston bill—it was one of the greatest pleasures I had, to have a law officer sitting up on that court who knew what he was doing. While we did not agree as to every point, we had a very capable man. And while the result of the case was not to my total satisfaction, I left that courtroom with a definite feeling that a fair break had been given to the accused.

Now as to the question of the Judge Advocate Corps. I do not know how the Air Corps functions with its present military justice system because they have in their 1949 Courts-Martial Manual adopted the same Courts-Martial Manual as the Army has, using the Elston law as the basis for procedure, as the basis for sentencing, as the basis for convictions, and as the basis for the essential elements of offenses.

They have taken it lock, stock, and barrel. But they have completely dropped off the last four paragraphs which require that there be a Judge Advocate Corps and that the officer sitting as the law member be a member of that corps or duly certified by the Judge Advocate General of the Air Force.

In this case—and I am reliably informed—in no instance do they have an officer certified by the Judge Advocate General, but the Chief of Staff has appointed a number of judge advocates, without the necessary requirement or certificate by the Judge Advocate General that this particular officer is so qualified.

I know that the officer concerned in my case was duly qualified, (a) by my private conversation with him, and (b) by his demeanor on the court. But we cannot operate under by guess and by God,

but we have to have it in the book as it is. Now either they are operating under the Elston law or they are not.

And I think they should be required to operate under the Elston law because that law was in effect at the time the statute was passed, saying that they would take over the military justice system then in effect in the Army.

Now the next point that I have been concerned with is in the Elston law, and it is the only point I do not agree with substantially, and that is the percentage of officers required to be in the Judge Advocate Corps. The Elston law says one and a half percent. I do not see how they can operate with the full requirements with less than two and a half percent.

The next point—and with that I am going to finish—is the question of making Reserve officers in inactive status, that is on inactive duty training, subject to the Articles of War. To me it is a gag if it were applied not as intended, not as these people say they think it should be put into effect, but within the letter of the law.

Suppose I come in to my commanding officer—Colonel Wiener—for a drill 10 minutes late and I have said something down here that he did not like or the Department did not like. Well, they can court martial me, put me on an active duty, and hold me because I was 10 minutes late as the excuse. It is a dangerous thing.

I personally have no objection to being tried by a court martial, because I am convinced that you get just as fair a break there as you do with any civilian court in the country. And with the requirements for an investigation under article of war 70, or whatever it is in the Elston bill, you have to have an experienced investigator and they do not kid with you. They get the facts.

They get them by means that we do not approve, that the defense lawyer will get up before the court and scream his head off about, but they really get the facts and if you are guilty, I think they get you.

And I think also if you are not guilty they are less likely to convict you.

As to this business of influence of courts, my personal experience in Europe was a very unique one. I sat as a claims commission and not as one having to do with military justice. I tried several thousand cases. And I had an office next door to the president of our general court.

We are very good friends. And I tell you that even if the staff judge advocate did try to influence him, he had the courage of his convictions, and I think most of them did because they were good officers.

They had the courage of their convictions to do what they thought was right. Some of them may not have, but we also have civilians who do not have the courage of their convictions.

So, gentlemen, with those four things, we really feel that the military being experienced in the military and the Navy officers being experienced in Navy activities, should be the ones to make the decision, with a definite limitation as to the manner in which these people are appointed. I like the Elston bill.

I fought for it. I think this committee did a magnificent job in preparing it. I think they came out with something good.

Mr. BROOKS. Would you think the Elston bill was perfectly adapted to the Navy needs?

Mr. KING. I think, Mr. Chairman, that the Elston bill could be substantially adapted to it. In effect, as to the Army and the Air Forces, we think——

Mr. BROOKS. What adaptations would you make?

Mr. KING. I frankly am not sufficiently familiar with the Navy procedure.

Mr. BROOKS. Of course, I just call your attention to this fact, that this proposed bill attempts to make a uniform system, and of course in that case there is bound to be some alterations to meet the needs of the Navy and the Air.

Mr. KING. Mr. Chairman, I believe that the Elston bill could be used by the Navy.

Mr. BROOKS. Without any changes?

Mr. KING. Without any substantial changes or material change. But I do feel that the Navy does have peculiar problems. Every commander of a ship, be it large or small, has his own problem. It is materially different in the Army than in the Air Force, where you are substantially land-based and you are always part of a larger echelon.

Mr. BROOKS. Could I ask you this, then: Do you believe that we should have a uniform code?

Mr. KING. I very definitely believe that we should have a uniform code, insofar as punitive articles are concerned. We do not have the same system in the Navy nor the Air Force or the Army for command channels.

We have an entirely different break-down, necessitated by the type of organizations that they are. The Navy functions off of the coast substantially. They are at sea. The Air Force is practically always land-based except when coordinated with the Navy.

I believe that the Elston bill, with very little change, could be made available and effective insofar as the Navy is concerned. And I have had that opinion expressed to me by many of my brother Reserve officers in the ROA who are Navy officers and with substantially command experience.

Mr. BROOKS. Any questions?

Mr. DEGRAFFENRIED. As I understand, you feel this, as one of your objections to this bill: You feel that the Reserve officers on inactive list should not come within the operation of this bill; is that correct?

Mr. KING. That is right, sir.

Mr. DEGRAFFENRIED. Is that the thought you had?

Mr. KING. Yes, sir.

Mr. DEGRAFFENRIED. They should not come within the operations of the bill.

Mr. KING. That is right.

Mr. DEGRAFFENRIED. That they should really be subject to civil authorities only.

Mr. KING. That is right.

Mr. DEGRAFFENRIED. Just as any other civilian?

Mr. KING. I think, though, that the military service has a very definite system by which a Reserve officer on inactive status can be properly taken care of, and that is by a board of fitness which they have at this time, and they can throw him out if he is not a proper person to be in there.

Mr. DEGRAFFENRIED. But for any offenses that he commits, any alleged offenses that he commits that might not go to that extent, for

him to be thrown out, do you think he should be tried before a civilian tribunal as any other civilian?

Mr. KING. That is right, sir.

Mr. BROOKS. Suppose you have this case. Say a Reserve officer over the week end takes a plane out in violation of the orders and regulations and there is a crack-up and someone is hurt. What would be your remedy there? Would it be by military or civilian court?

Mr. KING. Mr. Chairman, it is a very simple thing for them and for the Department concerned to put him on active duty for 2 days for that period of time. He is drawing the pay for those 2 days. He is doing everything.

It is a question of how the order is written. And he has to volunteer for it in the first place. He can be put on active duty for 2 days or 1 day or indefinitely. It is a matter of just cutting an order.

Mr. BROOKS. You would put him on active duty?

Mr. KING. Certainly I would.

Mr. BROOKS. For that time.

Mr. KING. If he is going to perform a military duty, for a couple of days, and he ought to be in the service. But if he is going down here in the evening for 2 hours of schooling or attending lecture, as we did the other night with Dr. Compton, are you going to charge a man with violation of the ninety-sixth article of war—the catch-all section—merely because he is late?

I think the proposition of a Reserve officer being subjected to courts-martial proceedings and being put on active duty pending his trial and taken away from his civilian occupation is an undue penalty in itself.

It would crucify most of them to be taken away from their civilian jobs for 10 days, 2 weeks, or 30 days pending the trial and the service of a sentence, whereas he can be thrown out if he is not a suitable officer.

Mr. BROOKS. Mr. Anderson?

Mr. ANDERSON. No questions, Mr. Chairman.

Mr. BROOKS. Thank you very kindly, Mr. King.

Mr. KING. Thank you, sir.

Mr. SMART. Mr. Chairman.

Mr. BROOKS. Yes.

Mr. SMART. Before you proceed with a section-by-section reading of the bill, I have two letters here which I would like to include in the record. One is from the Air Reserve Association expressing their appreciation for being offered an opportunity to testify but respectfully declining and offering this letter wherein they generally endorse this bill. I would like to offer it for the record.

Mr. BROOKS. If there is no objection, it will be put in the record.

(The letter referred to is as follows:)

AIR RESERVE ASSOCIATION,
Washington 5, D. C., March 16, 1949.

Hon. CARL VINSON,
Chairman, Committee on Armed Services,
House of Representatives, Washington, D. C.

MY DEAR MR. CHAIRMAN: It is the desire of the Air Reserve Association to express its endorsement and support of H. R. 2824.

The enactment of this bill will do much to stimulate and sustain individual interest in the Reserve program. Training facilities are a must for any real Reserve program. This bill will do much to fill that "must."

The association wishes particularly to commend the joint utilization provisions of the bill. It complies with the resolutions adopted at our national conventions.

Fully aware of the limitations of time on the committee's crowded schedule, the association does not request an appearance before the committee feeling that the expression set forth in this letter will serve the purposes of the committee.

Sincerely yours,

WILLIAM C. LEWIS,
Executive Director.

Mr. SMART. The second comes from Mr. Knowlton Durham, of New York, who is presently chairman of a military justice committee of the New York State Bar Association. They likewise decline to testify, but offer their statement for the record.

Mr. BROOKS. If there is no objection, it will be incorporated in the record.

(The letter and statement referred to follows:)

NEW YORK 5, N. Y., *March 7, 1949.*

Hon. CARL VINSON,
Chairman, House of Representatives Committee on Armed Services,
House Office Building, Washington 25, D. C.

DEAR MR. VINSON: In response to previous correspondence between Mr. Brooks and yourself with Mr. McCook, and Mr. Smart's letter to me of February 25, 1949, I have the honor to submit to you herewith a statement on behalf of the special committee on administration of military justice of the New York State Bar Association relative to H. R. 2498, a bill to provide a uniform code of military justice.

Sincerely,

KNOWLTON DURHAM, *Chairman.*

MARCH 7, 1949.

To the Committee on Armed Services, House of Representatives, Washington, D. C.:

Your chairman has been kind enough to invite this committee to submit its evaluation of the proposed legislation H. R. 2498, the so-called Uniform Code of Military Justice.

The special committee on the administration of military justice of the New York State Bar Association was appointed during the summer of 1946 to make its own inquiries along lines similar to those then being carried on by the War Department Advisory (Vanderbilt) committee. Our 14 members are all veterans of the Army, Navy, or Air Corps who served during one or more wars, and all but two have been either members of the Judge Advocate General's Department or at various times have been detailed to the work of that Office. Through the then chairman of the committee, Judge Philip J. McCook, we kept in touch with the War Department committee.

When the War Department committee's report was published, we found that while we disagreed with its recommendations in several respects, we were generally in accord with its approach and premises.

Meanwhile the House Committee on Military Affairs had been conducting its own inquiry and had issued its report dated August 1, 1946, comprising some 16 recommendations. These were all carefully considered by us, and while we agreed with most of the recommendations, we disagreed with a few, and supplied some original thoughts of our own.

We submitted our original report to the seventieth annual meeting of the New York State Bar Association on January 24, 1947, and it was by vote of the members present adopted.

Since then the Elston bill affecting the Army before unification has been enacted into law, and the majority of our recommendations have been disposed of, generally speaking, in a manner satisfactory to us.

Now, your committee has before it for consideration H. R. 2498, a bill to provide a Uniform Code of Military Justice, and your chairman has been interested sufficiently in the proceedings of our committee to state that he would be pleased to receive our evaluation of the proposed legislation, together with any suggested amendments.

For the purpose of this study, Chairman McCook appointed a subcommittee of three, representing each of the three branches of the service—Army, Navy, and Air Corps.

This subcommittee, on January 29, 1947, in reply to the invitation from Prof. Edward M. Morgan, chairman, submitted its recommendations in a letter addressed to the Committee on Uniform Code of Military Justice. That letter is available to your committee should you desire to see it. We shall not burden the record by quoting, but it does express our views so succinctly that we urge upon you its careful consideration. Of course, you are also welcome to our previous publications, should you desire them.

From first to last we have believed, argued for and emphasized the principle that the judicial system of the armed services should not be removed from command control.

The uniform code wisely continues the authority to convene the court in the commanding officer (arts. 22, 23, 24). The initial action on the record after trial is also taken by the convening authority (arts. 60, 61, 62, 63). These provisions are substantially the same as present Army and Navy procedure. Provisions for review by boards of review constituted by the Judge Advocate General (arts. 63, 66) are substantially similar to the present Army system of review. Finally, there is a wholly new provision for review by a Judicial Council (art. 67) with provision for appellate counsel (art. 70). Improper interference by the convening authority or any other commanding officer, with the court or with "any member, law officer, or counsel thereof" is prohibited (art. 37) and is made punishable (art. 98).

In our original report to the New York State Bar Association, above referred to, we presented a number of objections to recommendations contained in the report of the House Committee on Military Affairs (Rept. No. 2722, Aug. 1, 1946). Our most important objections have either been recognized or otherwise disposed of to our general satisfaction in the subsequent enactment of the Elston bill.

This leaves for the purpose of our present discussion only the proposed fundamental change of separation of courts martial from command, not provided for in the uniform code nor in the Elston Act. On this question we know that separation will be pressed for by its advocates, as it has been by the Vanderbilt Committee, the American and other bar associations. We urge the contrary view, as we have from the beginning. We agree with Judge Patterson, who has repeatedly said:

"It would be unwise to have particular functions within the Army carried out by officers who are independent and separate from command and the responsibilities which go with command."

We also agree with General Eisenhower, in his statement to members of the New York Bar at the Lawyers Club on November 17, 1948, that:

"This division of command responsibility and the responsibility for the adjudication of offenses and of accused offenders, cannot be as separate as it is in our democratic government.

"Somewhere along the line * * * the man who makes the final decision must have also on his shoulders responsibility for winning a war; and please never forget that."

The success of an Army depends upon its commander. His is the responsibility to maintain discipline in the command. So also must he bear the responsibility for the proper administration of the system of justice within his command.

Because we find some abuse of authority gives no sufficient reason for abandoning the cardinal principle of unity of command. The uniform code makes provision for correcting abuses. We believe that H. R. 2498 is a good bill. It retains the best points of the Elston Act which took a long forward step in reform of military justice and adds good new points of its own.

We ask that you recommend it for enactment into law.

Respectfully,

KNOWLTON DURHAM,
Chairman, Special Committee on Administration of Military Justice, New York State Bar Association.

Mr. SMART. I would like further to say, Mr. Chairman, that Mr. Arthur J. Keeffe who presided over a group of gentlemen who prepared a report relative to Navy justice, known as the Keeffe report likewise has declined to testify, but I now offer his statement for the record.

Mr. BROOKS. Without objection, it is so ordered.

(The statement referred to is as follows:)

STATEMENT OF PROF. ARTHUR JOHN KEEFFE, OF CORNELL LAW SCHOOL

For over 11 years I have been a teacher of law at Cornell Law School in Ithaca, N. Y. Prior to that time I was for about 12 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 2,000 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 Prof. 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 fourght 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. 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, and the annual report of these men and the three Judge Advocates General. 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 reflection 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 Advocate Department, not three.

Why have three Judge Advocates General? 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 percent of all court-martial cases are desertion or a. w. o. l. and involve difficult psychiatric 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 1 month after VJ-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 Advocates General? 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 Government 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: (1) 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; (2) 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 (arts. 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 Advocates General. 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 Advocates General 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 anyone. 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 percent of the cases are desertion or a. w. o. l. 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 of or the United States 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 2,000 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 Chancelor 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 par. 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.

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 phony. It is for the wicked and well connected, not for GI 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 United States Supreme Court for GIs 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 Advocates General. 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 New York 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 cannot 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 perpetuates the vice that was present in the old Army boards of review. It imits 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, December 1946 Atlantic Monthly and Keeffe Rept., pp. 226–227.)

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 thoroughgoing reform of the court-martial system unless a permanent advisory council is created as suggested by our board (Keeffe Rept., pp. 2–5, 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.

ARTHUR JOHN KEEFFE.

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 wartime would be subject to both civil trial and court martial. This language should be torn out by the roots.

Mr. SMART. Justice McGuire has forwarded his recommendations to the committee and you will find that they are included in the list of questions which I have prepared for you.

Mr. BROOKS. Now, Mr. Smart, I would like to ask you this question: Have the services indicated whether they desire to designate someone here during the reading of the bill and if so who do they want to have present?

Mr. SMART. I think this is the situation which we should understand, Mr. Chairman. This bill comes here from the National Military Establishment. You will recall that Mr. Forrestal, the Secretary of Defense, appointed the committee which has prepared this bill so that as far as we now know it represents, in the main, the complete agreement of all the services.

As I have previously indicated there are points of difference, which Mr. Larkin will point out during the hearings, and on which departmental witnesses should and must be heard. So far as representation is concerned, the Navy is represented today by their Judge Advocate General, the Air Force is represented by Colonel Maxey who sat with the working group, and the Army is represented by Colonel Dinsmore who likewise sat with the working group.

In addition, the Navy representative, Col. John Curry of the Marine Corps, represented the Navy during the working group consideration and he is here. So I think you have a very good representation of the three services here today, in the event you want to question them.

Mr. BROOKS. Since that is the case, I think it would be appropriate for the committee to go into executive session in reading the bill section by section. And we want the representatives of the services as indicated to be present for that purpose.

Mr. SMART. May we go off the record.

Mr. BROOKS. Yes, off the record.

(Discussion off the record.)

Mr. BROOKS. It has been pointed out that there is no fundamental need for an executive session, so we will just proceed to read the bill without an executive session. I think that is much better.

Mr. ANDERSON. Mr. Chairman, is it your plan now to start with the reading of the bill?

Mr. BROOKS. Yes.

Mr. ANDERSON. I had three or four questions here I wanted to ask Mr. Larkin or Professor Morgan.

Mr. BROOKS. Mr. Smart tells me Professor Morgan will be back. And he especially wants to be heard on certain particular articles. If there is no objection we will start reading the bill, and I will ask Mr. Smart, if he will, to read article 1, following which we will take up the disputed portions and interrogate any witness we want, and then pass on to the next one.

Mr. SMART. Mr. Larkin has a question, sir.

Mr. LARKIN. Not a question, Mr. Chairman, but before we start with the reading there are one or two things I would like to bring to your attention which I think might be helpful in connection with the reading of the bill.

We have available for the members of the committee a staff study which was prepared for the Military Justice Committee. In view of the diverse number of views you have heard on every article from the various witnesses who appeared, you may desire to do a little additional research of your own and in that connection I think this study which the staff of the committee that drafted the Uniform Code had before it and considered might be very helpful.

This study was not prepared for publication, and it has not been edited for publication, and occasionally you will find in the different briefs questions raised which subsequently are answered in the code. But it is the only complete study on a comparative basis.

Mr. BROOKS. Do you have some of them available here?

Mr. LARKIN. Yes.

Mr. BROOKS. Suppose you give them to Mr. Smart for distribution to the members of the committee.

Mr. LARKIN. Yes, that is a comparative study of the Articles of War, and the Articles for the Government of the Navy with an explanation in each case of the differences. This study was completed before the committee started its deliberations. They had it before them and it gave them all the pertinent information on each and every point that we could find, showing the differences and the problems involved, the suggestions and recommendations that had been made by various groups, and in each instance it pointed out the change that had been made in the Articles of War by the Elston bill.

So it is a fairly complete reference work. And as I say, if you care to go to sources on any one point, it will be particularly helpful to you, I am sure.

Mr. SMART. I would like to say, Mr. Chairman, I think the committee will find an additional presentation of the code which I will now issue to each of the members, very helpful throughout these hearings because at the close of each article and section of the bill it includes a notation showing you exactly where that article or section came from, the particular article of war, the particular article for the government of the Navy, and following that you will find comments as to the attitude of the working group and also the policy group.

I think, rather than to use this large reference, to which Mr. Larkin refers, unless you have some very knotty problem, it will be much better to use a copy of the bill as to page and line and follow it in this other document which I will distribute.

Mr. LARKIN. If you will indulge me 1 more minute, Mr. Chairman, I would like to acknowledge on behalf of the National Military Estab-

lishment and our office particularly for the record the debt that we owe Mr. Smart, your extremely capable professional member.

As you know, Mr. Smart sacrificed a great deal of his time, I think his vacation too, to join in the daily debate we had all last summer and all last fall on this whole subject. His advice and counsel was invaluable to us throughout our whole deliberations.

I point out this: None of the errors or mistakes you may find in the code are Mr. Smart's. They are all ours.

Mr. SMART. Mr. Chairman, I think it well to keep the record exactly straight on this point. I appreciate the kind things Mr. Larkin has said. You will probably remember that Mr. Forrestal extended me an invitation to sit as an observer with his committee.

Our committee granted me that permission. I sat solely as an observer and with the frank understanding that I was in a position to criticize any word, every word, every line, and every article of the bill after it got here.

I merely sat in an effort to be helpful if I could be, and I hope that I was.

Mr. BROOKS. Now, Mr. Smart, the committee knows that you were there and sat in on every portion of the writing of this proposed law. Would you rather make a statement, that is a general statement, in reference to your studies or would you prefer to do it section by section?

Mr. SMART. I think whatever assistance I can give the committee, Mr. Chairman, would be far more effective on a section by section consideration of the bill rather than by a general statement. I think you have heard all the general statements you want. It is time to get down to business now.

STATEMENT OF FELIX LARKIN, ASSISTANT GENERAL COUNCIL, OFFICE OF THE SECRETARY OF DEFENSE

Mr. LARKIN. For the record, Mr. Chairman, my name is Felix Larkin. I am the Assistant General Counsel in the Office of the Secretary of Defense. I served as executive secretary to the committee on the Uniform Code of Military Justice and was chairman of the working group that did the initial studies and developed this comparative study and the various other information we have here for you.

Mr. BROOKS. I would think, Mr. Larkin, again, in reference to you, that the committee would rather proceed with the section by section discussion of the bill.

Mr. LARKIN. Yes.

Mr. BROOKS. Since they have received so many general statements already. But I know of your work, too, in reference to the bill and we certainly want to hear from you on every critical point.

Mr. LARKIN. I think the most efficient way and the most expeditious way is just go through it section by section, as you suggest.

Mr. BROOKS. All right.

Now do you have the analysis, Mr. Smart, that you referred to yesterday?

Mr. SMART. That is it. The typewritten document which is before you.

With your permission, Mr. Chairman, I am ready to start with article 1 of the bill.

Mr. BROOKS. All right, sir. Just proceed.

Mr. SMART (reading):

ARTICLE 1. Definitions.

The following terms when used in this code shall be construed in the sense indicated in this article, unless the context shows that a different sense is intended, namely:

(1) "Department" shall be construed to refer, severally, to the Department of the Army, the Department of the Navy, the Department of the Air Force, and, except when the Coast Guard is operating as a part of the Navy, the Treasury Department;

(2) "Armed force" shall be construed to refer, severally, to the Army, the Navy, the Air Force, and, except when operating as a part of the Navy, the Coast Guard;

(3) "Navy" shall be construed to include the Marine Corps and, when operating as a part of the Navy, the Coast Guard;

(4) "The Judge Advocate General" shall be construed to refer, severally, to The Judge Advocates General of the Army, Navy, and Air Force, and, except when the Coast Guard is operating as a part of the Navy, the General Counsel of the Treasury Department;

(5) "Officer" shall be construed to refer to a commissioned officer including a commissioned warrant officer;

(6) "Superior officer" shall be construed to refer to an officer superior in rank or command;

(7) "Cadet" shall be construed to refer to a cadet of the United States Military Academy or of the United States Coast Guard Academy;

(8) "Midshipman" shall be construed to refer to a midshipman at the United States Naval Academy and any other midshipman on active duty in the naval service;

(9) "Enlisted person" shall be construed to refer to any person who is serving in an enlisted grade in any armed force;

(10) "Military" shall be construed to refer to any or all of the armed forces;

(11) "Accuser" shall be construed to refer to a person who signs and swears to the charges and to any other person who has an interest other than an official interest in the prosecution of the accused;

(12) "Law officer" shall be construed to refer to an official of a general court martial detailed in accordance with article 26;

(13) "Law specialist" shall be construed to refer to an officer of the Navy or Coast Guard designated for special duty (law);

(14) "Legal officer" shall be construed to refer to any officer in the Navy or Coast Guard designated to perform legal duties for a command.

References: first article of war; title 1, United States Code, section 1 (1946) (words imparting singular number, masculine gender); N. C. and B., appendix B–73.

Commentary: The definitions in this article pertain only to this code. In the interest of economy of draftsmanship certain words, such as "The Judge Advocate General," have been given special meanings.

For the purpose of this code the Marine Corps and, when operating as part of the Navy, the Coast Guard, are considered part of the naval armed force. The term armed force includes all components.

A provision as to masculine and feminine gender is unnecessary in light of title I United States Code, section 1.

Mr. BROOKS. Do you want to make any comment on that, Mr. Larkin?

Mr. LARKIN. I think this general comment should be brought to your attention: These definitions are designed for this code alone. They are not to be understood to apply to these terms in other aspects or for other military purposes. For instance, the definition of "judge advocate" is not a full description or definition of just what the judge advocate is, but for the purposes of this code we have adopted this definition.

So I think you ought to bear in mind that the construction is for the purposes of understanding these terms when they appear in the code for the purposes of military justice and not for all purposes.

Mr. ELSTON. Do you not think maybe it would be a good idea, Mr. Larkin, to begin your article 1 with the words "for the purposes of this code the following terms when used in this term should be construed." and so forth?

Mr. LARKIN. I think we have the same effect, Mr. Elston, by our commentary. Incidentally, I would like to offer it for the record and I would like to offer it each time we discuss an article.

I think it will supplement the testimony we have had on all the articles and will make for a much fuller legislative history on the specific and intended meaning of each provision. And by putting in the record the reference and the commentary we will have a legislative history which will make it very much easier for the drafters of the manual if this bill ever becomes law.

Now, if you will notice under the commentary of article I the notion I just mentioned is contained. I will read the first paragraph: "The definitions in this article pertain only to this code. In the interest of economy of draftsmanship certain words, such as 'the Judge Advocate General,' have been given special meanings."

It was for the purposes of economy rather than having to insert additional language here and in each and every place throughout the code, that definitions of this type were used.

For instance, an example would be wherever we speak of the judge advocate we intended to mean the general counsel of the Treasury for the purposes of the Coast Guard in time of peace. Instead of repeating time and time again the full, complete coverage of the word it makes for economy in draftsmanship if we just define it. So I think it is unnecessary.

Mr. BROOKS. Your commentary refers to the fact that the Marine Corps, which operates as a part of the Navy, and the Coast Guard are considered part of the naval armed force.

Mr. LARKIN. Yes.

Mr. BROOKS. But that is in time of war.

Mr. LARKIN. Insofar as the Coast Guard is concerned?

Mr. BROOKS. Yes, insofar as the Coast Guard is concerned.

Mr. LARKIN. That is right.

Mr. BROOKS. What about in time of peace?

Mr. LARKIN. In times of peace, the Coast Guard by the terms of this code will operate under this code. That is something that I do not think has been clearly brought out here. The present situation as you know is that in time of war when operating with the Navy the Coast Guard are under the Articles for the Government of the Navy.

However, in peacetime they have their own disciplinary laws which are a substitute for the Articles for the Government of the Navy.

Now we were conscious of that difference. We were also conscious of the fact that the Coast Guard at the present time has recodified their organic legislation and it is before the Committee on Merchant Marine and Fisheries, I think, for consideration.

In that recodification they were also recodifying the disciplinary laws that apply to them in peacetime.

Since we are trying to provide a code that was as uniform as possible we were anxious to have the Coast Guard come in under it and not

have them still remaining in peacetime under separate disciplinary laws.

For that reason the Coast Guard was invited to join our deliberations and they sent a representative. He sat in throughout our working group hearings. It is provided here that the Coast Guard in time of peace and war is subject to this code and they freely consent and join in the support of it.

So the effect of this code is not only does it cover the Army, Navy, and Air Force and the Coast Guard in time of war, but in time of peace as well. So there is now one military justice system for all of the armed forces in peacetime and in war.

Mr. ELSTON. At the outset I would like to ask Mr. Larkin this question: Did your committee take into consideration the recommendations of the Hoover Commission insofar as the services are concerned, to see whether or not the enactment of this bill might in some manner conflict with some subsequent legislation that Congress may enact to carry the provisions of the Hoover report into effect?

Mr. LARKIN. The Hoover report had not been released during most of our deliberations and it was not until the very end that we had some of those task force reports. We did consider it—not very carefully because the possibility of those recommendations being enacted by the Congress are speculative as are all other proposed changes.

But as far as we can see this code would not interfere with proposed changes in the National Security Act or would not be inconsistent with them.

Mr. BROOKS. Of course, even if the recommendations of the Hoover Report which were made yesterday regarding the Army engineers were put into effect, they could still come within the provisions of this title.

Mr. LARKIN. Yes, sir.

Mr. SMART. That is right.

Mr. ANDERSON. Mr. Chairman, I was not present, unfortunately when Mr. Spiegelberg testified the other day, but I think he furnished each member of the committee with a letter and his recommendations. I note that he had a recommendation for two additional definitions in article 1. Do you have any comment, Mr. Smart, on that?

Mr. SMART. May I say this, Mr. Anderson, in regard to that inquiry. Mr. Spiegelberg's criticism of the bill goes to the present method for selection of courts. That begins with article 22 of this bill.

In other words, if the committee should decide to amend article 22 in accordance with his recommendation, then it will be necessary to come back to article 1 and insert those. But until we get to article 22 that is not a matter of issue.

Mr. ANDERSON. I see. Thank you.

Mr. BROOKS. Now reference was made the other day, too, to subsection 11, in reference to the wording of that subsection regarding the meaning of the word "accuser." Does anyone care to make any comment on that?

Mr. LARKIN. I might supply this information on that, Mr. Chairman. When we studied the Navy and Army systems we found a difference in the manner of preferring charges and specifications. That is provided in the later articles of the code which we will come to as we read the code.

But by virtue of the difference in the two procedures the standard definition of an accuser as heretofore employed by the Army might well have caused or resulted in this incongruous situation, that the Navy commander who convened the court would have been disqualified by virtue of the definition.

In other words, the definition substantially is that anyone who prefers charges is ineligible to appoint the court or sit as a member of it. Now the Navy system did not heretofore have a preferring of charges initially as the Army system did. The preferring of charges took place after the investigation was concluded.

And the preferring or refering of charges and the convening of the court was a simultaneous action. Now under the strict definition of accuser we were afraid there might be a possibility that the Navy commander could not have, by virtue of the official signing of the charges themselves, qualification. He would have been disqualified by virtue of being a technical accuser.

So for that reason we have changed it around a little bit. But the complaint in this connection was that a commander who was disqualified could order a subordinate to prefer the charges. Well, that I think overlooks a present regulation providing that no commander can order any subordinate to prefer charges at all.

The persons who prefer the charges or refer them to trial and appoint courts are required to do so on their own initiative and on their own independent judgment and not at the order of anybody else and this definition does not change that at all. I do not have any fears on that score.

Mr. BROOKS. Mr. Smart, do you have a comment?

Mr. SMART. I want to state to the chairman that Admiral Russell, the Judge Advocate General of the Navy, has a comment.

Mr. BROOKS. Admiral Russell, do you have a comment on that?

Admiral RUSSELL. Yes, sir. I think subsection 11 relates to article 30. I would suggest that it be left or marked when we take up that article, for this reason: I have a feeling that we are confusing pleading with what might be termed a complaint. We do not want to get somebody into the business of pleading who is not competent to draw up exchanges and specifications.

Mr. BROOKS. If there is no objection, we will wait until we reach article 30. Are there any further questions regarding this article?

Admiral RUSSELL. I have one more comment to make, sir, for the record.

Mr. BROOKS. All right, Admiral.

Admiral RUSSELL. Under the existing law the Coast Guard operates as a part of the Navy in time of war or when the President shall so direct. In other words, it is not quite accurate to say that they are never a part of the Navy in time of peace. Actually they became a part of the Navy before we went to war, in World War II.

Mr. ANDERSON. Do you think that would require a change in one of these definitions?

Admiral RUSSELL. No, sir.

Mr. SMART. No.

Mr. BROOKS. They still come within the terms of the code, as I understand it, regardless of whether they are actually in the Navy or under the Treasury Department as presently written?

Admiral RUSSELL. Yes.

Mr. SMART. That is correct, Mr. Chairman. In time of war or at the direction of the President they are attached to the Navy.

Mr. BROOKS. Yes.

Mr. SMART. They will then follow the Navy jurisdiction and will follow the same code.

Mr. BROOKS. But will still be governed by the same, identical rules?

Mr. SMART. That is right. But in peacetime instead of being under Navy courts-martial jurisdiction, or when not ordered attached to the Navy by the President, they will try their own cases with Coast Guard personnel under this same code, whereas today if the Coast Guard has a serious offense of any type it must refer the case to the civilian authorities, to the Federal court and district attorney, and then worry with it for months to see whether or not the fellow gets tried.

Mr. BROOKS. What about the appellate jurisdiction? Would it be the same as under this code?

Mr. SMART. Under this code, in peacetime, it goes right on up through the judicial council to the Secretary of the Treasury, and, if necessary, to the President.

Mr. DEGRAFFENRIED. Mr. Smart, did I understand you to say that right now that the Coast Guard, when it is not attached to the Navy, has no method of courts-martial of its own?

Mr. SMART. That is not exactly the case, Mr. deGraffenried. They do have a method of procedure. Title 14 United States Code provides they will substantially follow the Articles for the Government of the Navy for procedure. But when they have a serious case—murder or rape or something of that character—then they will turn that case over to the Federal district court. Then it is a matter of indictment and following it through through civilian channels completely apart from the Coast Guard, which by statute, (14 U. S. C. 1) is defined as a military service.

Mr. DEGRAFFENRIED. They have no method of their own to handle serious cases?

Mr. SMART. That is correct, as of today.

Mr. BROOKS. Any further questions?

Mr. HARDY. To what extent, then, or will it to any extent, will this legislation bring the Coast Guard under the jurisdiction of the Department of Defense with respect to justice?

Mr. LARKIN. During peacetime they will not be under the Department of Defense, except that their cases will be appealable to the judicial council in the same way as the cases of Army, Navy and Air Force.

They will have their own courts with their own personnel. They will have their own board of review. The Secretary of the Treasury will have the same function as the Departmental Secretaries.

Their general counsel will have the same function as the judge advocate general have for their own purposes. But they are keyed in through the judicial council which is this independent tribunal.

Mr. HARDY. So under the final review there would be some tie-in with the Department of Defense?

Mr. LARKIN. Yes, sir.

Mr. HARDY. Even though the Coast Guard is under the Treasury Department?

Mr. LARKIN. Yes, sir.

Mr. SMART. That is right.

Mr. ELSTON. I notice in some bills we have referred specifically to the Geodetic Survey. Is that necessary here?

Mr. LARKIN. That is in article 2, Mr. Elston.

Mr. BROOKS. Well, Mr. Elston, if I may, I would like to ask another question on the Coast Guard before we get to the Geodetic Survey. Would that be all right with you?

Mr. ELSTON. Oh, persons subject to the code, it is in article 2, you mean?

Mr. LARKIN. Yes. It is in article 2, subdivision 8.

Mr. BROOKS. Mr. Larkin, in further reference to the Coast Guard, as I understand it, this code is so adapted that the Coast Guard will fit under it for procedure and for trials and for substantive right and definition of crimes and everything else necessary to try cases and administer justice, even in times of peace?

Mr. LARKIN. That is exactly right, Mr. Chairman.

Mr. Elston?

Mr. ELSTON. That is all. He answered my question.

Mr. SMART. I would like to ask one question, while we are still on article 1. I do not know that everyone understands the distinction between a commissioned warrant officer in relation to the usual type of warrant officer. That is presented in subsection 5 of article 1:

> An officer shall be construed to refer to a commissioned officer including a commissioned warrant officer.

For purposes of understanding, I think that ought to be clarified.

Mr. LARKIN. The purpose of that definition, as distinguished from the definition on enlisted man in subdivision 9, is to clarify these ranks and grades for the purpose of eligibility on the courts which is found in article 25.

In view of the fact that there is provision for enlisted men, as well as officers and warrant officers and commissioned warrant officers to sit on courts we have made the distinction. Heretofore, before the Elston bill, for the Army and at the present time for the Navy, of course only officers are eligible to sit on courts-martial. Now the provision covers all services and for that purpose we thought it necessary to make the distinction.

Now the point is that we have included commissioned warrant officers because there is such a commission in the Navy where there are no commissioned warrant officers in the Army.

Mr. SMART. Or Air Force.

Mr. LARKIN. Or Air Force, for that matter.

The Navy has both a commissioned and a noncommissioned warrant officer and we wanted to make it clear that when you are talking about warrant officers a distinction is to be borne in mind and that the commissioned warrant officer is in the same classification as an officer.

Mr. BROOKS. That draws a line, then.

Mr. LARKIN. That is right.

Mr. BROOKS. Noncommissioned warrant officers would be enlisted men under this definition?

Mr. LARKIN. Well, they would not be enlisted men because they are something over and above enlisted men in that they have a warrant They may originally have been one. However, they are not an officer, you see, not a commissioned officer.

Mr. BROOKS. Not a commissioned officer.

Mr. LARKIN. They are the type of personnel with a warrant.

Mr. BROOKS. Any further questions on the definition? If not, we will proceed with article 2.

Mr. SMART (reading):

ART. 2. Persons subject to the code.

The following persons are subject to this code:

(1) All persons belonging to a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; all volunteers and inductees, from the dates of their muster or acceptance into the armed forces of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty in or for training in, the armed forces, from the dates they are required by the terms of the call, draft, or order to obey the same;

(2) Cadets, aviation cadets, and midshipment;

(3) Reserve personnel who are voluntarily on inactive duty training authorized by written orders;

(4) Retired personnel of a register component of the armed forces who are entitled to receive pay;

(5) Retired personnel of a reserve component who are receiving hospital benefits from an armed force;

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve;

(7) All persons in custody of the armed forces serving a sentence imposed by a court-martial;

(8) Personnel of the Coast and Geodetic Surey, Public Health Service, and other organizations, when serving with the armed forces of the United States;

(9) Prisoners of war in custody of the armed forces;

(10) In time of war, all persons serving with or accompanying an armed force in the field;

(11) All persons serving with, employed by, accompanying, or under the supervision of the armed forces without the continental limits of the United States and the following Territories: that part of Alaska east of longitude 172° W., the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands;

(12) All persons within an area leased by the United States which is under the control of the Secretary of a Department and which is without the continental limits of the United States and the following Territories: that part of Alaska east of longitude 172° W., the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

References: Second article of war; proposed A. G. N., article 5 (a); Revised Statute, section 1256 (1875), 10 U. S. C., section 1023 (1946), (retired Army officers); 40 Stat. 87 (1917), 33 U. S. C. section 855 (1946), (Coast and Geodetic Survey); Revised Statutes, section 1457 (1875), 34 U. S. C. section 389 (1946), (retired naval officers); 52 Stat. 1180 (1938), 34 U. S. C., section 855 (1946), (Naval Reserves); 52 Stat. 1176 (1938), 34 U. S. C., section 853d (1946), (Fleet Reserve and Retired Reserves); 57 Stat. 41 (1943), 34 U. S. C., section 1201 (1946), (nonmilitary persons outside of the United States); 58 Stat. 690 (1944), 42 U. S. C., section 217 (1946), (Public Health Service.)

Commentary:

Paragraph (1) is an adaptation of A. W. 2 (a). The term "inductees" has been added to make the paragraph consistent with section 12 of Public Law 759, Selective Service Act of 1948, Eightieth Congress, second session (June 24, 1948), which provides:

> No person shall be tried by court martial in any case arising under this title unless such person has been actually inducted for training and service prescribed under this title * * *.

Paragraph (2) is an adaptation of A. W. 2 (b). See article 1 for definitions of "cadet" and "midshipman."

Paragraph (3) is adapted from 34 U. S. C., section 855. The requirement that there be written orders is added for two reasons.

First, the applicability of this code to personnel on inactive-duty training is desirable only with respect to certain types of training, such as week-end flight training, and the written orders will be used to distinguish the types. Secondly, the orders will be notice to the personnel concerned.

Paragraphs (4) and (5) have their sources in 10 U. S. C. section 1023 and 34 U. S. C., sections 389, 853d. The power of the Navy over Retired Reserves has been reduced.

Paragraph (6) is the present law. See 34 U. S. C. section 853d.

Paragraph (7) is a slight modification of A. W. 2 (e). It follows article 5 (a) of the proposed A. G. N. by limiting applicability to those persons who are in custody of the armed forces.

Paragraph (8) is drawn from 33 U. S. C. section 855 and 42 U. S. C. section 217.

Paragraph (9) is consistent with articles 45 and 64 of the Geneva Convention on Prisoners of War (47 Stat. 2046, 2052, (July 27 1929)), in that the prisoners of war are subject to this code and thereby have the same right of appeal as members of the armed forces.

Paragraph (10) is taken from A. W. 2 (d). The phrase "in the field" has been construed to refer to any place, whether on land or water, apart from permanent contonments or fortifications, where military operations are being conducted. See In Re Berue (54 F. Supp. 252, 255 (S. D. Ohio 1944)).

Paragraphs (11) and (12) are adapted from 34 U. S. C. section 1201, but are applicable in time of peace as well as war. Paragraph (11) is somewhat broader in scope than A. W. 2 (d) in that the code is made applicable to persons employed by or under the supervision of the armed forces as well as those serving with or accompanying the same and the Territorial limitations during peacetime have been reduced to include territories where a civil court system is not readily available.

Personnel of the Coast Guard are subject to this code at all times as members of an armed force.

Mr. BROOKS. Now, Mr. Larkin, we will be glad to have your comments on this article, which I think calls for considerable explanation.

Mr. LARKIN. May we take them up numerically—these subdivisions?

In Subdivision 1, in general, we have provided for jurisdiction over persons in the Regular components, which is a continuation of the present jurisdiction. The second part of that paragraph, after the first semicolon, provides for the jurisdiction of volunteers and inductees, that is, people who either volunteer for service or are drafted by the selective service law.

And in the third segment of that paragraph, after the second semicolon, we provide for all other classes.

Now there has been a considerable amount of comment by the various witnesses. The first comment I think we should consider is the question of when volunteers or inductees become subject to the jurisdiction of the code.

I think there has been a misreading of this by a number of witnesses, particularly those who say that draftees become subject to the jurisdiction from the dates they are required by the terms of the call, draft, or order to obey the same. That is not our intention and I do not believe it is justified from the language.

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There was some doubt in the previous Article of War—Article of War 2 which covered this same subject as to when inductees were subject to the Articles of War. Generally I think this latter part has been construed as the time when they are sworn in or mustered in. However, it has also been construed as the time when a man starts his traveling to report for service.

The Selective Service Act of last year specifically provided that as to these draftees, jurisdiction over them shall not arise until they are actually inducted. We have adopted that provision and the practice will continue under this code of trying people who are called or drafted but who do not report and become draft dodgers by the Federal courts. The military will not have jurisdiction over them until they are inducted.

Mr. BROOKS. When you use the term inducted, you mean swearing in, do you not?

Mr. LARKIN. Well, when they are sworn in and are available for service. We have done that, if you will follow me, by inserting in the second segment here the word "inductees." Heretofore the Article of War read:

All volunteers from the dates of their muster or acceptance into the armed services.

It did not say inductees, but the Selective Service Act—and we have made a reference to that in our commentary if you look at it—provided that—

no person shall be tried by courts martial in any case arising under this title unless such person has been actually inducted for training and service prescribed under this title.

Now that clearly postponed the jurisdiction until they were actually inducted or mustered in. And we amended the Article of War 2 by putting inductees in there, in that second section, and by our commentary show that it is our intention that we follow the Selective Service Act in that connection.

Mr. BROOKS. What, then, does that concluding clause in that sentence say?

Mr. LARKIN. Now, the concluding clause in the sentence says all other than those drafted under the Selective Service Act. As to the calling in or perhaps the drafting in of the Reserves to active duty—the National Guard and any other organizations which may be called to active duty, as to them since they are already members on inactive duty and already have been sworn in, why the jurisdiction will arise from the dates they are required to obey them—I think the construction there would be when they actually report for duty or perhaps when they leave their home on their way to report for duty.

But you see that covers and is intended to cover this other class or other classes who in some fashion are connected with the military already or are on inactive duty or are a military group of some kind like the National Guard who became federalized.

Mr. HARDY. Do you not get a little confusion there by the use of the word ' inductees" in one place and the word "drafted" in the other?

Mr. LARKIN. Well——

Mr. HARDY. It looks like you might be talking about the same group of people.

Mr. LARKIN. Yes. Well, I think our commentary spells it out. And this language here—the inclusion of the word "drafted"—has been in the Articles of War for many years. It does cover the situation where some of these other groups are called in or ordered to or are perhaps considered to be drafted—not under selective service, but nevertheless drafted in some fashion.

Mr. HARDY. In other words, purely from a reading of this thing you could interpret that latter part to refer to selective-service inductees or draftees or whatever you want to call them?

Mr. LARKIN. I think you would be stretching it a little bit, Mr. Hardy, because we started by saying "all other persons," all other than inductees, and it is used——

Mr. HARDY. Do you define "inductees" to mean only people that are taken under the Selective Service Act?

Mr. LARKIN. That is right.

Mr. HARDY. Your commentary is the only thing that I see here that would indicate to me that an inductee under the Selective Service Act could not be included in the latter part of your phraseology.

Mr. LARKIN. Well, the Selective Service Act itself of course provides that. And, as I say, this is an attempt on our part to adopt it and to leave, in other words, the inductees or the people who are called for examination and screening and so forth by the draft boards, to the Federal courts.

Mr. HARDY. That is just the point I am talking about. Of course the usage is the thing I am thinking about and not the technical terms used in the Selective Service Act.

Mr. BROOKS. Would it be a good idea to include at this point in the record the reference to the Selective Service Act?

Mr. LARKIN. I think it does become included if you will make a part of the record the commentary in connection with this code because if you will note the first paragraph of the commentary spells out the idea I have just expressed.

Mr. BROOKS. Let me ask you another question. When you come down to the last clause, when the National Guard is federalized, do they not take an oath and are formally inducted?

Mr. LARKIN. May I ask Colonel Dinsmore, do you know the facts?

Colonel DINSMORE. I do not, Mr. Chairman. I am sorry.

Mr. BROOKS. My recollection was, the last time we federalized them, they were required to take an oath.

Colonel DINSMORE. I suppose that is undoubtedly true. I will give you a definite answer on that.

Mr. BROOKS. All right, sir.

Mr. LARKIN. Do you know, Colonel Maxey?

Colonel MAXEY. I think I can answer only so far as officers are concerned. They do take an oath in the federally recognized National Guard as well as in the State National Guard. They are called to duty as National Guard officers. Now as to the enlisted personnel I cannot answer.

Mr. BROOKS. Do they do that initially or do they do that when they are called into active Federal service?

Colonel MAXEY. Initially.

Mr. BROOKS. Initially?

Colonel MAXEY. Yes, sir.

Mr. SMART. May I ask a question?

Mr. BROOKS. Mr. Smart.

Mr. SMART. I would like to take the case of a Reserve officer on inactive duty who gets an order to report to duty and he refuses to abide by the order. Is he triable by this code or in the Federal court?

Mr. LARKIN. I think you have to distinguish that between a call in peacetime and a call in time of emergency or war.

Mr. SMART. Let us assume that it is wartime.

Mr. LARKIN. In wartime, I think he comes under this code. Is that right? [To Colonel Maxey.]

Mr. HARDY. I do not see how you can arrive at any other conclusion than that he comes under it at any time, from the wording of this last paragraph.

Colonel MAXEY. May I make one observation. In time of peace he can only be called for a period of 15 days or less without his consent. Therefore, if he is lawfully called, he is subject to the code and the code so states.

Mr. HARDY. That is right. He comes under this thing as soon as the call is issued.

Mr. SMART. I think the point to bear in mind is that he is voluntarily accepting a Reserve commission and when he accepts that he accepts the obligations that go with that. So he knows that he can be called for 15 days in time of peace and if he refuses to obey the commission which he has voluntarily accepted perhaps he should be subject.

Mr. HARDY. There is no argument about that. But certainly, the way this thing reads—and I am not arguing as to whether that should or should not be—if he gets a call for 15 days or whatever it is he is under the terms of this code from the time that he is supposed to appear according to his orders, as I read it.

Mr. LARKIN. That is right.

Mr. SMART. Well, assuming that to be true, I think the general opinion is that that is as it should be.

Mr. HARDY. That is all right with me. I have no argument about that.

Mr. SMART. I just wanted to clarify that point, though, for the record, so there would be no misunderstanding about that.

Mr. HARDY. I am still not happy about the use of the word "drafted" in one place and "inductees" in another. I do not think your commentary clears that thing up sufficiently for my purposes.

Mr. ANDERSON. Well, is there any specific example you can give the committee of an instance where a person might be drafted into service other than being inducted under the terms of the provisions of the Selective Service Act?

Mr. LARKIN. Not being a member of the Reserve or the National Guard or any other Reserve outfit. I do not know of any other way.

Mr. DE GRAFFENRIED. That last section is just a little bit confusing to my mind, that is those last few lines there. There is a conflict there, in the last four lines, with what you said just before that:

> All volunteers and inductees, from the dates of their muster or acceptance into the armed forces of the United States.

Mr. ANDERSON. I think Admiral Russell has something to offer.

Admiral RUSSELL. I was wondering whether it would meet Mr. Hardy's suggestion to strike out the words "drafted" and "draft."

Mr. BROOKS. So it would read—

persons lawfully called or ordered into, or to duty in or for training in the armed, services.

Mr. HARDY. Then that would clear up the confusion in my mind.

Admiral RUSSELL. If you take out the word "drafted", then you would automatically take out the word "draft" in the last line.

Mr. HARDY. Yes.

Mr. LARKIN. Before you make up your mind on that, I would like to ask Colonel Dinsmore if he feels that will cause any difficulty. You see the words "drafted" and "draft" have been in the articles for a long time and they were kept in again of course in the Elston Act, in the amendment to section 2 as provided in Public Law 75.

You can see that incidentally in this big book, if you would like to look at it, under tab 2, page 3.

Do you think it will cause any confusion, Colonel?

Colonel DINSMORE. Mr. Chairman, we discussed that at some length in the working group, and I am frank to say that I can think of no case in which the word "drafted" would be necessary in this article.

We put it in as I recall it because it had been in the Articles of War for a great many years and no doubt had been useful and we were afraid if we left it out that we might be omitting something that was useful

Mr. BROOKS. Colonel, could I ask you this question: Would it be preferable just simply to add after the word "inductees" in section 1 so that it would read: "Inductees under Selective Service"?

Colonel DINSMORE. I see no objection to that, Mr. Chairman.

Mr. BROOKS. Which do you think would be clearer?

Colonel DINSMORE. That certainly would clarify it; yes, sir.

Mr. BROOKS. What do you think of that?

Mr. HARDY. That would take care of it. But I do not want anybody to be confused in construing selective service inductees to be covered in this last part under any conditions.

Mr. LARKIN. Well, if it is a work of art that we have kept for many years and we do not know that it covers any specific instance, I would be perfectly willing to adopt Admiral Russell's suggestion.

Mr. HARDY. That would simplify the thing, if it can be done without any trouble.

Mr. BROOKS. You heard the suggestion on that. Do you make it as a motion, that we strike out those words——

Mr. HARDY. Yes; I will make that as a motion.

Mr. BROOKS. In article 2, subsection 1, in two instances. All in favor of that will say "Aye." All opposed "No." It is so ordered.

Mr. SMART. Mr. Chairman, in order that the record be perfectly straight on that, I would suggest that on page 4, line 19, the word "drafted" and in line 21 the word "draft" be deleted.

Mr. BROOKS. That is in H. R. 2498 and not in the annotated copy that we are looking at.

Mr. SMART. That is right. All amendments will refer to the bill and not the annotated copy, sir.

Mr. BROOKS. That is right.

Let us proceed, then, with subsection 2, if there are no further comments. Any comments on subsection 2?

Mr. ANDERSON. Oh, on subsection 2, yes, Mr. Chairman. That brings up the question again that I raised in committee the other day.

Do we refer to ROTC midshipmen there? Are they known as midshipmen when they are taking Navy ROTC training, Admiral Russell?

Admiral RUSSELL. That is covered in definition 8, section 1.

Mr. ANDERSON. I should have raised the question there. It does definitely cover naval and Army ROTC students?

Admiral RUSSELL. Yes, sir.

Mr. ANDERSON. The words "cadets and midshipmen."

Admiral RUSSELL. When they are on active duty.

Mr. ANDERSON. When they are on active duty and not when they are taking a course of training.

Admiral RUSSELL. That is right.

Mr. BROOKS. That would also cover ROTC personnel on active duty.

Mr. ANDERSON. That is what I say.

Mr. BROOKS. Any further comments? If not, we will proceed to subsection 3. Any comments on that?

Mr. ELSTON. That is the section I think that the Reserve officers objected to.

Mr. BROOKS. Colonel Oliver objected and Colonel Wiener said it was not necessary.

Mr. ELSTON. I think they pointed out that you might have a Reserve officer——

Mr. DEGRAFFENRIED. Mr. King objected to it, too, I think.

Mr. HARDY. That covers ROTC in our various military schools that are not directly under the Army or the Navy or the Air Force.

Mr. BROOKS. Mr. Larkin, I believe we ought to hear from you on that.

Mr. LARKIN. Yes. There has been a good deal of discussion of this article, Mr. Chairman. I think the committee will understand its content and intent if I can give you this much background. The Army, in the Articles of War, has not heretofore provided jurisdiction over Reserve personnel when they are in an inactive duty status, nor when they come in for training.

On the other hand, the Navy has had very extensive jurisdiction over their Reserve personnel who are on inactive duty and that jurisdiction is covered in 34 U. S. C. section 855.

Now I think it might be helpful if I just read that section in the record so you can all scrutinize it. It is entitled: "Naval Reserve, Application of Laws Regulations and Orders of the Navy; Disciplinary Actions:"

All members of the Naval Reserve when employed on active duty, authorized training duty with or without pay, drill, or other equivalent instruction or duty, or when employed in authorized travel to or from such duty or appropriate duty, drill or instruction, or during such time as they may by law be required to perform active duty or while wearing a uniform prescribed for the Naval Reserve, shall be subject to the laws, regulations, and orders for the government of the Navy.

Now it goes on with two provisions which are more nearly pertinent to article 3–A, which has also been discussed at great length by some of the witnesses. I think I might hold the provisos until we get to article 3–A.

Coming upon this wide difference in present procedure, the committee of course discussed the problem at great length. For Reserves in general, the Army and Air Force specifically felt they did not need jurisdiction over their Reserve personnel while they were on inactive duty.

The Navy already had widespread jurisdiction over their personnel. We tried to find out just what the most important point of having jurisdiction over Reserve personnel on inactive duty was, if there was any.

As a result of debates and conferences, it was generally agreed that we should not have for all purposes and all services jurisdiction over Reserve personnel when they are on inactive duty—while they are taking correspondence courses at home or while they are attending meetings or while they are wearing their uniform on parades and the various other provisions by virtue of which the Navy now does have jurisdiction over their people.

The Navy, I think, in the interest of uniformity felt that the most important circumstance under which you should retain some jurisdiction over Reserve personnel was found in this inactive duty training.

You have the situation that occurs on week ends, with Reserves coming in for a short cruise. Usually when naval reservists go on a cruise it is a 2 weeks' cruise and they are on active duty at that time, so there is no problem.

But there is some small amount of activity of that kind. But more important, there is a great deal of activity in the use of aircraft. Now that is common to the Air Force as well as the Navy, where Reserve personnel come in for the whole week end, and form in their units.

The Reserve then trains while on inactive duty, but formally under instruction and uses planes and in general handles expensive heavy equipment. It was felt that it is entirely appropriate when they are acting in that capacity that they be subject to the sactions of the uniform code if they commit offenses while in that status.

The services who are permitting them to use this expensive heavy equipment and this dangerous equipment and should have the right to govern their conduct and their activities under those circumstances.

For that reason, that was the residual amount of jurisdiction that was retained. The rest of the jurisdiction the Navy now has is deleted and goes by the board, but that specific amount does remain.

Mr. BROOKS. What happens——

Mr. LARKIN. The Air Force can use it.

Mr. BROOKS. Excuse me——

Mr. LARKIN. One more second will clear it up, I think.

Mr. BROOKS. All right.

Mr. LARKIN. We specifically did not intend and did not want to impose court-martial jurisdiction over Reserves on inactive duty when they are just taking correspondence courses or coming to meetings or wearing their uniforms or under these various other circumstances.

In order to clarify that, we put in this extra provision: That when they voluntarily come in under written orders they become subject to the code. The written orders we contemplate would spell out the voluntary nature of this type of duty and the fact that they become subject to the military code, and if they are unwilling to do that they do not come on duty.

We have provided this additional provision of notice and written orders so that in the absence of them, when Reserve personnel come to a lecture at night, a meeting, or they take their correspondence course or wear a uniform, they would not be subject to this code.

The intent of the language used is spelled out in the commentary, under the third paragraph.

The complaint has been made that such jurisdiction over Reserves on inactive duty would cause the Reserve organizations to disintegrate and make them unpopular, that the members would not wish to continue as members if this jurisdiction is provided.

I would submit in that connection that I think the most efficient and effective Reserve service is the Navy's, who have had far more jurisdiction by virtue of their present law.

Mr. BROOKS. Mr. Smart.

Mr. SMART. I am just wondering whether there is any conflict here. If an officer receives those orders and then refuses to obey them, then he is subject to the code, is he not?

Mr. LARKIN. No. He would be subject in peacetime to the code if he were ordered to duty for 15 days. You see, this is voluntarily.

Mr. SMART. Well, what are the mechanics there? Does an officer come in and volunteer to go on week-end training and then get the orders cut? Is that the process through which it goes?

Mr. LARKIN. I do not think it makes any difference which way. Whether he receives orders and he voluntarily accepts them, or whether he voluntarily comes in and gets orders afterward seems to me to be immaterial.

As long as the two elements are present, I do not think it makes much difference which one comes first.

Mr. SMART. Well, the Navy week-end flyers are perfectly used to this provision. But let us take the Air Force Reserves first who are on this week-end type of flying duty. Heretofore they have volunteered for it and have not been subject to the Articles of War.

Mr. LARKIN. That is right.

Mr. SMART. Now they become subject. They still want to take it. Now they come in and volunteer and perhaps after they volunteered and orders have been cut then they find out they are subject to the provisions of this code and do not want to go.

Then would they be subject to court martial under this code for disobeying the order?

Mr. LARKIN. I do not think so.

Mr. SMART. Let us be sure of that.

Admiral RUSSELL. May I make a comment there?

Mr. BROOKS. Admiral Russell.

Admiral RUSSELL. As far as I am aware, no Reserve officer can be ordered to active duty, training, or otherwise, in time of peace without his consent.

Mr. LARKIN. I think the 15-day provision is an Army and Air Force one.

Admiral RUSSELL. No naval officer can be required to come back for a 2 weeks' period if he does not want to come in time of peace.

Mr. BROOKS. Well, ordinarily for this type of training it is a voluntary provision.

Mr. LARKIN. And it so states right here.

Mr. BROOKS. Now, what would you think of this, Mr. Larkin, spelling that out just a little more definitely in reference to written orders?

Mr. LARKIN. Well, in view of the comments about it, the first question I dare say is whether that is a valid type of training to cover. If it is, in view of the inability of most people to understand it from the language—many of them I do not think had the commentary

and the benefit of what we say we intended to mean—I think perhaps it would be a very good idea to spell it out a little bit more. I have some language which I would just tentatively offer.

Mr. BROOKS. I can conceive of this case, where the Reserves are training in the Air Force on a regular air base and there might be an accident involving the violation of orders with a craft on regular duty.

Now in that instance, what would be the situation in reference to trials, assuming there was any criminal violation? Would it not be a fact in that type of training they would be tried in the local courts, that is the civilian courts, and the men in the Regular Establishment would be tried in a court martial?

Mr. LARKIN. Without this, you mean?

Mr. BROOKS. Without this.

Mr. LARKIN. Yes, sir.

Mr. BROOKS. So you might have on the same plane men in the Regular Establishment, in the same type of incident, being tried in a court martial and the men from the Reserve being tried in the civilian courts.

Mr. LARKIN. That is right.

Mr. SMART. And you will find, Mr. Chairman, I think invariably, that the civilian courts are much more lenient than the court martial for purely military offenses.

Mr. LARKIN. Of course they would have no jurisdiction over purely military offenses.

Mr. SMART. Well, I did not mean to say just that. I have some cases in the office where that very thing happened. One is a larceny case where a GI in the Army got 3 years and a dishonorable discharge and he is now serving his sentence and the codefendant who had been honorably discharged before they found out about it was tried in a civilian court and he got a 2-year suspended sentence. And he was the leader in the commission of the offense.

I offer that as evidence that the civil courts are more lenient, for civil crimes committed in the military, than are courts martial.

Mr. ELSTON. I would like to ask Mr. Larkin what offenses would be included in this subsection that could not be prosecuted in the civil courts?

Mr. LARKIN. All the military offenses outlined in the code—well, some of them are not applicable of course: Misconduct in the face of the enemy and several of those in peacetime.

Mr. ELSTON. Yes; but it does not leave many, does it?

Mr. LARKIN. Not very many. Disobedience of orders and things of that character.

Mr. ELSTON. Well, is it not a little objectionable that you enlarge the number of offenses, or at least you can enlarge the liability of the accused for prosecution by issuing written orders?

Mr. LARKIN. I do not think so, Mr. Elston. He is already a member of the armed services. He happens to be in an inactive duty status. He is voluntarily accepting them, which is the provision that is similar to the acceptance, I think, that is in the enlistment contract. I mean it is analagous to it. It depends on voluntary acceptance.

Mr. ELSTON. I do not think we ought to get in the position where anyone can claim that in the writing of this code we are trying to take in under the provisions of the code people who are not now subject to military or naval law.

Mr. LARKIN. Well——

Mr. ELSTON. A lot of people claim, you know, that the military is overstepping its bounds and we are becoming a military nation and all that sort of thing, and I do not think we ought to in the enactment of this code begin to include people who have not been heretofore included.

Mr. LARKIN. I agree. I do not think we want to encroach or innovate, if you will, by virtue of the fact that we are dealing with different services. It was one of the problems that we faced.

We faced this problem on innumerable occasions by virtue of our comparison of the two systems which varied both in their origin and as a result of their growth over 150 years here by the different customs under which they have heretofore operated.

So it is perfectly true as far as the Army is concerned this is an extension of jurisdiction. As far as the Navy is concerned it is a dilution of present jurisdiction.

Mr. ANDERSON. Did I understand you to say that you had some additional language?

Mr. LARKIN. Well, this might clarify it. I offer it tentatively. We have just drawn it up. Instead of the language in subdivision 3, this might be a little tighter: "Reserve personnel while they are on inactive duty training authorized by written orders voluntarily accepted by them which specify that they are subject to this code."

I think that would certainly clearly exclude any of these other types of inactive duty training that they may do in the form of correspondence courses.

Mr. ANDERSON. Which indicates that it leaves it strictly up to the individual himself.

Mr. LARKIN. That is right, whether he desires to undergo this type of training and under these conditions.

Mr. BROOKS. Should not your statement go further and say "Who are subject to this code during the limited time of the call"?

Mr. LARKIN. I think that is a good idea, to add that to it.

Mr. BROOKS. So there would be no doubt that it does lapse immediately after the call?

Mr. LARKIN. Oh, yes.

Mr. ANDERSON. Why do we not do that, Mr. Chairman. It would be a lot easier for us horseback lawyers to understand it.

Mr. BROOKS. Suppose we do this. Mr. Larkin, will you prepare that in the form of an amendment. We can take it up this afternoon or later.

Mr. LARKIN. That is right.

Mr. HARDY. Which one will that take the place of?

Mr. SMART. Number three.

Mr. HARDY. What about the ROTC, that would come under two?

Mr. LARKIN. Well, they are either, as I understand it, on an active-duty status, if they ever are, or they are in such an inactive-duty status not covered by written orders which specify that they are subject to the code. It is either one or the other.

They do not find themselves in the circumstances envisioned by number three at any time.

Mr. HARDY. In other words, you think this rewording, would that take care of that situation?

Mr. LARKIN. Yes, sir. I do not think in the first place that a cadet or aviation cadet or midshipman involves ROTC anyhow.

Mr. HARDY. I did not think it did, either, from the definition we had over here. Seven is cadet and eight is midshipman, here.

Mr. LARKIN. Seven and eight it is.

Mr. BROOKS. Shall we proceed to the next subsection?

Mr. SMART. Four.

Mr. LARKIN. Do you care for me to volunteer quickly on some subdivisions which there has been little or no comment?

Mr. BROOKS. Colonel Maas suggested that subsection four, as I recall, was wrong.

Mr. LARKIN. I recall that, Mr. Chairman. That is a provision that we have not changed by modification, extension, or by diminishing it in any way from the present law that has been on the books for I do not know how many years.

It covers of course the retired personnel of the Regular components, the officers who in a retired state are still considered to be officers of the United States or the armed services. They receive their pay and are carried on the Army and Navy register and I believe are in most cases subject to recall to active duty at any time.

Mr. ELSTON. Well, was there any complaint about that section? I thought the complaint was about subsection 5.

Mr. HARDY. It came on both of them.

Mr. LARKIN. It was also on four, Mr. Elston.

Mr. ELSTON. Four, too.

Mr. HARDY. I thought Colonel Maas' comments about it were particularly pertinent.

Mr. ELSTON. I thought they were, too, on five, because you talk about a person who is receiving hospital benefits from an armed force. He might just go to the hospital once a week and have some slight treatment, as distinguished from a person who is hospitalized and is permanently in a hospital. The subsection does not make any distinction between the two.

Mr. LARKIN. Well, if you care to take them both up at once, we can.

Mr. BROOKS. Let us take them one at a time.

Mr. LARKIN. I think Colonel Maas' objection to four, if I may presume to state it—it is in the record—was that retaining court-martial jurisdiction over retired Regular officers acted as a restriction on their——

Mr. HARDY. Right of free speech.

Mr. LARKIN. Right of free speech or their ability to speak their mind when they are in this statue. He felt great gains, I believe, would be achieved by permitting them to speak their mind. That is a question which I cannot answer.

I would point out it seems to me a considerable number of retired officers have spoken very frankly and at great length recently in the press and in the magazines. I did not notice any undue restriction on them.

There is this about it; I should say: A retired officer after all is an officer of the United States, the same as when he was on regular duty, and he is being paid. It seems to me it is not inconsistent to expect him to comport himself in the way that is a credit to the service and in the same way he was expected to conduct himself when he was a Regular.

He is still officially an officer of the United States and on its retired list and receiving pay. As I say that is the first time I had heard a

criticism of that article which as far as we are concerned is a pure reincorporation of what has been on the books for many years.

Mr. BROOKS. Mr. Smart, what would you want to say on that?

Mr. SMART. Well, I would merely like to present the converse of that to the committee, not that I am actively opposing this subsection 4. The theory back of the military viewpoint, I think, Mr. Larkin has expressed.

The converse of that is you have a man on the retired list and what is he being paid for? He is being paid because he has completed a statutory period of service within the armed forces or he gets on the retired list by virtue of becoming physically disabled.

In either event he has complied with the law which provides for his retirement.

Mr. HARDY. He has earned his retirement pay already, has he not?

Mr. SMART. Exactly. That is the converse of this argument. He has earned what he is getting.

Mr. ELSTON. And if he is recalled to active service, he will be subject anyhow?

Mr. SMART. That is exactly right. Why should courts-martial jurisdiction prevail over him after he is drawing what he has earned? Why not reserve that jurisdiction until he returns, if ever, to active status. That is the converse of the argument.

Mr. HARDY. That is the way my thinking runs.

Mr. LARKIN. Well, that converse turns, I think, partially on the notion of whether this is a pension earned as a result of the services during active duty or whether it is a partial continuation of pay in a less formally active state by virtue of his continuation in a position as an officer of the United States.

Mr. HARDY. From what little I heard from the Hook Commission, that is certainly the point of view they adopted in trying to work out a pay bill.

Mr. SMART. That is exactly right, Mr. Hardy.

Mr. BROOKS. Admiral Russell, does not the Navy have some sort of retirement like Fleet Reserve or Navy Reserve that might be affected by the deletion of that?

Admiral RUSSELL. The Fleet Reserve is more of a retainer pay proposition, until they have completed a total of 30 years, at which time they go on the retired list. That is for enlisted personnel only.

Mr. LARKIN. That, may I point out, is provided in six. And Admiral Russell can correct me, but I think in six "members of the Reserve Fleet and Fleet Marine Corps Reserve" applies to those who have had 20 years' service and as they complete another 10, then they are transferred to subdivision 4: Formal retirement.

Admiral RUSSELL. That is right. It has gone back and forth between 16 and 20 years.

Mr. BROOKS. And they would be entitled to receive some increased pay after that 30 years?

Admiral RUSSELL. Yes, sir.

Mr. BROOKS. Gentlemen, you have discussed the article there. Any further discussion?

Mr. HARDY. Well, there is just one thing, Mr. Chairman. As far as I can see, when a retired officer goes out on pay that he has earned, at least as I interpret it, by his service, I do not see why he should be subjected to military courts.

I do not see why he should be treated any different from any other civilian.

Mr. BROOKS. Do not retired officers have some right to the use of military equipment—a special right?

Mr. ELSTON. He has some privileges.

Mr. SMART. So far as the privileges are concerned, Mr. Brooks, the retired officer of the Navy, be he a Regular or Reserve, gets exactly the same benefits. That is, he is entitled to hospitalization.

He is entitled to shop at a ship's store. He is entitled to go to the commissary. I do not know whether or not there are additional benefits. But those three are specifically rights of retired personnel. And in the event of the physical retirement of a Reserve officer of the Navy, he goes on the same retired list of the Navy as the Regular officer who has served out his 30 years and is paid from the same naval appropriations. There is that much difference between the Army and the Navy.

Mr. ELSTON. May I ask Mr. Larkin if he knows of any offense that retired personnel might commit that civil courts could not prosecute them for?

Mr. LARKIN. Oh, yes. Any military offense, I should say.

Mr. ELSTON. Well, if they are retired what military offense would they commit that would not be punishable in the civil courts?

Colonel CURRY. I can tell you some.

Mr. BROOKS. All right, Colonel.

Colonel Curry. It is not often done, but it has been used to persuade them to pay their debts and answer correspondence about it. They could not be tried in a civil court for not paying a debt, a dishonorable indifference toward a just debt or for failing to answer correspondence about it. That is most likely.

Usually it does not result in a trial because they pay the debt and that ends it.

Mr. LARKIN. They are regarded in a certain classification by other provisions of law. I believe the dual compensation of Federal Government employment applies to retired officers who are receiving this pay.

You also have this situation: Suppose some of them are convicted in the civil courts. Would you continue to keep them on the Army register as an official officer of the United States and pay them while serving penitentiary terms and so forth and so on?

In the last analysis it comes to a question of not having jurisdiction over them and just retiring them completely and making them no longer an official part of the military forces in any way or keeping them on with those prerogatives and expecting them to comport themselves in the fashion they did when they were Regular officers.

Mr. BROOKS. I think the question is whether there would be done any harm by leaving them out. If there is no real need for keeping them under this jurisdiction, why it would seem to me they would be out of place in the code.

Mr. ELSTON. It would seem to me that the mere fact of making somebody pay their debts is not important. A civilian can be sued and a retired officer can be sued. If he is getting compensation from the Government and they get a judgment in the civil court they can levy on his compensation, can they not?

Admiral RUSSELL. No, sir.

Mr. HARDY. They cannot do that.

Mr. ELSTON. If he owns any property, they certainly can levy on it.

Mr. DEGRAFFENRIED. Yes.

Mr. ELSTON. Of course there is certain civil pay that cannot be levied upon, unless it is over a certain amount.

Colonel CURRY. Congressman, I was not arguing that you should retain that so you can do that. I was merely specifying that that is one thing they can do. It certainly would be a relief to the services if they did not have to bother with it.

Admiral RUSSELL. I do not think we have had so much of that, sir. We had a couple of cases that I remember of wives who yelled non-support. I know of at least one case where a retired officer was court-martialed—that has been a good many years ago—for that offense.

Mr. BROOKS. Admiral, would the Navy have any particular objection to striking that out?

Admiral RUSSELL. I believe we would; yes, sir.

Mr. BROOKS. You would.

Mr. LARKIN. If I may so so, I think the three services would desire to offer a formal objection to striking out this provision.

Mr. BROOKS. A formal objection.

Mr. HARDY. Well, I would be interested in knowing what real good purpose it serves. If it serves some good purpose, why it is all right with me, but I declare I cannot see the justification of it on the basis of what little I know about it.

And as far as what the Colonel said back here, about helping to collect it, I have not seen that work out in the observations I made.

Mr. BROOKS. I would suggest this, gentlemen. We are going to take up later on subsection 3. Let us take three and four together. If there is no objection we can do that and think about it. And we can go ahead to five now.

Mr. LARKIN. All right, sir.

Mr. BROOKS. Do you care to make a comment in reference to the suggestion that the term "hospital benefits" should be changed?

Mr. LARKIN. Well, it may be that that is too obscure to reflect what we intended to reflect, which was specifically to cover a man in more or less a permanent status is in a hospital being treated. It is a question of degree, I suppose, of whether a 2-day stay as against a month is contemplated here. It was not contemplated specifically that out-patients who come in for a prescription or for an examination would be covered.

Now the problem, here, I think, is more of a Navy one. You see, most retired personnel of Reserve components receive their hospital benefits, if they are Army or Air Force personnel, in the veterans' hospitals which this of course does not cover.

As far as Navy personnel are concerned, however, they almost always receive those benefits in the naval hospitals. So you have a difference there.

Mr. ELSTON. Do they not have the power to punish them if they violate any of the regulations by simply denying them the hospital benefits? Suppose you got a man in the hospital and he refused to obey orders and was insulting to the nurse and a lot of other things, do they not have the authority to deny him further hospitalization?

Mr. LARKIN. I cannot answer that. Do you know, Captain Woods?

Captain WOODS. They are clearly entitled to hospital benefits as a matter of law. It would be very hard to say that as a matter of regulation you could defeat those rights because they fail to conform with those regulations.

Mr. BROOKS. What would you think of this, Captain, of changing that to read "receiving hospitalization"?

Captain WOODS. I think that might make it a bit clearer than it now is.

Mr. SMART. This might very well refer to in-patient treatment as well as out-patient treatment, such as a fellow going to a dispensary. I think if it is anticipated that a man is actually being hospitalized so you can maintain some control over his decorum while he is a patient in a hospital——

Captain WOODS. I think that would make it clearer. Hospitalization with us is a word of art and it means receiving treatment in a hospital.

Mr. BROOKS. Is there any objection to changing that to "hospitalization while actually hospitalized"?

Mr. LARKIN. No.

Mr. BROOKS. Now, is there any objection to that subsection 5 as changed?

Mr. SMART. Let me ask one question, after the committee, sir.

Mr. ELSTON. Well, "hospitalization" still might be indefinite.

Mr. HARDY. He is treated in a hospital.

Mr. LARKIN. That is still indefinite.

Mr. SMART. I think this, that the service people who are going to administer this law are definitely going to know what the intent of Congress was by exactly what you are saying here. If you say that this applies in a hospital while a person is actually being hospitalized, I would certainly hate to try to be the prosecutor of a case involving a fellow who has misbehaved at a dispensary. He would not get any place with that.

I would like to ask one question before you leave these two.

Mr. BROOKS. All right, Mr. Smart.

Mr. SMART. It appears to me—I just cannot tell for certain—that this is a relaxation of jurisdiction over Navy retired officers on the retired list. Is that correct?

Admiral RUSSELL. That is correct.

Mr. LARKIN. That is correct.

Mr. SMART. You see the point there, Mr. Chairman, is that the physically retired Navy Reserve officer is on the same retired list as the Regular officer of the Navy. The physically retired Army officer is certified to VA as being authorized to draw retirement pay—not retired pay but retirement pay.

So there has been a great difference in the past as between physically retired Navy Reserves and Army retired Reserve officers. I just wanted to make certain here that the Navy was relinquishing courts-martial jurisdiction over retired Reserve officers. And they say that that is correct.

Mr. BROOKS. Furthermore, in reference to the suggestion regarding changing that to read "while actually being hospitalized," a retired officer in the hospital, even temporarily, might violate some provision of the regulations which would justify some sort of punishment.

Mr. SMART. Captain Woods states that the word "hospitalization" is a word of art with the Navy and actually means I presume——

Captain WOODS. Undergoing treatment in a hospital as a hospital patient.

Mr. ELSTON. Could not that be written in the commentary, here, so it will be understood what is meant by the term "hospitalized"?

Mr. SMART. It is in there now. It is in the record.

Mr. ELSTON. Then I think the language suggested by the Chairman would probably take care of it.

Mr. BROOKS. Is there any objection to that language?

Mr. DEGRAFFENRIED. No.

Mr. BROOKS. If not, we will adopt that language.

Now is there any objection to subsection 5 with the changed language? If not, then it is adopted——

Mr. SMART. One question. You say "that language." I do not know what that exact language is, sir.

Mr. LARKIN. The reporter has it.

Mr. ELSTON. Was it not something like: "retired personnel of a Reserve component who are receiving hospital benefits from an armed force while actually being hospitalized" or something like that?

Mr. HARDY. "While receiving hospitalization from an armed force."

Mr. ELSTON. "While receiving hospitalization"—well, that is a little mixed up. Why not leave the amendment——

Mr. BROOKS. Change the two words "hospital benefits" so it will read "who are receiving hospitalization from armed forces."

Mr. SMART. That is good.

Mr. ELSTON. All right.

Mr. DEGRAFFENRIED. That has it.

Mr. BROOKS. All right, if there is no objection to it, then we will pass on.

Now, gentlemen, it is 12 o'clock. What is the will of the committee: meet at 2 o'clock?

Mr. DEGRAFFENRIED. It is agreeable to me.

Mr. BROOKS. If there is no objection, then, we stand adjourned until 2 o'clock.

(Whereupon at 12 o'clock, the subcommittee adjourned until 2 o'clock.)

AFTERNOON SESSION

Mr. BROOKS. The committee will please come to order.

When we recessed for lunch, gentlemen, we were discussing article 2, subsection 5. As a matter of fact, we had just completed that. And if there is no objection, we will proceed with subsection 6 of article 2.

My recollection is that Colonel Maas and perhaps someone else had some objection to section 2.

Mr. Larkin, do you want to comment on that?

Mr. LARKIN. We spoke of it very briefly this morning, Mr. Chairman, in connection with the consideration of subdivision 4. And as Admiral Russell pointed out, that is a provision which is very similar to 4 in that it covers the Regular components, but is a type of Reserve that is found in the Navy only and is the type of Reserve that comes into being or to which a man comes into after 20 years of service as distinguished from the 30 years required in 4.

I should say that the same considerations apply to it as to 4.

Mr. BROOKS. Well, is there not an additional reason? In reference to 6, the Fleet Reserve and the Fleet Marine Corps already come within the provisions of the military justice laws. And if you knock

that out you will actually be circumscribing the law as we have it at the present time.

Mr. LARKIN. Oh, that is right.

Mr. BROOKS. Is that not true?

Mr. LARKIN. That is a present provision.

Mr. ELSTON. How long has that been the law? Quite a while, I believe.

Mr. LARKIN. Oh, yes, sir. Specifically I see a statute that covers it now that was passed in 1938. I do not know if that is a continuation of a previous statute or not. I think so.

Incidentally, I think you would be interested in a case which has construed this specific section as it appears for the Navy. The case is *Pasela* v. *Fenno* (76 Fed. Supp. 230), in which the constitutionality of this provision was challenged on the ground that the Fleet Reserve was not on active duty at the time when he was court-martialed and the Supreme Court of the United States denied certiorari after it went through the other courts.

But it is not an innovation with us at any rate. It is the same reincorporation again of what has been on the books.

Mr. BROOKS. Mr. Smart.

Mr. SMART. There is one more consideration in regard to that subsection, Mr. Chairman. Those in the Fleet Reserve and Fleet Marine Corps Reserve after 20 years of service draw retainer pay, not retired pay.

Now the important point there is that for the next 10 years, even though they are not on active duty, they continue to accumulate longevity and after 10 years on the Fleet Reserve list they can then draw retirement pay. They go to the retired list.

But, you see, they are in a pay status and continue to enhance their position for 10 years after they are in the Fleet Reserve. So it is considerably different than a person who has been retired and can never enhance the amount of money he will draw.

Mr. BROOKS. As I remember that, it places these people on a semi-inactive status. They are active for some purposes and inactive for others. There is nothing like that in the Army or the Air Reserve.

Mr. SMART. No.

Mr. BROOKS. Do you have any comments, Mr. deGraffenried, or any questions?

Mr. DEGRAFFENRIED. I do not believe so, Mr. Brooks.

Mr. BROOKS. Mr. Elston?

Mr. ELSTON. No.

Mr. BROOKS. Is there any objection to leaving that subsection in the bill? If there is no objection, we will leave it in and go ahead with subsection 7.

Subsection 7 covers all persons in custody of the Armed Forces serving a sentence imposed by a court martial. I assume there is no objection to that.

How about subsection 8?

Mr. ELSTON. I would like to be enlightened a little bit on what is meant by the expression "and other organizations."

Mr. LARKIN. Well, that was put in, I believe, Mr. Elston, more as a caution than for any other reason. The situation has been heretofore that the Coast and Geodetic Survey, the Public Health Service, and the Lighthouse Service, for instance, do come under the Articles of War

or the Articles for the Government of the Navy, with their personnel, when those organizations are transferred to or are serving with the armed services generally in time of war.

Those organizations went to either the Navy or the Army. By a recent statute the Lighthouse Service has become a permanent part of the Coast Guard, I believe. Is that not right, Commander?

Commander WEBB. Yes.

Mr. LARKIN. So they are provided for. But just what other Goverment agencies or services in the future might be transferred either temporarily for war purposes or permanently we were unable to guess and it was for that reason that it was worded that way.

Heretofore the jurisdiction given over Coast and Geodetic Survey, Public Health Service and Lighthouse Service, was scattered throughout the United States Code. The provisions were not a part of any Article of War or Articles for the Government of the Navy.

This subdivision, I recall from some of the witnesses, has been construed to mean that the Boy Scouts or the American Red Cross or other organizations might come under the jurisdiction of the Code. I can say we had no such intention. There is a Judge Advocate General's decision, as a matter of fact, which points out that the Red Cross is not under the Articles of War. I will see if I can find it. And of course it is not a Government organization in the sense that we intended to cover at all.

Now perhaps it would be clearer if we said, instead of "serving with": "when transferred to." It would mean the whole organization.

Mr. BROOKS. I think that would be much better.

Mr. SMART. "Transferred to and serving with."

Mr. LARKIN. I think "when transferred to." Actually I notice the language of the present statute in several cases says, as to the Coast and Geodetic Survey, "when transferred to," and since there is a special meaning to "serving with" in subdivision 1 (l), perhaps it would be clearer if we revert back to "transfer to." I would have no objection if you think it clears it up.

Mr. BROOKS. How would you get the Lighthouse people in there if you did not use that term: "transferred to," because they could not be construed as serving with the Coast Guard, could they?

Mr. LARKIN. Well, they are transferred to them now, and I believe, are serving with them. Could you enlighten us on that, Commander?

Commander WEBB. Yes, sir. The situation is that those who were able to accept military status as commissioned officers, warrant officers or enlisted, have been integrated with the military personnel.

Those who did not accept such status or could not qualify remain as civilian employees and of course would not come under the Code in any case. Those who would or could be affected are now part of the Military Coast Guard and automatically would come under this Code.

Mr. BROOKS. Well, are they serving with, or, are they transferred to the Coast Guard?

Commander WEBB. They have been transferred to and are now integrated right in with all the other military personnel of the Coast Guard, Mr. Chairman.

Mr. BROOKS. What is the pleasure of the committee in reference to that?

Mr. ELSTON. I think, Mr. Chairman, it ought to be amended by adding the words that were suggested: "when transferred to and when serving with the armed forces of the United States."

Mr. SMART. Colonel Maxey of the Air Force has a point there on that. What is it, Colonel?

Colonel MAXEY. "Transfer" is a word of art to some extent in the services. It means in the nature of a permanent assignment. I think that is not what is intended here. These organizations would not be permanently transferred to. If they were they would become part of it. It seems to be a separate organization.

Mr. BROOKS. What would you say of "assigned to?"

Colonel MAXEY. I was going to suggest "assigned to," Mr. Brooks, if you think "serving with" is not clear enough. "Assigned" is not as strong a word as "transfer" within our use of those terms.

Mr. ELSTON. I think perhaps that is a better change.

Mr. DEGRAFFENRIED. "Assigned to and serving with."

Mr. BROOKS. "Assigned to and serving with." You have heard the motion. Is there any objection to it? If not, the change will be made.

Now, if there is no other discussion on subsection 8, what about 9? I assume there is no objection to 9.

Mr. ELSTON. Well, there was some objection raised by one of the witnesses who testified before us——

Mr. BROOKS. You mean to 9?

Mr. ELSTON. Yes. There was some objection raised to 9 by, I believe it was the Reserve officers group.

Mr. SMART. I do not remember any objection to No. 9, Mr. Elston, except under the general premise that people should not be subject to the code unless they are on active duty.

Colonel DINSMORE. May I say something there, Mr. Chairman.

Mr. BROOKS. All right, Colonel.

Colonel DINSMORE. That is in the Articles of War now, and it is in accord with the laws of war as set forth in the Geneva convention.

Mr. ELSTON. I see no objection to it.

Mr. LARKIN. We have a note to that effect in the commentary, Mr. Chairman.

Mr. BROOKS. Is that all right with you, Mr. deGraffenried?

Mr. DEGRAFFENRIED. Yes.

Mr. BROOKS. If there is no objection, then, let us pass on to the next one.

That is No. 10. I would like to ask this question about No. 10. Would that cover the Red Cross, the Salvation Army, or the church organizations that very often accompany and serve with the armed forces?

Mr. LARKIN. It would in time of war only cover individuals who are accompanying the armed forces in the field, whether the field happens to be in this country or out of this country and whether or not they are Red Cross, Salvation Army, civilian employees, or anybody else.

Mr. DEGRAFFENRIED. Newspapermen.

Mr. LARKIN. War correspondents, and so forth. This, by the way, is an exact incorporation of the present provision in the Articles of War.

Mr. BROOKS. It would cover land and water.

Mr. LARKIN. Yes, I should say so.

Mr. BROOKS. That is what the annotation says.

Mr. LARKIN. Yes, that is right.

Mr. BROOKS. Any discussion? Any objection? If there is no objection, all right.

What about subsection 11? I would like to have the record refer to the reason for these parallels in reference to Alaska, the Virgin Islands, and these other places.

Mr. LARKIN. The purpose of that, Mr. Chairman, is to give jurisdiction outside the continental limits of the United States to the services over all persons who are serving with, employed by or accompanying the armed services and outside of those areas of Alaska, the Canal Zone, Hawaiian Islands, Puerto Rico, and so forth, for the reason that we have some kind of United States courts in those areas of the Hawaiian Islands, Canal Zone, Puerto Rico, and the Virgin Islands, and even though they are outside the continental limits of the United States we do not desire or intend to take jurisdiction over civilians who are accompanying or serving with the Army in those places.

But beyond that point of longitude in Alaska, where there are no United States courts of any kind, it is believed necessary to have some jurisdiction over civilians. Now that is the line of demarcation.

This, incidentally, is a reincorporation or a combining of the present Articles of War and Articles for the Government of the Navy, with the exception of the words in the second line which were added and which have been criticized, specifically: "or under the supervision of."

Now I am trying to reconstruct the reason we used these words, and I think that it had to do with the situation outside of the continental United States and outside of the longitude mentioned where it is necessary frequently to have jurisdiction over employees of contractors in overseas installations who are working for the military.

I think the criticism, however, that those words go further than that and conceivably could be construed to mean that we get supervision then over, for instance, the Navy of Guam is meritorious.

We did not think of it at all at the time. We had no intention of trying to provide such jurisdiction.

Mr. BROOKS. How is Guam governed now?

Mr. LARKIN. Well, Guam happens to be under the Navy, and it is a place outside of this longitude where the jurisdiction applies to the civilians. But it would cover the natives of Guam, apparently, which we have no intention of covering.

Mr. SMART. And American Samoa also.

Mr. LARKIN. And American Samoa and the trust territory of the Pacific. So far that reason I would move the committee to strike out that language. It is in addition to what is in the present language. It was put in as I say in an effort to——

Mr. BROOKS. What language is that?

Mr. LARKIN. In the second line of 11, the words "or under the supervision of".

Mr. DEGRAFFENRIED. That is mighty broad.

Mr. LARKIN. If you leave those words in there, why the natives of Guam and Samoa are under the supervision of the Navy specifically and they would be covered where we did not intend to.

Mr. BROOKS. What about this, Mr. Larkin: Suppose an island out there is captured as it was in the last war and retained as some of those islands have been retained, what government do you have in the islands?

Mr. LARKIN. Well, at Guam——

Mr. BROOKS. Well, take Kwajalein, for instance?

Mr. LARKIN. Well, you would presumably be either serving with or accompanying the armed service. We would have jurisdiction.

Mr. BROOKS. Well, were there not natives there?

Mr. SMART. Mr. Chairman, I think the thing that happened in those cases is that you had a military government set up and before your invasion ever took place your commanding officer was authorized to appoint provost courts to handle all civilian cases.

You never had them in courts martial. That is the same situation not only on Kwajalein and Okinawa but all of the places where we took large numbers of civilians. They were not subject to courts martial, but to provost courts and other types of military courts which the commanding officer was empowered to convene.

Mr. LARKIN. That was during wartime, you see; 11 applies to war and peace.

Mr. BROOKS. Yes.

Mr. LARKIN. That is the distinction. And also 10.

Mr. BROOKS. Yes.

Mr. SMART. Mr. Chairman, may I suggest the proper technical amendment here for the record?

Mr. BROOKS. You have it written out there, Mr. Smart?

Mr. SMART. Yes; I can give it to you.

Mr. BROOKS. All right.

Mr. SMART. On page 5, line 15, after the word "by" insert the word "or" and in line 16 delete the words "or under the supervision of".

Mr. BROOKS. Now you heard that suggested amendment. Is there any objection to it?

Mr. ELSTON. Mr. Chairman, I would like to ask about the language used in line 17 and also line 18. You say "all persons serving with" and so forth "the armed forces without the continental limits of the United States and the following Territories."

It sounds like you mean outside of those Territories. Why should you not say "without the continental limits of the United States, including that part of Alaska" and so forth. Is that not what is intended?

Mr. LARKIN. I think that is what is intended; yes, sir. I think if we change that we might well change the word "continental." There is the point of connection.

Mr. BROOKS. Without the "limits."

Mr. LARKIN. Territorial limits, including that part of.

Mr. ELSTON. Then it would read "without the limits of the United States, including that part of Alaska," and so forth?

Mr. LARKIN. I just cannot think it through to determine whether it changes the sense of it or not.

Mr. SMART. It is safe the way it is, Mr. Elston.

Mr. ELSTON. It sounds like it might mean outside the following.

Mr. SMART. Well the point is, of course, the continental limits of the United States do not include any part of Alaska, the Canal Zone,

the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

They are not within the continental limits. But they do have types of courts there which are recognized by our Government that do not exist in territories beyond that area.

Mr. BROOKS. What would you think of striking out the word "Territories"? The thing I have in mind is this: The proposition now is before Congress to make of Alaska a State, for instance. Now if you leave that word "Territories" in there it certainly gives the impression that Alaska will remain a Territory and not a State.

Mr. LARKIN. I do not see any objection to that, Mr. Chairman. I do not consider that it would create any great difficulty in going forward with making Alaska a State. It certainly would not preclude it by any means.

Mr. BROOKS. Well, unless there is some advantage in striking it out, why I would want to see it left in.

Are there any more suggestions?

Mr. ELSTON. This would not be considered to include any divilians over in Germany who are now under the jurisdiction of the civil courts that we have set up over there to try them, would it?

Mr. LARKIN. Yes, sir, if they are serving with or accompanying the armed services.

Mr. ELSTON. Of course a great many of those people are now tried by the civil courts over there. At least they are not tried by courts martial.

Mr. LARKIN. That is right. They are tried by occupation courts or other types, as Mr. Smart indicated—principally these occupation courts which are a combination of German law and court-martial law.

Mr. DEGRAFFENRIED. Merely because they are living there, Mr. Larkin, that would not be construed as meaning "serving with" or "accompanying", would it?

Mr. LARKIN. No.

Mr. DEGRAFFENRIED. If they just lived there.

Mr. LARKIN. That is right.

I can for the record give you a definition and construction of the word "accompanying" and "serving with" as construed by the courts. I have it right here. It is quite lengthy. It is considerable discussion.

Mr. ELSTON. That might be helpful.

Mr. LARKIN. We can put it in the record and I can supply you with a copy of it.

Mr. BROOKS. Do you have it there?

Mr. LARKIN. Yes, sir, I do.

Mr. BROOKS. Suppose you read it in the record right now?

Mr. LARKIN. All right.

Mr. BROOKS. It is short, it is not?

Mr. LARKIN. Well, a page and a half.

Mr. BROOKS. Then why not just put it in the Record.

Mr. LARKIN. All right, I will offer it for the record, if I may.

Perhaps I can extract a little bit for the information of the members:

One may be considered to be accompanying the Army of the United States, although he is not directly employed by the Army or the Government but works for a contractor engaged on a military project or serving on a merchant ship carrying war supplies or troops.

That is the principal enunciated in a number of cases.

In those cases, however, where a civilian has been held to have been accompanying the Armies it appeared that he has either moved with the military operation or that his presence within a military installation or theater was not merely incidental but was connected with or dependent upon the activities of the Armies or their personnel. He must in order to come within this class of persons subject to military law accompany the military service in fact.

And it goes on in the same fashion as to "serving with." It would cover the type of person who is accompanying. But the incidental citizen who is in the area would not be covered.

Mr. ELSTON. It would not cover the families of soldiers, would it?

Mr. LARKIN. I think it would, if they were dependents.

Mr. ELSTON. Well——

Mr. LARKIN. If they were living with him in some quarters furnished and moved from place to place with him, based on the service——

Mr. ELSTON. That this wife of the soldier who recently was tried. I forget the name.

Mr. LARKIN. Mrs. Ybarbo.

Mr. ELSTON. Yes. She was tried for murder and was given a life sentence and it was reduced to 5 years because the law of Germany required 5 years as maximum punishment.

Mr. LARKIN. Yes.

Mr. ELSTON. She was not tried by court martial.

Mr. LARKIN. No.

Mr. ELSTON. By a military court. She was tried by one of those special courts that had been set up in Germany.

Mr. LARKIN. Yes, sir.

Mr. ELSTON. Now do you think there is any possibility of this section being construed as divesting those courts of jurisdiction over families of soldiers?

Mr. LARKIN. No. It could not specifically because we have in another part of the code an article which specifically guards their jurisdiction.

Mr. SMART. They have concurrent jurisdiction, Mr. Elston.

Mr. LARKIN. Yes, sir.

Mr. ELSTON. If you say it is mentioned later on, we do not need to bother with it now.

Mr. LARKIN. Yes.

So this could not be construed as divesting any occupation court, military tribunal, or provost court of any jurisdiction that it currently has today.

Mr. BROOKS. I just received today a letter from a mother saying she was going over to visit her daughter who is the wife of an officer in Germany. When she arrives over there the court, that is the military court, would have concurrent jurisdiction under this code with the court martial in the trial of the case if one should arise, would they not?

Mr. LARKIN. The occupation court would have jurisdiction over her if she committed any crimes.

Mr. SMART. I do not see where that particular person would come under the code. She is not serving with, employed by, or accompanying the forces.

Mr. LARKIN. That is right.

Mr. SMART. She would not, in any case, in my opinion, be subject to this code. Whereas the family of the soldier, be it officer or private, does accompany him and he certainly is a part of the forces.

I do not think it could be construed that this provision would be broad enough to cover the relative who goes for a mere visit.

What is your view, Colonel Dinsmore?

Colonel DINSMORE. I agree with Mr. Smart.

Mr. SMART. How about you, Captain Woods?

Captain WOODS. I agree with you.

Mr. BROOKS. Any further comments? Any further objection to article 2, subject to the reservation covering subsections 3 and 4 which have already been made? If not, we will approve it and move to article 3.

Mr. Smart, would you read article 3.

Mr. SMART. Mr. Chairman, before article 3, I just want to know if subsection 12 has been considered?

Mr. BROOKS. Oh, we missed 12. We better go back to subsection 12.

Mr. SMART. Yes, sir.

Mr. LARKIN. Subsection 12 is adopted from 34 United States Code, section 1201. The only difference between it as it appears here and as it appears in section 1201 is that it now is made to apply in times of peace as well as war, just as subsection 11 is. It covers the areas, that is these bases which the United States has and during the early part of the war acquired in addition to Philippine bases and would, I believe, be subject to restrictive agreements that have been entered into between the United States and the Philippine Government on the one hand in connection with that base and any agreements between the United States Government and Great Britain on the other in connection with the bases we have leased from them.

Other than that, I do not think there is anything——

Mr. DEGRAFFENRIED. Has the constitutionality of that particular subsection there been passed on, Mr. Larkin? In your judgment, do we have that right?

Mr. LARKIN. Not that I know of.

Mr. DEGRAFFENRIED. Do we have that right?

Mr. LARKIN. Well, as it is written now it provides for all persons other than military within a leased area. This country already had agreements with Great Britain, for instance, of the concurrent type of jurisdiction, that is, the British and this country, within and without the leased area.

For instance, I believe there is a leased area in Bermuda. Is that not a fact?

Captain WOODS. That is right.

Mr. LARKIN. Most of those leased areas actually are under the jurisdiction or operated by the Navy. There is an agreement between Great Britain and United States as to nationals on the spot. Now we are governed administratively by those agreements with the British and this subdivision provides permissive jurisdiction which is subject to those agreements and their operation.

Mr. ELSTON. What do you mean by the "secretary of a department"?

Mr. LARKIN. Well, it depends on which department is given the responsibility of operating the area.

Mr. ELSTON. You mean the service department?

Mr. LARKIN. That is right; yes, sir. The Secretary of the Department I think we defined as Army, Navy, and Air Force, in our department definitions, under subdivision 11 of article I.

Mr. ELSTON. Some leases might be under the jurisdiction of the Secretary of the Interior or Commerce or some other department—the State Department.

Mr. LARKIN. That is right, and on that basis it would not be covered here. "Department" has been defined to refer to Army, Navy, Air, and Coast Guard. Interior would be excluded by the definition.

Mr. ELSTON. That includes the Secretary of Defense?

Mr. LARKIN. No.

Mr. ELSTON. Well, might it not be possible for the Secretary of Defense to make agreements or leases with respect to the use of foreign territory?

Mr. LARKIN. This is a tentative answer. I think not. The Department of State always makes the arrangement and then the President I think designates the military department that is to operate it.

Captain WOODS. I think that is correct.

Mr. LARKIN. Is that correct, Captain?

Captain WOODS. Yes, sir.

Mr. LARKIN. I know the Department of State is the proper authority to enter into the leases and is the Department which does negotiate with the foreign countries. Then I believe, as I say, the President designates in most all of these cases the Navy.

Mr. WOODS. Mr. Larkin, do you not have some duplication in subsections 12 and 11? You refer to the same description there, as to Alaska. Why is that included in both subsections?

Mr. LARKIN. Well, I do not know that we can——

Mr. ELSTON. In the one case they are serving with troops and in the other they are not.

Mr. LARKIN. That is right. But the distinction is all persons on the one hand and the other is when they are accompanying the armed forces.

Mr. BROOKS. Well——

Mr. LARKIN. But in Alaska, the same reason obtains. There we do have United States courts, where in some of these leased areas there are probably no courts at all or if there are, there is a concurrent jurisdiction with Great Britain or the Philippines or whoever it happens to be.

I do not think that you could cut out in 12 that latter part without doing violence to it because of the difference. But I would prefer to ask the Navy if they have an opinion on it.

Captain WOODS. Well, I think this is addressed to areas leased from foreign governments and unless you leave this in it would be areas leased within the United States. We certainly do not want that.

Mr. LARKIN. Areas leased by the United States Government from a State, for instance.

Captain WOODS. Yes.

Mr. LARKIN. Do you think a reservation would come under that?

Captain WOODS. Yes.

Mr. BROOKS. Well, do you need a special power to cover a reservation in Alaska?

Captain WOODS. No, sir. That is just to make sure that this would not touch areas leased in Alaska.

Mr. BROOKS. It seems to me subsection 11 covers all persons serving with, employed by or accompanying the armed forces in that part of Alaska east of longitude 100 degrees and 72 degrees west.

Subsection 12 says "All persons within an area leased by the United States which is under the control of a secretary of a department and which is without the continental limits of the United States and the following territories." Then you describe Alaska again.

Mr. LARKIN. Of course you see you have a much broader jurisdiction in 12, in that you have jurisdiction over persons within the area without them serving or accompanying. Local bandits, for instance, or other people within the area who have no connection whatever with the military——

Captain WOODS. That is right.

Mr. LARKIN. In event there were no local courts or in the event the foreign nation that leased it to us had no courts there, why somebody would have to have jurisdiction to try them.

Mr. ELSTON. It might be completely unoccupied territory.

Mr. LARKIN. That is right.

Mr. BROOKS. Well, if you think there is no harm from the standpoint of duplication, because you do cover the same group there twice, why it is all right.

Mr. LARKIN. I think it is for the purposes of guaranteeing that we do not have jurisdiction in Alaska, Puerto Rico, and so on and so forth.

Mr. HARDY. It seems to me like 12 covers the whole field. I do not believe 11 would.

Mr. BROOKS. Twelve covers everything. You could certainly leave out that part in 11 there referring to Alaska.

Mr. HARDY. Except that it says "leased" and the other does not.

Mr. ELSTON. It would be just a little clearer if it was in both of them, would it not?

Mr. LARKIN. I think so.

Mr. BROOKS. Well, is there any objection to 12?

Mr. HARDY. No.

Mr. BROOKS. If there is no objection, then it will stand approved.

We move on, then, to article 3, Mr. Smart.

Mr. SMART (reading):

ARTICLE 3. Jurisdiction to try certain personnel.

(a) Reserve personnel of the armed forces who are charged with having committed, while in a status in which they are subject to this Code, any offense against this Code may be retained in such status or, whether or not such status has terminated, placed in an active duty status for disciplinary action, without their consent, but not for a longer period of time than may be required for such action.

(b) All persons discharged from the armed forces subsequently charged with having fraudulently obtained said discharge shall be subject to trial by court martial on said charge and shall be subject to this Code while in the custody of the armed forces for such trial. Upon conviction of said charge they shall be subject to trial by court martial for all offenses under this Code committed prior to the fraudulent discharge.

(c) Any person who has deserted from the armed forces shall not be relieved from amenability to the jurisdiction of this Code by virtue of a separation from any subsequent period of service.

References: Proposed A. G. N., article 5 (a); 52 Stat. 1180 (1938), 34 U. S. C., section 855 (1946) M. C. M., paragraph 10; N. C. and B., section 334;

Commentary: Subdivision (a) is substantially a reenactment of the present Navy law as set forth in 34 U. S. C., section 855. A similar provision is found in article 5 (a) of the proposed A. G. N.

Subdivision (b) is the statutory expression of the law as set out in M. C. M., paragraph 10 and N. C. and B., sec. 334. It differs from a similar provision in article 5 (a) of the proposed A. G. N. in that it provides that a person who obtains a fraudulent discharge is not subject to this code during the period between the discharge and later apprehension for trial of the issue.

Subdivision (c) is prompted by ex parte Drainer, 65 F. Supp. 410 (N. D. Cal. 1946), which held that a discharge from the naval service barred prosecution of a person for desertion from the Marine Corps at a period prior to his enlistment in the Navy. See article 5 (a) of the proposed A. G. N.

Mr. BROOKS. Now there was some criticism leveled at this article.

Mr. ELSTON. Subsection (a) particularly.

Mr. LARKIN. Yes. The thinking that went into 3 (a) is similar to that which was used in article 2, subdivision 3 and 5, or at least we started off with the same set of circumstances.

The Department of the Army and the Air Force did not have jurisdiction of this character and do not have it at the present time. The Navy did have and at this time does have such jurisdiction. It is found in 34 U. S. C. section 855, the first part of which I read in connection with article 2, subdivision 3.

That section has two provisos which I would like to read at this time.

Provided, That disciplinary action for an offense committed while subject to the laws, regulations, and orders for the Government of the Navy shall not be barred by reason of release from duty status of any person charged with the commission thereof.

All this, of course, is Naval Reserve personnel.

And provided further, That for the purpose of carrying out the provisions of this section to affect members of the Naval Reserve be retained on or returned to a duty status without their consent but not for a longer period of time than may be required for disciplinary action.

Now, this gives in other words a continuing jurisdiction over Reserve personnel on inactive duty if it is discovered while they are on inactive duty that they committed an offense while they were on active duty or in a status under the code. Article 2 subdivision 3 would be such a status.

It is a problem that is very much akin to the problem that was faced in the Hirshberg case, except this of course covers Reserve personnel who have not been discharged whereas in the Hirshberg case as you know you had a situation where a Navy petty officer during the term of his enlistment became a prisoner of war, was returned to this country and hospitalized, and then received a discharge and immediately reenlisted, and it was not until his service during his reenlistment that it was discovered or it was alleged that he had committed the crime of maltreating fellow prisoners while in his first enlistment.

This brought up the question of whether or not you still had jurisdiction over him. Here the same question as to Reserve personnel is presented, whether while they are on inactive duty you would have a jurisdiction over them for something they did while they were on active duty.

The jurisdiction of course would be limited in any case, I should say, by the statute of limitations itself. But we did not provide for the Hirshberg type of case in this code because frankly it was before the Supreme Court and we just did not know what was going to happen.

Mr. ELSTON. I am wondering why you could not reach the whole subject with a very simple provision to the effect that any person who commits any offense and is subject to prosecution under this code may be prosecuted even though he may no longer be in the service, and the only exceptions would be cases which are barred by the statute of limitations.

Mr. LARKIN. There is one concern that I would have—and I do not know the answer, frankly—which has to do with the third type, if you will, and that is the person who serves, is discharged and who neither joins the Reserves or does not reenlist and becomes for all purposes a civilian.

The question I have in connection with it—actually I think if it were possible you ought to be consistent across the boards in those types of cases—is the constitutionality of attempting to retain a continuing jurisdiction over that person since now he clearly is not in the land or naval forces even though while he was in them he did commit an offense which would have made him subject to its jurisdiction if tried at that time.

Now perhaps my concern is exaggerated but I think there is a difficult legal problem in that one type at least.

Mr. ELSTON. Do you not think it would be within the Constitution if they retained jurisdiction only so far as it is necessary to prosecute the case which was committed while the offender was in the service?

Mr. LARKIN. I think there are several cases both ways, frankly, on it, and I do not know that it has ever gone to the Supreme Court.

I am reminded that the Articles of War and the Articles for the Government of the Navy at the present time do contain a continuing jurisdiction of that character insofar as frauds against the Government are concerned.

Mr. ELSTON. Well, does it have to be limited to frauds?

Mr. LARKIN. Well, that also involves a legal question.

Mr. ELSTON. It seems to me that the Supreme Court in the Hirshberg case held as they did solely because we did not have a provision in the law that provided for continuing jurisdiction.

Mr. LARKIN. Yes, that is right. I agree with you entirely, Mr. Elston, but there you see at least Hirshberg when he was tried was in the naval service.

Mr. ELSTON. Well, that may be true.

Mr. LARKIN. Now that is a fortuitous circumstance, perhaps, but he did come under the basic jurisdiction of being in the service. So the difference still exists. Now whether it is a material one or not, I do not know.

Mr. ELSTON. You would have some very absurd situations.

Mr. LARKIN. Exactly.

Mr. ELSTON. A man might commit murder the day before his term of enlistment was up and step out of the service and could not be prosecuted.

Mr. LARKIN. I think you would have had that case actually in the Durant case, where Mrs. Durant or Captain Durant, whatever her name was, was convicted of stealing the Crown Jewels of Hesse.

Mr. ELSTON. Yes.

Mr. LARKIN. The question there arose: She was on terminal leave and it was considered that she was still in the service. If the case had been brought to trial about 3 weeks later and she had not joined the Reserves, if you will, or reenlisted, then there would have been no way of trying her at all because the offense was committed overseas.

The Federal Courts would have had no jurisdiction. And the military would not have had any either.

The question, however, in the last analysis, I should say, is whether you can abide, missing the few cases of that kind, or whether there should be provided across-the-board jurisdiction for people who do not reenlist and are not Reservists. But I agree with you. I think the whole question should be decided as one whole problem rather than by a piecemeal approach. Our difficulty, as far as the reenlisted Hirshberg style, was that it was before the Supreme Court and we just did not know which way it was going to go and we could not forecast it.

Mr. BROOKS. My mind is running along the line Congressman Elston's mind is running. I was wondering whether it would not be well to have a very simple provision for jurisdiction to attach as of the date of the commission of the crime and shall continue until shall we say 5 years after the facts are brought to the attention of the proper authorities, thereby permitting prosecution. Beyond that time the statute of limitations would run on it.

Mr. LARKIN. Well, I should say you might make it subject to the statute of limitations provided in the code. I do not think most statutes of limitations run from the time of the discovery, except in certain fraud cases. Usually they run from the time of the commission of the offense. I think that your idea would be quite an extension. But subject to the statute——

Mr. BROOKS. In our State they have some provision that the prosecuting officer must have some knowledge of the crime so as to permit the prosecution, if it is a major crime, within the period——

Mr. DEGRAFFENRIED. On most major felonies or capital cases we do not have any statute of limitations.

Mr. ELSTON. That is right. In Ohio we have few——

Mr. DEGRAFFENRIED. On capital cases you do not have any statute of limitations.

Mr. LARKIN. That is right. And we provide in cases of murder, mutiny, and several others, that there is no statute of limitations.

Mr. DEGRAFFENRIED. I believe we can put a provision in here, that would be perfectly constitutional, that it should be fixed as of the time the crime is committed and the mere fact that he is discharged at a later date and returns to civilian life ought not to free him from being prosecuted in a military court for an offense that he committed while he was in the service.

Mr. BROOKS. I would limit that to offenses triable by perhaps general court martial, so that just minor infractions of discipline would not be taken advantage of to bring a man back under the jurisdiction of a court martial.

Mr. DEGRAFFENRIED. That is right.

Mr. SMART. I think right there, Mr. Brooks, that is one of the fears that the ROA seems to have expressed. That if a Reserve happens to say something while on active duty which subsequently happens to incur the disfavor of the people in the Regular service, they could utilize this very section here to pull them back into the service and away from their business for comparatively minor offenses as a harassing movement.

Now I do not say there is any validity to their fears but that is the fear which they expressed.

Mr. BROOKS. It would meet their objection, though, if we classify only major crimes for the purpose of bringing a man back under this code.

Mr. DEGRAFFENRIED. That is right.

Mr. HARDY. I think there is a distinction between that provision with respect to Reserve officers as objected to by the ROA from the thing that we are talking about here because we are providing that the Reserve officers continue under their jurisdiction anyway, are we not?

Mr. LARKIN. Well, if they have committed an offense during the active period, you see. Article 3 does not provide jurisdiction over Reserve personnel for any offense they commit while on an inactive status. It just is a continuing jurisdiction——

Mr. HARDY. If an offense was committed while in active service?

Mr. LARKIN. That is right.

Mr. SMART. Of course, Mr. Brooks, as to the suggestion you made on cases triable by general court martial, it should be pointed out that a general court martial has jurisdiction over all offenses which may be tried by a summary or a special court.

Mr. BROOKS. Perhaps a limitation would be in order.

Mr. SMART. Yes. I think it might be well for the committee to consider the possibilities of amending this article further to provide that court martial could try only those cases involving major offenses which were not triable in the civil courts.

Mr. ELSTON. In other words, if a man committed murder the day before his period of enlistment expired——

Mr. SMART. In the United States.

Mr. ELSTON. Yes; we will say he was in United States and a certain State had the jurisdiction to try the case, they could not try him in the military courts?

Mr. SMART. That furthers, I think, the Reserve idea. Try everything in the civil courts you can if the accused is not on active duty and limit prosecutions to major offenses.

Mr. ELSTON. I think that is a very good suggestion.

Mr. HARDY. Yes.

Mr. ELSTON. After all, the only purpose of this is to avoid a case like the Hirshberg case or any case where a person has committed a serious offense. I do not say it should include minor offenses, but where he has committed a serious offense, he should not be permitted to escape by reason of the fact that he is out of the Army.

Mr. LARKIN. That is right.

Mr. ELSTON. Whereas the same offense committed by a fellow who had just enlisted would bring prosecution.

Mr. LARKIN. That is right.

Mr. ELSTON. It is not fair. And my suggested amendment would be that except as cases are barred by the statute of limitations, juris-

diction shall continue as to major offenses committed in the service even though a person has left the service. And then we might have what Mr. Smart has suggested. Provided the offense is not one over which the States have some jurisdiction and can proceed with the trial. That is the substance of it.

Mr. LARKIN. I think we certainly would not object to that. And I think we can work out some language. Although most of the comments against this article were that we were trying to encroach and enlarge our jurisdiction, we would be happy with the restrictions of a statute of limitations and not having jurisdiction over what is triable in the civil courts.

Mr. HARDY. I think you should give consideration to the point Mr. Brooks raised a while ago, that you do not permit minor or disciplinary offenses to take a man back into the service for military trial.

Mr. LARKIN. I agree.

Mr. ELSTON. Mr. Chairman, I would suggest if it is agreeable to the other members of the committee, that we have an amendment along this line drafted. Then it can be submitted to the committee for further consideration.

Mr. BROOKS. I think that is an excellent idea. And if there is no objection we can suggest that between now and the first part of next week, if you will, Mr. Larkin and Mr. Smart, work on that.

Mr LARKIN. Fine. Be happy to.

Mr. BROOKS. And also work it so that the Hirshberg type of case will be taken care of.

Mr. LARKIN. Yes, sir.

Mr. DEGRAFFENRIED. Just a suggestion there. Consider the use of the word "felony."

Mr. LARKIN. I think that would be helpful, Mr. deGraffenried, although I hope not necessary. We have tried to avoid in our punitive articles the use of the word "felony." It is unknown in the military law to this time. While it is a common enough word in civil laws, I think specific crimes which are felonies in different States differ. So far we have been successful in not using it, but it is possible that in this case we would have to.

Mr. DEGRAFFENRIED. Of course if there is no such word as "felony" in military law I do not know what word you use. You have to describe in some way the nature of the offense, even if you have to set each specific offense out for which he could be brought back in.

Mr. LARKIN. That is right.

Mr. BROOKS. You might base it on the thought that some offenses have exclusive jurisdiction in the general courts-martial and of course those are major offenses.

Mr. ELSTON. You also have the difficulty, too, about the offense being more serious sometimes to an officer than it is to an enlisted man, and so forth. There are a lot of questions involved.

Mr. LARKIN. Yes. Let us try to submit something to you on that question.

Mr. BROOKS. Yes. Article 4.

Mr. SMART. Mr. Chairman, you have not yet discussed subsection (b) and subsection (c) of article 3.

Mr. BROOKS. I thought the whole thing would be the subject of consideration.

Mr. SMART. I believe that (b) and (c) will stand on their own merits, without (a), would they not?

Mr. LARKIN. Yes.

Mr. BROOKS. I thought Mr. Elston's idea was to cover all three.

Mr. LARKIN. We can do that when we bring the other back, if you like. (b) is part of a similar philosophy, let us say, so that we could postpone its consideration.

Mr. SMART. O. K.

Mr. LARKIN. Otherwise, it is pretty much on its own feet.

Mr. BROOKS. Is there any objection to (b) and (c) as they are written?

Mr. LARKIN. I might point out in connection with (b) that it is new and while it has been a regulation we did not have much confidence in the stability of a regulation of this character. The notion here purely and simply is that we retain jurisdiction or have a continued jurisdiction in the case where a person is accused of having fraudulently secured his discharge.

Now there were a number of cases during World War II where through some fraud or other a man was able to obtain discharge papers. It was a device, in other words, that was tantamount to deserting except that he was able to furnish himself with the outward legal effects of having been properly discharged.

It was a device, in other words, in which he was able to get out of the services by fraud and had a piece of paper which indicated that it was proper, but in reality it was not any different than a man who just left and deserted and had no piece of paper.

Well, there was a jurisdictional problem in that connection because under the Hirshberg ruling again, for instance, the effect of the discharge was to cut off any offense he had committed while on active duty and if you uncovered evidence that he had fraudulently obtained his discharge and attempted to try him for it, why before you could try him he could challenge the court's jurisdiction by presenting a piece of paper which on its face showed he was legitimately discharged and the court had no jurisdiction over him by virtue of that discharge.

So it was a situation that enabled a person by fraud to escape the consequences of his act and really leave the services and desert in effect. He had a piece of paper which acted as a bar to the services doing anything about it.

For that reason this is put in and that is what it is intended to accomplish: In other words, to give a continuing jurisdiction over a man whose discharge was actually a fraud.

Mr. ELSTON. What do you mean by those words "while in the custody of the armed forces for such trial," on lines 15 and 16? If he is discharged he is not in the custody any longer?

Mr. LARKIN. Oh. May I read the whole article?

Mr. SMART. That refers to after he is apprehended for trail for the fraudulent discharge, Mr. Elston.

Mr. LARKIN. That is right.

Mr. DEGRAFFENRIED. You do not mean a discharge that he forged. You mean one that he obtained by some fraudulent representation?

Mr. LARKIN. Either one. Well, there were cases——

Mr. DEGRAFFENRIED. If he forged a discharge it looks like to me that it would be absolutely void and not considered as anything.

Mr. LARKIN. He might have forged it or he might have paid some money to some clerk at a separation place and obtained the official papers. He might I suppose in a number of ways obtained papers which were on their face official but which were illegally obtained, however he did it.

Mr. DEGRAFFENRIED. It just looks like to me that those words there would mean that where he had really obtained a discharge it was signed properly but he had obtained it by some fraudulent misrepresentation, rather than to actually forge it.

Mr. LARKIN. I think it would cover both situations.

Mr. DEGRAFFENRIED. It would cover both.

Mr. BROOKS. Is there any objection to that? Did you answer Mr. Elston's question with reference to being in custody?

Mr. LARKIN. I thought Mr. Smart did. The notion was that he is subject to this code while he is in custody awaiting trial.

Mr. ELSTON. Do you not think the words ought to be "shall after apprehension be subject to this code while in the custody of"?

Mr. LARKIN. I think that would certainly not change the sense and would clarify it.

Mr. ELSTON. It makes it a little clearer.

Mr. HARDY. Well he has to be subject to the code before he is apprehended, has he not? Otherwise, how are you going to get authority to pick him up?

Mr. LARKIN. Well, this gives us the jurisdiction to apprehend him.

Mr. SMART. I think the point there, Mr. Hardy, would be, in line 15, after the word "shall," you would put the words "after apprehension." So you presume the first time that he is already subject to jurisdiction and the second time, after you have him, then he is subject to any offense he commits while in custody.

Mr. BROOKS. Yes; your jurisdiction is under that preceding clause there, "Shall be subject to trial by courts martial."

Mr. HARDY. Yes.

Mr. BROOKS. Suppose you put your suggested change there, Mr. Elston, in proper language and we will vote on it.

Mr. ELSTON. Mr. Chairman, I would offer the amendment that on line 15, after the word "shall" he——

Mr. BROOKS. What page now?

Mr. ELSTON. Page 6, line 15, after the word "shall" insert the words "after apprehension."

Mr. BROOKS. You heard the motion, gentlemen. Any objection to it?

Mr. HARDY. No.

Mr. BROOKS. If not, that insertion will be made.

Now what about subsection (c)? Is there any discussion on that?

Mr. LARKIN. I might point out, as we did in the commentary, that that is prompted by a case in California, the circumstances of which are as follows: A man deserted from the Marines and enlisted in the Navy and was given an honorable discharge after his service in the Navy and that discharge was held to operate as a bar to trying him for his original desertion. This is designed to correct that situation.

Mr. BROOKS. You have heard the section or article. If there is no objection to it, excepting for subsection (a), it will stand approved.

We will proceed, then, on article 4.

Mr. SMART (reading):

ART. 4. Dismissed officer's right to trial by court martial.

(a) When any officer, dismissed by order of the President, makes a written application for trial by court martial, setting forth under oath that he has been wrongfully dismissed, the President, as soon as practicable, shall convene a general court martial to try such officer on the charges on which he was dismissed. A court martial so convened shall have jurisdiction to try the dismissed officer on such charges, and he shall be held to have waived the right to plead any statute of limitations applicable to any offense with which he is charged. The court martial may, as part of its sentence, adjudge the affirmance of the dismissal, but if the court martial acquits the accused or if the sentence adjudged, as finally approved or affirmed, does not include dismissal or death, the Secretary of the Department shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issuance.

(b) If the President fails to convene a general court-martial within 6 months from the presentation of an application for trial under this Article, the Secretary of the Department shall substitute for the dismisal ordered by the President a form of discharge authorized for administrative issuance.

(c) Where a discharge is substituted for a dismissal under the authority of this Article, the President alone may reappoint the officer to such commissioned rank and precedence as in the opinion of the President such former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to position vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and such reappointment shall be considered as actual service for all purposes, including the right to receive pay and allowances.

(d) When an officer is discharged from any armed force by administrative action or is dropped from the rolls by order of the President, there shall not be a right to trial under this Article.

References: A. G. N. Art. 37; R. S., sec 1230 (1875), 10 U. S. C., sec 573 (1946).

Commentary: This article should be read in conjunction with the provision being reenacted in section 10 of this act. The right to trial will apply only in the case of a summary dismassal by order of the President in time of war. (Sec. 10 covers the provisions now found in A. W. 118 and A. G. N. art. 36.)

If the President fails to convene a court martial where there has been an application for trial, or if the court martial convened does not adjudge dismissal or death as a sentence, the procedure followed will be the same as that prescribed in article 75 (d) where a previously executed sentence of dismissal is not sustained on a new trial. This changes the present statutory provisions set out in the references. The change is made because of the doubt, expressed by Winthrop and other commentators, as to the constitutionality of the present provision declaring that an order of dismissal, lawfully issued by the President, shall be void under certain circumstances. Under the proposed procedure it will be possible to achieve the same result—that of restoring the officer.

No time limit has been set on when an application for trial must be submitted. The present statutory provision has been construed to require that the application be made within a reasonable time, which will vary according to circumstances. See Winthrop, Military Law and Precedents, 1920 edition, page 64; Digest of Opinions, Judge Advocate General of the Army, 1912–40, section 227.

Mr. ELSTON. Is that new?

Mr. LARKIN. Partially. I think you will get a better understanding of it if I give you a little background on it. It is somewhat complicated. It stems from the following legislative history. In 1865 the Congress passed a statute, Revised Statute 1230, which gave officers

a right to trial in the fashion that we have provided in 4 (a) when they had been dismissed by the President.

That was a provision for the Navy and the Army.

The following year, in 1886, article of war 118 was passed, which was construed subsequently by the Court of Claims as not giving the right in the Army to an officer to a court martial after he had been dismissed by the President, in that article 118 repealed Revised Statute 1230.

The original statute had said that if a court martial thereafter exonerated a man the President's dismissal was void. A number of legal opinions hold that court martial cannot so void a dismissal by the President, that the President had the constitutional right of dismissal which is an incident of his right of appointment.

So there has over the years been a difference by virtue of the time in which this article 118 of the Army's was passed. There has been a difference in practice in the Army and the Navy in that the Navy has always construed the law, and it apparently applied to them properly, that a naval officer could have a court martial if he was dismissed by the President where an Army officer could not.

Now that was one divergence or difference that we desired to make uniform and for that purpose put in here this provision that if an officer is dismissed by the President, he can have a court martial.

This 4 (a) applies to the power of the President in time of war only.

One hundred and eighteen itself specifically sets out the manner in which or the circumstances under which an officer can be dismissed from the service and it is either by court-martial sentence or in time of war by the President.

That is reenacted in this bill in the very back of it, in section 10, and is reaffirmed. But section 4 is within the Uniform Code itself because it spells out a court-martial remedy.

In studying that whole problem we felt that if a court martial, having granted an officer now dismissed the right to a court martial on the same circumstances, exonerates him afterward, why then the infamy, if you will, that attaches to this dismissal by the President ought to be ameliorated in some way and for that reason we provided at the end of 4, subdivision (a), that an administrative form of discharge could be substituted for the dismissal.

Mr. ELSTON. What is that—administrative discharge?

Mr. LARKIN. Well, an administrative discharge is one of three: Either an honorable discharge, under honorable conditions or the so-called undesirable discharge. There are in all five types in each service. They have been standardized. They are a dishonorable and a bad-conduct discharge, both of which can be imposed by a court martial only, and then the other three are honorable, under honorable conditions, and undesirable.

Mr. ELSTON. It would not sound very fair to say that if the court martial acquitted the accused or if the sentence adjudged as finally approved or affirmed does not include dismissal or death the Secretary of the Department shall substitute for the dismissal ordered by the President a form of discharge other than honorable, would it? Then why should he be discharged from the service under other than honorable conditions?

Mr. LARKIN. I think it is desirable to have a certain amount of flexibility under those circumstances because it may well be that the officer is not guilty of a specific offense which warrants his dismissal.

But he may be the type of person who for other reasons of incompetence or just general misbehavior is such that you do not feel he is entitled to an honorable discharge. You see, the dismissal by the President cuts him off and he is out.

Now you are changing the dishonorable feature of that, but he may not be entitled to an honorable discharge under those circumstances.

I recall that that phase of it was criticized by somebody. Somebody suggested, I believe, that it should be honorable or under honorable conditions. They just objected to the third one. But it strikes me that there may be circumstances which would warrant less than an honorable discharge, even though you have not established an offense that warrants an equivalent to a dismissal with dishonor.

Mr. ELSTON. Well, it seems to me that should be another proceeding.

Mr. LARKIN. Well, that is right. That is what it is.

Mr. ELSTON. If he is acquitted of the offense that caused his dismissal in the first place, he certainly should be entitled to be discharged honorably unless he has committed some other offense or his conduct in some other respects warrants another proceeding.

But in the proceeding in which he is acquitted and found to be not guilty it would be meaningless if he was then discharged from the service other than under honorable conditions.

Mr. LARKIN. Well, except that you would have this situation, I think: If you provide that they must substitute an honorable discharge but there are other factors which would indicate that it should be less than honorable, why I just do not see how you would give him the honorable one and then try to take it back and then have another proceeding and do something else with it.

Mr. ELSTON. Were there many cases that warrant this kind of legislation?

Mr. LARKIN. I think there were a few. I do not know of any during the war.

Mr. ELSTON. Well, where does the request come for this rather unusual type of procedure?

Mr. LARKIN. Well, this has been, in one or the other forms, as I outlined in the beginning, in the Articles for the Government of the Navy or the Articles of War since 1865 when Congress first passed it.

Mr. ELSTON. Well, that may be an old statute that is not worth much any more. Have they had occasion to use it in recent years?

Mr. LARKIN. There has been very little occasion. But the point is, since the President undoubtedly has the continuing constitutional power to dismiss somebody, all this does in the rest of its sections is to provide certain remedies in the event that action was arbitrary.

If we can go on a little bit, in section (c) for instance, the committee felt that if a man had been dismissed, that is an officer, by the President in time of war and he was tried by a court martial and was completely exonerated and acquitted in addition to having an honorable discharge as you pointed out, why we are to provide further that there be some means of restoring him to the service again because you see the court martial here will follow the dismissal, which dismissal cuts him out.

And even if you gave him an honorable discharge as substitution after the court martial, his professional career as an officer is at an end. So the committee felt in all justice it was necessary to provide further remedies, in (c), that there should be a provision notwith-

standing the provisions of the Officer Personnel Act which would enable the President to put him back.

Mr. ELSTON. In the first place the President has the constitutional power to discharge an officer.

Mr. LARKIN. Yes, sir.

Mr. ELSTON. No question about that, is there?

Mr. LARKIN. No, sir; I do not think so.

Mr. ELSTON. You think a law is constitutional that gives a court martial the right to overrule the President and take that constitutional right away from him or at least overrule the effect of it?

Mr. LARKIN. No. I think you cannot change the dismissal. However, you can by court martial thereafter change the dishonorable aspects of it. You see, the President could dismiss him and you cannot by any other action void his action. I do not think there is any difficulty in——

Mr. BROOKS. Mr. Larkin, that subsection (a) of course would permit the President to act and in effect approve the proceedings of the court martial. But what about (b), which says that should the President fail to act the Secretary of the Department shall substitute for the dismissal order by the President a form of discharge authorized for administrative issuance. Is that not taking it out of the President's hands?

Mr. LARKIN. No, sir; I do not think so. It does not change the dismissal but it makes it possible to change the dishonorable effects of it by substituting a different type of discharge—an honorable one. I do not think you can void the President's power to dismiss by any subsequent action, but you can change the circumstances or the effect of that dismissal if by further process you find that the dishonorable effects should not attach to the dismissal.

Mr. ELSTON. I seriously question that.

Now on page 7, the very purpose of the court martial is to determine whether or not he has been wrongfully dismissed by the President. That is the exact wording of your statute, where he makes a written application for trial by court martial, setting forth under oath that he has been wrongfully dismissed, by the President

Mr. LARKIN. All right.

Mr. ELSTON. Now, if the President has the constitutional right to dismiss him, who has any right to question it?

Mr. LARKIN. Well, I do not think anybody has any power to void the dismissal, but they have a right to question the wrongful aspects of it or the dishonorable consequences that flow from it.

This would not, unless the President himself, in (c), by being enlightened, if you will, by the court martial, decided a wrong was done. Then he at his option alone would reappoint the man and undo the wrong.

But no one else could vacate the action of the President. However the notion originated in 1865 that there should be some method of clearing the man's name, even though he may still stay dismissed.

Mr. ELSTON. Was the constitutionality ever passed on?

Mr. LARKIN. The constitutionality of the right to void the dismissal was passed on and it was said there is no further agency beyond the President that could void the dismissal. Winthrop, I think, is of that opinion.

And there is an Army judge advocate opinion, which holds that any attempt to undo the President's dismissal is unconstitutional because he has the constitutional power. However, the right to change the dishonorable consequences of it, if it is found by a court martial that he did nothing wrongful, is available.

Mr. BROOKS. I would like to hear from Mr. Smart on this particular point.

Mr. SMART. Thank you, Mr. Chairman.

The first thing to remember about this section is that it is purely administrative. It has nothing to do with the trial, until you get farther down into the provisions. Secondly, it refers only to officers. Now you will find when we get to article 75 of this bill that it refers to restoration after a court martial and it provides exactly the same thing that we find in this article.

I think the thing that shocks the sense of justice of most people is the fact that here you have it possible for the President to dismiss an officer and certainly that is his constitutional right, to do so.

But the officer comes in and asks for a trial and gets acquitted and he still has no assurancd whatsoever that he can get rid of that stigma. Heaven only knows what kind of a discharge they may give him.

I am strongly of the feeling that if an officer should subsequently come in and have a court martial and should be acquitted by that court, that the statute should provide that an honorable discharge will be given that officer.

Now you cannot force the President to reappoint him. That is matter within the option of the President. But if he is acquitted I cannot escape the feeling that he should be accorded an honorable discharge.

Mr. HARDY. Now right on that point, the only effect of a court martial, in this case is to fix the degree of stigma which attaches to this dismissal, is that right?

Mr. SMART. That is correct.

Mr. LARKIN. Yes.

Mr. SMART. That is correct, as I see it.

Mr. LARKIN. That is right.

Mr. HARDY. In other words, a court martial could determine one of three forms of discharge to be issued.

Mr. LARKIN. No. The Secretary, after receiving the court-martial findings.

Mr. HARDY. Yes. But it would be based on the judgment of the court martial?

Mr. LARKIN. That is right.

Mr. HARDY. So that actually the court martial is purely for the purpose of adducing the evidence to indicate the degree of significance which is to attach to this man after he goes out of the service.

Mr. LARKIN. If any.

Mr. HARDY. Yes, if any.

Mr. BROOKS. And furthermore, to give the President the opportunity if he wants to reinstate him in the service?

Mr. LARKIN. That is right, you see.

Mr. ELSTON. Well, he can do that anyhow.

Mr. LARKIN. Well, he might, but now under the officer personnel act, the man goes down to the bottom of the list and gets a new number and things of that character follow.

Mr. SMART. Actually this section is much broader from the standpoint of the officer so dismissed than existing law. The provisions in this article are something which may be helpful to an officer which have not theretofore been provided.

Mr. BROOKS. This is something we discussed in the personnel act but did not take any action in reference to it.

Mr. LARKIN. Well, it covers a very few number of cases.

Mr. DEGRAFFENRIED. On your thought there that a man might be acquitted and yet at the same time his conduct might have been such that he is not entitled to an honorable discharge but to some other kind of discharge, could you not have some kind of provision there that if he were acquainted he should be given an honorable discharge unless within a certain time, say 30 days or whatever time is considered reasonable, new charges were preferred against him and established or something of that kind?

Now you have a thought there, that you had in your mind, that when a man is acquainted he still might not be entitled to an honorable discharge. I think he should, unless some other kind of discharge is preferred against him which is established so that he should not be entitled to it.

Mr. LARKIN. I do think that would make a little more formal the discretion on which the Secretary would ultimately depend.

Mr. DEGRAFFENRIED. Where he is acquitted and no other charges are preferred against him, do you not think that he should have an honorable discharge?

Mr. LARKIN. I would expect he would get it in almost all circumstances. That is exactly what I would expect. But I just do not know——

Mr. BROOKS. There is this about it, though. Now he convenes this at his own request. Suppose, for instance, a man is tried for murder and dishonorably discharged, maybe, on a charge of manslaughter.

Suppose later on at his request a court martial is convened and he is acquitted of that but he has a bad record behind that. While he is acquitted of the offense specifically for which he has been released from service the question naturally is going to be: Has he requested the court martial to go into the question of the guilt or innocence of these preceding offenses.

You see the point I have in mind there?

Mr. LARKIN. Well, I got lost part way. I was thinking of the double jeopardy situation in the beginning of your question.

Mr. BROOKS. My point is this: He invokes this remedy at his own request.

Mr. LARKIN. That is right.

Mr. BROOKS. Would he be willing to invoke the same thing should some other part of his record come under scrutiny?

Mr. LARKIN. You mean, would he have a right to ask for a court martial in the event he was accused of something which was not an offense, but some other action?

Mr. BROOKS. Would the court martial have a right to go into something that he did not request?

Mr. LARKIN. Not unless it was an offense.

Mr. BROOKS. After he has been discharged. They have the right because under this article we permit him to request it.

Mr. LARKIN. That is right.

Mr. BROOKS. But, now, if he does not request another part of his record to be scrutinized by the court martial, will the court martial have that right to do it?

Mr. LARKIN. If he does not request, he cannot be tried. He is out. He is a civilian now.

Mr. HARDY. I believe the language here covers the point you raised, Mr. Brooks. It says "shall convene a general court martial to try such officer on the charges on which he was dismissed."

Mr. LARKIN. You could not try him for anything else at all. You could not try him for that unless he asked for it.

Mr. BROOKS. You could not go back over his record as far as that is concerned to see whether he has a good record or bad record. But you pin it exactly on that one charge for which he has been discharged.

Mr. LARKIN. Yes.

Mr. SMART. I think, Mr. Chairman, that is also the answer to Mr. deGraffenried's question a moment ago, where there might be a possibility of preferring other charges against a man. I think one of the implications possible in that situation would be that they could try him piecemeal.

They could hold back things on him and just try him piecemeal until they finally got one to stick on him. Now if they have any sound basis upon which to proceed they ought to file all the charges and specifications that were involved in the dismissal of the officer in the first place and he should not be subjected to a piecemeal prosecution until heaven knows how long.

Mr. deGRAFFENRIED. I agree with you there, Mr. Smart. But I understood you to say a few moments ago that you thought that if he was acquitted he should receive an honorable discharge.

Mr. SMART. I certainly do.

Mr. deGRAFFENRIED. But on the other hand, as Mr. Brooks suggested, the man's record might be bad in such a general way that even though he was acquitted of murder or whatever particular charge he had there he still might not be entitled to an honorable discharge. That is the thought, as I understand it, that Mr. Brooks had there.

Mr. LARKIN. May I point out in that connection, we have provided that in the event the court martial acquits him, in which case I would normally expect there would be an honorable discharge by administrative process, or even if the court martial convicts him but does not sentence him to dismissal—they think he is guilty but they do not think that the sentence ought to be dismissal—well under those circumstances I should think that you would hesitate about giving him or substituting for it an honorable discharge.

You should more appropriately give him an undesirable discharge. He may be convicted here and still have a remedy, but would not be entitled to the honorable one.

If you notice near the end of (a), it says—

> The court martial may as a part of its sentence adjudge the affirmance of the dismissal, but if the courts-martial acquits the accused or if the sentence adjudged, as finally approved or affirmed does not include dismissal or death

but is nevertheless a conviction, you can substitute an administrative discharge and in those cases probably less than honorable would be appropriate.

Mr. SMART. I think so, exactly. I merely singled out the case where he is subsequently acquitted and you leave it here purely to the discretion of the Secretary. You do not assure that officer he is going to get an honorable discharge.

Now you go further in section (b) here. This provides what I think is a right without a remedy. Here is a fellow who comes up, he has been dismissed and he asks the President to convene a court.

Six months passes and the President does not do a worldly thing about that and here sits the officer trying for a trial he cannot get. I think in that case, if he is refused a trial at which he may present the evidence, I think there again an honorable discharge should be substituted for the administrative discharge, the meaning of which you or I do not know.

Mr. BROOKS. It seems to me this, that this is a most unusual remedy and I am just wondering will this reopen any of those 24(b) cases.

Mr. ELSTON. They were not discharged by the President, were they?

Mr. BROOKS. They were discharged from the service. Who discharged them?

Mr. LARKIN. I do not know whether they were dismissals by the President or not. The President of course can drop from the rolls an officer who has been absent for 3 months or who has been convicted and is incarcerated in a Federal penitentiary.

Or an officer of course under the Officer Personnel Act can be discharged administratively if he is passed over twice or if there is a finding of incompetence. So this is to this wartime power of the President's to dismiss.

And from knowledge and information, I think there have been very, very few over the years.

Mr. BROOKS. This does not say it shall be used only in time of war, though.

Mr. ELSTON. It does not say that.

Mr. BROOKS. Is that limited to wartime?

Mr. LARKIN. Yes, it is, because the President can only dismiss under the provisions of section 10 of this act. If you will look at the very back of the act, under section 10, it is page 97, it says "No officer shall be dismissed from any of the armed forces except by sentence of a general court martial or in commutation thereof or in time of war by the order of the President.

Mr. ELSTON. What form does a Presidential dismissal take? Just dismissal from the service?

Mr. LARKIN. Yes, I believe so. Have you ever seen one, Colonel?

Colonel DINSMORE. No.

Mr. ELSTON. When was the last time an officer was ever dismissed by the President?

Colonel DINSMORE. I do not remember that, Mr. Elston. I would have to look that up. I would imagine it has been many years ago.

Colonel MAXEY. As a matter of fact, I think it was a short time ago. One Benny Meyers was dismissed by the President.

Mr. ELSTON. Well, Benny Meyers was subject to court martial and could have been tried and dismissed other than by the President. Are there any cases other than that? I mean you did not need the

statute for the Benny Meyers case. If you had the statute Benny Meyers might have appealed and gone through a lot of trial.

Mr. LARKIN. Under this, you see, he could have asked for a trial.

Colonel DINSMORE. I would like to correct my statement. I remember another case, in which an officer was tried and convicted by a civil court and dismissed by order of the President. That was maybe 15 years ago.

Mr. ELSTON. Well, it can only be done during wartime. Was there a World War I case?

Colonel DINSMORE. No, that was from a different authority.

Mr. LARKIN. That was from the dropping of the rolls.

Mr. ELSTON. Oh.

Mr. HARDY. That is covered, though, back there in section 10.

Mr. LARKIN. That is right.

Mr. BROOKS. My idea is this, gentlemen. This is a most unusual remedy. It is going to be used very, very seldom. If an officer is out of service a long time and then by his own volition asks for another trial and they reverse him preceding a finding of dismissal, there should be lots of latitude given to help him or to help the service.

Mr. DEGRAFFENRIED. I kind of agree with you.

Mr. BROOKS. And this does give him a most unusual remedy. It seems to me we ought to give them a good deal of discretion in the use of it.

Mr. ELSTON. Of course it could not be used unless we have another war, could it?

Mr. LARKIN. It could not be this kind of a dropping, that is right.

Mr. SMART. I think what you would find in this type of case—would be the type of dismissal involving an officer who had committed a group of more or less continuous or recurring infractions which were entirely inconsistent with the behavior of an officer.

Now, of course you could try him for conduct unbecoming an officer, but it might be such a border-line case that you were fearful of not being able to convict in a court martial but you were convinced on the other hand that he just has no business being an officer.

Now, the cases, I understand, are rare. Maybe we are borrowing a lot of trouble that we do not need to borrow, I do not know. Captain, have you any views about it?

Captain WOODS. What I said to you was supposition on my part. I have no personal knowledge of any case in which an officer has been dismissed by the President in time of war in the Navy.

Mr. ELSTON. There is no question but what a person who receives an honorable discharge is entitled to certain rights and privileges that he would not get under a Presidential discharge, is that not correct?

Mr. LARKIN. I think so, yes, sir.

Mr. ELSTON. Under the circumstances, then, you are giving a court martial the authority to give to a dismissed officer some rights and some privileges which the President by virtue of his discharge said he was not entitled to, and I still question the constitutionality of it.

Mr. LARKIN. Well, I cannot add anything by repeating myself again.

Mr. ELSTON. No.

Mr. LARKIN. Because I cannot prove it, either.

Mr. BROOKS. What is the pleasure of the committee in reference to this?

Mr. HARDY. I have one other question, Mr. Brooks. I do not know whether it is particularly significant, but there is no time limit specified in here as to when such officers might make a written request.

At least I have not seen any. Conceivably a man might be dismissed and make a written request 10 years afterward.

Mr. SMART. Which would be no good.

Mr. LARKIN. I think that has been construed by a case, Mr. Hardy. The construction that I have in mind—perhaps it was a digest of opinions of the Judge Advocate General of the Army—is that it must be in a very short time. A reasonable time would be the standard, I should say.

And reasonable had been construed in that connection as very short, I think, several days afterward.

Mr. HARDY. I noticed that reference back here. But certainly as far as the bill itself is concerned I do not see anything here that would require it.

Mr. BROOKS. What is your pleasure, gentlemen?

Mr. HARDY. It is all right with me.

Mr. BROOKS. Subsection (a).

Mr. HARDY. I think it will probably work all right.

Mr. BROOKS. All in favor of taking subsection (a) as it is say, "Aye."

Mr. ELSTON. Mr. Chairman, I am not in favor of any part of article 4, but I have an open mind on the subject and if I can convince myself that it is all right I will go along with it. I just cannot get it out of my head that you have any rights after the President has ordered a dismissal as Commander in Chief of the Army.

He dismisses by virtue of a constitutional right that nobody can can interfere with. Congress has no right to interfere with it. No one has any right to interfere with it. To come along and say that you can give a man a different kind of a discharge than the President gave him, and give him rights, privileges and emoluments and everything else, that he would not be entitled to under the Presidential order, is not proper in my opinion. I do not think we have any right to do it.

Mr. BROOKS. Well, I am not questioning the remark of Congressman Elston at all. My view on this is largely this: It has been there since 1865. It has caused no trouble to date. It has not been thrown out by any court yet.

Mr. ELSTON. Well from 1865, Mr. Chairman, until 1898 we did not have any war.

Mr. BROOKS. We hope we do not have any more.

And in reference to changing discharges we set up a board that permits the change of all discharges, as I understand all dishonorable discharges, and that board reviews these things constantly.

But as I say I am perfectly willing, if the committee wants to, to let it go over. That would also be the subject of further thought.

Mr. ELSTON. I think there is a difference, Mr. Chairman, in the review of a case by the board of review. The board of review is not acting by virtue of any constitutional authority but is acting by virtue of authority which Congress conferred upon it, and is reviewing the decision of courts-martial trial provided for by congressional action.

Mr. LARKIN. I do not want to belabor the subject, certainly. I do not think it warrants more of your time.

Mr. BROOKS. No; I do not think so either.

Mr. LARKIN. But, in connection with it, I do want to draw to your attention an objection specifically made so you will have it in mind when you decide, and that was made by Colonel Oliver, if you remember, to the statute-of-limitations provision.

He did not think that an officer should be required to waive the statute in the event he asked for a subsequent trial. I do not think that should cause any trouble because actually the officer is asking for a device to better himself, and I think it is appropriate that he waive it.

And in addition to that, by virtue of the reasonable time under which he has to ask for it, I do not think the question arises.

Mr. DEGRAFFENRIED. Mr. Larkin, do you think it might be wise to put in the number of days he has a right to ask, or do you think what you have there will control that sufficiently?

Mr. LARKIN. I think so, Mr. deGraffenried.

Mr. BROOKS. Tell me, is that a part of the Army's Articles of War now?

Mr. LARKIN. Well, section 10 in the back of this bill is a part of the Army's now, which does not give the right to a trial thereafter. The Navy, on the other hand, since 1865 has had a provision which gives the right to a trial thereafter just as we have provided.

Mr. BROOKS. I would like to ask you in reference to subsection (d), this subsection (d) refers to a condition of being dropped from the rolls by the order of the President. Of course (a) refers to dismissal by the order of the President.

Mr. LARKIN. Yes.

Mr. BROOKS. There is quite a difference between the two; is there not?

Mr. LARKIN. That is correct. And I think for the legislative history I would like to say that the dropping from the rolls there means to us the same thing that it means in section 10, and that is that it is the result of 3 months' absence or confinement in a penitentiary after conviction of an officer.

Mr. BROOKS. Well, let us pass that one by also and we will come back to it later on.

What about article 5; Mr. Smart?

Mr. SMART (reading):

ART. 5. Territorial applicability of the code.

This code shall be applicable in all places.

References: Preamble, Articles of War; proposed A. G. N., arft. 5 (c)

Commentary: This article reenacts the present Army provision. It is not in conflict with the provisions in article 2 (11) and 2 (12) of this code, which make certain persons subject to the code only when they are outside the United States and also outside certain areas. The code is applicable in all places as to other persons subject to it. Previous restrictive provisions on this subject in the AGN have given rise to jurisdictional problems which this language will correct. (See Keeffe Report, p. 262 ff.)

Mr. BROOKS. Any objection to that? If not, then it will stand as read.

Article 6.

Mr. SMART (reading):

ART. 6. Judge advocates and legal officers.

(a) The assignment for dtuy of all judge advocates of the Army and Air Force and law specialists of the Navy and Coast Guard shall be subject to the approval of The Judge Advocate General of the armed force of which they are members. The Judge Advocate General or senior members of his staff shall make frequent inspections in the field in supervision of the administration of military justice.

(b) Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is authorized to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with The Judge Advocate General.

(c) No person who has acted as member, law officer, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act as a staff judge advocate or legal officer to any reviewing authority upon the same case.

Reference: A. W. 11, 47a.

Commentary: Subdivisions (a) and (b) are derived from A. W. 47a. There are no similar provisions in present Navy law. Subdivision (a) differs from A. W. 47a in order to make clear that orders assigning judge advocates do not have to be actually issued by the Judge Advocate General but shall be subject to his approval, although issued by the Adjutant General or Bureau of Naval Personnel.

The purpose of subdivision (a) is to place judge advocates and law specialists under the control of the Judge Advocate General. Subdivision (b) not only authorizes direct communication within military-justice channels but also enhances the position of staff judge advocates and legal officers by requiring direct communication between such officers and their commanding officers.

Subdivision (c), which is based on the sixth proviso of A. W. 11, is designed to secure review by an impartial staff judge advocate or legal officer.

Mr. BROOKS. Are there any questions about that?

Mr. SMART. I have a question, if none of the rest of you have.

Mr. BROOKS. Mr. Smart.

Mr. SMART. I would like to clarify for the record the meaning which comes from the change in the wording of this article as contrasted to the similar article in the Articles of War, revised.

Article 6 (a), line 18, refers to the assignment of judge advocates and says "shall be subject to the approval of the Judge Advocate General." You remember in the so-called Elston bill it was stated that the Judge Advocate General would assign them, the idea being there that the Judge Advocate General would probably know better than anyone else which of his officers would fit best with certain commands in the field.

Now to say that the Judge Advocate General will assign seems to presume that he will be a personnel officer on a part-time basis and perhaps there should be better wording than that if the committee still wants assignments of judge advocates to be made on the recommendation of the Judge Advocate General.

But that particular wording in there has been subjected to considerable criticism, if not in hearings certainly to me outside of the hearings.

Mr. ELSTON. Can we find out, Mr. Chairman, why the language of the previous bill was not used? What reason was there for the change?

Mr. LARKIN. It was principally for administrative purposes, rather [illegible] virtue of an intent to effect a substantive change. The

Elston bill as I recall it provided that the judge advocates shall be assigned by the Judge Advocate General after consultation with the commander.

In the first place, for all services it seemed to involve the personal consultation of the Judge Advocate General with commanders and his assignment of them which from an administrative point of view was a tremendous extra job for him and in connection with the Navy particularly a considerable administrative conflict with the Bureau of Personnel which handles personnel administration.

In order to preserve what we thought was the same notion and to make it administratively more feasible, why we reworded it here so that they must be subject to the Judge Advocate General and have his approval, if you will, without his initial assigning and going through all those administrative practices.

There is one other item that was considered from an administrative point and that was, for instance, the assignment of judge advocates to some of the particularly large commands. For instance, I think Admiral Nimitz had four or five judge advocates assigned to his staff.

For the Judge Advocate General to be required to go to Admiral Nimitz each time in connection with the fourth and the fifth and the sixth and consult with him and then do the assigning was out of the question.

Under those circumstances it seemed to be involving such a large amount of time of both of those officers that the same effect would be achieved by this. Now that is the notion behind it.

Mr. ELSTON. We gave a lot of thought to that last year. Of course we were trying to get away from command influence as much as possible and satisfy the complaints—and they were certainly heavy—about too much command influence. We thought this was one way we could do it.

Now if the command authority does the assigning and the Judge Advocate General simply rubber stamps the assignment I do not believe you are going to meet the criticism that was offered before we passed our bill last year.

Mr. LARKIN. I do not think that the commanding officer is to do the assigning as contemplated by this but that the Bureau of Personnel subject to the approval of the Judge Advocate General handles that administrative aspect of it, in the same way as the personnel services.

It is not that the commander appoint his own staff judge advocate and then get the concurrence as much as the Bureau of Personnel with the concurrence of the judge advocate. Would that be the way it works, Captain?

Captain WOODS. Yes.

Mr. LARKIN. Could you fill in on that in any way?

Mr. SMART. I think Colonel Maxey has an inquiry.

Mr. BROOKS. Colonel.

Colonel MAXEY. Mr. Chairman, the Air Force did not object to the Elston bill at all and we anticipated not the slightest bit of difficulty with any of those provisions. We did not, nor did the Army, read the Elston bill as requiring the Judge Advocate General to personally assign people.

Nor did we consider it to mean that the Judge Advocate General would personally have to talk with the commander in the field. The bill did not so require. We interpreted that to mean that the Judge

Advocate General would assign Colonel So-and-So to such and such a command by requesting the proper personnel officer to issue the order.

He would not do it personally and had no intention of doing it personally. Nor did we consider that General Harmon, the Judge Advocate General of the Air Corps, would have to call General Stratemeyer personally and say "Will you accept so-and-so?"

We construed that to mean that such and such an officer would be offered to General Stratemeyer as judge advocate. Back would come a letter either signed by General Stratemeyer or by his adjutant saying that such and such an officer is acceptable to his command, and then the order would be issued by Personnel. But the Air Force did not oppose the Elston bill as written.

Mr. BROOKS. You read in there implied authority to delegate?

Colonel MAXEY. As is true in everything except judicial functions, yes, sir.

Mr. LARKIN. The language of the Elston Act is not entirely clear. I think it is susceptible to Colonel Maxey's interpretation, but the language was:

> All members of the Judge Advocate General's Department will be assigned as prescribed by the Judge Advocate General after appropriate consultation with commanders on whose staffs they may serve.

I think it is probably susceptible to the inference or the construction that the judge advocate personally consult with the commander personally in all cases, all the time. We may well have misconstrued what you intended in the Elston Act, but we thought that this language did about the same thing with greater administrative freedom.

Mr. BROOKS. Well, does not this give the absolute power of veto to the Judge Advocate General?

Mr. LARKIN. I would say so.

Mr. BROOKS. And under that interpretation, would he not have a right to delegate some of that authority, subject to his veto?

Mr. LARKIN. I should say the Assistant Judge Advocate General or others would perhaps handle it for him, after the Bureau of Personnel has submitted to him the names of those whom they contemplate assigning as staff judge advocates.

Mr. ELSTON. Let me ask: Have the services encountered any tremendous administrative problem by reason of that provision that was in our bill last year?

Mr. LARKIN. Now, their experience dates from February, and under the construction if they are so construing it that the judge advocate does not have to consult personally with the commander anyhow, why I do not know. Perhaps they are not.

Mr. ELSTON. But he initiates the assignment. There is the feeling that he at least initiates the assignment.

Mr. LARKIN. Yes.

Mr. ELSTON. It is just that far removed from command influence. I do not see where the great administrative problem would arise.

Mr. LARKIN. Well, I am not completely familiar with the Navy organizational structure which involves the Bureau of Naval Personnel. Can you add anything, Captain?

Captain WOODS. Our thinking is that the Judge Advocate General does not want to have to go into the details of keeping an audit of amounts of moneys expended or making estimate of appropriations or

otherwise keeping track of quarters available and all those things that go into the detailing of officers.

His approval here would give him the veto power. No man could be sent unless he concurred.

Mr. LARKIN. In other words, he is really certifying by his concurrence that the man is an appropriate one.

Captain WOODS. If I may go off the record?

Mr. BROOKS. All right, off the record.

(Discussion off the record.)

Mr. BROOKS. On the record.

Now I would like to ask this question: How would you think this verbiage would sound: "The assignment for duty of all judge advocates of the Army and Air Force and law specialists of the Navy and Coast Guard shall be made by the Judge Advocate General's Department subject to the approval of the Judge Advocate General?"

Mr. SMART. Or you could say "shall be made upon the recommendation of the Judge Advocate General." Then it will initiate in the Judge Advocate's office and not in Personnel.

Mr. ELSTON. That is right.

Mr. BROOKS. "Shall be made upon the recommendation." Would that suit everybody?

Mr. DEGRAFFENRIED. That suits me.

Mr. LARKIN. That is fine.

Captain WOODS. That is all right.

Mr. BROOKS. If there is no objection, then, to that change, all right. Mr. Elston moves that the change be made and it is so ordered.

What about section 8?

Mr. LARKIN. That is a restatement of the Elston Act.

Mr. BROOKS. There is no dispute about that.

Mr. LARKIN. No.

Mr. BROOKS. What about (c)?

Mr. LARKIN. That is borrowed or adopted from the sixth proviso of article of war 11. It is now in the Articles of War and is designed of course to insure impartial staff judge advocates.

Mr. BROOKS. I do not believe there is any dispute about that.

If there is no objection, then the article—article 6—as amended will stand approved by the committee.

Mr. SMART (reading):

ART. 7. Apprehension.

(a) Apprehension is the taking into custody of a person.

(b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this code may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it.

(c) All officers, warrant officers, petty officers, and noncommissioned officers shall have authority to quell all quarrels, frays, and disorders among persons subject to this code and to apprehend persons subject to this code who take part in the same.

References: A. W. 68; Naval Justice, chapter 6.

Commentary: This article should be read in conjunction with articles 8–14, which codify and enact present practice as to apprehension and restraint of persons subject to the code.

Subdivisions (a) and (b) are new and relate in particular to military police. Subdivision (c) is derived from A. W. 68.

Mr. BROOKS. Mr. Larkin, would you want to give an explanation there?

Mr. LARKIN. This is new in format, more than in anything else, Mr. Chairman. In our study of the Articles of War and the Articles for the Government of the Navy we found a certain duality of meaning in the words "arrest," "restraint," "confinement," and words of that character, and we adopted this scheme to clarify the defintitions of those words and started off with "apprehension" in article 7.

The balance of the whole subject is pre-pre-trial procedure, really, being the initiation of the case from the apprehension standpoint.

Article 7, then, is part of a whole revision, the rest of which is contained in articles 9 and 10 and I think just clarifies it. It clarifies the whole notion of what is arrest, restraint, confinement, and so forth.

Section (c) specifically is borrowed from subdivision (c) of article of war 68. But it is just a general simplification.

Mr. BROOKS. It is a rehash of that article?

Mr. LARKIN. That is right.

Mr. BROOKS. Is there any further discussion on this?

Mr. ELSTON. I think the section is satisfactory, Mr. Chairman. Of course it is a little more liberal than pertains in civil life. You cannot arrest on reasonable belief, except as to felonies. An officer cannot go out and arrest on a reasonable belief that a misdemeanor has been committed. He must see it committed.

Mr. LARKIN. That is right.

Mr. ELSTON. He may arrest on a warrant if he has a warrant, but without a warrant he cannot arrest except in a felony case where if it is on a reasonable belief the belief is that the offense has just been committed and not committed last week or some other time.

Mr. LARKIN. That is correct, Mr. Elston.

Mr. ELSTON. To that extent we go beyond the authority of arresting officers in civil cases. But we can appreciate the fact that in the military they do not have the same opportunity for obtaining warrants and the like as they do in civil courts.

Mr. LARKIN. I think that is just the point.

Mr. ELSTON. I do not see any particular objection.

Mr. BROOKS. And the emergencies, too, are greater.

Mr. LARKIN. That is right.

Mr. BROOKS. So if there is no objection we will approve article 7 and pass on to article 8.

Mr. SMART. Are you ready to proceed with 8?

Mr. BROOKS. Yes, "Apprehension of deserters."

Mr. SMART. I thought Colonel Dinsmore had a question on 7.

Mr. BROOKS. Colonel, do you have a question on 7?

Colonel DINSMORE. Well, it has been pointed out to me or at least this suggestion has been made that subsection (c) limits the authority of officers, warrant officers, and noncommissioned officers to apprehend persons who take part in quarrels, frays, and disorders. It eliminates the power to order officers and others into arrest.

Now I am frank to say that I have not thoroughly digested that. I suggest you pass that.

Mr. SMART. We will go ahead with 8, Mr. Chairman.

Mr. BROOKS. All right.

Mr. SMART (reading):

ART. 8. Apprehension of deserters.

It shall be lawful for any civil officer having authority to apprehend offenders under the laws of the United States or of any State, District, Territory, or possession of the United States summarily to apprehend a deserter from the armed forces of the United States and deliver him into the custody of the armed forces of the United States.

References: A. W. 106; 35 Stat. 622 (1909), 34 U. S. C., section 1011 (1946) (arrest of deserters).

Commentary: This article incorporates references with minor changes of language.

There was one suggestion made by Mr. Farmer of the War Veterans Bar Association, that we include in this particular section a. w. o. l. cases. I do not see the validity of that, Mr. Chairman, inasmuch as if a man is a. w. o. l. for any length of time he goes from a. w. o. l. to desertion and immediately becomes subject to this article.

We are not going to worry about him as long as he is purely in a. w. o. l. status. I think the section is all right.

Mr. LARKIN. Otherwise, it is just a reincorporation of the present article of war 106, with a few grammatical changes.

Mr. BROOKS. I think we understand it pretty well.

Then, Mr. Smart, if you will read 9.

Mr. SMART (reading):

ART. 9. Imposition of restraint.

(a) Arrest is the restraint of a sperson by an order directing him to remain within certain specified limits not imposed as a punishment for an offense. Confinement is the physical restraint of a person.

(b) An enlisted person may be ordered into arrest or confinement by any officer by an order delivered in person or through other persons subject to this Code. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted persons of his command or subject to his authority into arrest or confinement.

(c) An officer, a warrant officer, or a civilian subject to this Code may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated.

(d) No person shall be ordered into arrest or confinement except for probable cause.

(e) Nothing in this Article shall be construed to limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

References: AGN, articles 43, 44; M. C. M., paragraphs 19, 20; Naval Justice, chapter 7.

Commentary: Subdivision (a) clarifies the meaning of terms used by the armed forces. In present Army practice "arrest" refers both to apprehension and to a type of restraint. In Navy practice "close arrest" would fall within the definition of confinement.

Subdivisions (b), (c), and (d) incorporate present Army and Navy practice. See article 97 for offense of unlawful detention.

Subdivision (e) is included to provide for custody of persons apprehended until proper authority is notified.

Mr. BROOKS. Is there any discussion on article 9?

Some suggestion was made during the course of this general discussion in reference to transposing the word "only" as I recall. Instead of reading as it does, under section (c), it will read "an officer, warrant officer, or a civilian subject to this code may be ordered into arrest or confinement by a commanding officer to whose authority he is subject only"—transposing that word "only" to the changed position in the sentence.

Mr. SMART. I think that was the suggestion of Colonel Oliver of the Reserve Officers Association, if I am not mistaken. It is purely a choice of words as to which is the better. Frankly, I do not think there is much to be gained one way or the other, Mr. Brooks.

Colonel DINSMORE. The question has been raised as to whether or not this covers oral orders only and excludes written orders. It says "orders delivered in person or by another officer."

Mr. SMART. That could easily be corrected by inserting after the word "order" on page 25 "oral or written."

Mr. BROOKS. What subsection is that?

Mr. SMART. That is at the bottom of page 10, subsection (c), on line 25.

Mr. BROOKS. Yes.

Mr. SMART. There is some ambiguity as to what kind of order is intended; is it oral or written, and I suggested an amendment after the word "order" to insert "oral or written."

Mr. BROOKS. In the sentence which begins: "The authority to order."

Mr. SMART. Yes; "by an order delivered in person by another officer." That is on line 25.

Mr. DEGRAFFENRIED. On the bottom of page 10, Mr. Brooks.

Mr. BROOKS. I am using the annotated copy. All right.

You heard that suggestion. I will put it in the form of a motion. Is there any further discussion on it? Any objection? If not, then we will adopt that amendment.

I would like to ask this question of Mr. Larkin on this: Under subsection (d) "no person shall be ordered into arrest or confinement except for probable cause"—does that clash with the preceding section which we have just read which permits arrest on reasonable belief?

Mr. LARKIN. No, because I think the other one has to do with the initial apprehension and this one has to do with the more formal procedures that are taken after the apprehension, when a man is put into a formal state of arrest, which may mean he is restricted to an area or a place or he is specifically put in confinement.

Mr. BROOKS. This will meet to some extent the suggestion made by Mr. Elston there, that we are rather liberal in permitting the arrest upon reasonable belief, but a screening-out process will occur here in reference to a more permanent status.

Mr. LARKIN. I think in this one, Mr. Chairman, we come, as to this notion of probable cause, closer to the civilian idea of the circumstances under which a man should be either restricted or incarcerated.

Mr. BROOKS. Any further questions on that? Any further discussion on this article? If not, we can adopt this.

And then I will entertain on behalf of the committee a motion to adjourn.

Mr. ELSTON. Off the record.

(Discussion off the record.)

Mr. BROOKS. Without objection, the committee is now adjourned until Monday morning at 10 o'clock.

(Whereupon, at 4:30 p. m., the subcommittee adjourned to reconvene on Monday, March 21, 1949, at 10 a. m.)

UNIFORM CODE OF MILITARY JUSTICE

MONDAY, MARCH 21, 1949

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The subcommittee met at 10 a. m., Hon. Overton Brooks (chairman) presiding.

Mr. BROOKS. The committee will please come to order.

Friday, gentlemen, when we adjourned as I recall we had finished article 9.

Mr. SMART. Right.

Mr. BROOKS. And we were prepared to start on article 10. That is right, is it not?

Mr. SMART. That is correct, Mr. Chairman.

Mr. BROOKS. All right, sir, if you will give us a start by reading article 10, we will be grateful to you.

Mr. SMART (reading):

ART. 10. Restraint of persons charged with offenses.

Any person subject to this Code charged with an offense under this Code shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court martial, such person shall not ordinarily be placed in confinement. When any person subject to this Code is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

References: A. W. 69, 70; A. G. N. article 43, 44; Naval Justice, pages 77–78.

Commentary: This article is derived from A. W. 69 and 70, and conforms to present naval practice. The provision as to notification of the accused is new.

Mr. BROOKS. Is there any comment on that article?

Mr. ANDERSON. Well, Mr. Chairman, is this the article in the bill that has to do with the length of time that a man will be placed in confinement and held there pending his trial?

Mr. LARKIN. It is one of the articles, Mr. Anderson, that touches on that point. The last sentence in it is pertinent—

When any person subject to this Code is placed in arrest or in confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

That is a direction to the authorities in charge to go forward. It says "immediate steps."

Mr. ANDERSON. What does that mean?

Mr. LARKIN. Well, that means that the charges against the accused must be considered and the authorities who have the responsibility to

consider them must decide whether or not they are going to order a pretrial investigation and process the case and whether the pretrial investigation shows that the crime has probably been committed and he is the man and to go ahead and try him.

Mr. ANDERSON. Well, is there anything else in the code that sets any sort of a time limit on the length of time that a man can be held in the brig pending his trial?

Mr. LARKIN. There is no provision as to hours or days. There are several other provisions which direct speedy trials. However, there is one article that provides in peacetime that you cannot try a man without his consent in less than 5 days after you have served him with the charge in a general court and 3 in a special.

The idea was to provide that there be a speedy trial but not one that is so speedy that the man cannot prepare his own defense.

Mr. ANDERSON. Well, I think of the cases that occurred—I think numerous times during the war and probably in all branches of the service, although I was more familiar with the Navy side of it where a fellow was put in the clink and held there for weeks, sometimes months, before he was brought to trial.

I am just wondering if we cannot do something in this code to insure the fact that the man is given a trial within a certain length of time or as I understand the California law reads it is that if he is not brought to trial within 30 days the charges are dismissed and he is released, because a man can be held for many weeks even under the terms of this code and in spite of the fact that it says "immediate" if the exigencies of the occasion are that he is a long way from the mainland or that he is confined aboard ship, it does not work out.

I am just wondering what is being done to be sure that he is brought to trial within a certain length of time so he is not held in confinement for too long a time prior to the confinement.

Mr. DEGRAFFENRIED. One thing we have to consider is this, though. You take the case where a prosecuting witness might be seriously injured in some kind of a fray. The man charged with assaulting him may be held and this man assaulted is in the hospital and they could not use him as a witness until he got well to come to court unless they got his deposition which is not quite as satisfactory as having a man on the witness stand where you can hear his testimoney and see his demeanor and give the defense counsel an opportunity for cross-examination.

And if we fix a definite time limit there, why it might be that a case would have to go out before this prosecuting witness was able to come to court. And where we use this word "immediate" here, that is like using "forthwith," which means to go ahead. I believe that is just about as close as we can get to it.

If we fix a definite time there, this prosecuting witness might not be able to get there.

Mr. ANDERSON. As I say, not being a lawyer I am not familiar with what these terms will indicate——

Mr. DEGRAFFENRIED. That is just a suggestion. I consider the way you feel about it, and I feel the same way. I think the defendant is entitled to a speedy and prompt trial.

Mr. LARKIN. That is just our idea, Mr. deGraffenried. To set a standard for a number of cases is very difficult. And in addition to that there are perfectly reasonable exigencies that arise in individual cases which just do not fit under a set time limit.

Now, to nail that idea of a speedy trial down and to assusre that it is complied with we have added article 98, which I draw your attention to at this time and which makes it an offense to engage in any unnecessary delay.

Mr. BROOKS. Which is that?

Mr. LARKIN. Article 98.

Mr. ANDERSON. Page 73.

Mr. LARKIN. It says:

Any person subject to this Code who (1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this Code shall be punished as the courts martial may direct.

So in addition to providing that there be an immediate processing of the charges, if anybody unnecessarily delays doing it, he himself becomes liable to an offense, you see.

Mr. ANDERSON. I see. And that is new?

Mr. LARKIN. That is new. That is a brand new offense. We put it in with your idea in mind, Mr. Anderson.

Mr. SMART. Mr. Chairman.

Mr. BROOKS. Mr. Smart.

Mr. SMART. I might enlighten Mr. Anderson a little bit further on that. As an ordinary rule all the court-martial cases of which I have any knowledge are such that when the charges and specifications are referred for trial or even back during the pretrial investigation, there is a time sheet which goes along with those charges and specifications.

They set out for each process that is to be accomplished in a reasonable period of time, be it 1 day, 2 days, 3 days, or whatever it is. And for each officer who must complete that process, if he fails to complete it within that period of time he must reply by endorsement or make a statement thereon as to why he failed. He must show the reason for that.

I might further say that the impetus as of today is to try these men as speedily as possible and still be consistent with good procedure and justice.

Now, today, in the Second Army Area and perhaps others, they have a lot of these old wartime desertion cases. The FBI is apprehending these people and placing them in confinement and then it becomes a chase to find the records, which may be in St. Louis, or Cleveland, Ohio, for Navy records, or other places.

In the Second Army Area they have issued a directive that a man will not be held in confinement more than 45 days. If the Government fails to produce those records within that 45-day period he will be released from confinement.

Mr. ANDERSON. Is that confined to the Second Army Area?

Mr. SMART. I think it is being done elsewhere, because these desertion cases are scattered all over the United States. For instance, in the St. Louis area I think there are perhaps about 2,000 wartime desertion cases still within the area of St. Louis.

They are apprehending them as fast as they can and trying them as fast as they can. But this process of getting old records is a long and difficult thing. But I am satisfied that they are using every reasonable effort to bring these people to trial as speedily as they can.

Mr. ANDERSON. Off the record, Mr. Chairman.

(Statement off the record.)

Mr. LARKIN. I also draw your attention to article 33, which attempts to make a flexible time limit, where we set an 8-day time period is provided, wherein the article requires the commanding officer in general court-martial cases to forward the charges he has received against a man to the next higher echelon.

We put in there "if practicable" to take care of the exigencies which may not make it practicable, but if he does not do it as you see he must report the reasons why he does not.

So I think the combination of 33 and 98 is pretty good assurance that the cases will be speedily processed. And as I said before, there is great desirability in that. But you have to be careful in not going too far and process the cases so speedily that the accused does not have a chance to prepare his defense. I think it is a pretty good balance, the way it is provided.

Mr. BROOKS. Let me ask you this, Mr. Larkin. This uses the phrase there "immediate steps shall be taken to inform him of the specific wrong of which he is accused." Would it improve it to change that by saying "he shall immediately be informed of the specific offense for which he is charged and steps shall immediately be taken to bring him to trial?"

Mr. LARKIN. I think you are weakening it a little bit that way, Mr. Chairman, by leaving out the immediacy of taking steps both to inform and to try or dismiss.

Mr. BROOKS. Why take steps? Why not immediately inform him of the charge and strike out "steps?" Why would it not be better to say "immediately he shall be informed of the charge?"

Mr. LARKIN. Well, the sentence was gramatically constructed so that "informing him and trying him or dismissing him," both modify "immediate steps."

Mr. SMART. I think there is another point, Mr. Chairman, and that is at the time he is placed in confinement there may not be any charges and specifications. The convening authority who will subsequently prefer charges and specifications may not even know the fellow is in confinement yet.

Mr. BROOKS. How, then, do you read the first part of that, that says "any person subject to this code charged with an offense under this code"? Does not that mean that he has been charged?

Mr. SMART. It may be an informal proposition up until then. It never becomes formal on charges and specifications until it gets to the convening authority or a subordinate officer who is authorized to prepare charges and specifications. He may not even know that the man is in confinement.

Mr. BROOKS. Then your interpretation of the word there in the first line of that section "charged" is that it does not really mean formal charges.

Mr. LARKIN. That is right.

Mr. BROOKS. It means suspected——

Mr. SMART. That is what I would say.

Mr. BROOKS. Of an offense rather than charged with an offense.

Mr. LARKIN. Well, the information is laid before some officer who within a day or two must draw the formal charge.

Mr. RIVERS. He then begins his pretrial investigation?

Mr. LARKIN. Thereafter the pretrial investigation begins, if it appears to be a general court-martial case.

Mr. SMART. He may be charged. Of course, if he committed an offense which someone had seen and reported and the fellow is a fugitive temporarily, the charges and specifications may be prepared. But on the other hand they may not be prepared.

Mr. BROOKS. This article relates to the second step, that is not the arrest initially but the arrest and confinement

Mr. LARKIN. That is right.

Mr. BROOKS. Following through the thought, there has been a screening out process already.

Mr. LARKIN. That is right.

Mr. BROOKS. That is he has been arrested, they screened him out and now they put him over for arrest and confinement.

Mr. LARKIN. That is right.

Mr. BROOKS. So it is not the initial arrest at all.

Mr. LARKIN. It is not the initial apprehension.

Mr. BROOKS. It is not the initial apprehension.

Mr. LARKIN. But thereafter as soon as he is——

Mr. BROOKS. It is a screening-out process which says that there is enough against you to charge you with some offense.

Mr. LARKIN. That is right, and hold you until they quickly process the charge and formalize it in charges and specifications.

Mr. RIVERS. Under this bill here, Mr. Larkin, when the original charges have been instituted, before the pretrial investigation, at what point can those charges be dismissed or thrown out as being with no foundation, under your bill?

Mr. LARKIN. Well, they can be thrown out after the pretrial investigation. If the investigating officer decides that there is not sufficient evidence to indicate a crime or that this man did it, he does not dismiss the charges but he can recommend to the staff legal officer and the convening officer and they can be thrown out at that point.

Mr. RIVERS. Now, if we have a separate JAG set-up, like we did in the Elston bill, after the command institutes the proceedings or institutes the arrest and before the investigation begins, when does his responsibility end or when does his jurisdiction end as far as the chain of command is concerned? The minute it is put formally in the hands of the JAG's Office?

Mr. LARKIN. Well, it just does not work quite that way, I do not believe. He is apprehended and if the charges appear sufficient to warrant holding him while they are further processed, he is confined.

Mr. RIVERS. Eight days under your——

Mr. LARKIN. The formal charges are drawn and within 8 days they must be, if it is a general court-martial case, transferred to the general court-martial authority.

Mr. RIVERS. That is the JAG's Office?

Mr. LARKIN. No. That is the commanding officer, who has this convening authority.

Mr. RIVERS. Assume, now, we have an independent JAG's Office.

Mr. LARKIN. All right, if we have an independent JAG the staff judge advocate of the commanding officer may or may not be a JAG officer.

Mr. RIVERS. That is right.

Mr. LARKIN. There is no requirement, even in the Elston bill, that he specifically be a corps officer.

Mr. RIVERS. Yes.

Mr. LARKIN. He probably will be. The Judge Advocate General is to select the people who are to be staff judge advocates under that act.

Mr. RIVERS. That is right. And he also——

Mr. LARKIN. But he may not necessarily select a corps officer. He may not have enough of them. But in any event, whether he is a corps officer or not, that staff judge advocate does get the results of the pretrial investigation and consults with the commanding officer.

Mr. RIVERS. Or his representative, who might be a law officer, representing the commanding officer?

Mr. LARKIN. Well, that is the staff judge advocate.

Mr. RIVERS. He will have a legal officer who goes to the JAG and says, "Now listen, this boy has done this, that, and the other, we want you to investigate it. We investigated this. Here are our papers." Now that legal officer representing the JAG can throw it out?

Mr. LARKIN. No.

Mr. RIVERS. As having no basis. He says, "I am just not going to prosecute him."

Mr. LARKIN. No, sir; he cannot throw it out. The commanding officer can throw it out.

Colonel DINSMORE. May I say something?

Mr. LARKIN. Yes, go ahead.

Colonel DINSMORE. Mr. Rivers, the charges or the intended charges may be dropped at any time by any officer who has power to act. For example, the man who ordered the confinement may change his mind and say "I do not think there is enough" and drop him right there and you never have an investigation.

Mr. RIVERS. That is right.

Colonel DINSMORE. The man's organization commander may drop the charges.

Mr. RIVERS. I know that.

Colonel DINSMORE. And that same processing all the way up. I remember one time I went to the guardhouse for some other reason and found a corporal in confinement. I had him out and the charges dismissed inside of an hour, and there had never been any investigation.

Mr. RIVERS. Well, now, my point is this: I can appreciate the original officer making the charge can withdraw his charges. But now say the JAG's Office or the office independent of the command says "I have investigated this thing from the legal standpoint, you cannot maintain charges before the general court-martial and we just are not going to prosecute him."

Now where does it stand?

Colonel DINSMORE. If you write that into the bill, why that would be so. But that is not true under the Elston bill.

Mr. RIVERS. That is not true under the Elston bill.

Colonel DINSMORE. Yes, sir.

Mr. RIVERS. Say we made that so it would have to be approved—by how high up on the JAG list?

Mr. LARKIN. It depends on what you write in.

Mr. RIVERS. Because there are some cases where a JAG officer knowing the law—and certainly under the bill we propose to make him sufficiently conversant with the bill on the basis of his prerequisite training——

Mr. SMART. Mr. Rivers, may I add right there, let us assume that the staff judge advocate to the convening authority advised the convening authority that there was no case made out as the result of pretrial investigation.

Mr. RIVERS. That is right.

Mr. SMART. And that the convening authority went ahead and convened the court in spite of that fact. It is my interpretation of this bill that after the case has been tried and the case then comes back to the office of the convening authority first the staff judge advocate must conduct a legal review of it.

He has a second whack. And I say at hat point, if he holds the record insufficient I do not think the commanding officer can sustain the case. I think there he is locked. If not the first time, he is the second time.

Mr. RIVERS. Now there is where we ought to anticipate that trouble right off the bat, because you are bound to run into it.

Mr. SMART. That is true.

Mr. LARKIN. That is in article 34. The whole subject is treated there.

Mr. BROOKS. Is there any further discussion on article 10?

Mr. ANDERSON. Just one more thing, Mr. Chairman.

Mr. BROOKS. Yes.

Mr. ANDERSON Is it the policy of the Navy Department that a man's service record has to be complete before he can be brought to trial?

Captain WOODS. In general court-martial cases they send for the service record from Bureau of Personnel and it has to be before the court before they can award sentence.

Mr. ANDERSON. I might point up my question by reading, if I may, Mr. Chairman, a paragraph here from a letter addressed to me on this subject of military justice by a lawyer friend of mine in California who served on Admiral Halsey's legal staff during the war and had an opportunity to see many of the things that you are seeking to correct in this code.

He says—

> From an administrative angle the Navy seems to have the idea that they cannot try a man for an offense until they have his service record complete. I have seen cases where men were arrested for being a. w. o. l. or being deserters where they have been confined to brigs for periods of time up to 90 days while the authorities were trying to get their service records complete. I have seen men whose service records have been lost in action by a ship going down, held in brigs for 6 and 8 weeks awaiting a trial on petty offenses until their service records could be completed.

That is the reason that I asked that question. Is that correct?

Captain WOODS. I think that is correct, Mr. Anderson; yes.

Mr. ANDERSON. In other words, then, even with the code written as it is, there is a chance that a man's trial might be delayed for months.

Mr. SMART. On the other hand, Mr. Anderson, one of the particular reasons to have that service record is to find out that the accused is actually in the service. Strange as it may seem, as of today you have alleged deserters coming on Army posts—I do not know about the Navy—saying "I am a deserter from such and such an outfit" and they are finding out that some are not deserters at all

They never deserted from any service. Now until you get that man's service record which tells you the chronological history of his service you are not positive that he is a deserter.

Mr. DEGRAFFENRIED. There are a great many people that have come in and confessed to offenses where it was later ascertained that they were not guilty.

Mr. ANDERSON. They just wanted to get a night's sleep and a bowl of beans.

Mr. SMART. Mr. Chairman, as to that word "wrong" in line 17, have you any feeling that that should be changed to "offense"?

Mr. LARKIN. Colonel Oliver, I recall, made that recommendation. We considered it when we were drafting this article and used "wrong" rather than "offense" for this reason, that we retain a general article as there is a general article in the Articles of War and Articles for the Government of the Navy now: article of war 96. To accuse a man of violating article 96 does not necessarily tell him very much because it is an article which makes conduct to the prejudice of good order and discipline and things of that character an offense.

Mr. BROOKS. It is a catch-all, is it not?

Mr. LARKIN. That is right.

So while the other punitive articles set out specific offenses of robbery, burglary, and so forth, that one does not. Of course, when the man is served with formal charges and specifications he is told what act he is alleged to have committed. But to be able to inform him immediately, why we used the word "wrong" rather than "offense," having the general article in mind.

Mr. BROOKS. Of course, if he has not been formally charged, the word "wrong" might be properly used. If he is specifically charged—and we have discussed the article and held that this does not require a specific charge at this point—then the word need not necessarily be "offense."

Mr. LARKIN. That is right.

Mr. BROOKS. It seems to me.

Mr. SMART. I think it is O. K. the way it is.

Mr. ELSTON. What is the matter with the word "act"—"of the specific act of which he is accused"?

Mr. SMART. It would be the same thing, Mr. Elston, if he were charged under the general article.

Mr. LARKIN. That is right.

Mr. SMART. Because all you can tell him is a shotgun statement that he is charged with conduct to the prejudice of good order. That certainly is not telling him much, until you investigate it further and find out the specific offense.

Mr. RIVERS. It could be a general or a summary.

Mr. LARKIN. That is right.

Mr. BROOKS. Any further suggestions or references to article 10? If not, we will proceed to article 11.

Mr. SMART (reading):

ART. 11. Reports and receiving of prisoners.

(a) No provost marshal, commander of a guard, or master at arms shall refuse to receive or keep any prisoner committed to his charge by an officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner.

(b) Every commander of a guard or master at arms to whose charge a prisoner is committed shall, within 24 hours after such commitment or as soon as he is relieved from guard, report to the commanding officer the name of such prisoner, the offense charged against him, and the name of such person who ordered or authorized the commitment.

References: A. W. 71, 72.

Commentary: This article is derived from A. W. 71 and 72. See articles 95–97 dealing with restraint.

Mr. SMART. I might add, as you go into this article, Mr. Chairman, on page 12, in line 3, some question has been raised regarding the word report to "the" commanding officer rather than report to his commanding officer. Just what is meant by "the," is the only question I have as to the article.

Mr. ELSTON. I am wondering why there is any necessity for this article at all. Is it not all a matter of regulation? Are not all these things self-evident? Would not all of these requirements necessarily follow, even though we did not have it written into the law?

Mr. LARKIN. I should say so, Mr. Elston. They have been in the law for many years, however, and they are desirable, I believe. To take them out might raise the inference that they are no longer necessary.

As you see, they are a consolidation of present articles of war 71 and 72 and of course they do relate indirectly to the punitive articles 95, 96, and 97, all of which makes it an offense to incarcerate a person unlawfully or to release him without authority. They are a reiteration of the present law.

If they had not been in the present law and were not regulations, I should say they should not stay there. By virtue of having been in the law and to avoid any question by taking them out, we have continued them.

Mr. BROOKS. Now in reference to that suggestion regarding the commanding officer, I could see where a man might be arrested by a post other than his own. The word "the" there would be inappropriate, perhaps.

Mr. LARKIN. I think that is the point.

Mr. BROOKS. And this would require some notice to his commanding officer to be made, would it not, since it requires that the name of the person ordered to be arrested be turned over to the commanding officer?

Mr. LARKIN. Well, the reason for this is to insure that a commanding officer—and incidentally it may well be his and frequently is, but whoever the commanding officer is—be notified as to who is being confined so that he can start the necessary processing of the whole case.

Mr. BROOKS. Any further suggestions?

Mr. RIVERS. Well, experience has proven that you need these things. That is why they should be here, because they have come up. Experience has proven that you need those various articles that appear to be not so necessary at the time. Then too the reason they are related here is because this is a brand new code to supplant everything that has gone before.

Mr. LARKIN. That is right, Mr. Rivers. And as I say we wanted to avoid the idea that it we dropped it, it was no longer necessary. Otherwise, I think Mr. Elston's comment is perfectly appropriate.

Mr. RIVERS. That is right. But the experience has shown it is needed.

Mr. LARKIN. That is right.

Mr. RIVERS. Being things that might not have suggested themselves on the face of it.

Mr. LARKIN. That is right.

Mr. BROOKS. If there is no further comment, we will approve the article, article 11, and pass on to article 12.

Mr. SMART (reading):

ART. 12. Confinement with enemy prisoners prohibited.

No member of the armed forces of the United States shall be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces of the United States.

References: A. W. 16.

Commentary: A. W. 16 could be interpreted to prohibit the confinement of members of the armed forces in a brig or building which contains prisoners of war. Such construction would prohibit putting naval personnel in the brig of a ship if the brig contained prisoners from an enemy vessel. This article is intended to permit confinement in the same guardhouse or brig, but would require segregation.

Mr. SMART. I might say to the committee that this was a floor amendment to H. R. 2575 when it was brought before the House. I think Mr. Burleson of Texas offered this amendment, to be sure that American boys were not confined with prisoners of war or other enemy nationals.

Mr. RIVERS. Like happened during the war.

Mr. BROOKS. The suggestion was made that there should be some stipulation regarding separation of sexes.

Mr. LARKIN. This article, as Mr. Smart points out, was a floor amendment, and it read a little differently as passed by the Congress last year. As it is in the Public Law 759, it says—

No person subject to military law shall be confined with enemy prisoners or any other foreign nationals outside of the continental limits of the United States.

Now we have changed the wording and said—

No member shall be placed in confinement in immediate association—

because as it read it conceivably could cause a number of confinement difficulties.

I do not think it was thought through completely when the floor amendment was offered. It was limited in the floor amendment to confinement overseas. The service might have a difficult time overseas if they could not confine a person with enemy prisoners in that they could not even keep them in the same jail.

There may not be more than one jail or place of confinement within the area. Then they just could not restrain them or confine them at all.

We thought we kept the sense of the present law but made it a little more flexible by saying "in immediate association" which in effect would mean you could keep them in the same jail by at least segregating them in different cells. It further was proposed for the Army, with no thought of the Navy—the Navy you can visualize might have a great difficulty aboard ship when they captured an enemy vessel and took foreign nationals.

Then they could not keep any offender of their own in the same brig on ship board. We have changed that. And we have deleted, if you will notice, "outside the continental limits" and made it apply everyplace, but prohibit incarceration in close association but not with because "with" has the connotation that you could not keep them in the same prison and there may be only one. They are the only differences between what is in the law now and this article.

Mr. ANDERSON. Mr. Chairman, is there any place in the code that expresses prohibition against confining our men in foreign jails?

Mr. LARKIN. No; but this one prevents them being confined with enemy prisoners of war or foreign nationals not members in the same cell. That is the only provision in that connection.

Mr. ANDERSON. But Professor Morgan in his very fine letter to me—oh, he refers to article 58: Place of confinement, wherein he says—

Article 58 of the code provides for confining convicted military persons in places of confinement under the control of the United States.

Mr. LARKIN. Yes; that is a different provision. That is in Federal prisons.

Mr. SMART. Within this country, Mr. Anderson.

Mr. ANDERSON. Within this country.

Mr. SMART. That is what they are talking about.

Mr. ANDERSON. I mean, under this code, could a commanding officer have an enlisted man in the United States Navy or Army confined in a foreign jail?

Mr. LARKIN. Yes; he could, for a short time or whatever time it is necessary. But if they are so confined they may not be in immediate association with any——

Mr. ANDERSON. Yes. But I am thinking that even jails in some of these foreign countries are pretty lousy—and I mean lousy—and I am wondering if at the whim of some commanding officer a man may be confined in one of those places, we might say Persia or China or some such country as that, which would be a pretty unhealthy experience for the man.

Mr. LARKIN. Well, the unfortunate alternate is that we may have no jails there and there probably is no other way to confine him temporarily.

Mr. ANDERSON. Well, I would not interrupt the proceeding here, Mr. Chairman. I think perhaps we will want to look into that a little more carefully when we reach 58, which is a long way in the future.

Mr. BROOKS. Well, is there any further discussion on article 12? You do not think there is any need of specifying there be a separation of men and women, do you?

Mr. LARKIN. I do not think so.

Mr. SMART. I do not think so. That will automatically take care of itself.

Mr. BROOKS. It would seem that way to me.

Mr. ELSTON. You do not have that in statutes here.

Mr. LARKIN. That is administrative.

Mr. ELSTON. You do not have any statute on it. It is left up to the authorities.

Mr. BROOKS. It would be unthinkable to have it otherwise.

Mr. ELSTON. The assumption is they would not do it.

Mr. LARKIN. That is right.

Mr. ELSTON. Any officer who would not do it would certainly be subject to court martial, by virtue of that very act itself.

Mr. LARKIN. I should say so.

Mr. ELSTON. I do not think we need to write it into the law.

Mr. BROOKS. Unless in instances where you had families arrested, or something like that.

Well article 13, Mr. Smart, will you read.

Mr. SMART (reading):

ART. 13. Punishment prohibited before trial.

Subject to the provisions of article 57, no person, while being held for trial or the results of trial, shall be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to punishment during such period for minor infractions of discipline.

References: A. W. 16; MCM, paragraph 19; Naval Justice, page 78.

Commentary: This article is derived from A. W. 16. The reference to article 57 clarifies the relation of this article to the effective date of sentences. A. W. 16 has been interpreted to prohibit the enforcement of any sentence until after final approval even though the accused is in confinement after the sentence is adjudged. It is felt that a person who has been sentenced by a court martial and is in confinement which counts against the sentence should not draw full pay for the period between the date of sentence and the date of final approval.

The provision as to the rigor of restraint is derived from present Army and Navy practice. The article also makes clear that a person being held for trial may be punished for offenses not warranting trial by court martial.

I might advise the committee that that likewise was a floor amendment during the consideration of 2575 and it was raised for the reason that apparently people who were confined pending trial were being subjected to rock breaking and everything else, the same as people who had already been convicted of offenses and happened to be incarcerated in the same place of confinement.

That is the reason for it. And this is merely a carry over from 2575.

Mr. GAVIN. Read that through again, and read it slower, will you.

Mr. SMART (reading):

Subject to the provisions of article 57, no person, while being held for trial or the results of trial, shall be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to punishment during such period for minor infractions of discipline.

Mr. BROOKS. Is there any discussion on article 13?

Mr. RIVERS. Well the case you have in mind is if you have a boy incarcerated for an alleged offense, unless he is just insubordinate in the jail there, there is the only time you can impose any disciplinary action?

Mr. SMART. Exactly right.

Mr. RIVERS. And in no case can you impose possible rock breaking on him.

Mr. SMART. That is right.

Mr. RIVERS. That is the case you have in mind.

Mr. GAVIN. Yes.

Mr. SMART. That is the intent of this article.

Mr. GAVIN. In no case can rock breaking be imposed upon him, unless convicted.

Mr. SMART. Correct.

Mr. GAVIN. And sentenced for it.

Mr. SMART. Correct.

Mr. RIVERS. Sentenced for it as a result of conviction, I should say.

Mr. LARKIN. Hard labor, that is right.

Mr. BROOKS. Article 14, then.

Mr. SMART (reading):

ART. 14. Delivery of offenders to civil authorities.

(a) Under such regulations as the Secretary of the Department may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.

(b) When delivery under this article is made to any civil authority of a person undergoing sentence of a court-martial, such delivery, if followed by conviction in a civil tribunal, shall be held to interrupt the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for his offense shall, upon request, be returned to military custody for the completion of the said court-martial sentence.

References: A. W. 74; N. C. and B., application C.

References: A. W. 74; N. C. and B., appendix C.

Commentary: Subdivision (a) is an adoption of present Navy practice. The present Army practice was adopted at a time when the Army did not have authority to try its personnel for civil offenses in time of peace so that if a man were not delivered up he would not be tried at all. Since the armed forces now have such authority, the mandatory feature of A. W. 74 is felt to be unnecessary. Under the Navy practice, which has worked very satisfactorily, the Secretary of the Navy has given broad authority to commanding officers to effect deliveries of enlisted personnel without reference to the Navy Department. (See Alnav 145 of June 26, 1947.)

Subdivision (b) adopts present Army practice.

Attention is invited to the provisions in appendix C, Naval Courts and Boards which deal with the procedure for delivering offenders, and related matters. It is contemplated that these matters will be covered by uniform regulations for the armed forces.

Mr. RIVERS. It is just like a State jurisdiction. When the Federal Government finishes with him, you send him back to finish his State sentence. That is the same principle.

Mr. SMART. That is right.

Mr. BROOKS. It is the Article on Comity.

Mr. ELSTON. Why do they use the word "offender after having answered to the civil authorities"? Does that not mean after having completed his sentence in the civil courts? He answers to it when he appears.

Mr. SMART. He may have been acquitted.

Mr. ELSTON. Well——

Mr. RIVERS. Just say "released."

Mr. ELSTON. Probably say "after the case has been disposed of by the civil court." But when you say "after having answered to the civil authorities * * * shall, upon request be returned to the military custody," suppose he went in and pleaded not guilty to the indictment in the civil courts. He answered to that charge.

Then he might request return to the military authorities. I think the meaning is after the case has been disposed of by the civil courts.

Mr. LARKIN. I think it has been so construed, Mr. Elston. That is the language of the present statute.

Mr. ELSTON. Of course, present statutes may not be perfect.

Mr. LARKIN. Oh, I quite agree.

Mr. RIVERS. Why do we not write that in there. It will not hurt. This is a new code.

Mr. BROOKS. What is that you have in mind?

Mr. RIVERS. What is yours, Mr. Elston?

Mr. BROOKS. Change the word "answer" to "disposed of"?

Mr. ELSTON. That is right.

Mr. RIVERS. That is right.

Mr. SMART. Well, it will take more changes than that, Mr. Brooks.

Mr. ELSTON. Yes.

Mr. DEGRAFFENRIED. I believe if you get the proper construction of that word "answer" there in words and phrases——

Mr. ELSTON. Then I am wondering why he has to request return to the military custody. Should he not be returned without request?

Mr. SMART. I might add there, Mr. Elston, if I remember correctly, those words were inserted at my request during the deliberations of this group. And for this reason——

Mr. ELSTON. You must have had a good reason, then.

Mr. SMART. I think I did. Supposing you have a man serving a sentence by a special court of 3 months and then it is determined that he committed a murder. Well, he has completed 1 month of his sentence, so the military releases this man who is charged with murder by the civil authorities. He is tried and convicted and maybe given 30 years by the civil authority.

Certainly it is beyond any stretch of my imagination that the military should ever want that man back. By the time he has completed his 30 years he certainly is going to have been dropped from Army or Navy rolls and they do not want him. So I thought it would be better to put in there "at the request of the military."

Now he may be serving a year's sentence and may get into the civil courts and after having served only 1 or 2 months of his military sentence he is acquitted by the civil authorities. That should not then erase the rest of his confinement by the military.

So it leaves up to the military, depending upon the outcome of the civil action, as to whether or not they will request him to come back and complete the service of his sentence.

Mr. ELSTON. Suppose you had a case like this, where a fellow is confined we will say for a year. Then he is charged with a very serious offense like rape or murder and he is turned over to the civil authorities and in a very short time he is acquitted of the charge.

Mr. SMART. All right.

Mr. ELSTON. Should not he be returned to finish his sentence?

Mr. SMART. By all means he should be. And that is exactly the reason why those particular words are in there so far as I am concerned, because it leaves it with the military. They can place a hold order with the civil authorities for the return of that man.

Mr. ELSTON. It looks, the way I read this, he could only be returned if he requested it.

Mr. SMART. If the military requested.

Mr. DEGRAFFENRIED. Not he requested, but the military.

Mr. SMART. If the military authorities requested it, he can be returned.

Mr. ELSTON. Do you not think we better add the words, then, "upon the request of the military authorities"?

Mr. LARKIN. Well, you could clear that up, I think, Mr. Elston, by saying "shall be returned to military custody upon their request for the completion." Change "request."

Mr. ELSTON. That carries out Mr. Smart's idea.

Mr. LARKIN. That is right.

Mr. ELSTON. And would not result in any misunderstanding.

Mr. LARKIN. That is right.

Mr. DEGRAFFENRIED. Mr. Larkin, in regard to that word "answer" there, do you think the construction which has been placed on that word would be that he had not answered to the civil authorities until he had been tried, convicted, sentenced and he had completed his sentence, and then he would have answered to it?

Mr. LARKIN. I think so.

Mr. DEGRAFFENRIED. That is the way you think that word has been construed?

Mr. LARKIN. I think that is the way it has been construed.

Mr. DEGRAFFENRIED. And you think the simplest way to get all of that in there, rather than to try to set it all out, would be to use this particular word which has been construed in that manner?

Mr. LARKIN. Well, I think that is the simplest way. However, I have no objection to spelling it out a little more clearly. But when we went over it, why we saw that it had that construction and just left it. But there is no pride of authorship, and because it has been on the books is no reason to keep it, certainly.

We were quite ambitious in changing lots of language, as you have noticed. I think we paid attention to tradition. We did not feel that everything that had gone in the past was wrong.

On the other hand we were free in dropping and deleting what we felt was obsolete and old-fashioned language. Now that actually is somewhat old-fashioned, I think. It is a derived meaning. It has been so construed. But I am perfectly happy to leave this to the committee.

Mr. BROOKS. I do not think your suggestion regarding the insertion of the word "their," "upon their request," would cover that case.

Mr. SMART. I want to suggest some wording there, Mr. Brooks, if I may.

Mr. BROOKS. All right.

Mr. SMART. I would say in line 5 "upon the request of competent military authority."

Mr. RIVERS. That is all right.

Mr. SMART. "Shall upon the request of competent military authority be returned to military custody."

Mr. ELSTON. That is fine.

Mr. BROOKS. You heard the suggestion, gentlemen. Is there any objection to it? If not, it stands adopted.

Now I wanted to bring up the question of subsection (a) there, which covers the case of a member of the armed forces accused of an offense against civil authority. That person may be delivered upon request to civil authorities for trial. Now should that go further and make delivery for trial and disposition of the case?

Mr. RIVERS. I do not think that is necessary.

Mr. BROOKS. You think for trial——

Mr. RIVERS. It presupposes disposition, I think.

Mr. BROOKS. Not necessarily.

Mr. RIVERS. You do not think so?

Mr. BROOKS. What do you think, Mr. Larkin? Do you think it should go any further?

Mr. LARKIN. I really do not think it is necessary. I think it just means that, myself.

Mr. RIVERS. Once he is delivered to the jurisdiction of the civil authorities.

Mr. LARKIN. It is up to them to follow through with their processes, which include indictment, trial and punishment.

Mr. BROOKS. You do not think the military authorities should request the return of the man?

Mr. LARKIN. Well, in connection with (a)?

Mr. BROOKS. Yes.

Mr. LARKIN. I think that is covered in (b). Do you not think so?

Mr. BROOKS. No, I do not because (b) covers the case of a person undergoing sentence of a court martial.

Mr. LARKIN. Well, (a) I should say covers the case of a man undergoing sentence or otherwise, a member of the armed forces, no matter what his status is.

Mr. BROOKS. Yes, but it would not cover the case of a man who merely is arrested and has not been sentenced.

Mr. LARKIN. Well, (a) as I see it is the general provision for comity with the civil authorities as to all members of the armed forces, whether or not they happen to be under court-martial sentence, whereas (b) provides for the case where a man is already serving a sentence and is requested by the civil authorities and is turned over to them.

You have the further question there of what is the military going to do in relation to that man's serving the unexpired part of the sentence in the military. (b) spells out that circumstance. Whereas (a) is the general provision for comity, no matter what his status is.

I think actually they are complete in and of themselves or as written they cover all those circumstances.

Mr. BROOKS. What do you think of it, Mr. Smart?

Mr. SMART. All he is is a member of the armed forces and you do not designate in what capacity he is serving.

Mr. LARKIN. That is right.

Mr. SMART. Whether it is a person on active duty, whether it is a person who is awaiting trial on charges, or whether it is a person languishing in the gaurdhouse after having been convicted. I think the provision is appropriate.

Mr. LARKIN. Yes.

Mr. BROOKS. It is generic, yes.

Mr. SMART. That is right. I think the provision ought not to be altered.

Mr. BROOKS. The question which arises in my mind, however: If it is necessary to write into this subsection (b) that the offender be returned to the military custody, why is it not necessary in subsection (a)?

Mr. LARKIN. Well, I think in subsection (a) if a member of the armed forces is turned over to the civilian jurisdiction and is acquitted, for instance, why the man has an obligation to come back, whereas

in (b) if he has been convicted by the civilians and he is serving a 10-year sentence in the civilian jail, for instance, then the question is 10 years later, do you want him to come back and serve out the balance of a short military sentence?

For that reason we would leave it up to the military to determine whether they want him. In most instances they would not want him after that period.

Mr. SMART. I think the distinction, Mr. Chairman, is that subsection (a) merely provides the authority to relinquish a person to the civil authorities; (b) provides the authority for his return to military custody.

Mr. LARKIN. And if he happens to be the kind of a person who is serving a military sentence when the request is made.

Mr. DEGRAFFENRIED. Mr. Larkin, as to the word "may" there, is it your construction that that leaves it entirely to the discretion of the military authorities as to whether or not they will deliver a man to the civil authorities?

Mr. LARKIN. That is right, Mr. deGraffenried.

Mr. DEGRAFFENRIED. Under this bill do the civil authorities have any way, where a man is indicted for what we term in civil law a "felony," to force the military authorities to turn a man over to them for trial under this bill?

Mr. LARKIN. I would say no under this.

Mr. RIVERS. That is the way it obtains today.

Mr. LARKIN. There are two practices today. This is the way it obtains in the Navy. The Army is required to turn over their personnel at the request of civilian courts, which is the outgrowth of an old law the history of which is that the Army did not have complete jurisdiction to try members of the Army for all cases.

Under those circumstances the man if he was not tried by the civilian would not have been tried at all. So Congress provided that the commander must turn him over. But now of course the Army as well as the Navy have far more complete jurisdiction over a larger number of offenses and as such the man just does not escape.

The Navy has just this provision and have used it for a considerable time and it has apparently worked to the entire satisfaction of the civilian authorities.

Mr. RIVERS. Does that go back——

Mr. DEGRAFFENRIED. Now, Mr. Larkin, let me ask you about a case like this. Can you conceive of a provision like this. A soldier had been indicted by the United States or Federal grand jury in the State of Louisiana for bringing a stolen automobile from Alabama to Louisiana. He was convicted in the United States district court and sent to the penitentiary for 3 years. After he got out he reenlisted in the Army.

He came to Tuscaloosa, stole a truck, and was indicted by the grand jury for stealing a truck. His commanding officer notified me, as prosecuting attorney I had that circuit, not only of the present charge that was pending against him in Tuscaloosa County by the grand jury but also the fact that he had just completed, before he enlisted in the Army, serving a 3-year sentence in the Federal penitentiary in Louisiana for carrying a stolen automobile across the line.

And then this commanding officer wrote me to send him a summary of the evidence before the grand jury. I sent him this evidence,

which showed completely and without any doubt that he committed this crime.

He was never released and never sent back for trial to the civil authorities and so far as I know he is still in the Army. Now, can you conceive of a situation like that?

Mr. LARKIN. Well, if you say it happened, why I do not doubt it at all, but I would not have expected it to have happened. I should think the Army would have been delighted to turn him over to the civilian authorities and get rid of him.

Mr. DEGRAFFENRIED. That is why I asked you about the construction of this word "may"?

Mr. LARKIN. Well, it should be construed and was intended to be contrued as discretionary, which is specifically the answer. In practice I would be more than amazed if the Army did not turn over that type of man. I should think they would be delighted to get rid of him.

Mr. BROOKS. The Army has not any authority to come and take a man away from the civil authorities if they have him under arrest.

Mr. LARKIN. That is right.

Mr. DEGRAFFENRIED. But a man has a right to make bond in a civil case.

Mr. LARKIN. That is right.

Mr. DEGRAFFENRIED. And when he made bond, he was released and he went back and reported to his command. Then when the case came up for trial, he was not there and the bond was forfeited.

Mr. BROOKS. If the Army does not release a man, it is questionable whether or not the bond should be forfeited.

Mr. LARKIN. That is in the discretion——

Mr. DEGRAFFENRIED. When he makes a bond in a civil case and those people sign his bond they guarantee to have him there, and there is no stipulation written in that bond about his being in the Army or anything.

Mr. LARKIN. I think that is customary.

Mr. SMART. I may add the converse of your experience, Mr. deGraffenried, that I had. And I think it is one of the thoughts back of this situation here. As you know, around all of these Army posts you will always have alleged charges of rape from the girls downtown. I investigated such a case at Louisville, Ky., wherein one of our sergeants was charged. I got downtown and found out that the woman was a rather unsavory character and a couple of her men friends were pushing that charge.

If they had ever taken that charge into civil courts down there, while she did not want him stuck, those two men who were hanging on the outskirts, and perhaps making a little money, would have seen to it that that boy got stuck. So the blade has two edges to it.

Mr. DEGRAFFENRIED. Yes; I am sure of that.

Mr. RIVERS. Well, does not, too, that go back to the old days of whether or not there is inherent jurisdiction vested, for even offenses on reservations?

Mr. BROOKS. Well, if there are no suggestions of amendment we will approve that article as written and move on——

Mr. ELSTON. Mr. Chairman, I understand that they will draft some language with respect to those words that we discussed before "having answered," so that it will mean after the case has been finally disposed of.

Mr. ANDERSON. I thought that language had already been read.

Mr. BROOKS. You mean "upon request"?

Mr. ELSTON. No. I mean in (b), where we questioned the words "and the offender after having answered to the civil authorities." The point I was making was after the case has been finally disposed of.

Mr. LARKIN. Yes.

Mr. BROOKS. What is the pleasure of the committee?

Mr. ANDERSON. Proceed.

Mr. SMART. I may state before I start, in that article 15 is a compromise article regarding the old 104 article of war, which we knew as company punishment. It is nonjudicial in nature. It is supposed to be administered for purely minor disciplinary offense within the unit. [Reading:]

ART. 15. Commanding officer's nonjudicial punishment.

(a) Under such regulations as the President may prescribe any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one of the following disciplinary punishments for minor offenses without the intervention of a court martial—

(1) upon officers and warrant officers of his command:

(A) withholding of privileges for a period not to exceed two consecutive weeks; or

(B) restriction to certain specified limits, with or without suspension from duty, for a period not to exceed two consecutive weeks; or

(C) if imposed by an officer exercising general court-martial jurisdiction, forfeiture of one-half of his pay per month for a period not exceeding three months.

Mr. GAVIN. On that subsection——

Mr. SMART. Yes, sir.

Mr. BROOKS. Let us finish the whole thing, Mr. Gavin, if it is all right with you, and then we will go back.

Mr. SMART. Let me point out so far, the punishments pertain to officers and warrant officers only. Now these follow, No. 2, for enlisted personnel.

(2) upon other military personnel of his command:

(A) withholding of privileges for a period not to exceed two consecutive weeks; or

(B) restriction to certain specified limits, with or without suspension from duty, for a period not to exceed two consecutive weeks; or

(C) extra duties for a period not to exceed two consecutive weeks, and not to exceed 2 hours per day, holidays included; or

(D) reduction to next inferior grade if the grade from which demoted was established by the command or an equivalent or lower command; or

(E) confinement for a period not to exceed seven consecutive days; or

(F) confinement on bread and water or diminished rations for a period not to exceed five consecutive days; or

(G) if imposed by an officer exercising special court-martial jurisdiction, forfeiture of one-half of his pay for a period not exceeding 1 month.

(b) The Secretary of a Department may, by regulation, place limitations on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers authorized to exercise such powers, and the applicability of this article to an accused who demands trial by court-martial.

(c) An officer in charge may, for minor offenses, impose on enlisted persons assigned to the unit of which he is in charge, such of the punishments authorized to be imposed by commanding officers as the Secretary of the Department may by regulation specifically prescribe.

(d) A person punished under authority of this Article who deems his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded

and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The officer who imposes the punishment, his successor in command, and superior authority shall have power to suspend, set aside, or remit any part or amount of the punishment and to restore all rights, privileges, and property affected.

(e) The imposition and enforcement of disciplinary punishment under authority of this Article for any act or omission shall not be a bar to trial by court martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this Article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

References: A. W. 104; A. G. N. articles 24, 25; proposed A. G. N., article 14.

Commentary: This article is a combination and revision of A. W. 104 and proposed A. G. N., article 14. The punishments authorized by these two provisions are combined in subdivision (a), while subdivision (b) empowers the Secretary of the Department to place limitations on their imposition. This recognizes the fact that the authority to administer all the punishments specified may be necessary in one armed force and needlessly broad in another. The problem can be illustrated by reference to one punishment, namely, restriction to specified limits. This punishment would be an effective sanction at a camp or post, but would carry little weight on a ship at sea.

Subdivision (b) also empowers the Secretary of the Department to permit members of the armed force to elect trial by court martial in place of proceedings under this article. This recognizes a difference in present practice among the armed forces. The Navy allows no election on the theory that the commanding officer's punishment relates entirely to discipline, not crime; furthermore, in the Navy the officer who has summary court-martial jurisdiction is the same officer who imposes punishment under this article. In the Army, on the other hand, a company commander with power under this article ordinarily will not have summary court-martial jurisdiction.

Subdivision (c) permits the Secretary of a Department to authorize officers in charge to impose certain punishments under this article. The status and authority of officers in charge differs according to the command of which they are in charge.

Subdivision (d) incorporates and strengthens the provisions of A. W. 104 as to appeal and review. Appeals are to be promptly forwarded and decided. In addition reviewing authorities are permitted not only to remit the unexecuted portion of the punishment, but also to restore all rights adversely affected by the punishment previously executed.

This subdivision is new to the Navy and Coast Guard.

Subdivision (e) is derived from A. W. 104. Under present Navy practice, punishment by a commanding officer is never a bar to trial by court martial although evidence of such punishment may be introduced in mitigation.

Mr. BROOKS. Now any discussion on that, gentlemen?

Mr. ELSTON. Mr. Chairman, might we before proceeding to discuss the individual parts of this article have Mr. Smart and Mr. Larkin indicate to us what if any changes have been made in existing law or over the act that we passed last year.

Mr. LARKIN. This article is a combination of the practices in the Army and Navy at the present time on this subject of nonjudicial punishment—not courts martial but the company-officer punishment.

The Army and the Navy under their present laws have authority to impose different punishments. Generally speaking the Army's are less severe than the Navy's.

The first question that we encountered was what is the ideal punishment or punishments that should be provided on a uniform basis.

The second question we encountered was whether all of the punishments provided be imposed or whether there should be just a number or whether the punishments should be limited to one or two.

The third problem we encountered was that in the Army and Air Force any person who was brought before company punishment had the right to refuse it, whereas in the Navy in company punishment which is called mast punishment there was no right to refuse the punishment.

The first thing that we did as you will observe under (a) was to limit the number of punishments, that is the numbers that can be imposed on any one man. Admonition or reprimand has been a punishment in both services.

We provided that reprimand might be imposed and if it is, not more than one other of these listed punishments could be imposed—not more than one other.

Mr. RIVERS. Not more than one?

Mr. LARKIN. That is right.

In trying to analyze why there was a difference between Army and Navy punishments we observed that this commanding officer's nonjudicial punishment differed because of the differences in operations between the Army and Navy, notably the operations of the Navy at sea. The Army had no confinement. They had no bread-and-water provision. They had no reduction to the next inferior grade.

Mr. NORBLAD. There was the authority of the commanding officer to bust a man any time he wants? Yes.

Mr. SMART. If he promoted him.

Mr. NORBLAD. That is contrary to what you just said.

Mr. LARKIN. That is right. It is the opposite.

Mr. NORBLAD. This limits that authority, as I understand it.

Mr. LARKIN. The Army heretofore had no authority—the commanding officer—to reduce in grade.

Mr. NORBLAD. He could not break a man from staff to buck, or private.

Mr. LARKIN. Not by company punishment.

Mr. NORBLAD. I see. He could do that by order.

Mr. LARKIN. That is right. But not by company punishment.

Mr. NORBLAD. That was always done for an offense, generally, though—drunk on duty or things like that.

Mr. LARKIN. Not under the Articles of War, Mr. Norblad.

Mr. BROOKS. He can do it now under this by company punishment?

Mr. LARKIN. That is right.

Mr. BROOKS. One grade.

Mr. LARKIN. That is right.

Mr. RIVERS. You mean he cannot bust him completely.

Mr. LARKIN. No. One grade.

Mr. RIVERS. One grade.

Mr. LARKIN. By this.

Mr. RIVERS. What about at the termination of these offenses here which you have catalogued? Can you make some other offense right thereafter and in substance have it run consecutively?

Mr. LARKIN. I think not, no—not unless he commits another offense.

Mr. RIVERS. I see.

Mr. LARKIN. Because under 15 (a), it says this "in addition to or in lieu of admonition or reprimand."

Mr. RIVERS. I see.

Mr. LARKIN. "Impose one of the following * * * for minor offenses * * *."

Mr. RIVERS. I see.

Mr. LARKIN. Without the intervention of a courts martial.

Mr. RIVERS. Because conceivably if you want to get rid of a man, and I am talking of officers now, who could become offensive to somebody else down the line—and there is quite a lot of jealousy as you know—you can keep on stacking up stuff against a man and get him out of there.

Mr. BROOKS. He could do that without company punishment, by just assigning him continually to offensive duty.

Mr. SMART. I would hate to be the commanding officer who did that, with the right of the accused to appeal this to the next superior authority. If a commanding officer started doing that, it would indicate there is more wrong with him than the accused. His superior is certain to learn this and he will not be in command very long, in my opinion.

Mr. LARKIN. We found that the Army and the Air Force did not desire to extend the punishments that their commanders could impose. The Navy on the other hand felt it necessary for them to have the greater punishments that they now have. What we in effect did, then, was to list both of them, add one to the other and make a complete list which of course for the Army's purposes involves or provides a number of punishments that they have never been authorized to impose and which they do not now desire to impose.

We drew up a comparative chart—which I would like to furnish to you gentlemen and which we might talk about for 1 minute before we go further—which shows the punishments set out in this act as well as the punishments heretofore provided in the Articles of War, those heretofore provided in the Articles for the Government of the Navy, and those that were in the proposed Navy bill introduced in the Eightieth Congress on which there was never a hearing.

I would like to offer, Mr. Chairman, this for the record. I will furnish the stenographer with a copy. If Mr. Smart will pass it out now, it will show you what I mean.

(The document referred to is as follows:)

C. O. PUNISHMENT

STATUTORY PROVISIONS IN U. C. M. J. COMPARED WITH STATUTORY PROVISIONS OF A. W., A. G. N., AND PROPOSED A. G. N. AS LIMITED BY REGULATIONS

1. Who may impose

U. C. M. J.—(1) Any commanding officer—Secretary of Department can restrict categories of C. O.'s authorized to exercise; (2) Officers-in-charge—limited as to punishments.

A. W.—C. O. of any detachment, company, or higher command. Power cannot be delegated.

A. G. N.—C. O. of a vessel and any officer empowered to convene a general or summary court martial. An officer who commands by accident, or in the absence of the C. O., except absence on leave, may impose only confinement.

Proposed A. G. N.—C. O. of a vessel and any officer empowered to convene a summary court; latter may delegate to subordinate officers on separate or detached duty authority to inflict most punishments, except loss of pay. An officer who commands by accident, or in the absence of the C. O., except absence on leave, may impose only confinement or suspension from duty.

2. Right to trial by court martial

U. C. M. J.—Secretary of Department may specify that accused shall be permitted to demand trial by court martial.

A. W.—Accused may demand trial.

A. G. N.—No right of refusal.

Proposed A. G. N.—No right of refusal.

3. Right of appeal

U. C. M. J.—Appeal to next superior authority permitted—in the meantime, punishment is carried out.

A. W.—Same as U. C. M. J.

A. G. N.—No appeal provision.

Proposed A. G. N.—No appeal provision.

4. Remission and suspension

U. C. M. J.—Officer who imposes punishment, his successor in command, and superior authority may suspend, set aside, or remit *any part or amount* of the punishment and restore all rights, privileges, and property affected.

A. W.—Same as U. C. M. J. except action is limited to *unexecuted portion* of punishment and no provision for suspension.

A. G. N. and proposed A. G. N.—No provision.

5. C. O. punishment as jeopardy

U. C. M. J.—C. O. punishment not a bar to trial by court martial for a serious crime or offense growing out of same act or omission, but may be shown on trial as mitigating factor in sentence.

A. W.—Same as U. C. M. J.

A. G. N. and proposed A. G. N.—Never a bar to trial, and cannot be shown in mitigation or as an indication of guilt.

6. Table of punishments

Punishment	U. C. M. J.[1]		A. W.[2]	
	Officers and warrant officers	Other military personnel	Officers and warrant officers	Other military personnel
Admonition or reprimand	Yes [1]	Yes	Yes	Yes.
Withholding of privileges	2 weeks	2 weeks	1 week	1 week.
Restriction to limits	do	do	do	Do.
Forfeiture of pay	½ per month for 6 months.[5]	½ per month for 1 month.[6]	½ per month for 3 months.[5 7]	No.
Extra duties		2 weeks (not to exceed 2 hours a day).	(?)	1 week.
Reduction in grade	No	Yes [9]	No	No.
Confinement	do	7 days	do	Do.
Confinement on bread and water or diminished rations.	do	5 days	do	Do.
Solitary confinement	do	No	do	Do.
Hard labor without confinement	do	do	do	1 week.
Arrest	do	do	do	No.
Suspension from duty	do	do	do	Do.

See footnotes at end of table, p. 928.

6. Table of punishments—Continued

Punishment	A. G. N.[3]		Proposed A. G. N.[3]	
	Officers and warrant officers	Enlisted personnel	Officers and warrant officers	Enlisted personnel
Admonition or reprimand	Yes	No	No	No.
Withholding of privileges	No	Yes (no limit)[4]	do	1 month.[4]
Restriction to limits	do	No	do	No.
Forfeiture of pay	do	do	½ per month for 1 month.[5 8]	½ per month for 1 month.[5 8]
Extra duties	do	Yes (no limit)	No	1 month.
Reduction in grade	do	Yes	do	Yes.
Confinement	10 days	10 days	10 days	10 days.
Confinement on bread and water or diminished rations.	No	5 days	No	5 days.
Solitary confinement	do	7 days	do	No.
Hard labor without confinement	do	No	do	Do.
Arrest	10 days	do	10 days	Do.
Suspension from duty	do	do	do	Do.

[1] 1 punishment may be imposed, in addition to or in lieu of admonition or reprimand.
[2] Punishments may be combined; but total of confinement, restriction, withholding of privileges, and extra duties, cannot exceed 1 week.
[3] 1 punishment only; reprimand classed as a punishment.
[4] Shown as deprivation of liberty on shore.
[5] If imposed by an officer exercising G. C. M. jurisdiction.
[6] If imposed by an officer exercising special C. M. jurisdiction.
[7] Not applicable to general officers.
[8] In time of war or national emergency, or when authorized by Secretary of Navy in time of peace.
[9] If grade from which demoted was established by command or equivalent or lower command.

Mr. LARKIN. If you will look at the chart which runs across the wide page, which is entitled, "Company Officer Punishment," you will notice on the left-hand side there are all the different types of punishments that have been found in either the Articles of War, the Articles for the Government of the Navy, or the proposed Navy Articles.

The first two columns to the right of that whole list are the punishments that are provided in this Uniform Code, article 15 which we are now discussing. The next two columns of course are the Articles of War.

The next two are the Articles for the Government of the Navy. And the last two are the proposed Navy bill.

Now if we just take one, the top one, which is admonition or reprimand, the Uniform Code provides it for officers and other military personnel. The Articles of War so provide for it. The Articles for the Government of the Navy provided it only for officers and not for enlisted men.

The proposed Articles for the Government of the Navy would have deleted it for the Navy.

The next one——

Mr. NORBLAD. What is the value of admonition and reprimand? I could never see where there was any value in having that at all.

Mr. LARKIN. Well, for an officer it is construed as severe punishment since it goes on——

Mr. SMART. One of the arguments that has always been used in trying to defend this disparity of treatment between officers and enlisted men is that a reprimand would go in the officer's record. Competent military men said that a reprimand seriously impairs an officer's future service.

I think it would be more so today where we have a selection system in the Army and the Air Force, the same as the Navy has had, in

preference to the old seniority rule for promotion. I am sure those reprimands are going to be in the officer's record and any selection board which passes on an officer is going to see them.

They are really pretty serious for an officer.

Mr. RIVERS. His accountability is much more severe.

Mr. SMART. That is correct. It will not affect an enlisted man. He does not care whether you bawl him out or reprimand him. He goes about his business. But it is a source of concern for an officer.

Mr. BROOKS. Article 15 permits it for both enlisted men and officers.

Mr. SMART. That is right.

Mr. BROOKS. Proceed.

Mr. LARKIN. Let us take another one as an example: Withholding of privileges, and also restriction to limits. The Uniform Code provides, for officers and men, 2 weeks in either case.

The Articles of War heretofore provided for both classes 1 week. The Navy had no provision for officers, but for enlisted personnel, while they did not call it withholding of privileges or restriction to limits, they had a similar punishment which, in footnote 4, is shown as deprivation of liberty on shore, which is similar.

Mr. RIVERS. What is the duration? How many weeks?

Mr. LARKIN. There was no limit.

Mr. RIVERS. Oh, I see.

Mr. LARKIN. In the Navy.

Mr. RIVERS. I see.

Mr. LARKIN. The proposed Navy bill would have provided a 1-month limit. Now there, in the Navy, we had no limit but a proposal by them of 1 month. And in the Army it was 1 week. What we did substantially was to strike an average and take 2 weeks.

That indicates how some of this compromise and give-and-take went on, of course, in this whole study.

Now to go down further. Let us skip to "Confinement" because that is an important one.

Mr. BROOKS. Why not take that "Forfeiture of pay"?

Mr. LARKIN. All right.

There we have provided one-half month's pay for not more than 3 months for officers, and one-half month's pay and not more than 1 month for enlisted men. The Army heretofore had half a month's pay for 3 months for officers and none for enlisted men.

The Articles for the Government of the Navy have never had that provision. The proposed Articles for the Navy had provided for both officers and men one-half a month's pay for 1 month.

Mr. ANDRESEN. Mr. Chairman, I understood him to say the first column was one-half pay per month for 3 months. This reads 6 months.

Mr. LARKIN. I thank you. That is a typographical error; I am sorry.

Mr. ANDRESEN. That is right.

Mr. LARKIN. It reads 3 months in the bill.

Mr. RIVERS. Three months in the first column?

Mr. LARKIN. Yes, Mr. Rivers.

Mr. RIVERS. Well, 3 months for the officers and 1 month for the enlisted men?

Mr. LARKIN. That is right; yes.

Mr. BROOKS. Why is there that difference between officers and enlisted men?

Mr. LARKIN. I take it because the officers get a larger salary. It is not as much of a burden as it would would be on the enlisted man for that period. And then, again, it is to balance off the fact that there is no provision for confining officers.

There has not been and is none, whereas here there is a provision for confining enlisted men.

Mr. ELSTON. If you took that much pay from an enlisted men he never would reenlist.

Mr. LARKIN. That is possible.

Mr. RIVERS. Then, too, the officer has more responsibility.

Mr. SMART. Mr. Chairman, this provision relative to officers was written into H. R. 2575 during the last Congress. There was serious complaint lodged as to the disparity of treatment between officers and enlisted men.

Up until the time of H. R. 2575 the President was authorized to exempt whatever classes he desired from trial by summary and special courts martial. He, historically, has exempted officers from trial by special or summary court.

As a consequence, we were confronted with the situation of an enlisted man and an officer returning to the post both equally drunk and disorderly. The enlisted man might get a summary or a special court, but the officer's commanding officer was faced with doing one of two things with him: Since he was not triable by a summary or special court, he either had to reprimand or admonish him under the 104th Article of War or submit him to trial by a general court martial.

Now, admittedly he should not get off, but commanding officers were reluctant to subject an officer to trial by a general court. It is an extremely serious thing for an officer, as well as an enlisted man.

Now in order to get around that, we provided that officers were subject to special trial, the same as enlisted. They are still exempt from trial by a summary court martial. But I do not think you are going to find any officer being tried by a special court.

The Army and Air Force have had the jurisdiction to do that since the 1st of February, when H. R. 2575 went into effect, and I doubt that any officer has been tried by a special court.

Now what else can you do to them? The committee was of the opinion that the only thing that they could do was to increase the commanding officer's punishment so that he could forfeit some of his pay.

And it has been generally said that it was perhaps the most effective thing that the committee did, so far as curbing recalcitrant officers was concerned: Reach in their pocket and take some of their money.

I still think it will have a very beneficial effect. But I would like to point out to the committee that H. R. 2575 gave the officer the option to refuse this punishment, thinking he might get that much of a forfeiture and elect to stand trial by court. This bill does not provide for such an option unless granted under subsection (b), by regulation.

Mr. BROOKS. This forfeiture of one-half of the pay does not cover other benefits such as we will say rations, housing, quarters——

Mr. SMART. You will notice the language of the bill says "Forfeiture of one-half pay." It does not say allowances. It is one-half pay, and I construe the language to limit it to base and longevity pay.

Mr. BROOKS. And that is the same for both officers and enlisted men.

Mr. LARKIN. That is right.

Mr. SMART. Except for the enlisted man the forfeiture is only one-half for 1 month.

Mr. RIVERS. What did you say about longevity?

Mr. SMART. Both base and longevity pay will be subject to the forfeiture.

Mr. RIVERS. How do you read longevity into it there?

Mr. SMART. That is part of his pay.

Mr. RIVERS. Oh, I see.

Mr. SMART. To the exclusion of his allowances.

Mr. RIVERS. I see. Let me ask Mr. Larkin this question.

Mr. LARKIN. Surely.

Mr. RIVERS. Which one of those sentences that the commanding officer can impose, that you have cataloged there, represented the largest and the most difficult ones to resolve or compromise in your deliberations?

Mr. LARKIN. Well, the confinement and the bread-and-water rations of course were the points of major issue. The Army does not desire to use them. They never have had them. The Navy feels that it is very necessary that they continue to have them.

So the compromise really amounted to providing for them in the statute, and then providing that the Army and the Navy can continue to choose to go forward with their present practice by the terms of 15 (b).

Under 15 (b), I draw your attention, we provided that the Secretary of a department may by regulation——

Mr. RIVERS. I see.

Mr. LARKIN. Place limitations on the powers granted by this article with respect to the kind and amount of punishment authorized.

Now you will recall that many of the witnesses who appeared before you last week were critical of this article in that it in their minds extended and provided for more serious punishment than the Army or Air Force heretofore have been authorized to impose.

By virtue of (b), however, the Army and the Air Force—their Secretaries, that is—can elect to instruct their commanders not to impose the sentences that are provided under (d), (e), and (f), as well as (g), if they desire. The Army can prevent its commanders from imposing anything more than they now have the right to impose, except for the fact that restrictions and withholding of privileges has been extended to 2 weeks rather than 1.

The Navy on the other hand can continue to impose 7 days' confinement or 5 days on bread and water.

Now of course the Army does not care whether the Navy does that, and the Navy does not care if the Army does not wish to do it.

Mr. RIVERS. That is right.

Mr. LARKIN. But the difference and the desire to have the provision for confinement in the Navy springs substantially from their shipboard operations.

Mr. RIVERS. Well the Navy has found that from experience a master of a ship has to be the master.

Mr. LARKIN. That is right, and they found that as to a man on shipboard who commits minor offenses or is just not in step—is malingering or doing any number of other irritating things—to withhold privileges from him or to confine him to the ship is not much of a punishment.

He is already confined to the ship and probably has been for a month while they are at sea.

Mr. RIVERS. That is right.

Mr. LARKIN. It just does not do much good. He has not any place to go anyhow.

Mr. RIVERS. That is right.

Mr. LARKIN. And unless you can confine him more restrictively, for instance, 7 days in the brig, why you are not giving him any punishment at all or you are not impressing on him the necessity of stopping the conduct which he is engaging in. For that reason it is quite necessary in their view, and of course the Army has no objection whatever to them doing that.

They recognize that it is a different kind of disciplinary problem that is faced by the Navy. For that reason, rather than delete the 7 days' confinement and bread and water and hinder the Navy and rather than force the Army to use it when they do not want it and do not feel they need it, we felt the most appropriate way was to provide these punishments in the statute and then let each Department determine which ones of these different and various punishments that are set forth are necessary for their own disciplinary problems.

I can I think forecast for you right at this minute that if this is phrased this way the Army and the Air Force will immediately instruct their commanders not to impose confinement and bread and water and that the Navy will permit their commanders to carry out those punishments.

It is by virtue of this arrangement that we get this flexibility and the ability of each of the services to go forward on their own.

Now we strove very hard for uniformity throughout this code and I think we have achieved about a 99 percent uniformity. This is one of the few provisions under which it is possible for the service to have something less than complete uniformity and as far as we were able to determine the different practice seemed to be dictated or seemed to be desirable by virtue of what is admittedly a different operation.

We just could not solve it any other way. No one was able to say that the Army's present or the Navy's present punishments are just perfect for all three services and they have to be squeezed into a form, one way or the other.

Mr. GAVIN. All three services now are in complete accord with your suggestion?

Mr. LARKIN. Yes, sir. They all subscribe to this technique and feel that it is the best way to solve what is probably a meritorious and sound difference in their disciplinary problems.

Also remember, this is not of course, court-martial procedure.

Mr. RIVERS. Did you ever come across the case where an officer warranted such a procedure, say with an ordinary troublemaker aboard ship?

Mr. LARKIN. Well, you will notice here that an officer is still not subject to confinement under this.

Mr. RIVERS. I see. I mean have you ever found a case where the Navy would warrant such treatment?

Mr. LARKIN. I will ask Captain Woods.

Captain WOODS. I do not think our officers are very often recalcitrant, sir. If they show indications that way, that would be taken up in their fitness reports very promptly by their commanding officer and our selective process would operate to eliminate them very soon.

Mr. RIVERS. They go back to that fitness report that Mr. Smart mentioned.

Mr. BROOKS. Mr. Smart, we want to hear from you on this, too.

Mr. LARKIN. There is another point, Mr. Chairman.

Mr. BROOKS. All right, go ahead, Mr. Larkin, and finish.

Mr. LARKIN. The third point of difference I mentioned before was this question whether or not a person brought before a commanding officer could refuse the punishment.

Now unfortunately this is a complicated problem which you just cannot decide, it seems to me, based on the company punishment alone. It is one of a large number of differences we found. In the Army at company punishment there is the provision that it can be refused.

In the Navy at mast there was no privilege of refusal. But when we get to the next higher court in the hierarchy—this is not a court at all, but when you come to your first inferior court: The summary in the Army and what used to be called the deck in the Navy, why we found just the opposite.

In the Army it was provided that no one can refuse the summary court trial except the two top noncommissioned grades—they were given the right—whereas in the Navy deck everybody who was subject to it was given the right to refuse it and ask for the next higher court.

Now to take it by services: In the Army you could refuse company punishment but you could not refuse summary punishment, unless you were one of the top two noncommissioned grades.

In the Navy it was the opposite: You could not refuse mast. You had to take the punishment, that is any of these punishments.

Mr. RIVERS. Yes.

Mr. LARKIN. But if you were given a summary court, you could refuse it and demand trial by a higher court, in which case you might have been awarded a summary in the Navy, which is a special, for the Army, or a general court.

So we found on each level opposite practices, and trying to make that uniform was a very difficult job. And frankly we just could not. There, again, it grew out of the different practices and the different operations.

The Army has felt that it is appropriate protection to the man to allow him to refuse company punishment: These four or five relatively minor punishments. They felt that he ought to be able to ask for a court martial, in which event he could be awarded a summary, special, or general.

In the Navy it has been felt that at mast—the equivalent to company punishment—particularly on shipboard——

Mr. RIVERS. No alternative?

Mr. LARKIN. That no one should have the right to refuse. That from their point of view as to operations is the most important point of discipline. You have not arrived at your court martial structure.

The captain of the ship ought to without having the man refuse, be able to impose for the disciplinary purposes of the ship these various punishments. However, they felt that if a man had a deck court—and incidentally I might stop using all those terms—they are confusing—because we actually have been able to agree on names for the courts.

We have adopted the Army names so that we have now summary, special, and general.

Mr. RIVERS. That is all services.

Mr. LARKIN. For all the services. So if I may I will use those terms.

The Navy felt in connection with the summary, the lowest court martial, that since in the Navy it usually is handled—it is always handled by one man of course—by the commander's executive officer, why anybody who has been brought before it ought to have the right to ask for the next higher court: The summary, which is the three-man court.

If a man feels that he is really innocent, why he might feel that he has a better chance of convincing some one of three or several of three rather than just one man. On the other hand, the Army felt that in their summary court—although it was a one-man court it was usually an officer of a higher rank than the officer who could impose company punishment—that except for the two top noncommissioned grades they ought not to be able to refuse it but should have to take it.

Now here is the way we have attempted to solve that: We have provided by this article that in the same way that the secretary of each department may decide which one of these punishments the commanders in that department will impose, so also he should have the right to decide whether or not they are going to allow the people who come up for company punishment to refuse it or not.

I can forecast immediately I think that the Army will give everybody who comes before company punishment the right to refuse it, just as they have been doing in the past.

Mr. RIVERS. That is your lower discipline?

Mr. LARKIN. That is right. Whereas the Navy feels it is not appropriate at sea, when the captain of the ship is imposing it, that the man should have the right to refuse it.

So we are going to leave it, according to this, to each department. And as I say I know they will continue their present procedures, which differ.

However, when you get up to your summary court level, where there is a difference now as I pointed out, we provided in article 20 that everybody should have the right to refuse a summary court except of course anyone who has been given the privilege of refusing company punishiment and did so refuse it.

Mr. RIVERS. I see.

Mr. LARKIN. So that you will not have the situation that he refuses company punishment, is awarded a summary, and then refuses that, too.

Mr. RIVERS. Yes.

Mr. LARKIN. But if he comes before the summary in the first instance, whether it is Army, Navy, or Air Force, they can all refuse it.

Mr. RIVERS. That is right.

Mr. LARKIN. And get a higher one. In view of the fact that we expect the Army to permit their people to refuse company punishment, then if a man has come before company punishment in the Army and has refused it and is awarded a summary court, he could not refuse that, too.

Now that is complicated I know, but the problem was complicated and the differences were great, and to try to squeeze those differences into one ironclad, uniform provision across the board was just something——

Mr. GAVIN. The Navy has accepted this proposal now, have they not?

Mr. LARKIN. That is right. This proposal as written here and as provided in article 20 is acceptable to the three services.

Mr. GAVIN. And also the changing of the names of summary and special and general?

Mr. LARKIN. Oh, yes; yes, sir.

Mr. RIVERS. Now, is there any real need for a special court?

Mr. LARKIN. Well, the special is a court. It is a more formal procedure than the company punishment.

Mr. RIVERS. And with a greater number of judges?

Mr. LARKIN. There are no judges but there must be not less than three members.

Mr. RIVERS. You go from three to how many?

Mr. LARKIN. Not less than five.

Mr. RIVERS. One to three to five.

Mr. LARKIN. That is right.

Mr. BROOKS. Now, did I understand it that it is your prediction that the Navy will not permit the enlisted persons to refuse company punishment?

Mr. LARKIN. That is right. That is their present practice, and they feel it is necessary and they intend, as of this minute, to invoke their discretion in that fashion.

Mr. BROOKS. And what paragraph does that come under?

Mr. LARKIN. That is 15 (b).

Mr. BROOKS. Any further questions on this?

Mr. LARKIN. The criticism that this is increasing punishments, and so forth and so on, actually based on the exercise of the Departmental discretion I do not think holds water, frankly.

What it really does is permit each service to go according to their present practice at the same time. Now that is the best judgment we could form on this.

Mr. ELSTON. In other words, so far as the law itself is concerned, offenses are uniform.

Mr. LARKIN. That is right.

Mr. ELSTON. If one service wants to place certain limitations within their own service, they may do so by an order of the Secretary of the Treasury.

Mr. LARKIN. That is right.

Mr. ELSTON. But, so far as the law itself is concerned, everything is uniform.

Mr. LARKIN. That is right.

Mr. ELSTON. And by virtue of the authority granted in subsection (b) to permit the Secretaries of the service to issue regulations placing limitations on the exercise of the authority granted.

Mr. LARKIN. Yes.

Mr. ELSTON. They may proceed just as they have in the past.

Mr. LARKIN. That is exactly right, Mr. Elston.

Mr. GAVIN. Mr. Chairman?

Mr. BROOKS. Mr. Gavin.

Mr. GAVIN. On page 13, at subsection (c): "If imposed by an officer exercising general courts-martial jurisdiction," it has been suggested to me that that be made to read "if imposed by an officer authorized to exercise appointing authority with respect to general courts martial."

Mr. RIVERS. Explain it.

Mr. BROOKS. What is your idea there?

Mr. GAVIN. Well, it takes it away from command control and authorizes the man who is exercising or appointing the authority rather than the commandant who is now making the recommendation.

Mr. RIVERS. What about if we set up a separate JAG? Does this go back to convening authority?

Mr. GAVIN. I do not know. This is a suggestion that was made to me and I would like to hear a discussion on it.

Mr. ELSTON. In other words, you are taking the position that a single officer does not exercise general courts-martial jurisdiction?

Mr. GAVIN. That is right.

It should read "if imposed by an officer authorized to exercise appointing authority with respect to general courts martial," and then follow with that forfeiture of one-half of his pay per month for a period not exceeding 3 months.

Mr. ELSTON. That is subsection (a) (c)?

Mr. GAVIN. That is subsection (a) (1) (c).

Mr. ELSTON. (a) (1) (c).

Mr. GAVIN. That is right.

Mr. BROOKS. Yes.

Mr. GAVIN. And also it goes into section (2) (g), on page 14.

Mr. ELSTON. I think Mr. Smart has come explanation.

Mr. SMART. Of course, I have no idea what the sense of the committee is as to what you are going to do about the appointing authority.

If you leave it as it is now provided in the bill, Mr. Gavin's amendment would not be necessary.

Mr. GAVIN. What article is that?

Mr. SMART. Article 22.

Mr. GAVIN. Make a note on that.

Mr. BROOKS. If there is no objection, the committee will pass that one amendment.

Mr. NORBLAD. May I ask a question, Mr. Chairman.

Mr. BROOKS. Just one moment. Subject to return. Will you make a notation on that, Mr. Smart?

Mr. SMART. Yes, sir.

Mr. NORBLAD. What is the purpose of section (c) on page 15? Is that tied in with section (b) and, if it is, should there not be some definite statement that it is tied in with (b)?

Mr. SMART. I think you will find, Mr. Norblad, that that is a provision written to accommodate the Navy and the Coast Guard where they refer to an officer in charge.

Now in the Air Force and in the Army we have no such designated officer as an officer in charge.

Mr. NORBLAD. That is right.

Mr. SMART. I think it refers to an officer who may be in command of a unit——

Mr. NORBLAD. A small boat.

Mr. SMART. That is right; isolated and removed from the usual channels of command.

Mr. NORBLAD. Should that not be tied in, then—after the word "prescribed" put a comma and add "in accordance with subsection (b)," or something of that nature.

Mr. LARKIN. I think that is the intention, Mr. Norblad.

I think that is appropriate, all right.

Mr. NORBLAD. To be added.

Mr. LARKIN. Yes.

Mr. NORBLAD. Could that be added—in other words to show that (c) is to be tied into (b)?

Mr. BROOKS. Where is that?

Mr. NORBLAD. Otherwise it is wide open.

Mr. BROOKS. That was the point that was brought to the attention of the chairman in several general statements made before the committee there.

Mr. LARKIN. It is intended to be tied in now. I think you can construe it to be such, where we say "such of the punishments authorized to be imposed."

Mr. NORBLAD. "In accordance with subsection (b)," which would clear the whole thing up.

Mr. LARKIN. Since that is the intention, it certainly does clear it up.

Mr. NORBLAD. I think it should be put in specifically.

Mr. BROOKS. State your language there, Mr. Norblad, so we can get it specifically.

Mr. NORBLAD. The section says that "an officer in charge may, for minor offenses, impose on enlisted persons assigned to the unit of which he is in charge, such of the punishments authorized to be imposed by commanding officers as the Secretary of the Department may by regulation specifically prescribe."

Mr. BROOKS. What change do you propose now?

Mr. NORBLAD. "In accordance with subsection (b)," which is the section before, which allows each Department to set up whether they want it by bread and water or confinement or pay forfeiture.

Mr. GAVIN. Where would you insert it?

Mr. NORBLAD. At the end.

Mr. BROOKS. Change the period to a comma and insert the following——

Mr. NORBLAD. "In accordance with subsection (b)," is that right?

Mr. LARKIN. That is right.

Mr. NORBLAD. Of article 15.

Mr. BROOKS. You have heard the suggested amendment. Is there any further discussion on that? If not, we will adopt the amendment.

Mr. ELSTON. Let us get that straight. I am not quite clear.

Mr. NORBLAD. Well, in other words, Mr. Elston, your main article, article 15, sets forth all these various punishments. Then it says under subsection (b) that the Secretaries may limit the punishments in their own service. For example, they tell us the Army will not use the bread and water and the Air Force will not use the bread and water.

In section (c), the officer in charge may impose on enlisted persons such punishments authorized to be imposed by commanding officers as the Secretary of the Department may by regulation specifically prescribe.

Well, that would leave it wide open, if we do not tie this section (c) in with subsection (b).

Mr. BROOKS. Correct.

Mr. RIVERS. That is right.

Mr. NORBLAD. They could hang them, I think, under that, if the thing is construed broadly enough, for being drunk. It does not hurt it any, but I think it clears up the intent.

Mr. LARKIN. I agree. It was not intended to be different.

Mr. NORBLAD. That will leave it wide open for the Department to prescribe any punishment, I should say, if it is not tied up with that language.

Mr. LARKIN. Yes.

Mr. BROOKS. Now is there any further discussion on the amendment as read?

Mr. RIVERS. Can we hear from Mr. Smart.

Mr. SMART. I have some comments.

Mr. BROOKS. Yes; we want to hear from Mr. Smart. I think it would be a wise thing before we get into a general discussion on these articles to hear from both Mr. Smart and Mr. Larkin in the future.

Mr. RIVERS. We have a roll call.

Mr. BROOKS. I am not prescribing that we are going to sit here after 12 o'clock. If we could hear from Mr. Smart before we leave.

Mr. SMART. I can be brief and state my feelings about this article, Mr. Chairman.

Mr. BROOKS. All right, if you will.

Mr. SMART. We start in here to write a uniform code and we do pretty well until we get down to this article. Now subsection (b) throws this thing wide open to the Secretaries to prescribe what punishments will be invoked.

I cannot escape the feeling that if we pass this the way it is written we are going to come into some headaches further on down the line, because you are going to find that Navy boys on shore have no right to elect to take a court whereas the Army boy does, for exactly the same type of offense.

Now, when you consider the specific types of punishment prescribed, I do not say that they are not all good. But when you consider confinement for 7 consecutive days and this bread and water proposition—those are subsections (E) and (F)—those are things which, so far as I have heard, are insisted upon in the Navy because they need them at sea.

Now, why should the Congress go along here and permit the Navy to give confinement and bread and water ashore for disciplinary punishment and permit enlisted men in the Army and the Air Force to be exempted from the same type of punishment?

You are leaving it completely up to the Secretary. I cannot escape the conclusion that if those things are necessary in order to preserve the command of officers at sea you ought to write it into the bill and say "when at sea, confinement for 7 days," and "when at sea, bread and water for 5 days", so that when you have shore-based

personnel, be it Army, Navy, or Air Force, they are all subjected to the same thing and in the same manner. I think it is leaving it entirely——

Mr. BROOKS. Mr. Smart, what would you do here: Suppose a Navy contingent was assigned to the Army and was tried by Army courts martial, would you allow that type of punishment to be vested on the Navy personnel by an Army courts martial?

Mr. SMART. Well, when a Navy man becomes attached or assigned to an Army unit, we will say MATS, where they are under Air Force command, at that point I think he would then be subject to the articles as construed by the Secretary of the Air Force.

Mr. RIVERS. I think the Air Force will be a little harder on the Navy than the Army would.

Mr. SMART. All right. But here you have a sailor who is with MATS and as soon as he becomes assigned then if it is an Air Force operation he is not subject to confinement and he is not subject to bread and water, but he is still wearing the Navy uniform.

Mr. BROOKS. An Army man on a transport, would he be subject to bread and water?

Mr. SMART. Of course, the ship's captain is in charge. But assuming you had a large unit moving, let us say, part of a division, with an Army officer there having general courts-martial jurisdiction. I think that officer has continuing jurisdiction, and I think he could punish his men at sea in a method different than when ashore.

That would give Army, Navy, and Air Force and everybody the same rights, when at sea, and give them the same rights when at shore.

Mr. WINSTEAD. What objection does the Navy or anyone else have to writing that provision in?

Mr. GAVIN. May I ask the Navy at this point what kind of an offense would have to be committed to give 5 days on bread and water?

Captain WOODS. Five days; sir, you have a type of man who is recalcitrant, he is pushing subordination and he refuses work, and so forth. That is the most effective sort of punishment. It cures him. The only alternative is court martial, which is on his record for the rest of his life.

Mr. BROOKS. Captain, would the Navy have any objection to putting in "at sea" there?

Captain WOODS. I think we would, sir. We feel very strongly about it, and I would not want to take that responsibility.

Mr. BROOKS. Is the Navy using that type of punishment in shore-based establishments?

Captain WOODS. Bread and water is almost never used. I have had 6 years command and I do not think I used it 10 times. The threat is important.

Mr. ELSTON. Captain, does it not go back to the old theory that you had to provide a more severe penalty for mutiny at sea than you would provide for the same act on shore?

Captain WOODS. Yes, sir. The commanding officer is alone. He has the responsibility for his ship. He must have powers within reason to keep his ship orderly.

Mr. ELSTON. Well, that being so, of course it would not seem to me that it would take any of those powers away from him if you did add

the words Mr. Smart suggested and say "when at sea," because if he is on shore he certainly has the same facilities for administering military justice that either the Army or the Air Force would.

Captain WOODS. I have two thoughts there, sir; that I could offer. One is that for there to be a difference in system within the Navy itself at sea and ashore, would be undesirable. The other thought is in our set-up at least the commanding officer in assigning a summary court details an officer junior to himself.

It would be a little bit unsatisfactory for him in his mature judgment to assign punishment and to have the man appeal to a subordinate officer and that subordinate officer to assign a lesser punishment.

It puts the commanding officer in a very bad position and it puts the subordinate officer in a very bad position.

Mr. RIVERS. Of course you do not want to take from that commanding officer, whose ship is tied up temporarily ashore, the right to have him aboard his ship. It is where they are attached to a shore establishment.

Captain WOODS. That is right.

Mr. BROOKS. By the same token, though, if it is a necessary punishment, would not an Army transport commander need that type of punishment?

Captain WOODS. I think he would not. At sea, the ship's force are operating the ship. The hazards and the dangers are the commanding officer's of the ships. The others are the passengers.

Mr. BROOKS. But does not the Army in operating a transport furnish personnel which is akin to——

Captain WOODS. I am not familiar with the Army transport situation.

Mr. RIVERS. I can tell you this. I know, I took a trip aboard one of them last year. The transport commander is in charge of the Army personnel aboard the ship, but the captain has the over-all jurisdiction.

I mean the master of the ship has supreme power. Even though the President of the United States is on there, he is the boss.

Mr. GAVIN. He is the captain.

Mr. RIVERS. He is the works.

Mr. NORBLAD. The Army operates more ships than the Navy.

Mr. BROOKS. It seems we better go into that pretty carefully because it will affect the Army and the Navy both.

Mr. ELSTON. Under this section, as it is written, if the Army did see fit to impose bread-and-water punishment on thier ship at sea, they would have the perfect right to do it by order of the Secretary.

Captain WOODS. Exactly, sir; that is right.

Mr. RIVERS. That is right.

Mr. BROOKS. Well, now, if there is no further discussion at this point, it would be a good point to adjourn. We will adjourn until tomorrow morning at 10 o'clock.

(Whereupon, at 12:05 p. m., the subcommittee adjourned to reconvene on Tuesday, March 22, 1949 at 10 o'clock.)

UNIFORM CODE OF MILITARY JUSTICE

TUESDAY, MARCH 22, 1949

HOUSE OF REPRESENTATIVES
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The subcommittee met at 10 a. m., Hon. Overton Brooks (chairman) presiding.

Mr. BROOKS. The committee will please come to order.

When we recessed yesterday we were on article 15 and had not quite completed article 15.

I want to say this to the committee here: the chairman is anxious to get this bill out. Tomorrow if the legislative session is not very heavy it is the purpose of the chairman to suggest that we try to meet tomorrow afternoon as well as tomorrow morning.

Of course if the session is heavy we may not be able to work that out. But we are anxious to make progress and if possible to get this bill out this week.

Yesterday when we adjourned we were debating the question of the imposition of punishment, expecially in reference to this bread-and-water punishment.

We can proceed. Mr. Smart, I think, was discussing the matter at that time.

Mr. SMART. Mr. Chairman, I think it is necessary before we can do anything about this section—we may be able to resolve it speedily—for the committee to reach some conclusion as to what they think the proper policy should be.

We were discussing, particularly, subsection (b) on page 14, which gives the Secretaries of the respective Departments the right to place limitations by regulations on the powers granted in this article.

As I have pointed out to the committee, under the bill as drawn, that is, this particular article, it will be possible for the Secretary of the Navy—and it has already been declared that this is what he will do—to authorize bread and water as well as confinement, for enlisted persons of the Navy.

On the contrary, it has already been pointed out that the Secretary of the Army will by regulation not permit disciplinary punishment which includes bread and water or confinement. Those are long standing practices in each of the services.

If it is the feeling of the committee that it is appropriate for them to continue to do that, then I think you can buy this section almost as written, with one exception or suggestion which I shall make to you.

On the other hand if you think the committee should not only prescribe the maximum punishment which all of the services can exercise but that you should likewise write in the minimum punish-

ments and that all services must and will have the authority to exercise all of those powers, then we are in trouble.

Mr. DEGRAFFENRIED. Excuse me just 1 minute.

Mr. SMART. Yes.

Mr. DEGRAFFENRIED. As I understand you and Mr. Larkin, the law is the same as to all of the services but you have enough leverage in there to where the Navy can continue to follow their policy and the Army can continue to follow their policy?

Mr. SMART. That is exactly the provision of the bill and that is exactly the purpose of subsection (b) which I am now discussing, Mr. deGraffenried.

Mr. BROOKS. The law will remain the same, but the policy will be a little different in one branch or the other branch.

Mr. SMART. The policy will definitely be different.

The unknown factor here to me is this: I frankly do not know what the committee is going to be faced with when it gets to the floor of the House. In addition to the provisions of the bill I, like you gentlemen, am always confronted with the fact: What will the House buy.

Now, if they kick over the traces when we get to the floor of the House on this thing and start complaining about bread and water and confinement and the fact that some of the services are going to do this thing differently we may very well get into trouble.

On the other hand it might be accepted with an open mind, as they did with H. R. 2575. They accepted it by voice vote without a single dissent. That is matter for you gentlemen to decide.

Mr. RIVERS. Let me say this: We cannot assume any path the House is going to follow.

Mr. SMART. That is right.

Mr. RIVERS. No telling what will happen on the floor.

But the main thing is, as I see it, to decide whether or not we are going to have the Navy pursue a course on shore-based establishments the same as they pursue aboard ship. Personally, I do not think it is necessary and I am going to vote that way.

Now I am not talking about a ship tied up at a dock. It suits me to let them do the same thing aboard ship at a dock as they do aboard ship at sea. But when it comes to shore-based establishments, it is something else—I do not know why we should make fish of one and fowl of the other—because the philosophy is different.

The matter reigns supreme, because of obvious reasons.

Mr. SMART. My thought and my suggestion yesterday, Mr. Rivers, in suggesting that we might prescribe bread and water and confinement when at sea—and, like you, I meant aboard ship——

Mr. RIVERS. Yes.

Mr. SMART. I realize that there are problems at sea. Everyone aboard a ship is restricted or confined, in a certain sense, purely by the nature of the operation and it does not do much good to restrict a man to the limits of the ship, as a punishment, when he is already restricted by virtue of being at sea.

Mr. RIVERS. And you cannot shoot a man aboard ship for deserting because he can only go the length of the ship, while in the Army, he can go the length of the battlefield.

Mr. SMART. That is right. So you have to be a little more severe in extreme cases.

Mr. RIVERS. That is right.

Mr. SMART. And I think bread and water and confinement are appropriate at sea.

Mr. BROOKS. Would it meet the approval of the committee to approach this matter from the standpoint of reading into subsection (f) a stipulation which would limit that subsection to those serving at high sea?

Mr. RIVERS. Or aboard ship.

Mr. SMART. I would like to point out that my comment is not directed solely to naval personnel. As we all know, we have Army and Air Force troops scattered throughout the world. It may be a safe statement to make that perhaps we have as many soldiers and airmen on ships being transported to and from their overseas stations as we do naval personnel taking them and bringing them.

So my thought was that it would be equally applicable to Army and Air Force personnel on board ship, the same as sailors. But I feel sure that the Navy wants to impose bread and water and confinement as punishment ashore, the same as it does at sea.

Mr. BROOKS. Yes. And some of the witnesses who have testified have indicated they thought there was nothing wrong in that type of punishment. There was Col. Melvin Maas, who said he thought there was nothing wrong with that.

Mr. SMART. Yes.

Mr. BROOKS. And several other Navy witnesses took the same position.

Mr. ANDERSON. Are the provisions of the Elston bill the same as these?

Mr. SMART. No, sir. The Elston bill provides only 7 days' restriction and only 7 days' extra duty. It provides no forfeiture of pay for enlisted men. It provides no confinement for enlisted men. And it provides no bread and water for enlisted men.

Mr. RIVERS. That was an Army bill, though.

Mr. SMART. That was an Army bill and these are practices which the Army has never exercised.

Mr. RIVERS. That is right.

Mr. BROOKS. The Army does use forfeiture of pay; does it not?

Mr. SMART. Not for enlisted men. Only for officers.

Mr. BROOKS. I see.

Mr. SMART. And that is the one point I want to present to you which I think ought to be revised downward.

Mr. RIVERS. We do not want to take a position which will make it difficult for any branch of the service to get recruits, where one branch of the service can advertise—and they do advertise against each other, and you know that yourself—"Join this branch of the service because we do not have bread and water." We do not want to give one the sword of Damocles that the other does not have.

I do not know why it would be any reflection on the line of the Navy or their traditions to confine that punishment to duty aboard ship. It is no reflection on them.

Now we know that the captain cannot get up here and speak for Admiral Russell. Anybody with sense knows that. But I mean we have to speak for our own conscience, too.

I am ready to vote on it, myself.

Mr. SMART. There is this much to be said for it, Mr. Chairman. While it is a more severe type of punishment than the ground forces have heretofore authorized for purely disciplinary infractions, it might very well be that you will save an enlisted person from going to trial before a courts martial.

Now company punishment goes on a so-called company-punishment book. It does not go on the enlisted man's service record. It does not hound him the rest of his service period.

So, even though he got confinement and bread and water, it might be the very thing that makes a man out of him, rather than let him go along and end up before a court which goes on his service record and definitely is a detriment to him for the rest of his service. So there is that much to be said for this type of punishment.

Mr. ANDERSON. What appeal does he have from confinement on bread and water?

Mr. SMART. Under this present bill, Mr. Anderson, when a man receives disciplinary punishment under this article, it goes to the next superior command if requested by the accused. Upon request, it will go to the next superior command, who will review it with full authority to remit any part of it. And that is all.

Mr. ANDERSON. But he cannot appeal from company punishment for a trial by a special court?

Mr. SMART. No, sir.

Now, I should point out there that is the Navy practice. And the man has no choice. He must take it. But in the Army they have given the man the option to take disciplinary punishment or a court martial. If he takes it, he is bound by it. He must exercise his option before disciplinary punishment is assessed.

But, if he takes the option to receive the punishment, he gets it and has no appeal. If, on the other hand, he says, "I do not want to take company punishment; I want a court," then they give him a courts martial and he is bound by any sentence which the court gives.

Mr. GAVIN. Well, the Army is here. Why do we not hear some expression from the Army as to their reason—or you, Mr. Larkin.

Mr. BROOKS. Well, the Army does not care, as I understand it; is not that true?

Mr. LARKIN. Well, let me put it this way, Mr. Chairman: The three services agree on this as written.

Mr. BROOKS. Yes.

Mr. LARKIN. Now, Mr. Smart has brought up a number of points in connection with the whole article. I think if we could take them up one by one, perhaps we could resolve them.

Yesterday the first point brought up by Mr. Smart had to do with the possibility of further limiting the punishments provided in (e) and (f); in other words, confinement for 7 days and confinement for 5 days with bread and water.

Now, if that is the only point before the committee, it is relatively easy of solution.

Mr. BROOKS. That is really what the situation resolves into.

Mr. LARKIN. However, Mr. Smart has brought up this morning additional points.

One additional point, for instance, is the question of whether or not the right to refuse this punishment should be left to the discretion of the individual Secretary or not. That is another and very important

part of this whole article. I just do not know what the committee's views are on any of these or just what problem the committee would like me to address myself to.

Mr. BROOKS. What is the pleasure of the committee? Are there any suggested changes or amendments?

Mr. RIVERS. Mr. Chairman, in order to get the thing to a head, I just move that we direct our lawyer to draw up the proper amendment.

Mr. BROOKS. For what?

Mr. RIVERS. Limiting the Navy to bread and water aboard ship or on the high seas—or any other branch of the service that operates ships.

Mr. BROOKS. I think that is the thing we ought to dispose of first.

Mr. RIVERS. I move that.

Mr. BROOKS. Well, you have heard the motion now——

Mr. GAVIN. Bread and water be limited purely to the Navy; is that right?

Mr. ANDERSON. At sea.

Mr. RIVERS. At sea or aboard ship, where they may be tied up at a dock.

Mr. BROOKS. It is not limited to the Navy, is it—just to anyone aboard ship?

Mr. GAVIN. How did you want your amendment to read?

Mr. RIVERS. That was the sense of it. I suggested that he draw up an amendment.

Mr. SMART. One question, Mr. Rivers. Do you mean to limit this bread and water for 5 days and confinement for not to exceed seven consecutive days so that it will be applicable to all enlisted persons, whatever their branch might be, aboard ship and beyond the continental limits of the United States?

Mr. RIVERS. What is that "beyond the continental limits"? That is a new one.

Mr. ANDERSON. That would include Hawaii, Alaska, the Philippines, Guam, and so on.

Mr. SMART. That is correct.

Mr. RIVERS. You mean bread and water at those places?

Mr. SMART. Yes, sir. I am merely inquiring as to what you mean?

Mr. RIVERS. I mean aboard ship.

Mr. ANDERSON. I think we should leave out the continental limits of the United States as suggested by Mr. Smart and confine it strictly to that point of aboard ship.

Mr. RIVERS. I think so, too.

Mr. BROOKS. A proviso that says that this type of punishment shall be available only while the individual is aboard ship.

Mr. RIVERS. Either on the high seas or in port.

Mr. SMART. And equally applicable to the Army, Air, and Navy?

Mr. RIVERS. That is right.

Mr. ANDERSON. Well, you do not have to say "on the high seas or in port" if you say "aboard ship."

Mr. RIVERS. That is right.

Mr. ANDERSON. It does not make any difference where the ship is.

Mr. RIVERS. You better write it out because some of these people have peculiar interpretations.

Mr. LARKIN. Well, there is this difficulty about construing the proposed language: What about the case where two stewards are assigned to a ship as part of its crew and it is in harbor. Suppose they get into a fight on the dock, are they aboard ship or are they not?

Mr. RIVERS. Technically, they are aboard ship because they are assigned to the ship.

Mr. LARKIN. Well "assigned to the ship" may be better language.

Mr. ELSTON. Well, it is possible that they might have a fight on the dock and the ship would be scheduled to sail the next day.

Mr. LARKIN. That is right.

Mr. ELSTON. And they could not confine them on bread and water. The commander would not have the same authority over them that he wants to have while he is in command of a ship. So, it would seem to me that there must be some definition of what "aboard ship" means.

Mr. LARKIN. That is my point, Mr. Elston.

Mr. ELSTON. Well, is there such a definition?

Mr. ANDERSEN. Ask the Navy.

Mr. ELSTON. What about it, Captain?

Captain WOODS. You have the language "attached to a ship."

Mr. RIVERS. "Aboard or attached to a ship."

Captain WOODS. That would not cover the Army who are passengers aboard a transport.

Mr. ANDERSON. Yes, but the Army does not use it anyway, Captain.

Captain WOODS. My understanding is that your proposed amendment would cover them.

Mr. ANDERSON. Well, if we amend it as suggested by Mr. Rivers, we make it available to the Army, but the Army is going to direct that it not be used.

Mr. RIVERS. By direction of the Secretary.

Mr. LARKIN. Still within the limitations of the discretion of the Secretaries.

Captain WOODS. But, if you use the language "attached to a ship," that would not permit the Army to use it because they would be passengers.

Mr. BROOKS. You could say "attached to or aboard a ship."

Captain WOODS. That would do it.

Mr. ANDERSON. What we are trying to do now is adopt the policy.

Mr. LARKIN. That is right.

Mr. ANDERSON. And the technical language can be worked out after we decide what will be the policy.

Mr. RIVERS. That is right.

Mr. ANDERSON. Why do we not vote on the motion now?

Mr. BROOKS. All right; all in favor of the motion as indicated by Mr. Rivers make it known by saying "aye." Opposed, "no."

The ayes have it. Therefore, if Mr. Smart will get together with these gentlemen who are interested in the matter and draft a suggested amendment, we would like to take it up in the next meeting.

Mr. LARKIN. All right.

Mr. BROOKS. Now, is there any other controversy about this article?

Mr. ANDERSON. Mr. Smart said he had another suggestion with reference to subsection (b).

Mr. SMART. Well, no. My suggestion at this point goes to forfeiture of pay.

You will remember that in H. R. 2575 we provided for a forfeiture not to exceed 3 months of 50 percent of an officer's pay under this article. While the House subscribed to it without a dissent, I cannot escape the conclusion that that is too stiff a penalty for disciplinary infractions.

Now, let us see what it would mean. Let us take the lowest-ranking officer, which is the ensign in the Navy or the second lieutenant in the Army or Air Force. In either case, the base and longevity pay of an officer of that grade will be $200 or more, so that a 50-percent forfeiture for 1 month means that you can fine that officer a hundred dollars or more. I cannot escape the conclusion that we should not be more severe than that.

And, of course, as you go on up to the higher grades and get up to the field-grade officer, it might amount to as much as $200.

Mr. RIVERS. Would that be reflected on his fitness report in addition?

Mr. SMART. Very definitely. Even a reprimand goes on his so-called fitness report in the Navy or efficiency report in the Army or Air Force.

Mr. BROOKS. Well, I thought it was testified that company punishment is not reflected.

Mr. SMART. For enlisted persons, Mr. Brooks.

Mr. BROOKS. But it is reflected for officers?

Mr. SMART. It very definitely reflects upon an officer's record.

Mr. RIVERS. There are two reflections. One is tangible property, his pay; and the other is the record that he compiles day by day.

Mr. SMART. That is correct.

And I would like to further point out on the question of forfeiture of pay for enlisted persons that the Navy has not heretofore had it, and this is the first time that it has been provided for the Army or Air Force enlisted men.

I have a rather strong feeling that you ought to reduce the forfeiture relative to officers from 3 months to 1 month and further consider the advisability of removing any forfeiture provisions so far as enlisted persons are concerned.

Mr. ELSTON. You may have the case of an enlisted man making allotments to his wife and his children, in which cases they would be seriously affected.

Mr. SMART. This goes only to his pay, Mr. Elston, and not to his allotments.

Mr. ELSTON. I meant a voluntary allotment of his pay. You would be penalizing the family as well as the enlisted man.

Mr. SMART. That is correct, sir.

Mr. ANDERSON. Let me get this straight now. Do I understand that your suggestion is in subparagraph (c) on page 13: "If imposed by an officer exercising general courts-martial jurisdiction, forfeiture of one-half of his pay per month for a period not exceeding —" you would reduce that 3 months? Is that your suggestion.?

Mr. SMART. Yes, sir.

Mr. ANDERSON. And then on page 14, in subparagraph (G): "If imposed by an officer exercising special courts-martial jurisdiction"—you would cut out that whole paragraph?

Mr. SMART. If that is the will of the committee. You would delete (G) on page 14. That would remove any forfeiture provision for en-

listed persons. And the other one would reduce it from 3 months to 1 month as to forfeiture for officers.

Remember, this is not a judicial punishment. This is a disciplinary punishment.

Mr. BROOKS. You have heard the suggestion, gentlemen. I will put it in the form of a motion. The suggestion as indicated, is to reduce the period not exceeding 3 months to read "a period not exceeding 1 month", in subsection (1), subparagraph (c). Any further discussion on it? If not, are you ready for a vote?

Mr. LARKIN. May I ask that Colonel Dinsmore be heard before the committee makes up its mind, Mr. Chairman?

Mr. BROOKS. Colonel, will you step forward, sir, and give us your idea.

Colonel DINSMORE. Mr. Chairman, the Army is not in favor of forfeiting pay of enlisted men by arbitrary disciplinary action. We think that ought to be reserved for a court. We think the enlisted man is entitled to that protection from arbitrary action by an unreasonable commanding officer.

It was testified on behalf of the Army when the Elston bill was under consideration that the Army is in favor of extending the forfeiture on officers to 3 months, to be imposed only by authority of an officer exercising general courts-martial jurisdiction. That is still the Army's position.

Mr. GAVIN. But nothing on enlisted men?

Colonel DINSMORE. That is right.

Mr. RIVERS. Nothing on any arbitrary deprivation of a man's right to retain his salary?

Colonel DINSMORE. As to officers only.

Mr. BROOKS. The Army's position in reference to nonjudicial punishment by the commanding officer apparently then is to omit any recommendation of a forfeiture of pay for officers or enlisted——

Colonel DINSMORE. That is not correct. Enlisted men only. But officers for 3 months.

Mr. RIVERS. After they have been before a court of proper jurisdiction?

Colonel DINSMORE. No, sir; by company punishment.

Mr. LARKIN. It is right in here.

Mr. DEGRAFFENRIED. He said by an officer who had the power of exercising general courts-martial jurisdiction.

Colonel DINSMORE. I am afraid I did not make myself clear.

Mr. BROOKS. Just take this off the record, so we can straighten this out.

(Discussion off the record.)

Mr. BROOKS. Now back on the record.

The Air Force does not recommend forfeiture of pay for enlisted men?

Colonel MAXEY. No, sir.

Mr. BROOKS. And that is the position of the Army?

Colonel DINSMORE. That is right.

Mr. BROOKS. And the Navy takes a similar position?

Captain WOODS. Yes, sir.

Mr. BROOKS. Then who does recommend this forfeiture of pay for enlisted men?

Mr. SMART. Only the bill itself.

Mr. ANDERSON. Then, why is it in the bill?

Mr. BROOKS. Well, I will entertain a motion.

Mr. ELSTON. I move, Mr. Chairman, that subparagraph (G) under article 15 (a) be deleted.

Mr. BROOKS. It is (2), is it not?

Mr. ELSTON. Beginning on line 20 and extending through line 22. It is (a) (2), subsection (G).

Mr. RIVERS. That is right, (a) (2), subsection (G)

Mr. BROOKS. You have heard the motion, gentlemen. Are you ready for the question?

Mr. ANDERSON. Yes.

Mr. BROOKS. All in favor of the motion will make it known by saying "aye." All opposed, "no." No opposition. Therefore that amendment carries and paragraph (G) is stricken out.

Now what about the forfeiture of pay for the officer? Any further discussion? Any motions? If not——

Mr. ANDERSON. Mr. Chairman, I move that article 15 (a) (1) (c) be amended, on page 14, line 1, to read 2 months instead of 3 months.

Mr. BROOKS. In that case the Navy would be opposed to that reduction?

Captain WOODS. No, sir.

Mr. ANDERSON. We can strike a compromise here.

Captain WOODS. I do not think the Navy feels strongly about it.

Mr. RIVERS. Why did the Navy select 3 months?

Mr. LARKIN. You people recognized 3 months in the Elston bill.

Mr. DEGRAFFENRIED. I will follow Mr. Smart's recommendation.

Mr. ANDERSON. Well, we can work it out by voting on it.

Mr. RIVERS. As a substitute motion to the motion of the gentleman from California I move, 1 month.

Mr. GAVIN. Well, split the difference and make it a month and a haof.

Mr. RIVERS. Move it, then.

Mr. BROOKS. Forty five days.

Mr. SMART. Make it even months, whatever the number is.

Colonel DINSMORE. May I be heard, Mr. Chairman?

Mr. BROOKS. All right, sir.

Colonel DINSMORE. As to its purpose, the Army's view was that it would reduce trials. You see, there was criticism that officers and enlisted men were not treated equally and we wanted more authority over the officer. That was the purpose of it.

Mr. RIVERS. Then, you see, if an officer keeps on forfeiting 1 month of his pay you can give him a general court. That will put a stop to it.

Mr. BROOKS. Well, it seems to me it is going to make very little difference whether you have 1 month or 3 months there because the fact that he is punished by a forfeiture of pay is going to be in my judgment the big thing.

Mr. RIVERS. It will be reflected on his fitness report.

Captain WOODS. His fitness report is the big thing.

Mr. RIVERS. I move 1 month.

Mr. BROOKS. Furthermore, you have the difference between enlisted men and officers.

Mr. ANDERSON. Mr. Chairman, just briefly on the motion I made—I am trying to find a compromise here, too—it seems to me as long as

the officer has the right to appeal from a decision by a superior depriving him of one-half of his pay for 2 months, he has the right to appeal and ask for a general court martial, I do not think is too stiff a penalty.

Mr. BROOKS. What is the motion now?

Mr. ANDERSON. I moved to make it 2 months and Mr. Rivers moved to make it 1 month.

Mr. BROOKS. The gentleman from California makes a motion, as a substitute, to make it 2 months. We will vote on the substitute first and then on the original motion to make it 1 month——

Mr. RIVERS. No. The original motion was for 2 months and I offered a substitute motion to make it 1 month.

Mr. SMART. Before you vote——

Mr. BROOKS. Then we will vote on the amendment to the motion.

Mr. ANDERSON. That is right.

Mr. BROOKS. Mr. Smart, do you care to say something?

Mr. SMART. I just want to point out: I think you have a slightly mistaken idea, Mr. Anderson. It is not an appeal, but it is an option as to whether or not he accepts the punishment in the first instance. Now if he says, "I will take the punishment," then he gets a 2 months' forfeiture under your motion. He has no appeal from that.

Mr. ANDERSON. He has the option.

Mr. SMART. He has the option in the first instance.

Mr. LARKIN. But he also has the option thereafter.

Mr. DEGRAFFENRIED. Mr. Smart, does he have that option before he knows what his punishment is going to be or after he knows what it is going to be?

Mr. SMART. He has his option before he knows what the punishment is going to be.

Mr. DEGRAFFENRIED. Say, for example, he did not think his punishment was going to be that great and he moved to accept it and he tried by disciplinary measures there. Then if he got more than he thought he was going to get he has no right of appeal?

Mr. SMART. He has only an appeal to the next superior authority.

Mr. DEGRAFFENRIED. But not to a court martial?

Mr. SMART. Not at all. I would call it an appeal when you follow a judicial process, not when you go up the line of command to the next superior authority.

Mr. ELSTON. Now, Mr. Chairman, last year we provided that there could be a demand by the accused for trial by courts martial.

Mr. SMART. Before he received the punishment.

Mr. ELSTON. Yes. Now that has been left out of this bill.

Mr. SMART. Mr. Elston, may I point out to you there, again, the provision in (b) whereby the Secretary may prescribe whether or not there is going to be an option. And it is anticipated under (b) that an option will be provided for Army and Air Force personnel but no option will be provided for Navy personnel.

Mr. GAVIN. Why?

Mr. SMART. By virtue of the policy of the respective services for many, many years.

Mr. BROOKS. However, under subsection (d) he has the right of appeal. It uses the word "appeal."

Mr. ELSTON. Only to the next superior officer.

Mr. BROOKS. He has that right, to the next superior officer.

Mr. ELSTON. But he cannot demand trial by court martial unless the Secretary of the Army and the Secretary of the Air Force issue regulations and authorize it.

Mr. RIVERS. That is right. That appeal is not worth a tinker's dam.

Mr. DEGRAFFENRIED. That is right.

Mr. BROOKS. You heard the motion, gentlemen. It was originally moved by the gentleman from California to substitute for 3 months the term 2 months, as sought to be amended by the gentleman from South Carolina, reducing the forfeiture period for officers down to 1 month.

Are you ready to vote? All in favor of the amendment as proposed by the gentleman from South Carolina make it known by saying "Aye." All opposed, "No." The amendment has carried, which in effect reduces the forfeiture period to one month.

If there is no further discussion, then——

Mr. ANDERSON. Mr. Chairman, there is just one thing I want to ask for purpose of clarification. Mr. Smart, or Mr. Larkin, we will take a hypothetical case of a naval officer. Say he is a commander who has had a tour of duty here in Washington and he is assigned to Guam or wherever it is. On his way out there under orders he is a transient. He is traveling through San Francisco.

His boat does not sail for 2 or 3 days. He decides to paint the town red. He is guilty of conduct unbecoming an officer. To whom is he responsible? Who has the power to impose punishment on that transient officer if he does that say out in the 12th Naval District on his way out to the Pacific?

Captain WOODS. The District Commandant, sir. He reports to him for transportation and he is his commanding officer while he is there.

Mr. ANDERSON. I see. And the District Commandant has the authority to either impose company punishment or direct a court martial.

Captain WOODS. That is correct, sir.

Mr. ANDERSON. Or whatever the officer has done requires in the way of punishment.

Captain WOODS. That is correct.

Mr. ANDERSON. I see. Thank you.

Mr. ELSTON. Mr. Chairman, for the record I would like to get it a little clear about why the Navy and the Army should have a different rule about appealing to a special or general courts martial if the offender does not want to accept company punishment.

Mr. LARKIN. Perhaps I can explain that, Mr. Elston. The theory of the Navy has been that company punishment is purely and simply for discipline and the punishments that can be imposed are relatively minor.

The captain of a ship, to use that example, has to have some sanctions. They feel that at that level for these minor offenses for which only relatively minor offenses can be imposed he should be supreme and he should have the right to impose them because fundamentally it is a disciplinary matter covering minor infractions.

Mr. ELSTON. Well I——

Mr. LARKIN. The——

Mr. ELSTON. Pardon me.

Mr. LARKIN. They feel, however, when they go to the next step and get into the hierarchy of courts martial in the summary court, which is the lowest court martial, that when a man comes before that one-officer court he should have the right to refuse a one-officer court and get a three- or five-officer court.

The Army and Air Force on the other hand have not felt that their disciplinary problems are such that at company punishment it is necessary to make the man take the punishment. So at that point by virtue of their disciplinary problems they give him the right to refuse it. But when he gets up to the lowest court in the hierarchy of courts, which is the summary court, they say there he has not the right to refuse it unless he happens to be of the two or three top noncommissioned grades.

So it is substantially a difference in philosophy or a difference in what is felt to be the needs for disciplinary action.

Colonel DINSMORE. May I say something——

Mr. ELSTON. Just before that, Colonel. I can understand all that as far as an enlisted man is concerned, but I am just wondering if an officer of the Navy who receives disciplinary punishment should not be entitled to an appeal to a court martial?

Colonel DINSMORE. I think I can answer that, Mr. Elston.

Mr. ELSTON. All right.

Colonel DINSMORE. Captain Woods will correct me if I am wrong. In the Navy, company punishment is ordinarily imposed by the master of a ship.

Now if you give an appeal to a court that court necessarily will be less experienced and of lesser rank than the man who imposed the punishment, so that you are appealing from a superior to an inferior.

In the Army, company punishment is ordinarily imposed by a commander of the company and the appeal for a court goes to an officer who is senior and more experienced.

Mr. ELSTON. I am principally asking this question just to clarify it because when we get to the floor of the House we will no doubt have to explain it.

Captain WOODS. That is entirely correct. It is a punishment and if you allow an automatic appeal or an optional appeal it goes to some junior. That junior is in the extraordinary position of saying that the captain's judgment is wrong.

Mr. LARKIN. It goes to the junior officer by virtue of the fact that the summary court officer is usually the captain's executive officer. There is no one else around.

Mr. BROOKS. When the party accused is on board a ship there is no higher ranking officer than the master of the ship, is there?

Captain WOODS. That is the position, sir.

Mr. BROOKS. That answers it. Is that all right?

Mr. ELSTON. That is all right. I just wanted the explanation.

Another thing we may have to explain is the expression: "If imposed by an officer exercising general court martial jurisdiction." Now what officer is that?

Mr. LARKIN. There are only a very limited number who have general court martial jurisdiction. They are spelled out, incidentally, in article 22. Only the top ranking officers have general court martial jurisdiction.

The admirals of a fleet, the generals of an Army, and officers of that rank.

Mr. ELSTON. I thought it ought to be in the record.

Mr. BROOKS. Mr. Elston, on one of the days when you were not here we covered most of that. It is in the record. But it is all right to have it repeated there.

Mr. LARKIN. That is right.

Mr. RIVERS. We do not have a general of the Army and a fleet Admiral now.

Mr. SMART. He means a general in the Army, perhaps, who is commanding a division. Ordinarily general court-martial jurisdiction is not vested in any Army officer lower than a divison commander.

Mr. LARKIN. That is right.

Mr. SMART. Which involves 15,000 troops or thereabouts.

Mr. ANDERSON. Did he not say it is spelled out in a subsequent article?

Mr. LARKIN. Twenty two.

Mr. SMART. Article 22, sir.

Mr. ELSTON. Which we have not yet considered.

Mr. BROOKS. Now——

Mr. SMART. I have just one question to raise purely for the record, before you leave this section.

Mr. BROOKS. All right, Mr. Smart.

Mr. SMART. I refer to page 15, in section (c), as to what is the meaning of "an officer in charge." The reason I raise the point is that I understand that the Coast Guard has a different interpretation of those words than has the Navy.

Mr. RIVERS. Where are the Coast Guard?

Mr. SMART. The Coast Guard is represented by Commander Webb. Is there a different interpretation, Commander Webb?

Commander WEBB. Yes. Our definition of "officer in charge" includes warrant officers and petty officers in charge of a station. We have many very small stations, such as lifeboat stations or light stations, all along the coast and along the major rivers of the country.

We have extended that definition to include those petty officers in charge of those stations.

Mr. SMART. Would it cure the defect so far as the Coast Guard is concerned if we added an amendment which would say: "A commissioned officer in charge"? That would exclude the right for enlisted persons to administer company punishment.

Commander WEBB. It would necessitate a change in our administrative control of those small stations. It has been a very difficult and serious problem for us to maintain any measure of discipline at those small stations.

The Department is very well aware of the fact that new consideration along this line would be a bad case of the tail wagging the dog. We had hoped that it could be left open so that we could give some measure of commanding officer's punishment to those warrant officers and petty officers in charge under the regulations provided for in subsection (A) (2) (b).

Mr. SMART. Well, do you feel that the section as written on page 15, subsection (c), would result in any difficulties for the Coast Guard or is it all right as written?

Commander WEBB. We feel that it is all right as written and would require a coordination of definition with the Navy and what we have to give up administratively is in the best interests of all the services.

Mr. SMART. That is all right.

Mr. RIVERS. That might be very true. But you take, for instance, those of us who are familiar with what the Coast Guard does. It has stations all up and down the United States. You have a problem peculiar to our own service.

Commander WEBB. Right, sir.

Mr. RIVERS. And it might not be good for the service to deprive you of that, because I know plenty of them in my district where you have a chief at the head of a lifeguard station.

Commander WEBB. That is right. We want to give the chief there the authority.

Mr. RIVERS. That is right.

Commander WEBB. We think the definition might work out a little different for the Navy and the Coast Guard.

Mr. SMART. So long, Mr. Rivers, as they have the authority, on page 14, under subsection (b), or line 23.

Mr. RIVERS. The Secretary of the Department.

Mr. SMART. The Secretary of the department may prescribe those regulations. But I did want to get that in the record and point out that there is a difference between the Navy definition and the Coast Guard definition.

Mr. RIVERS. And there is no intention on the part of this committee to deprive the Coast Guard of its existing recognized authority.

Commander WEBB. If the Congress will go along with a slightly changed definition for the Coast Guard officer in charge, that leaves us just as we are now with the authority we needed.

Mr. RIVERS. That is right.

Mr. BROOKS. Now, gentlemen, article 16 brings up part 4 of the bill. We only have about 5 minutes.

Mr. ANDERSON. I suggest we recess, Mr. Chairman, because we are going to have a vote over there very shortly.

Mr. BROOKS. If there is no objection, we will adjourn until 10 o'clock tomorrow morning.

(Whereupon, at 10:55 a. m., the subcommittee adjourned to reconvene on Wednesday, March 23, 1949, at 10 a. m.)

UNIFORM CODE OF MILITARY JUSTICE

WEDNESDAY, MARCH 23, 1949

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The subcommittee met at 10 a. m., Hon. Overton Brooks (chairman) presiding.

Mr. BROOKS. The committee will please come to order.

Yesterday, gentlemen of the committee, when we adjourned we had just completed article 15. So this morning we will begin on article 61.

Mr. Smart, will you read article 16.

Mr. SMART. May I make one suggestion before you go on that, Mr. Chairman?

Mr. BROOKS. What is it?

Mr. SMART. It is still in regard to articld 15, on the question of forfeitures and it is purely a corrective thing.

You will notice that we have in subsection (c), beginning at the bottom of page 13: "If imposed by an officer exercising general court-martial jurisdiction, forfeiture of one-half of his pay per month for a period not exceeding 1 month," now that would seem to say that if you exercise that forfeiture that you must forfeit the full one-half and have no right to forfeit any less than one-half.

I do not think that that is the intent. I think the intent is to forfeit anything up to but not to exceed one-half.

Mr. BROOKS. Well, is that not, though, based not on the percentage but based on the part of the month, that is the month or fraction thereof?

Mr. SMART. I construe it to be upon the full month's pay.

Mr. BROOKS. It says "not exceeding 1 month."

Mr. SMART. Then it likewise should say "not to exceed 50 percent."

Mr. BROOKS. You have heard the suggestion there, as a corrective measure, to so frame subsection (e) that it will read "forfeiture not exceeding one-half of his pay for a period not exceeding 1 month."

Mr. SMART. That is right, sir.

Mr. BROOKS. Is there any objection to that?

Mr. ANDERSON. No objection.

Mr. BROOKS. All right.

Now let us proveed with article 16.

Mr. GAVIN. Let me go back there now. We have taken out in that second section article (G)?

Mr. RIVERS. That is right.

Mr. ANDERSON. That is right.

Mr. BROOKS. Yes.

Mr. SMART (reading).

ART. 16. Court martial classified.

There shall be three kinds of court martial in each of the armed forces, namely:

(1) General courts-martial, which shall consist of a law officer and any number of members not less than five;

(2) Special courts-martial, which shall consist of any number of members not less than three; and

(3) Summary courts-martial, which shall consist of one officer.

References: A. W. 3, 5, 6, 7; A. G. N., articles 27, 39, 64.

Commentary: This article consolidates provisions as to types of court martial and number of members. As the term "summary" is felt to be more appropriate for a court of one member than for a court of three members, present Army and Air Force terminology is retained. Maximum limits are believed unnecessary. The law officer of a general court martial replaces the law member under the present Articles of War. The law officer is specified in paragraph (1) to show that he is not a "member." See also articles 26, 39, and 51.

Mr. BROOKS. Any discussion or objection?

Mr. RIVERS. Let me say this. I was talking to Commander Webb of the Coast Guard and he called to our attention the fact that the Coast Guard itself only has about 25 lawyers in the whole corps. I wonder if we could not take care of the situation which he has. I was asking him these things. Here he is now. We better protect the Coast Guard set-up.

Mr. SMART. May I say, Mr. Rivers, that that question will arise when we get to article 22.

Mr. RIVERS. I see.

Mr. SMART. It is not pertinent to article 16.

Mr. RIVERS. Five lawyers on a general court would take about all the lawyers they have.

Mr. LARKIN. May I point out that these are court members, who do not have to be lawyers, you see.

Mr. RIVERS. That is right.

Mr. BROOKS. If there is no objection to article 16, we will approve it as read——

Mr. GAVIN. May I ask a question?

Mr. BROOKS. Yes.

Mr. GAVIN. What other comparable courts are there in the Navy now or have been?

Mr. LARKIN. They are exactly the same, Mr. Gavin, except they were named as follows: General court, summary court, and deck court.

Mr. GAVIN. Now they will all be known as general court, special court, and summary court?

Mr. LARKIN. Yes, sir.

Mr. BROOKS. Just a change of the wording.

Mr. RIVERS. It is a good thing.

Mr. BROOKS. The terminology.

Mr. LARKIN. That is right.

Mr. BROOKS. Well, let us proceed, then, with article 17.

Mr. SMART (reading):

ARTICLE 17. Jurisdiction of courts-martial in general.

(a) Each armed force shall have court-martial jurisdiction over all persons subject to this Code. The exercise of jurisdiction by one armed force over per-

sonnel of another armed force shall be in accordance with regulations prescribed by the President.

(b) In all cases, departmental review subsequent to that by the officer with authority to convene a general court-martial for the command which held the trial, where such review is required under the provisions of this Code, shall be carried out by the armed force of which the accused is a member.

References: None.

Commentary: Subdivision (a) authorizes reciprocal jurisdiction among the armed forces, but makes the exercise of such jurisdiction by any force subject to regulations prescribed by the President. Such regulations will enumerate those situations in which one armed force may try personnel of another armed force. This method of providing for the exercise of reciprocal jurisdiction permits flexibility, in that new situations for which the exercise of such jurisdiction may be desirable, can be provided for as they arise.

The provision in subdivision (b) is particularly applicable to cases where reciprocal jurisdiction has been exercised and is therefore placed in this article. The same practice will be following in all court martial cases, however. The disposition of records under article 65 is controlled by this subdivision.

Mr. BROOKS. Now, would you mind giving an explanation of that, Mr. Smart?

Mr. SMART. I will leave that to Mr. Larkin, if I may, Mr. Chairman.

Mr. BROOKS. All right.

Mr. SMART. But I point out to the committee that this is the article which provides for reciprocal jurisdiction of one service over the personnel of another.

Mr. RIVERS. Now what does (b) say?

Mr. LARKIN. (b) says that after the trial in the event that an Army court has tried a Navy man or an Air Force man——

Mr. RIVERS. That is right.

Mr. LARKIN. That after the trial is concluded then the review of that case will be undertaken by the accused's own service.

Mr. RIVERS. I see.

Mr. BROOKS. It is put in there to guarantee that there will be no prejudice on account of service?

Mr. LARKIN. Well, there will be no prejudice, if you will, on account of being tried by the courts martial of a different service.

Mr. RIVERS. We want to avoid any criticism by somebody who wants to make headlines, such as some newspaper set-up of whatever nature it may be who may be partial to one branch of the service using such a thing as that to bring about an unwarranted commentary or criticism. I know that is what you had in mind.

Mr. LARKIN. That is right. We felt that it may be necessary and appropriate and result in an efficient use of courts if the Army, the Navy or the Air Force under certain circumstance, do try men of another service when they are operating with them.

Mr. RIVERS. Your classic example is the MATS.

Mr. LARKIN. That of course is a permanent operation at this time. We expect if we are ever in a war again that there will be joint operations of various kinds which will dictate or indicate that it is sensible to have this reciprocal jurisdiction. We just cannot tell what they will be at this time.

Mr. RIVERS. That is the only appreciable dilution of one service, that is a mix-up of different services we have now in existence, is it not, to amount to anything, and that is the MATS?

Mr. LARKIN. MATS is at this time I think the principle one. There is one other circumstance I believe where there are some Army engineer officers who I think have been assigned on a relatively permanent basis to the Air Force.

Mr. RIVERS. I see.

Mr. LARKIN. Just how much that is going to grow as unification grows, is hard to tell at this time, but it was our idea to provide by statute for reciprocal jurisdiction and then as closer and closer operations come into being we provide that the President prescribe when this reciprocal jurisdiction should operate. But we need to have the authority in the first instance. If we do not have it, then it can never operate, you see.

Mr. RIVERS. I see.

Mr. BROOKS. This provides a workable set-up for the theory of carrying on war by task force?

Mr. LARKIN. That is right.

Mr. RIVERS. That is right.

Mr. LARKIN. But it leaves it flexible so that we can appraise the character and nature of these different task forces as they are made up and depending on their nature at that time we can ask the President to provide reciprocal jurisdiction. If he does not do it, why then the exercise does not take place.

Mr. BROOKS. Any suggested amendments? No objection to the article?

Mr. GAVIN. None.

Mr. BROOKS. Or further discussion.

Mr. GAVIN. No.

Mr. BROOKS. Then it is approved as read.

Article 18.

Mr. SMART (reading):

ART. 18. Jurisdiction of general courts-martial.

Subject to Article 17, general courts-martial shall have jurisdiction to try persons subject to this Code for any offense made punishable by this Code and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this Code. General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.

References: A. W. 12.

Commentary: This article is derived from A. W. 12. The punishments which may be adjudged are changed from those "authorized by law or the customs of the service" to those "not forbidden by this code" because the law and customs of each of the services differ. Cruel and unusual punishments are forbidden in the code; other punishments which may be adjudged will be made uniform by the regulations prescribed by the President under article 56.

Mr. BROOKS. Now, Mr. Larkin, what does that last sentence mean?

Mr. LARKIN. Well, that is provided, Mr. Chairman, so that a general court martial can act as a military tribunal if necessary and when it does so act that it will operate under the laws of war. It is a precautionary type of provision. It rarely happens, I take it, but in the event it ever became necessary, that jurisdiction would be provided.

Mr. BROOKS. Now that does increase the discretion in reference to the type of punishment to be used.

Mr. LARKIN. It makes it equivalent to the types of punishment that a military tribunal can impose.

Mr. BROOKS. In the preceding sentence we limit the type of punishment to any punishment not forbidden by the code. Now does that sentence add anything to the types of punishment?

Mr. LARKIN. Yes, it does, I should say, if the court martial is acting as a military tribunal and not as a court martial.

Mr. BROOKS. What does it do toward increasing the types of punishment?

Mr. LARKIN. Well, it enables the court martial then to impose the same kind of punishments that a military tribunal could impose under the laws of war.

Mr. RIVERS. On civilians, too.

Mr. LARKIN. That is right

Mr. BROOKS. Do you interpret that to mean cruel and unusual punishment—any type?

Mr. LARKIN. Well, I do not believe cruel and unusual punishments are permitted under the laws of war.

Can you answer that, Colonel Dinsmore?

Colonel DINSMORE. Those are set out very specifically, Mr. Chairman, in the laws of war. It is well settled what punishment you can adjudge. This is primarily designed for the trial of spies, saboteurs, and people like that, and not military personnel.

It does not change anything from the present articles. That is in the Articles of War right now, in that language. It has been there a long time.

Mr. RIVERS. Is that the code you operate under in the occupied territory of Europe?

Colonel DINSMORE. No, sir. Those are military government courts.

Mr. RIVERS. I see.

Mr. SMART. May I raise one technical question here while Colonel Dinsmore is on his feet. In line 13 the words are used "law of war." I am wondering if that should not say "laws of war." I think "laws of war" are words of art which have a specific meaning, whereas "law of war", I doubt, would have the same meaning. What is your reaction to that?

Colonel DINSMORE. The present article says "law of war."

Mr. BROOKS. What is a law of war?

Colonel DINSMORE. "Law of war" is set out in various treaties like the Geneva convention and supplements to that.

Mr. BROOKS. International law.

Colonel DINSMORE. Yes, sir.

Mr. RIVERS. The law of war was "whoever gets there the fustest with the mostest."

Mr. BROOKS. Any further discussion of this?

Mr. LARKIN. May I offer a clarifying amendment to the first sentence. Since we drafted this article and reread it, we feel to make it perfectly clear we should add the words after the word "code" which is the last word of the sentence "including the penalty of death when specifically authorized by this code."

Now we provide under certain punitive articles that the penalty of death may be imposed. Unless it is so provided of course it cannot

be imposed. It is provided for sufficiently in other parts of the code but since the general jurisdiction of general court martial is to be found in this article I think to clarify it and to make sure that it is understood and to enable people to find out just what general court jurisdiction is without running to five other articles of the code, it is valuable if we add that right here.

Mr. BROOKS. Will you read that suggested amendment again?

Mr. LARKIN. Just add the words——

Mr. GAVIN. Whereabouts is that now, Mr. Larkin?

Mr. LARKIN. At the end of that first sentence.

Mr. RIVERS. Page 17.

Mr. SMART. Line 10.

Mr. LARKIN. Page 17, line 10.

Mr. GAVIN. Yes.

Mr. LARKIN. Continue on that sentence by adding the words "including the penalty of death when specifically authorized by this code."

Mr. RIVERS. No "command" mixed up in it?

Mr. LARKIN. I do not think so; no. It is purely for clarification.

Mr. RIVERS. "When specifically authorized by this code?"

Mr. LARKIN. Yes. Other than that I have nothing more.

Mr. GAVIN. How is it it was not in the code before?

Mr. LARKIN. Well, when we first drafted it, we felt it was sufficient as is; that is, the language was sufficient as is, in view of the provision elsewhere. And we still do think so. But since this is the article that gives general jurisdiction we feel it will be clearer if we add it here as well. It changes nothing.

Mr. GAVIN. What is it you want to amend it to?

Mr. LARKIN. We want to make sure that it is understood that a general court martial has the power to impose the death penalty in certain specific cases where the death penalty is provided, such as in murder cases, desertion in time of war, aiding the enemy and crimes of that character.

Mr. RIVERS. Mr. Larkin, is it true that wherever a mar is charged with murder and convicted by a court of the proper jurisdiction, which of course would be this court we are talking about, the court has no alternative but to sentence him to death?

Mr. LARKIN. No.

Mr. RIVERS. They always told me that in the Army.

Mr. SMART. That was changed, Mr. Rivers, in H. R. 2575.

Mr. RIVERS. In the last year.

Mr. SMART. There were two instances, were there not, Colonel Dinsmore, where the court had previously been——

Mr. RIVERS. I am talking about before the Elston bill.

Mr. SMART. That is right. But there were two instances in the Elston bill where prior to that time only the death penalty had been authorized, and in the Elston bill they authorized a lesser penalty than death.

Mr. RIVERS. That is right.

Mr. BROOKS. You have heard the suggested amendment. Is there any objection——

Mr. GAVIN. Wait a minute. I would like to hear an opinion from Mr. Elston on that. What do you think?

Mr. ELSTON. Well, it has been stated that that was true, as Mr. Rivers suggested, where we passed the bill last year.

Mr. GAVIN. Do you think this amendment should be added to this?

Mr. ELSTON. Yes; I think it will make it clearer.

Mr. SMART. It is purely clarifying, Mr. Gavin. It neither adds to nor takes anything from existing provisions of law.

Mr. RIVERS. That is right, because it will be authorized later on in this code.

Mr. LARKIN. Yes, in specific articles.

To answer your question specifically—for instance, as to murder—the penalty is provided as the death penalty or such punishment as the courts martial may direct.

Mr. RIVERS. That is right.

Mr. LARKIN. So, it is not a mandatory death penalty in the murder statute.

Mr. BROOKS. Any further discussion? If not, we will adopt the amendment as suggested by Mr. Larkin.

Now I want to ask one more question before we finish the paragraph. I may be a little confused about it, but it seems to me that last sentence is a catch-all that will just about cover anything. Perhaps, historically, it was worded all right.

Mr. LARKIN. It is designed to enable the courts martial, when it is acting not as a courts martial but as a military tribunal, to follow the laws of war.

Mr. BROOKS. Does it not nullify what we just said above there?

Mr. LARKIN. No, because it is used as a military tribunal in only a very limited number of cases, usually a case like spying or treason.

Mr. BROOKS. But it says "any person who by the law of war is subject to trial." Would that not include any man in any branch of the service?

Mr. LARKIN. Well, any man in any branch of service, I suppose who violated the law of war would be triable by a military tribunal or a courts martial which is not acting as a courts martial but a military tribunal.

Mr. BROOKS. I will not make it a point, but it does just seem to me that that covers everybody and it renders null the preceding provision which limits the type of punishment. That is not true, is it?

Mr. LARKIN. I do not think so, Mr. Chairman.

Mr. DEGRAFFENRIED. Mr. Larkin, I do not want to delay—I know we have to cover a lot of ground and everything—but I am not entirely familiar with the difference between military tribunal and a courts martial.

Would it take you too long to tell us just a little bit about that?

Mr. GAVIN. Who sits on the military tribunal?

Mr. LARKIN. Well, they vary. Perhaps Colonel Dinsmore can explain that difference.

Colonel DINSMORE. That ordinarily, Mr. deGraffenried, takes the form of a military commission. It is appointed in the same manner and perhaps by the same authority as the courts martial. It is not sitting as a courts martial, however. It is sitting as a military tribunal to administer the laws of war.

Now, I would like to say at the same time, in response to a suggestion that has been made, I conceive of no situation in which military personnel of our own forces would be tried under the laws of war as distinguished from the Articles of War we are writing.

A classical example of the military tribunal is the trial of the Lincoln conspirators.

That was a military commission appointed by the President.

Mr. RIVERS. Have you finished, Mr. deGraffenried?

Mr. DEGRAFFENRIED. Yes, sir.

Mr. RIVERS. I would like to ask, in connection with my chairman's observation, is this the same provision which was excepted to by Colonel Oliver and Colonel Maas about bringing these Reserves that are meeting under their jurisdiction. They come under a general anyway?

Mr. SMART. This is not the article. There you were referring to article 2 and subsection (a) of article 3, and not this. This has nothing to do with it, Mr. Rivers.

Mr. RIVERS. All right. I just did not want to overlook that.

Mr. BROOKS. Any further discussion? If not, and there is no objection to article 18 as amended; it will stand approved.

Article 19.

Mr. SMART (reading):

ART. 19. Jurisdiction of special courts martial.

Subject to article 17, special courts martial shall have jurisdiction to try persons subject to this Code for any noncapital offense made punishable by this Code and, under such regulations as the President may prescribe, for capital offenses. Special courts martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this Code except death, dishonorable discharge, dismissal, confinement in excess of six months, hard labor without confinement in excess of three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for a period exceeding six months. A bad-conduct discharge shall not be adjudged unless a complete record of the proceedings and testimony before the court has been made.

References: A. W. 13; proposed A. G. N., articles 17, 20.

Commentary: This article is derived from A. W. 13. Special courts martial are given the authority to try capital cases under such regulations as the President may prescribe instead of when the officer with general court martial jurisdiction over the case authorizes it. The Navy proposes this procedure so that prior blanket authority may be obtained for capital offenses to be tried by special courts aboard ship where circumstances make it desirable, since it is not practicable to refer such a case to the officer with general court martial jurisdiction. Death is added to the list of punishments which a special court martial may not adjudge, to cover the cases where a special court tries what would otherwise be a capital case. Other restrictions on punishment are adopted from A. W. 13. It is intended that special courts martial shall not have jurisdiction to try offenses for which a mandatory punishment has been prescribed by this code

The provision in A. W. 13 that a bad-conduct discharge adjudged by a special court martial is subject to approval by an officer with general court-martial jurisdiction has been deleted from this article. The review of special courts-martial records and the execution of sentences are covered in articles 65, 66, and 71 of this code.

Mr. RIVERS. What is the consistency about the forfeiture of the pay? In other words, they are disciplined down the line. Now we have the forfeiture of pay under the code.

Mr. SMART. This is the result of an action of a courts martial as a part of a sentence of a court martial, whereas the other is a punishment for disciplinary infractions.

Mr. RIVERS. Is this out of line with our thinking along that line?

Mr. SMART. Not at all, Mr. Rivers. This perpetuates existing law as far as the Army is concerned, and it brings the Navy's present provisions up to equal those of the Army and Air Force.

In other words, while a special court would have the jurisdiction to try any case, they are limited by this section here to give a man not more than 6 months' confinement and not more than a forfeiture of two-thirds pay per month for 6 months.

But they can give confinement for 6 months or confinement for 3 months at hard labor, and they may likewise give a bad-conduct discharge.

Mr. RIVERS. That goes to all officers and enlisted men, alike?

Mr. SMART. And officers have been subjected to trial by this court, as you say, the same as enlisted men.

Mr. RIVERS. That is right.

Mr. SMART. Heretofore, historically, officers have been exempted from trial by special and summary courts.

Mr. RIVERS. I see.

Mr. SMART. H. R. 2575 made Army and Air officers subject.

Mr. ELSTON. The provisions of this section are substantially the same as the provisions of the bill we passed last year?

Mr. SMART. Exactly, Mr. Elston.

Mr. RIVERS. I see.

Mr. LARKIN. For the three services now.

Mr. ELSTON. Yes.

Mr. BROOKS. And it results in a uniformity of procedure in the courts.

Mr. LARKIN. Yes.

Mr. RIVERS. Did you have any trouble with the services on this?

Mr. LARKIN. No. Their present procedures were similar. There were little differences in the maximum limits of punishment, but we had no trouble in agreeing that this is appropriate.

Mr. BROOKS. If there is no objection to the article as read, let it stand as adopted——

Mr. SMART. Mr. Chairman, before the committee adopts it——

Mr. BROOKS. Mr. Smart.

Mr. SMART. I would like to say that there has been some criticism by previous witnesses as to permitting a special court, which may not have lawyers as prosecution and defense counsel, which will not, except in extreme cases, have a law member, to adjudge a bad-conduct discharge.

Mr. BROOKS. That was criticized by two or three witnesses.

Mr. SMART. It was, Mr. Chairman.

Mr. BROOKS. However, this, Mr. Larkin, does not cover dishonorable discharges but merely bad-conduct discharges?

Mr. LARKIN. That is right.

Mr. ELSTON. However, it is provided that if there is a discharge for bad conduct a complete record must be made so that it can be reviewed.

Mr. RIVERS. That is right.

Mr. LARKIN. And we also provide in the review section, as you will see when we get to it, that such cases are reviewed in the same way that a general courts martial case is.

Mr. SMART. I want to point out one more point there.

Mr. BROOKS. Yes.

Mr. SMART. I am reluctant to extend this discussion, but I want to point out again the same point I made when this provision was adopted in 2575: As of today, the Navy summary, which is the equivalent of the Army special court, has a reporter who makes a question-and-answer transcript of the entire proceeding. You have a complete record, the same as at a general court. In the Air Force, as late as last October at least, they had a reporter present who made a complete transcript of the record, but they only made an extract of that record for review and, in the event any question arose as to the legality of the proceedings, they then ordered the reporter to prepare a complete question and answer transcript and send it forward for review.

In the Army they do not have reporters for all of their special-court cases. This provides that before they can give a bad-conduct discharge there must have been a reporter there.

Now my point is this: I may be wrong and I would like to have perhaps Colonel Dinsmore as the representative of the Army speak for them—I cannot escape the conclusion that where Army special courts have a reporter present for some of their trials and not present at other trials that when a special court sits and sees a reporter there it seems like a cue to them that the convening authority intended that a bad-conduct discharge would be a portion of the sentence.

I do not know what is going to happen to that, but I have the strong feeling that if that is ever taken up to the courts it may be held to be a prejudicial error. I merely want the committee to know the situation before they approve it.

Mr. BROOKS. What does Colonel Dinsmore say?

Colonel DINSMORE. That is correct, Mr. Chairman. I will read the paragraph applicable in the Manual for Courts Martial now in force. It is short.

Mr. BROOKS. You mean, you feel it is prejudicial? Is that what you mean by "correct"?

Colonel DINSMORE. No; I mean Mr. Smart's statement is correct.

Mr. BROOKS. Yes.

Colonel DINSMORE (reading):

> If a case involving an offense punishable by bad-conduct discharge is referred for trial to a special courts martial, the appointing authority may direct by his signed endorsement that it be tried without a reporter, if the interest of the service does not appear to require that a bad-conduct discharge be adjudged

Mr. BROOKS. Is that prejudical to the defendent or does the defendent gain comfort from the knowledge that the reporter is not there?

Mr. SMART. Well, I am thinking about the defendant when the reporter is there.

Mr. DEGRAFFENRIED. If the reporter is there, it might put the court martial itself on notice of the fact that whoever sent the reporter there is expecting the probability that the defendant will receive the bad-conduct discharge.

Mr. SMART. That is exactly my point.

Mr. DEGRAFFENRIED. The court is put on notice of the fact that that is what they are expected to do, and it might prejudice the right of the defendant for them to be under that impression when they start out on the trial of the case.

Mr. SMART. That is my point exactly. For instance, now you will have a special court convened to try maybe 15 cases, and they try four or five without a reporter and the sixth case comes up and here comes a reporter, so they all say, "Look out, the old man expects us to give a BCD in this case."

Mr. BROOKS. Who orders the reporter, Mr. Smart? Is it the trial officer?

Mr. SMART. The convening authority, sir.

Mr. BROOKS. The convening officer.

Mr. SMART. The same one who appoints the court and counsel and the law member, in the case of general courts.

Colonel Maxey, do you have an opinion on that matter?

Colonel MAXEY. If I may be heard just a moment. The Air Force recognized that possibility that you raised. I might point out this additional fact, however, that wherever a reviewing authority sends a case to a general court martial which he could send to a special, he thereby is indicating, on your same reasoning, Mr. Smart, that a dishonorable discharge is appropriate.

I am not too concerned with the prejudice because we have done this: We have informed all of our judge advocates in a conference that in any special court martial case in which a bad conduct discharge was authorized a reporter would be present, so in any case in which a reporter is not present the sentence authorized for that offense does not include a bad-conduct discharge.

Mr. SMART. Well, may I——

Colonel MAXEY. Just one second.

Mr. SMART. All right.

Colonel MAXEY. So if a reporter is present all the court has before it is an offense which the manual prescribes as one which may carry a bad-conduct discharge. So they will not know what the convening authority's opinion is on a particular case, you see.

Mr. DEGRAFFENRIED. But, Colonel, even in cases where you can give a bad-conduct discharge does not the convening authority or whoever sends the reporter there, if he thinks the facts of that particular case although the man is charged with an offense that might carry a bad-conduct discharge does not warrant a bad-conduct discharge he does not have to send a reporter there and sometimes does not send one there?

Colonel MAXEY. Well, in order to avoid that very practice we required that he do so, Mr. deGraffenried.

Mr. DEGRAFFENRIED. How about the Army?

Colonel MAXEY. I do not know how they operate.

Colonel DINSMORE. I would like to make it clear, it is normal practice for the reporter to be present unless the convening authority says no. So you have a reporter in every case, unless it is specifically provided that you do not have.

Now all these cases may or may not carry bad-conduct discharges.

The same argument would hold, it seems to me, Mr. Chairman, as to a general court case where the court has authority to adjudge a dishonorable discharge.

Mr. ELSTON. Mr. Chairman, may I ask Colonel Dinsmore?

Mr. BROOKS. Yes.

Mr. ELSTON. Would it be an undue hardship if the services were required to have a reporter in all special court martial cases?

Colonel DINSMORE. Yes, sir. We have not the money, Mr. Elston, and we have not the reporters. I suppose if you gave us the money we could get the reporters, but it would cost a good deal and we do not think it is necessary.

Mr. DEGRAFFENRIED. Would it cost much if you had this provision, that in every case where the court had a right to give a man a bad-conduct discharge a court reporter should be present?

Mr. GAVIN. That is about the stiuation now.

Mr. RIVERS. That is the special court.

Mr. DEGRAFFENRIED. No. As I understand it now he can either send a reporter there or not, is that right, Mr. Smart?

Mr. SMART. Mr. deGraffenried, the Air Force says that that is the policy which they follow.

Now within this code there is the provision that the President may prescribe a table of maximum punishments. Now once that is done—and that will be followed of course—it will prescribe every punishment for which a special court may give a bad-conduct discharge—may give, not must give.

Now on that basis this may be all right. It does not tell the court they have to give it to a man, but it is one of the possible punishments and basis it may and on that basis it may not be prejudicial in the way that I think of it. It might be perfectly all right, if the Army will provide a reporter in every special case where a bad conduct discharge is authorized as a portion of the sentence.

Mr. DEGRAFFENRIED. That is right. I asked Colonel Dinsmore if that would cost too much.

Mr. SMART. Certainly there will be hundreds and thousands of special court cases where a bad-conduct discharge is not authorized as a portion of the sentence and there is no reason why they should have to furnish a reporter.

Mr. DEGRAFFENRIED. My idea is if in those cases where a bad-conduct discharge may be prescribed in some of those cases a court reporter is present in the Army and in other cases he is not present that when the court reporter is present it might put the court on notice of the fact that is what they were expected to so.

Mr. SMART. That is my point, Mr. deGraffenried, and that is the thing I want the committee to understand.

Mr. RIVERS. Now, how many times does the defendant know what the offense for which he is charged could carry as a maximum?

Mr. SMART. Well, he knows the maximum he can get because the table of maximum punishments prescribes it.

Mr. RIVERS. You mean everytime a GI is locked up, he knows exactly what the maximum is?

Mr. SMART. His counsel will——

Mr. RIVERS. Wait. I just asked you as a practical situation.

Mr. SMART. Yes, sir. His counsel can open up the new Manual for Courts Martial for the Air Force, for instance and look at pages 140, 141, and 142 and see very extensive tables there which set out the maximum tables of punishments for specific crimes.

Mr. RIVERS. And he knows the minute he is put in the clinker that he is charged with so and so and he can look at the book and say "Well the most they can give me is so and so if they give me this there will be a reporter present,' is that right?

Mr. SMART. Well, I do not know that that is exactly right.

Mr. RIVERS. I am just asking you. I have known plenty cases in my experience where they did not know what it was they had done.

Mr. GAVIN. Does his counsel give him that information, though? That is the question.

Mr. SMART. Yes, sir, his counsel may look at the table of maximum punishments and upon the basis of the charges and specifications can tell him whether or not he is charged with a crime which may include a bad-conduct discharge as a portion of the sentence.

Mr. RIVERS. That is only after the Elston Act, though?

Mr. SMART. No.

Colonel DINSMORE. No.

Mr. SMART. We have had the maximum table of punishments for long years before the Elston Act.

Mr. PHILBIN. How about the record on appeal? What portion of the record comes to the appeal and the counsel?

Mr. RIVERS. The whole works.

Mr. SMART. If there was a bad conduct discharge adjudged as a portion of the sentence, a complete question and answer transcript must go up for complete review.

Mr. BROOKS. Let me ask you this, Mr. Smart. Would it help any if we stipulated in this article wherever it is appropriate that the reporter may be requested by the trial officer? Would that help any?

Mr. SMART. I doubt that.

Mr. BROOKS. What you are trying to do is to take this away from command influence?

Mr. SMART. Well, not necessarily that, Mr. Brooks.

Mr. BROOKS. Because it seems to me, if I were the defendant in a trial like this, I would be pleased not to see a reporter there.

Mr. SMART. Yes.

Mr. BROOKS. Now the only thing is when the reporter is there, does that indicate by his presence that the commanding officer sent him there to get a bad-conduct discharge? Now, if he is not sent there by the commanding officer, but requested by the trial officer, would that make a difference?

Mr. SMART. Yes; I think it would make this difference: The trial officer may very well ask for a reporter in a defense that does not even include a bad-conduct discharge as a part of the sentence.

Mr. GAVIN. Yes; that is all right. But that is not customarily done; is it?

Mr. SMART. No, sir.

Mr. GAVIN. You cited an instance where there would be a number of cases tried and four or five of them would have no reporter. Then on the sixth case the reporter comes in.

Mr. SMART. Yes, sir.

Mr. GAVIN. And naturally they assume that a certain punishment is going to be meted out because of the fact that he is there.

Mr. SMART. I think, Mr. Gavin, the only way to nail this thing down would be to provide that a reporter must be provided in every special case which the table of maximum punishments provides a bad-conduct discharge as a portion of the sentence. That would exclude all of the cases——

Mr. BROOKS. Suppose your trial officer admits beforehand that he does not want a bad-conduct-discharge sentence there; would you still take it down?

Mr. SMART. He can so advise the court.

Mr. BROOKS. I mean in an ordinary civilian trial for murder down in my section the prosecuting attorney can get up and say, "Now, we are simply going to ask for manslaughter; we do not expect a murder conviction here." No defendant objects to that.

If that power was placed in the hands of the trial officer, would it take it away from command influence? That is the thing that concerns me.

Mr. SMART. I personally am not concerned about the point of command influence with this particular proportion, Mr. Chairman.

Mr. BROOKS. Well, are you concerned because of the fact of the reporter being absent might diminish the punishment as to the defendant?

Mr. SMART. Well, it certainly limits the punishment, because they cannot give a BCD.

Mr. PHILBIN. As to the cases where you are not giving a BCD, what constitutes the record on appeal for the consideration of the appellate court?

Mr. SMART. In the Navy they have a complete record. In the Air Force they have a narrative record.

Mr. PHILBIN. And that narrative record is made up by the court itself?

Mr. SMART. Usually it is the trial judge advocate. The prosecuting official makes a narrative of the testimony. That is, from the record which the reporter has taken, the trial judge advocate makes up one for the Air Force. In the Army the trial judge advocate has no reporter in a special court, and he makes up a narrative, and if there is any question that arises about the case there is no transcript of the proceedings which may then be transcribed and sent forward for review.

Mr. PHILBIN. Is there any opportunity at that point for the defendant or his representative to look over the narrative to see whether what was testified to squares with his view?

Mr. SMART. Yes.

Mr. DEGRAFFENRIED. The thing about it, Mr. Smart: If you just have it in narrative form when it goes up, then the reviewing authorities do not get the benefit of the objections which were made by the defendant's counsel and that those objections were overruled and that an exception was taken. So, all the testimony appears to be legal because there are no objections and no rulings on those objections there for the reviewing authorities to see.

When it goes up in narrative, you have the situation where there were no objections, and if there were no objections the testimony is entirely legal; whereas, if objections were made and they were overruled and an exception was taken, then the legality of that ruling is presented to the reviewing authority.

Mr. SMART. Correct.

Mr. DEGRAFFENRIED. Therefore, do you not think that in every important case—I cannot say in every felony case because they say that is not recognized in military law—it should be presented in what we call a bill of exceptions; that is, it should be presented in questions, objections, what the answer was and what the ruling of the court was, so they could rule on its legality?

And that would be less expensive than to have another one prepared after you already prepared it in narrative form—have the defendant's

counsel raise some objection to it before the reviewing authorities and then have to prepare a new one setting it out in question-and-answer form.

Mr. SMART. There are many special-court cases where I do not think a reporter is necessary at all and we would be incurring, I think, some additional, unnecessary expense and go to a lot of trouble which is not necessary. But when you get around to this BCD provision—and I say to you that a BCD is almost as bad in practical effect as a dishonorable discharge to a man, regardless of how the armed forces characterize it—then I think you must be very careful about the way you handle these reporters and whether you have them or not.

Mr. BROOKS. Every defendant may be jeopardized, though, by making it possible even if the trial officer does not ask for a BCD to get a decree taking away his honorable discharge?

Mr. SMART. I would say there is much less likelihood of that happening, Mr. Brooks, because where your trial counsel—the prosecuting official—agrees that he thinks that a BCD is not an appropriate part of the sentence to be given, if he is the fair official that I think he should and would be——

Mr. BROOKS. Why would you take down that testimony, if he agrees there?

Mr. DEGRAFFENRIED. If he states there in advance, there would not be any necessity.

Mr. SMART. Then they can stipulate it and waive a reporter.

Mr. LARKIN. May I say in that case, his views may not be followed. It is the prerogative of the court to sentence.

Mr. BROOKS. And, if you insist on a reporter being there, it is going to give the man more punishment in some cases than he otherwise would get.

Mr. SMART. Mr. Chairman——

Mr. BROOKS. Yes.

Mr. SMART. I have no suggestions to the committee as to what they should or should not do about that matter. I did want to point out to you some of the possibilities in it for your consideration before you passed it.

Mr. RIVERS. Let me ask you this. Let us take the case of an officer. If he is tried before a special court and he is acquitted of the whole works, is there anything about that trial placed on his fitness report?

Mr. SMART. I cannot answer that, Mr. Rivers.

Mr. RIVERS. Who can?

Mr. SMART. Let me say this. Up unt ilthis time no Navy officer has ever been subject to trial by a special court.

Mr. RIVERS. How about an Army officer?

Mr. SMART. Up until the 1st of February 1949 no Air Force or Army officer was subject to trial by special court and I will bet this month's salary that none has been tried by special courts since the 1st of February. And I will bet furthermore that even though it is provided in the law, you are going to live a long time before you see any Army, Navy, or Air Force officers go to trial before a special court.

Mr. RIVERS. I think we ought to take cognizance of what could happen under this and make provision right here and now that in the event one is tried——

Mr. ELSTON. Mr. Chairman, if Mr. Rivers will yield.

Mr. RIVERS. Yes, sir.

Mr. ELSTON. Would not the whole thing be solved by simply providing, as Mr. Smart suggests, that in case where a bad conduct discharge may be imposed as part of the sentence a reporter be provided?

Mr. DEGRAFFENRIED. Yes, sir.

Mr. BROOKS. Why not put it "unless waived by the court."

Mr. ELSTON. Let us find out how much of a burden it would be. If that situation should prevail. What do you say, Colonel Dinsmore?

Colonel DINSMORE. It would be a considerable burden, Mr. Elston. I do not have the figures, but——

Mr. ELSTON. How does it happen the Navy is able to do it?

Colonel DINSMORE. They have had authority to adjudge bad conduct discharges for a good long time and we have not.

Mr. ELSTON. Well——

Colonel DINSMORE. So we have no experience.

Mr. ELSTON. If the Navy is able to get reporters, why cannot the Army get them?

Colonel DINSMORE. We can.

Captain WOODS. Our reporters are all enlisted men.

Mr. GAVIN. Cannot hear you.

Captain WOODS. Our yeomen are reporters.

Mr. ELSTON. The Army have enlisted men for reporters?

Colonel DINSMORE. We do have some, not enough.

Mr. ELSTON. How about the WACs, are not there a number of WACs that are stenographers?

Colonel DINSMORE. I am quite sure that is true, Mr. Elston. My own experience does not go that far.

Mr. ELSTON. Of course every stenographer is not a reporter.

Colonel DINSMORE. That is right, sir.

Mr. ELSTON. But you do give the WACs some training and maybe it would be a good idea to give them some training as reporters.

Mr. RIVERS. That is right.

Mr. SMART. Mr. Chairman.

Mr. BROOKS. Mr. Smart.

Mr. SMART. As I said initially, I was reluctant to open this question up because it has taken so much time of the committee. May I suggest this to the committee: Having considered the matter, the three services are convinced they can live with this provision.

Now no doubt they have given it deep thought. I would say if they are convinced they can live with it let them try it and then if they get in trouble we are going to have to do something about it.

Mr. GAVIN. What you say interests me. If the reporter is there he is practically judged before the case goes to court.

Mr. ELSTON. Well, Mr. Gavin, that would not be true if you provided that a reporter had to be present in every case where a bad conduct discharge might be a part of the punishment.

Mr. DEGRAFFENRIED. That is right.

Mr. PHILBIN. You can get serious punishment for some of these other offenses, besides bad-conduct discharges. It seems to me we should try to find some protection for the individual accused in such cases.

Mr. RIVERS. Of course during the war there were a lot of miscarriages. I know plenty of cases in the Navy. I know of one which

stands out in my mind. This boy was charged with something. They put him inside of some kind of a hermetically sealed container where nobody could get in touch with him. The only man who ever came to see him was a chaplain and the chaplain told him, among other things, that they could send him to wherever they send them up there and put them in jail—somewhere up north, in New England, wherever they incarcerate them.

And it scared that boy so that he was delighted—it tickled him to death—to plead guilty to whatever it was so they could very generously and beneficially bestow upon him a bad-conduct discharge. It is just like you say. It is a very bad thing.

That boy hates to see his record, and to my knowledge he has never been home since he joined the Navy. And that bad-conduct discharge can carry the same implications to the boy who served as the dishonorable discharge.

Mr. SMART. So far as that is concerned, Mr. Rivers, of course complete review is provided of that under existing law.

Mr. RIVERS. There was not any review of it, because the man pleaded guilty and so forth. I do not know how you can avoid it. But this bad-conduct discharge, where they can charge the man with the maximum and compromise on a lesser one, is a bad, bad practice.

Mr. PHILBIN. Do you feel, Mr. Smart, that a complete review is assured in these non-bad-conduct discharge cases under the provisions of this bill?

Mr. SMART. I think a sufficient review is accorded in cases where a bad-conduct discharge is not a portion of the sentence. I feel that way, Mr. Philbin. Heretofore the Navy has had all of its summary—the equivalent of a special in the Army—cases come to the Navy Judge Advocate General's Office, presumably for review.

That has not been true in the Army and the Air Force. They do not get to the Judge Advocate's Office for review. And I will say most of them should not.

Mr. GAVIN. There are thousands and thousands of those cases, though.

Mr. SMART. Oh, I will say there are thousands and thousands.

Mr. GAVIN. How many men sit and review these cases?

Mr. SMART. It depends upon what service you refer to, sir.

Mr. GAVIN. Well, any of them. How many cases would they dispose of? What I am trying to find out: How many there have been and how many are disposed of and how many are yet to be reviewed?

Mr. SMART. Those figures will be presented to the committee in connection with another section of the bill, if you will withhold your question until that time, Mr. Gavin.

Mr. GAVIN. Well, in view of the fact that you have made it quite evident that the reporter being there prejudices the defendant's case, you either ought to have him there for all of their cases or not have him there for any of them.

Mr. ELSTON. Mr. Chairman, to bring the matter to a head I offer this amendment: On page 18, line 4, add the following sentence: "In any case where a bad-conduct discharge may be imposed a reporter shall be provided."

Mr. BROOKS. You have heard the suggested amendment. Is there any discussion on it? If there is not, we will call for a vote. All in favor of the amendment as suggested by Mr. Elston will make it

known by saying "Aye." All opposed, "No." The "ayes" seem to have it. The "ayes" have it. The amendment is carried.

We approved that section once. We better reapprove it, though, as amended. As amended, is there any opposition to article 19?

Mr. RIVERS. That amendment comes at the end of the section there; is that right?

Mr. BROOKS. Yes.

Mr. ANDERSON. Line 4, page 18.

Mr. RIVERS. I see, there.

Mr. BROOKS. You are using the annotated copy.

Mr. RIVERS. I see.

Mr. BROOKS. Then that article stands approved as amended and we will turn to article 20.

Mr. SMART (reading):

ART. 20. Jurisdiction of summary courts-martial.

Subject to Article 17, summary courts-martial shall have jurisdiction to try persons subject to this Code except officers, warrant officers, cadets, aviation cadets, and midshipmen for any noncapital offense made punishable by this Code, but no person who objects thereto shall be brought to trial before a summary court-martial unless he has been permitted to refuse punishment under Article 15. Where such objection is made by the accused, trial shall be ordered by special or general court-martial, as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this Code except death, dismissal, dishonorable or bad-conduct discharge, confinement in excess of one month, hard labor without confinement in excess of forty-five days, restriction to certain specified limits in excess of two months, or forfeiture of pay in excess of two-thirds of one month's pay.

References: A. W. 14; Proposed A. G. N., articles 15, 16.

Commentary: This article is derived from A. W. 14. The right to refuse trial by summary court martial is made absolute, except for the case where the person has been permitted to refuse punishment under article 15.

Mr. BROOKS. Mr. Larkin, do you want to explain that?

Mr. LARKIN. Well, this provides the jurisdiction for the lowest court of the three: The one-man court It is a court that can try enlisted men only. It is similar in its punishments to the present summary court of the Army and the deck court of the Navy. The one particular change insofar as the Army and Air Force are concerned is found in the provision that no person who objects to a summary court can be tried by that court unless he has previously had the opportunity of objecting to company punishment and did object.

The Navy practive at the present time is to afford the right to refuse this court, and the Army's has been not to except for the two or three noncommissioned grades.

Other than that, I think this follows a close pattern to what we have in all services.

Mr. BROOKS. You have heard the discussion. Is there any further discussion on this article?

Mr. GAVIN. Yes, Mr. Chairman, I would like to ask a question.

Mr. BROOKS. Mr. Gavin.

Mr. GAVIN. "Hard labor without confinement in excess of 45 days," what do you mean by hard labor?

Mr. LARKIN. Hard labor I think generally is construed to mean work while in confinement.

Mr. GAVIN. Well, what kind of work?

Mr. LARKIN. What kind of work is performed usually, Colonel, do you know?

Colonel DINSMORE. Trimming lawns, picking up garbage, digging ditches maybe——

Mr. RIVERS. Captain of the head.

Colonel DINSMORE. Improving the roads around posts, general police work—just the ordinary run of housekeeping, Mr. Gavin.

Mr. GAVIN. What about this rock-pile business with a certain cadence; that is, a certain number of blows per minute, and so forth?

Colonel DINSMORE. Never heard of it, sir. I know as a matter of general information that that has been used by the civil authorities sometimes. I do not say that we have not done that. I know of no case where we have.

Mr. BROOKS. Any further questions? If not——

Mr. ELSTON. Just a minute, Mr. Chairman.

Mr. BROOKS. All right.

Mr. ELSTON. The way this is written any offense, provided it is noncapital, may be tried before a summary court?

Mr. LARKIN. But if it is, then the punishments which may be imposed are limited to these punishments set out here. So you can try a case by this court which by the table of maximum punishments calls for a certain sentence as a maximum, but this court could not impose that maximum or could not impose a sentence greater than the maximum set forth here even though the offense itself if tried by another court might call for or might provide that a heavier sentence could be imposed.

Mr. ELSTON. Of course that is all to the advantage of the accused.

Mr. LARKIN. Exactly.

Mr. ELSTON. And there may be a case even of murder——

Mr. LARKIN. That is right.

Mr. ELSTON. I will say homicide instead of murder because murder presupposes an intent to kill. But you might have a homicide case that is not very serious. It may have elements of accident in it, or misadventure, which they could try by summary court rather than general or special.

Mr. LARKIN. But if you convicted him you could not give him more than 1 month's confinement, you could not give him a DD or a BCD, and so forth.

Mr. ELSTON. So you would probably never have a case where an accused person would object.

Mr. LARKIN. That is right.

Mr. BROOKS. This is where command influence comes in favor of defendant, because the command selects the type of court.

Mr. LARLIN. That is right.

Mr. BROOKS. And if he selects this court, it will actually work to the advantage of the accused.

Mr. LARKIN. In that it limits the punishments, no matter what the offense, to these limited provisions here.

Mr. BROOKS. Well, is there any further discussion? Any question? If there is no objection to this article, it will stand adopted.

Mr. RIVERS. I made an observation awhile ago about an officer tried before one of these courts having competent jurisdiction of offenses on which he is charged. Now in the event he is acquitted,

would that be noted on his fitness report and used whenever he is considered for promotion before a selection board?

Mr. LARKIN. I do not think so. But I could say this: The record of the trial and the acquittal is not expunged from departmental records.

Mr. RIVERS. Well that could be kept.

Mr. LARKIN. But I do not know specifically about the fitness.

Captain WOODS. It would have to be a matter of departmental regulation after enactment of the code, sir. I could use the analogy of the courts of inquiry.

Mr. RIVERS. I do not think a man ought to be tried in the star-chamber proceedings of a selection board.

Captain WOODS. There is no doubt in my mind that this would be made a matter of his personnel record.

Mr. RIVERS. Would it be out of order for us to consider that in this same document here at the proper place?

Mr. SMART. I doubt if it would be appropriate in this Code to legislate along those lines.

Mr. RIVERS. Where would you legislate it?

Mr. SMART. Well, as a practical matter, Mr. Rivers, I do not care what you write into the law, if the appropriate people in any department so desire, even though this officer has been acquitted, I can assure you that that will be considered by people in the selection board whether or not you have it in the law.

Mr. RIVERS. Only God Almighty with His infinite wisdom, omnipotence, and omnipresence knows what happens behind the closed doors of a selection board. I tell you that because I know whereof I speak.

Mr. PHILBIN. Does the record of an acquittal now appear on his fitness report?

Mr. SMART. The captain says it does not.

Mr. PHILBIN. It appears in other records.

Captain WOODS. Yes, sir.

Mr. LARKIN. That is right.

Mr. PHILBIN. But there is no notation on his fitness report.

Captain WOODS. No.

Mr. PHILBIN. So that would not be considered for promotion under present regulations.

Captain WOODS. That is right.

Mr. GAVIN. But that record is always available?

Captain WOODS. That is right. Administratively every record goes to the Bureau of Personnel and they make a notation on a particular court martial whether or not it constitutes a matter of interest in the particular officer's record. In acquittals they do not.

Mr. RIVERS. Of course if he had been disciplined somewhere down along the line that should be there.

Captain WOODS. That is right.

Mr. RIVERS. But where a court of competent jurisdiction has rendered him innocent, I think it should not be. It should be prohibited.

Captain WOODS. Administratively it is prohibited now, sir.

Mr. RIVERS. Well, it could be changed administratively.

Captain WOODS. It could. But for the same reasons that persuaded them for not doing it, they would continue.

Mr. PHILBIN. Administratively, Captain, the fact that a man has been tried and acquitted is not taken into consideration by a promotion and selection board.

Captain WOODS. That is correct. There is no information before the selection board on that fact.

Mr. BROOKS. Now, let us proceed with article 21.

Mr. SMART (reading):

ART. 21. Jurisdiction of courts martial not exclusive.

The provisions of this Code conferring jurisdiction upon courts martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals.

References: A. W. 15; proposed A. G. N., article 5 (f).

Commentary: The language of A. W. 15 has been preserved because it has been construed by the Supreme Court. (See *Ex Parte Quirin*, 317 U. S. 1 (1942).)

Mr. ELSTON. Mr. Chairman, might we have some explanation for the record of what is meant by "military commission, provost courts, or other military tribunals"?

Mr. BROOKS. You want to undertake that, Mr. Larkin?

Mr. LARKIN. Well, which part of it concerns you, Mr. Elston? Is it the "other military tribunals"?

Mr. ELSTON. No. I think for the record there ought to be an explanation of all that. "Such military commissions"—someone on the floor may want to know what a military commission is.

Mr. LARKIN. I believe a military commission may be defined as a tribunal which can be set up for the trial of persons who offend against the law of war.

Mr. ELSTON. Appointed by the President?

Mr. LARKIN. By the President. You have an example in that Sabateur case. That was a military commission.

A provost court is—what, Colonel Dinsmore? Is that a military government court or is it——

Colonel DINSMORE. It is an occupation court.

Mr. LARKIN. It is an occupation court; a court that may be set up by the occupation authorities within the area that they occupy.

There are other military tribunals. Are they occupation courts, too? What other kinds are there?

Colonel DINSMORE. Courts of inquiry.

Mr. ELSTON. Well, a court of inquiry does not have power to impose punishment, does it?

Mr. LARKIN. No. We have a provision in article 136 here for courts of inquiry, which cannot impose punishment or make a finding of guilty or not guilty.

Colonel DINSMORE. I suppose a Military government court is a military tribunal.

Mr. LARKIN. And that is a court that is similar, then, to the provost court; is that right?

Colonel DINSMORE. Yes; with greater jurisdiction.

Mr. ELSTON. I am wondering if we should not consider, then, a jeopardy provision, unless you have covered it in some later general jeopardy section?

Mr. LARKIN. We have a jeopardy section which I believe applies to this.

Mr. RIVERS. That is right.

Mr. PHILBIN. Do you have a section that may relate to possible conflict between military and civil courts, such as we had at Hawaii during the war? Do you recall that particular incident?

Mr. LARKIN. That was a question of martial law rather than courts martial.

Mr. PHILBIN. That was martial law versus civil law.

Mr. LARKIN. That is right.

Mr. PHILBIN. Of course it would not be covered here.

Mr. LARKIN. That is right.

Mr. PHILBIN. It was not contemplated by this section.

Mr. LARKIN. That is right.

Mr. PHILBIN. Or anything in this code.

Mr. LARKIN. That is right.

Mr. ELSTON. I wanted to be certain that they cannot try a person before one of these other military commissions and perhaps get an acquittal of the accused and then have him tried by general, special, or a summary courts martial.

Mr. RIVERS. That is right.

Mr. LARKIN. I think that concern is a real one and I think the jeopardy provision does and should apply.

Mr. RIVERS. I think it covers it. I was looking over this provision.

Mr. LARKIN. That is right.

Mr. BROOKS. Is there any objection to article 21? If not, it stands approved.

Now on article 22—that covers an appointment and composition of courts martial—I would like so ask Mr. Smart this: Is it possible, Mr. Smart, to bypass this article and still proceed with a discussion and approval of the subsequent articles?

Mr. SMART. It is entirely possible, Mr. Chairman, if this article is highly controversial with the committee, that it can be passed until a later date and reconsidered at that time by the committee.

Now of course you will recall that this brings into focus the proposition as to whether or not the convening authority shall remain to be the so-called command or whether you are going to have command submit panels from which a judge-advocate officer or some superior command will select the court.

Now that is the one big question right here. If it is the sense of the committee that you want to adopt 22 as it is written and let the command continue to appoint courts, then you could dispose of the question at this time.

If on the converse there is a substantial feeling that you should adopt the panel idea, certainly I know that the Departments will want to be heard and I feel in all fairness should be heard.

Mr. BROOKS. Well, would we have to also bypass article 23?

Mr. RIVERS. Yes; the whole works.

Mr. SMART. I think not, sir—not on special and summary courts, because special courts do not involve a law officer, they do not require legally trained personnel as trial counsel and defense counsel, and in most of them they are not accorded the same complete review that general courts are. I think you could very well consider 23 and 24 completely apart from 22.

Mr. BROOKS. Well, what is the pleasure of the committee, then, in reference to bypassing the question of command influence for the

present? We promised Mr. Anderson to have Professor Morgan back here.

Mr. ANDERSON. Mr. Chairman, I wanted to refer to that agreement which I understood we had when we started the reading of the bill by articles that we could return if we wanted to any article that is tentatively approved, to reconsider it or to hear Professor Morgan.

Now as I have indicated to Mr. Smart, I have a very comprehensive communication here from Professor Morgan which makes it unnecessary for me personally to require him to appear here as a witness again.

I understand he is coming down anyway. But in a matter that is as controversial as 22, I agree with Mr. Smart that if we are going to change the provisions of the bill as it is written the Departments are entitled to be heard if they so desire.

Mr. GAVIN. We said when we discussed these articles that all those who appeared before the committee be so notified, so they can be in attendance to make any suggestions they may care to offer.

Mr. RIVERS. Notify them so they can hear first-hand what way say about them behind their backs.

Mr. BROOKS. Well——

Mr. RIVERS. Let me ask Mr. Smart this. If we want to relieve the command of this burdensome obligation now imposed on them, would this be the place to do it?

Mr. SMART. This would be one of the places if you want to attack the proposition of command control. And I say I have no hesitancy in going on the record right now as subscribing to the ideas of General Riter and others. I do not think it would be appropriate to change this section.

I think there is a lot of wishful thinking being done about it. Many things have been suggested that are certainly fine from an ideal sense, and everybody who thinks about justice would hope that they would be done.

But so far as the services are concerned, I do not think they are practical, and I am perfectly willing to say so to this committee now.

Mr. RIVERS. Now in that connection, if we made a separate judge advocate set-up, would that cure the defect about which so many of us complain?

Mr. SMART. It would be helpful in my opinion, sir. I think the establishment of a Judge Advocate General's Corps, if that is the wish of the committee, for the Air Force and the Navy—the same as has already been done for the Army—could very well stand on its own feet and not be any part of the consideration of article 22.

Mr. RIVERS. Then it would minimize a lot of the criticism which is directed at command influence? Is that also your opinion?

Mr. SMART. It would certainly minimize the criticism. Whether it would cure the defect, that is something I can't say, sir.

Mr. ANDERSON. Is there anything in this code which sets up a separate Judge Advocate Corps?

Mr. LARKIN. No.

Mr. ANDERSON. Well, Mr. Chairman, perhaps the way to attack this thing, then, is to do it backward, by getting the sense of the committee first in connection with the possible establishment of a separate Judge Advocate Corps for all three of the services.

Then if the committee indicates that it wishes to set up a separate Judge Advocate's Corps, go ahead with the consideration of article 22.

Mr. BROOKS. Well, the only difficulty there, would be this, it seems to me: I doubt that a separate Judge Advocate's Corps would be germane to this particular bill.

Mr. SMART. Only to this particular extent, Mr. Chairman——

Mr. BROOKS. And certainly—go ahead.

Mr. SMART. I am sorry to interrupt you, sir. It would make only this difference: In the Army you have a Judge Advocate's Corps, whereas in the Navy and Air Force you don't. So suppose you would pull out this appointing or convening authority from so-called command channels and give it to a judge advocate in the Air Force or the Navy. It is still in command. So you wouldn't have accomplished a single, solitary thing——

Mr. NORBLAD. It would be in separate command then.

Mr. SMART. Because they have no corps. They are officers of the line in the Navy and Air Force.

Mr. NORBLAD. If we set them up as separate, they will be separate.

Mr. SMART. Yes, sir; if you set them up as a separate corps.

Mr. RIVERS. That is what we are talking about.

Mr. SMART. But I say under existing conditions——

Mr. RIVERS. They are not going to exist like they are, if I have anything to do with this bill, when we finish this bill.

Mr. SMART. I will subscribe to what you say, Mr. Rivers.

Mr. RIVERS. If my vote has anything to do with it.

Mr. GAVIN. What was your observation again? Will you state that again?

Mr. SMART. As of today, Mr. Gavin, you have no Judge Advocate Corps in the Air Force or the Navy.

Mr. GAVIN. That is right.

Mr. SMART. So that if you gave, under article 22 here, the authority to convene courts to judge advocate officers——

Mr. GAVIN. With a special Judge Advocate Corps to be set up.

Mr. SMART. If you do that, then that casts a completely different light on it. But as of now you would have accomplished nothing as far as the Air Force and Navy is concerned.

Mr. GAVIN. We are trying to work that out.

Mr. RIVERS. I believe the reason Professor Mordan didn't bring up a recommendation for a separate Judge Advocate Corps is because if he had the bill would still be up there in the Departments.

Mr. LARKIN. It wasn't within the terms of our reference, in the first place, Mr. Rivers.

Mr. RIVERS. Sir?

Mr. LARKIN. The question of a corps was not within the terms of reference of the committee. The committee did not provide for a corps for the Air Force or Navy. Nor did they attempt to change in any way the corps heretofore provided for the Army.

Now, the question of a corps in the panel plan as recommended to the committee by a number of witnesses relates to article 22 to the extent that under that plan the appointment of the members of the court would be by the corps officers.

The appointment of the members of the court can be of course by the command even though you have a corps. That is illustrated by the fact——

Mr. GAVIN. Not necessarily so.

Mr. LARKIN. Not necessarily so, but as a fact it can be and is.

Mr. GAVIN. As a fact it can, but it can't also.

Mr. LARKIN. That is right.

Mr. RIVERS. It may not, also.

Mr. LARKIN. But under the present provision in the Army, where you have a corps, the members of the court now, in the same fashion as article 22 provides, are appointed by the command. So while there may be a relation between the two, they can both exist separately.

Mr. RIVERS. I don't think we ought, right at this time, to constrict the command. But I do think that we should give some autonomy to the judge advocate set-up.

Mr. LARKIN. I think, as Mr. Smart says, if the sense of the committee is that they desire a corps for all services, that is one judgment to make. Then, secondly, you will follow through and determine, having a corps for all just as you have for the Army now, whether you want that corps and its members related to the appointment of the court members or not.

If you do not, that is if you have come to that conclusion, why it is perfectly appropriate to consider 22 right now. If, however, you desire in addition to a corps throughout and that the appointment be by corps members, then of course 22 will have to be changed completely.

Mr. RIVERS. That is right.

Mr. LARKIN. And that is a most important question of course. It is one that I think should be taken up in considerable detail. If you desire to take it up in that detail or if your conclusion already is that there should be corps and they should control appointment of members, then I would ask that the detailed discussion of this 22 be postponed until various Secretaries of the military come in and present their views to the committee.

Mr. ELSTON. Wouldn't it be appropriate to just pass all of part V until that time, because there are some other sections, too.

Mr. GAVIN. What does part V cover?

Mr. RIVERS. The whole works right there.

Mr. ELSTON. For example, article 26 might be related, where you refer to the law officer of a general courts martial and so forth. Why shouldn't the whole article just be passed until we decide that fundamental question.

Mr. PHILBIN. Yes.

Mr. RIVERS. Yes.

Mr. LARKIN. I think that is perfectly appropriate. You can take up phases of the rest of this. But to the extent that it concerns appointment of either court members, law officer, defense counsel, or otherwise, why——

Mr. GAVIN. Mr. Chairman, we will have to come back to it eventually. I suggest we go on, passing part V.

Mr. LARKIN. Your decision it seems to me ought to be based on your present state of mind on this whole subject.

Mr. BROOKS. There is no motion before the Chair, so in the absence of a motion and unless there is objection I am going to pass this article by and set the whole matter of taking up part V down for a special day and ask Mr. Smart, if he will, to notify all interested parties

to be present and notify all the members of the committee with a special reference to the fact that we are going to take up this disputed point—setting it all down at one time.

Mr. ANDERSON. Mr. Chairman, may I offer a suggestion?

Mr. BROOKS. Surely.

Mr. ANDERSON. Not in the way of a motion. Mr. Larkin made quite an explanation there of what the committee is going to be confronted with if the committee decides to set up a special Judge Advocate Corps and whether or not the corps will select the officers for courts martial or whether that will be done by command.

Mr. LARKIN. Yes, sir.

Mr. ANDERSON. Now I would suggest, Mr. Chairman, that Mr. Smart and Mr. Larkin prepare for the committee, particularly for those of us who have no legal background, a brief in words of one syllable so we will understand what we are doing when we take this motion, this motion or this motion, because we are going to have to make up our mind as members of the committee and I would like to know just exactly what I am voting on when that time comes. That is just in the way of a suggestion.

Mr. BROOKS. I think your suggestion is excellent. I think the committee would like to have you gentlemen advise them in reference to a separate Judge Advocate Corps before the committee would want to pass judgment on that.

Mr. SMART. Mr. Chairman, I shall be glad to prepare a brief and in as nonlegal terms as possible.

Mr. HARDY. And make it as brief as possible.

Mr. SMART. Or I will be glad to discuss it with you personally if you should desire to do that, if you have time.

Mr. RIVERS. Why don't you do this—if Mr. Anderson will yield——

Mr. ANDERSON. I am through. I will yield the floor.

Mr. RIVERS. Why don't you explain the two plans separately, you and Mr. Larkin, and send it to all of us so whichever one appeals to us we can vote for.

Mr. SMART. It is my honest opinoin that that could be done here in a 3 or 4 minute conversation more satisfactorily than it can be done on paper.

Mr. BROOKS. Well, we will pass the part V by for the time being and move on to part VI, article 30. If you will read article 30, Mr. Smart.

Mr. SMART (reading):

ARTICLE 30. Charges and specifications.

(a) Charges and specifications shall be signed by a person subject to this Code under oath before an officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(2) that the same are true in fact to the best of his knowledge and belief.

(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

References: A. W. 46a; A. G. N., article 43.

Commentary: This article should be read in conjunction with articles 31–35 which deal with procedures before trial.

Subdivision (a) is derived from A. W. 46a and is new for the Navy. Subdivision (b) requires disposition of the charges as soon as possible

and provides for the notification of the accused. Article 98 makes it an offense to unnecessarily delay the disposition of a case

Mr. BROOKS. Any discussion on this article 30?

Mr. ANDERSON. This has to do primarily with the expeditious handling of these cases, which we discussed the other day in connection with article of war 1, as I recall it?

Mr. LARKIN. That, plus the formal beginning of the case.

Mr. DEGRAFFENRIED. Mr. Smart, do you like that word "practicable" there? What would you think about using the word "possible" there?

Mr. SMART. I think, Mr. deGraffenried, you would come out at the same place because there are other provisions in the bill which place a duty upon people to expedite these things. I think this wording, while it does seem a little lax, is satisfactory.

Mr. DEGRAFFENRIED. All right.

Mr. PHILBIN. Do you have other safeguards in the bill to require a man to be notified and in timely fashion of the charges against him?

Mr. SMART. That is correct, Mr. Philbin. Pretrial investigation, counsel at pretrial investigation and things of that character.

Mr. BROOKS. Someone, Mr. Smart, suggested during the course of the hearings that we add to subsection (b) a statement specifically stating that the accused shall be informed of the charges against him as soon as practicable and because of his constitutional right.

Mr. SMART. I don't remember that I raised that point, Mr. Chairman.

Mr. BROOKS. That is not the point exactly, but someone referred to it in the hearings. They thought they should state the reason for the information was because of the constitutional right.

Mr. SMART. That was Colonel Oliver, sir, in behalf of the Reserve Officers Association. But I think this section presupposes that, at any rate.

Mr. BROOKS. Any discussion on this?

Mr. GAVIN (reading):

> Upon the preferring of the charges, the proper authority shall take immediate steps to determine what disposition should be made thereof—

and—

> the person accused shall be informed of the charges against him as soon as practicable.

How long do you think that "practicable" is?

Mr. SMART. It happens pretty fast, Mr. Gavin.

Mr. GAVIN. Sometimes it doesn't happen so fast, too. They languish in a jail somewhere for a considerable length of time before they get around to it.

Mr. SMART. I agree with you, sir, that it has been abused.

Mr. GAVIN. Yes. I think, Mr. Chairman, some specified time ought to be in there, instead of leaving that open.

Mr. NORBLAD. There is a man that I defended during the war who was held for 2 weeks at another base before he was even returned to our base and charged.

Mr. RIVERS. Why don't you say "forthwith."

Mr. BROOKS. Or "immediately."

Mr. DEGRAFFENRIED. That is what I think. We ought to have "as soon as possible" or "forthwith" or "immediately" or something. That "practicable" is so broad.

Mr. PHILBIN. What other safeguards do you have in this bill?

Mr. LARKIN. Well, in article 10, there is a provision that the committee has already considered which provides that immediate steps shall be taken to inform him, that is the accused, of the specific wrong——

Mr. BROOKS. The point was brought out there that you don't say immediately informed but you say that immediate steps shall be taken to inform him.

Mr. RIVERS. I move, Mr. Chairman, that "as soon as practicable" be deleted and "forthwith" be substituted therefor.

Mr. HARDY. How about "promptly"? Wouldn't that work just as well? It will phrase out a little bit better if you say "the person accused shall be promptly informed of the charges against him."

Mr. GAVIN. Well, it is all according as to how you interpret the word "promptly."

Mr. RIVERS. "Forthwith" is about as fast as you can let a man know.

Mr. BROOKS. It is pretty hard to justify not letting a defendant know what he is being held for when charges have been preferred.

Mr. LARKIN. Once again I draw your attention to article 98, which provides that it is an offense against this code——

Mr. GAVIN. Provides what?

Mr. LARKIN. That it is an offense against this code for any person to be responsible for unnecessary delay in the disposition of any case against an accused.

Mr. DEGRAFFENRIED. In other words, under the code as written there are other provisions there which require him to be informed forthwith.

Mr. LARKIN. I think so.

Mr. DEGRAFFENRIED. In other words, promptly or immediately. And if other provisions provide that, why not let this provision provide it and keep all of them alike.

Mr. PHILBIN. I don't think that is true.

Mr. ELSTON. Will the gentleman yield? You remember the other day on the floor we had an amendment on the rent control bill to strike out the words "wherever practicable" on the theory that it just gave the Rent Administrator authority to fix any time he saw fit. The same words might be objectionable here.

Mr. RIVERS. That is right.

Mr. ELSTON. So I think the suggestion that the word "forthwith" be put in there would be perhaps better than anything else.

Mr. GAVIN. The gentleman has so moved. Let us vote on it.

Mr. BROOKS. It has been moved that we vote on this motion. All in favor of the words "forthwith" indicated by my colleague to the right, Mr. Rivers, will say "aye." All opposed, "no." The amendment is carried.

Mr. LARKIN. Well, in view of that amendment, Mr. Chairman, may I suggest an additional amendment to cover this situation. Suppose you don't have the accused in custody? You know you can swear out charges without having the accused in custody.

The fact of the offense charged against him may come to the notice of the proper authorities. Witnesses or complainants or victims who allege they have been wronged in some way may come into the Military Establishment and complain.

And based on their evidence formal charges and specifications may be drawn, whenever the signer of the charges has investigated and believes the accusations true. But you still may not at that time have the accused in custody. And suppose you don't have him for some time. Is he going to be able to claim you haven't forthwith informed him of the charges?

Mr. ELSTON. Well, wouldn't it follow as a matter of course that if he wasn't in custody he couldn't be notified? The Constitution guarantees to every person a speedy public trial and all that sort of thing.

Mr. LARKIN. Yes.

Mr. ELSTON. But if he isn't in custody he can't complain that he didn't get a speedy trial.

Mr. LARKIN. But upon the signing of these charges, he hasn't been informed of them promptly.

Mr. ELSTON. The law cannot contemplate the doing of an impossible thing.

Mr. LARKIN. Well——

Mr. ELSTON. And if they can't locate him they couldn't notify him. Wouldn't it be interpreted to mean they shall forthwith notify him whenever it is possible to notify him?

Mr. LARKIN. Well, that is the type of amendment I was going to add.

Mr. NORBLAD. "As soon as he shall be taken into custody" would take care of that.

Mr. LARKIN. That is my point. It is not practicable if you don't have them. If you have them, then it should be promptly or forthwith.

Mr. PHILBIN. So if you put in an amendment when he is in custody or is available, it would cover it.

Mr. LARKIN. That is the idea I had.

Mr. BROOKS. Would you want to draw up a suggestion?

Mr. LARKIN. I would like to if I may.

Mr. BROOKS. An additional amendment.

Mr. LARKIN. Yes, sir.

Mr. BROOKS. If you do that, we will take it up at the next meeting.

Mr. LARKIN. Very good, sir.

Mr. BROOKS. Now article 31.

Mr. SMART (reading).

ART. 31. Compulsory self-incrimination prohibited.

(a) No person subject to this Code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this Code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement at all regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court martial.

(c) No person subject to this Code shall compel any person to make a statement or produce evidence before or for use before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this Article or by any unlawful inducement shall be received in evidence against him in a trial by court martial.

References: A. W. 24; A. G. N. article 42 (c).

Commentary: Subdivision (a) extends the privilege against self-incrimination to all persons under all circumstances. Under present Army and Navy provisions only persons who are witnesses are specifically granted the privilege. Subdivision (b) broadens the comparable provision in A. W. 24 to protect not only persons who are accused of an offense but also those who are suspected of one. Subdivision (c) is similar to A. W. 24 in that the privilege against self-degradation is granted to witnesses before a military tribunal and persons who make depositions for use before a military tribunal. It is made clear that this privilege cannot be invoked where the evidence is material to the issue—where it might be crucial in the determination of the guilt or innocence of an accused. Subdivision (d) makes statements or evidence obtained in violation of the first three subdivisions inadmissible only against the person from whom they were obtained. This conforms with the theory that the privilege against self-incrimination and self-degradation is a personal one.

The international violation of any of the provisions of this article constitutes an offense punishable under article 98.

It is unnecessary to provide in this article that the failure of an accused to testify does not create a presumption against him. See title 18, United States Code, section 3481.

Mr. RIVERS. Isn't that about the same way as it is in civil courts?

Mr. LARKIN. Well, it goes further than civil courts, and on the other hand it is changed a little bit from the provision in the Elston Act. I can point them both out quickly, I think. In the Elston Act there was an amendment offered on the floor, if you will recall, which provided that a witness need not answer a question which would tend to degrade him whether or not that answer or question was material to the issue.

Now that goes very much further than any civilian rule, which is normally that you may not be required to answer a question the answer to which would degrade you if it is immaterial to the issue.

But if it is material to the issue, why then you are not free to refuse. It all has to do with the question of a degrading answer or an answer which would tend to degrade you. That is my point.

We rephrased the language and protect a person from making a statement which would degrade him if it is immaterial to the issue. But if it is material to the issue then he must make the answer.

Mr. PHILBIN. Why don't you use the language "incriminate" there rather than "degrade"?

Mr. LARKIN. Well, incriminate is a different concept than degrade. We do use the language "incriminate" and provide the standard protection against incriminating statements.

Mr. PHILBIN. I was referring to this particular subsection (c).

Mr. LARKIN. Well, (b) covers incriminating, Mr. Philbin.

There are two other changes. In (a) we have provided, you will notice, that no person shall compel any person to incriminate himself or answer a question which might incriminate him. Heretofore, in the Articles of War and in last year's act, it was limited to witnesses.

In addition we have provided, as you see, that a person must be first informed in effect that anything he says can be used against him. That is not a requirement normally found in civil courts—this provision of informing a man in advance.

Mr. BROOKS. Isn't it a requirement in the Federal courts?

Mr. LARKIN. I don't believe so. It is not in most State courts. But here we do provide that you must inform him in advance and if you don't, then anything he says is inadmissible as far as he is concerned.

Mr. ELSTON. Mr. Chairman, it would seem to me that subsection (c) goes farther than you need to go in any criminal case. Who is going to determine whether or not the statement is material? Every accused person could say, "I refuse to answer on the ground that my answer is not material to the prosecution."

Mr. LARKIN. I think the law officer does.

Mr. ELSTON. Well, statements may be made outside of the presence of a law officer. Suppose a man is arrested out in the field somewhere and he makes some statement, or even if he is before the law officer. He says, "My statement is not material."

The law officer says it is material. You have a dispute between the accused and the law officer. There is nothing in the code that indicates that the law officer is final authority.

Furthermore, as I understand criminal law, a person can at any time refuse to answer a statement on the ground that it would degrade him.

Mr. PHILBIN. That is right.

Mr. ELSTON. It is only when it will incriminate him. Every admission of crime is degrading. He could say "Well, I won't answer the question because it will tend to degrade me." Of course, if he answers it and it indicates his guilt, it would degrade him.

It would seem to be a complete loophole for anybody to get out of answering questions. It is only when it would tend to incriminate him. I don't think subsection (c) belongs in here at all. I think when the amendment was offered on the floor last year they confused the degrading feature with libel, in some offense where a statement is degrading and that is made the basis for the prosecution.

Mr. LARKIN. I think they confused on the floor the degrading statement in that they were trying to make it inadmissible whether or not it was material in all cases.

Mr. PHILBIN. Applied the same rule that you apply to incrimination; in other words, to degrade him?

Mr. LARKIN. Yes.

Mr. ELSTON. Well, isn't every inquiry material?

Mr. LARKIN. Not necessarily.

Mr. ELSTON. The best crimina investigator will take the least little thing and sometimes develop something from it. How are you going to pass on everyone of those questions and determine whether or not it is material?

Mr. LARKIN. In the investigation stage you certainly have difficulty.

Mr. ELSTON. Well, doesn't that apply in the investigation stage?

Mr. LARKIN. Yes; that is right, as well, of course, as on the trial. Now on the trial you may have a number of questions the answers to which would be degrading to the witness and still not be incriminating.

Mr. ELSTON. Well, when you get to the trial stage, of course it is much easier to pass on the question because at that time the charge has been made in writing, the accused knows what he has to face and so does his counsel, and you have a better opportunity to determine what is and what is not material.

But in the investigation of a matter how can anybody say what is material, because you find out from your investigation what is material.

Mr. LARKIN. Yes.

Mr. ELSTON. You find out upon investigation what charge to make.

Mr. LARKIN. Yes.

Mr. ELSTON. If we got subsection (c) in here we might as well throw the whole thing out.

Mr. RIVERS. You are not wedded to that, are you, sir?

Mr. ELSTON. You are not wedded to that section, are you?

Mr. LARKIN. No. That is an added protection, that is all.

Mr. ELSTON. I think it gives too much protection. It enables the guilty person to escape.

Mr. LARKIN. Well, in the same way providing an obligation to inform him before he speaks is more than the usual protection.

Mr. BROOKS. You mean the constitutional provision?

Mr. LARKIN. So far as incrimination is concerned.

Mr. ELSTON. That is all right. That is up above.

Mr. LARKIN. That is right.

Mr. ELSTON. That is in subsection (b). That is perfectly all right. But any prosecuting attorney who was confronted with subsection (c) would have an awful time making out a case, and so would the Police Department. The FBI would have a terrible time.

Mr. LARKIN. Excuse me 1 second.

Mr. RIVERS. How do you feel about it?

Mr. DEGRAFFENRIED. My present opinion is that it would cripple the investigation.

Mr. LARKIN. May I point out in this connection, gentlemen, that this protection against making a degrading statement has been in the Articles of War for a long time, it was in the Elston Act and was modified on the floor in the way I described it, and I think applies to the court processes in tribunals rather than to the pretrial investigation because it does say here:

> No person subject to this Code shall compel any person to make a statement or produce evidence before or for use before a military tribunal.

If that is not clear, why we can clarify it and make sure that it is limited before some military tribunal of some character, courts martial or otherwise. But the notion of the protection against a degrading statement is not a new one.

Nor is it an innovation here. Now if it is not clear that it applies to when you are before a military tribunal, I think we should make it so. It would cause the difficulties Mr. Elston sets forth in an investigation.

Mr. ELSTON. If you confine it to a proceeding before a court and the accused could refuse to answer any question on the ground that it would degrade him, wouldn't you hamper the court in the prosecution of the case?

Mr. LARKIN. Except the court would force him to answer.

Mr. ELSTON. Well, his answer obviously would degrade him.

Mr. LARKIN. Yes.

Mr. ELSTON. But at the same time it might not be incriminating.

Mr. LARKIN. That is right.

Mr. ELSTON. And if he takes the stand of course and testifies why he opens the door and he can't complain.

Mr. RIVERS. That is right.

Mr. LARKIN. But he shouldn't be degraded or forced to answer questions that degrade him that have nothing to do with this case.

Mr. PHILBIN. Doesn't this protection usually relate to both incrimination and degrading?

Mr. LARKIN. Yes.

Mr. PHILBIN. Isn't that the way it is used—conjunctively?

Mr. LARKIN. No; not conjunctively.

Mr. PHILBIN. They are used together, aren't they? Or are they used apart?

Mr. LARKIN. Yes, they are used separately. There is a connection at times. Certain answers will not only degrade but incriminate or the fact that you do incriminate in and of itself may be considered degrading. But there are a number of questions that can be asked a witness which are not material to the issue before the court the answer to which would degrade him but not incriminate him.

Mr. ELSTON. Isn't it the duty of the law officer to confine the evidence to competent, relevant, and material evidence?

Mr. LARKIN. That is right. And that is why this is a strengthening of his hand, so that he can protect the witness and not force him to answer a degrading question that is not material. But if it is material, why the witness should be forced to answer, even though it doesn't degrade.

Now the amendment on the floor would have excluded a degrading answer whether it was material or not. That goes too far because I think a person should be forced to answer a material question.

Mr. RIVERS. That is right.

Mr. LARKIN. Even though it is degrading.

Mr. RIVERS. That is right.

Mr. LARKIN. You might have the situation with a complainant—a girl in a rape case for instance—might refuse to state what happened on the theory that it degrades here. But it is material to the issue and she should be forced to tell the circumstances.

On the other hand, asking a witness a question which is wholly immaterial and the answer to which would degrade him should not be permitted. The witness should not be forced to answer it.

Mr. RIVERS. Of course, as Mr. Elston says, without putting it in there, the competent legal representative of the defendant could say it is not relevant and they would argue that out. If it is not relevant it is not relevant, whether it is degrading or not.

Mr. LARKIN. I think that is so. But I think this strengthens the hand of the law officer in that connection.

Mr. BROOKS. Mr. Larkin, let me ask you this question now. It is contemplated that this authority will be used in a hearing, is it?

Mr. LARKIN. Yes, sir.

Mr. BROOKS. It isn't restricted to a hearing, but outside of the hearing no one would be in the position to invoke the authority.

Mr. ELSTON. "Before or for use before any military tribunal."

Mr. LARKIN. I think that refers to depositions taken before, for use and so on. There may be an occasion where it may be necessary.

Mr. ELSTON. Now do you think it is necessary that we write into the law subsection (c) and stipulate that the accused may object to giving evidence which is not material to the issue when it is well settled that he may object to any evidence that is not competent, relevant, or material?

If you are going to confine it to material evidence, then you better put in competent evidence, too, because evidence might be material but not be competent under the rules of law.

Mr. LARKIN. That is right.

The present article of war in this connection reads—and it is article 24—

No witness before a military court, commission, court of inquiry or board, or before any officer conducting an investigation or before any officers, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question, the answer to which may tend to incriminate him or to answer any question not material to the issue when such answer might tend to degrade him.

That as I say was continued in the Elston Act, but it was amended on the floor to say that he is not required to answer any question whether it is material or not to the issue when such answer might tend to degrade him.

Now we thought it was entirely appropriate to get away from that. That goes much too far. I think it was unintentional, frankly. I don't think that is intended, but unfortunately the amendment just has that meaning.

Mr. ELSTON. Of course the section you read is much clearer than this section because that makes it very plain that it is before some court.

Mr. LARKIN. That is right. But we adopted this format because we put in here as I mentioned the additional necessity of informing the man before you take a statement that insofar as incrimination is concerned it might be used against him.

In (a) we have just reiterated again the right not to incriminate himself.

(b) incidentally, covers a wider scope in that you can't force a man to incriminate himself beforehand—not just on the trial, if you will. And this in addition, since it prohibits any person trying to force a person accused or one suspected, would make it a crime for any officer or any person who tries to force a person to do that.

So not only do we retain the constitutional protections against self-incrimination and this evidentiary protection against degrading yourself unless it is material, but it goes further and provides that if anybody tries to force you to incriminate yourself then he has committed an offense. In providing for all those ideas we have different language.

Mr. BROOKS. Now, is there any further discussion, or what is the pleasure of the committee?

Mr. GAVIN. What is your suggestion, Mr. Elston? Do you have any definite suggestion on that?

Mr. ELSTON. Well, I don't think it is necessary. I think it is confusing.

Mr. BROOKS. Gentlemen, I don't think we are going to finish this article this morning. It is high noon. If there is no objection, we will adjourn.

Mr. RIVERS. We can't meet this afternoon, can we?

Mr. BROOKS. No; we can't meet this afternoon. We will meet tomorrow morning at 10 o'clock.

(Whereupon, at 12 o'clock, the subcommittee adjourned to reconvene on Thursday, March 24, 1949 at 10 a. m.)

UNIFORM CODE OF MILITARY JUSTICE

THURSDAY, MARCH 24, 1949

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The subcommittee met at 10 a. m., Hon. Overton Brooks (chairman) presiding.

Mr. BROOKS. The committee will come to order.

Yesterday, gentlemen of the committee, when we recessed we were on article 31 and we were discussing that. It is proper, therefore, we begin with the same article and continue the discussion.

Mr. deGraffenried, I think you were speaking at that time.

Mr. DEGRAFFENRIED. I have forgotten what the question was, Mr. Chairman, and I withdraw it.

Mr. BROOKS. Well, are you satisfied with the article as written?

Mr. DEGRAFFENRIED. I don't know that I fully understand it, Mr. Chairman, but I have no specific objection to it.

Mr. BROOKS. Well, Mr. Elston indicated, however, that he would like to look it over further.

Mr. DEGRAFFENRIED. Yes, sir.

Mr. BROOKS. It seems to me we ought to either accept it as it is because historically it has been in the code so long or we ought to undertake to completely rewrite it.

Mr. DEGRAFFENRIED. Well, I have no objections to it. I don't feel that I am well enough acquainted with the particular matters discussed in this section to make any suggestions. And if it has been in here a long time and it has been satisfactory, I have no objection to it.

Mr. BROOKS. Mr. Larkin——

Mr. LARKIN. May I make a suggestion, Mr. Chairman.

Mr. BROOKS. Yes. We want to hear from Mr. Smart, too, before we pass on this article.

Mr. LARKIN. Yes.

In view of Mr. Elston's misgivings about subsection (c) you might reserve the decision of the committee on that article and if the rest of it is acceptable consider adopting the rest of it.

I say that for the reason that "c" is completely severable from the rest of the article and if it is the pleasure of the committee to drop "c" which has to do with the degrading type of statement as distinguished from the incriminating type, you could do so without doing violence to the principle of incrimination as contained in the other subsections.

For that reason you could pass "c" for the time being and if the committee adopts it, why it would stay as is. And if they feel that it is unnecessary or goes too far even though it has been in the present

law, it wouldn't complicate the rest of the article at all because as I say it is severable.

Mr. BROOKS. Mr. Larkin, if you are going to start revising, subsection (b) says "An accused or a person suspected of an offense." Now, what does that mean?

Mr. LARKIN. Well, that is——

Mr. BROOKS. How would a person know he was suspected of an offense?

Mr. LARKIN. Well, after an offense has been committed a number of persons who are suspected might be brought in for questioning none of whom have been accused because the evidence is not complete enough to indicate who the perpetrator may be.

Mr. BROOKS. But you can't interrogate him without first informing him of the nature of the accusation.

Mr. LARKIN. That is right. You would have to tell him that the crime of larceney has been committed, for instance. You could say that this is an inquiry in connection with it and that you intend to ask him questions about it, but that he should be informed that he does not have to make any statement about it.

All that does is broaden the protection of self-incrimination so that whether a person is actually the accused and you attempt to interrogate him or whether you just don't know who the accused is and there are five or six people whom you suspect they are all protected.

Mr. BROOKS. Why have it in the nature of an accusation, though, unless there is an accusation?

Mr. DEGRAFFENRIED. As I understand it, Mr. Larkin, is this what you have on your mind: Say a crime is committed and several people are suspected but no one has been arrested.

Mr. LARKIN. Yes.

Mr. DEGRAFFENRIED. You bring them in before they have been arrested.

Mr. LARKIN. Yes.

Mr. DEGRAFFENRIED. You ask them to come in and you inform them of the crime that has been committed.

Mr. LARKIN. Yes, sir.

Mr. DEGRAFFENRIED. Say that somebody has been shot or something of that kind.

Mr. LARKIN. Yes.

Mr. DEGRAFFENRIED. You tell him that John Jones has been shot, that is tell each one of them that and tell them that they don't have to make any statement if they don't care to to incriminate them.

Mr. LARKIN. Yes.

Mr. DEGRAFFENRIED. Then you ask each one of them if they would object to making a statement about where they were at the time it was done so that an investigation may be made to find out if they are telling the truth about it.

Mr. LARKIN. Yes, sir.

Mr. DEGRAFFENRIED. Is that it?

Mr. LARKIN. That is exactly the idea, Mr. deGraffenried.

Mr. SMART. I can give you a specific example that happened to me personally, if I may, which was an interrogation by an Army Inspector General for a group of battery commanders, all of whom apparently had violated an order of the post commander. We were all taken before the Inspector General and advised of our rights under the

Twenty-fourth Article of War, which this article perpetuates, and there were no charges or specifications. We weren't in jail.

They were just attempting to determine the facts. We were advised we didn't have to make any statement if we didn't want to because the Twenty-fourth Article of War protected us. I think that this contemplates the same type of an action.

Mr. BROOKS. I understand what it contemplates. The question is just the verbiage of it, whether or not you are really covering just about every important witness in every case, and also the question of whether or not you can inform the person the nature of an accusation when there is no accusation but merely an investigation.

Mr. LARKIN. Well, there may be no accusation against him. I think the sense of the word "accusation" is that someone, some witness or victim or complainant, has made complaint to the commanding officer who now calls in a number of people who are suspected.

Mr. BROOKS. Well, that is a problem there.

What is your suggestion, Mr. Elston?

Mr. ELSTON. Well, I wasn't here at the beginning of the discussion, Mr. Chairman, and I don't know that I can answer.

Mr. BROOKS. Mr. Smart, do you have any further suggestion?

Mr. SMART. I only have one, that is a general point to raise, and another specific point as to wording in subsection (b), Mr. Chairman.

Mr. BROOKS. Yes.

Mr. SMART. My general point is this: I think there is an adequate answer for it, but it ought to go into the record—you will notice that this particular article refers only to persons subject to this code, so that if a military person is apprehended by authorities other than military authorities they may likewise extract a statement from the accused or suspect which is in violation of the provisions of this article.

Now I think the record should clearly show that any statements obtained under those circumstances would likewise be inadmissible.

Mr. BROOKS. Well, of course if a suspect becomes a defendant and you haven't notified him beforehand of his constitutional guaranty of protection you can't use that testimony to prosecute him, as I understand the statute; isn't that true?

Mr. SMART. I think it is true; but I think that this record, that is, the legislative history, should clearly show that if a sheriff downtown picked up a boy suspecting that he is the person who committed an offense which the military authorities have announced has been committed, and he gets certain admissions out of that boy in violation of this article. I think the record here should clearly show that it is not intended that those statements will be admissible in a military trial of that accused.

Mr. LARKIN. I think that whole point ought to be——

Mr. BROOKS. Even though he never becomes a defendant, the fact that you obtained the statement when you suspect him of a crime would deny the court from using it; is that right?

Mr. LARKIN. I think there ought to be a distinction pointed out there, Mr. Chairman. In many State jurisdictions the local authorities have no obligation to inform a person suspected of an offense that any answers they make may be used against them.

I don't think if a confession is obtained by the civilian authorities that it should be inadmissible because the civilian authorities neglected to inform the man in advance of his rights.

I do say this: If the civilian authorities extracted the confession from the man by any force, coercion or in any way that would make it an involuntary statement, then I think certainly it should not be admissible in evidence against him on a military trial.

But you would face this situation if you required the civilians—whom you can't require by this code—to inform a suspect in advance as provided in subsection (b): A man may voluntarily walk into the local civilian authorities or a police station and make a confession and they won't know what it is all about and not having any obligation to inform him or not seeing any reason to, why you would then not be able under the construction presented here to use such a statement or such a confession against the man. I think that would be——

Mr. SMART. That would be an admission against interest.

Mr. DEGRAFFENRIED. In a good many State courts you don't have to tell them in advance, in questioning them, what their rights are. Before that confession is admissible, you have to ask the witness whether he made any threats against the defendant or if there was any hope of reward or inducement to get him to make a statement and ask him if the statement was entirely voluntary.

If he says it was, then it is admissible in a great many civil courts, without going further and showing that he told him in advance what his rights were and all that. All you have to show is that it was voluntary.

Mr. LARKIN. In some civilian jurisdictions, as a matter of fact, you can trick a man into making a confession. As long as you don't coerce him and as long as the confession is voluntary it is admissible. We can't by the provisions of this code require civilian authorities to inform a suspect that anything he says may be used against him. It seems to me——

Mr. BROOKS. Of course, that is the same in (b) and (c). The point that I make—and I am not going to urge it further—is that you have two loosely written subsections, it seems to me, (b) and (c).

Well, I will abide by the will of the committee on whatever they want to do.

Mr. DEGRAFFENRIED. I still think (c) is probably more objectionable than (b).

Mr. BROOKS. I rather think so, too. It has been suggested we omit (c) and try to rewrite it so as to make it a little more in keeping with what the committee has in mind. With that change, that is with that exception, article 31 will be adopted as read.

Mr. SMART. I have one suggestion as to language in subsection (b), Mr. Chairman.

Mr. BROOKS. All right.

Mr. SMART. I merely question the use of the language in lines 6 and 7, "advising him that he does not have to make any statement at all." It just seems to me that there must be some better wording than that. You could say "he may refrain from making any statement," or words to that effect.

Mr. BROOKS. I fully agree with you on that.

Mr. ELSTON. I move that that change be made, Mr. Chairman. I think that would make it sound a little better.

Mr. BROOKS. You have heard the motion. Any objection? It is so ordered. The words "at all" are stricken from that subsection.

Mr. ELSTON. Mr. Chairman, before we pass to the next section I would like to ask Mr. Larkin if there is anything in the regulations that requires a court martial or directs a court martial to follow the rules of evidence the same as they are followed in the civil courts?

Mr. LARKIN. The court-martial manual spells out a number of rules of evidence to be used before courts matrial, which incidentally were drafted in 1920, I think by Dean Wigmore. They are the rules of evidence under which courts martial operate.

If you are referring specifically to this self-incrimination point, why, I can refer you to the rule of evidence as applied and in connection with a specific provision which says "a confession not voluntarily made must be rejected," which I believe means not voluntarily made no matter to whom it is made: A civil authority, a person subject to military authority, or otherwise.

Mr. ELSTON. Well, of course you appreciate that only a meager part of the rules of evidence are statutory.

Mr. LARKIN. I do.

Mr. ELSTON. Most of the rules of evidence come from the common law and from decisions of the court over many years. In the civil courts, when you try a person for an offense, those rules apply.

You also have of course some statutes which specifically define your rules of evidence. Now what I am trying to find out is whether or not in a military trial the same rule applies.

Mr. LARKIN. We have provided in article 36, which reincorporates in general the rule set forth in article of war 38, that the manual, which is prescribed by the President—the procedures and the modes of proof—

shall as far as the President deems practicable apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

Mr. ELSTON. Well, I see I am just a little premature. We will come to that in a few minutes.

Mr. LARKIN. Yes, that is right, Mr. Elston. I think that covers the point you have in mind.

Mr. BROOKS. If there is no objection, then, article 31 is approved with the exception of subsection (c), which we will ask Mr. Smart and Mr. Larkin to work on and help us rephrase.

Article 32, Mr. Smart.

Mr. SMART (reading):

ART. 32. Investigation.

(a) No charge or specification shall be referred to a general court martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiries as to the truth of the matter set forth in the charges, form of charges, and the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and shall be permitted, upon his own request, to be represented at such investigation by civilian counsel if provided by him, or military counsel of his own selection if such counsel be reasonably available, or by counsel appointed by the officer exercising general court-martial jurisdiction over the command. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted prior to the time the accused is charged with the offense, and if the accused was present at such investigation and afforded the opportunities for representation, cross-examination and presentation prescribed in subdivision (b) of this Article, no further investigation of that charge is necessary under this Article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

(d) The requirements of this Article shall be binding on all persons administering this Code, but failure to follow them in any case shall not constitute jurisdictional error.

References: A. W. 46b.

Commentary: This article is derived from A. W. 46b and is new to the Navy. Subdivision (c) is added to provide for a case where a court of inquiry or other investigation has been held wherein the accused was afforded the rights required by subdivision (b).

Subdivision (d) is added to prevent this article from being construed as jurisdictional in a habeas corpus proceeding. Failure to conduct an investigation required by this article would be grounds for reversal by a reviewing authority under the code and an intentional failure to do so would be an offense under article 98.

Mr. ELSTON. Mr. Chairman, first of all it seems to me that there is a slight change necessary in subsection (b). It says—

the accused shall be advised of the charges against him and shall be permitted * * * to be represented by counsel —

and so forth. It would seem to me that the accused should not only be advised of the charges against him but should be advised of his right to have counsel because many an accused person may not know that that is a right.

Mr. BROOKS. That was one of the objections made in the course of the hearings.

Is there any further discussion on that idea?

Mr. DEGRAFFENRIED. I think that is good.

Mr. NORBLAD. I am very much in favor of that, Mr. Chairman. In the cases I investigated, I don't think any of the accused knew they had the right to counsel. They were completely befuddled and mystified by what was going on, and there was no such requirement that I knew of or any other officer that I ran into knew being followed.

Mr. BROOKS. Do you phrase that in the form of a motion?

Mr. ELSTON. Yes. Mr. Chairman, to bring it formally before the committee I would offer this amendment: On page 29, line 4, after the word "him" add the following: "of his right to be represented by counsel."

Mr. ANDERSON. Put a comma in there after "him"?

Mr. SMART. May I make a suggestion, sir?

Mr. BROOKS. Sure.

Mr. SMART. I would suggest on page 29, line 4, after the word "and" delete the words "shall be permitted upon his own request" and substitute the words "of his right."

Mr. GAVIN. I don't think it should be "upon his own request." I think it shouldn't be necessary for him to request it. I think he should be advised. That would leave it upon his request. If he didn't make the request, why he won't be advised.

Mr. ELSTON. Well, doesn't that refer to his right to be represented by civilian counsel?

Mr. SMART. No, sir.

Mr. ELSTON. Well let us see whether it does.

The accused shall be advised of the charges against him and shall be permitted, upon his own request, to be represented at such investigation by civilian counsel if provided by him, or military counsel of his own selection if such counsel be reasonably available, or by counsel appointed by the officer exercising general courts-martial jurisdiction.

It includes all three.

Mr. HARDY. If I may make a suggestion, I think you can clear the whole thing up if you said—

shall be advised of the charges against him and of his right to be represented by counsel.

Then start with a new sentence:

He shall be permitted upon his own request to be represented by civilian counsel—

and so forth.

Mr. BROOKS. Do you make that as a motion?

Mr. HARDY. I offer that as a substitute.

Mr. NORBLAD. Could I make a suggestion, that you add "at this investigation." It might otherwise be construed to tell him he could have counsel at a trial. That is what is intended. It is intended that he shall have counsel at this investigation.

Mr. HARDY. That is all right.

Mr. NORBLAD. I think that would clear it up a little bit better. Mr. Elston, do you have any objection to that?

Mr. ELSTON. No. I think the suggestions are both good to clarify the language. Wouldn't that take care of this, Mr. Smart?

Mr. SMART. May I ask Mr. Norblad: You see, in line 5 it says "to be represented at such investigation."

Mr. NORBLAD. I saw that, yes. But that is subsequent to that. I don't think it is going to do a bit of harm to add "at the investigation" and put it in a second time.

Mr. LARKIN. May I point out that the title says "Investigation."

Mr. NORBLAD. Yes. But still your officer who does the investigating is not normally a legal officer or lawyer. They will appoint most any officer to do that investigating and unless it is made eminently clear to him what it is supposed to do, he will just take this thing and go ahead and do exactly as he is told. Your investigating officer by and large is rarely a legal officer.

Mr. BROOKS. Is it your idea to put that at the end of the first sentence?

Mr. NORBLAD. Any place. Mr. Smart, I am sure, can do that to clear that up.

Mr. SMART. I think I know what you mean.

Mr. NORBLAD. "At such investigation and subsequent trial," or something of that nature, to be sure we have it covered.

Mr. BROOKS. You would put it at the end of the first sentence, which would read "the accused shall be advised of the charges against him"—is that the idea?

Mr. NORBLAD. And of his right to be represented by counsel.

Mr. BROOKS. Yes.

Mr. NORBLAD. At the investigation and at the trial.

Mr. BROOKS. At the investigation and at the trial?

Mr. NORBLAD. At any subsequent trial.

Mr. ELSTON. Then following Mr. deGraffenried's suggestion, a new sentence:

He shall be permitted upon his own request to be represented at such investigation by civilian counsel, by military counsel, or by counsel appointed.

Mr. NORBLAD. Yes.

Mr. BROOKS. You have that all right?

Mr. LARKIN. Yes, sir.

Mr. BROOKS. Is there any objection to those amendments as indicated? If there is not, it will stand adopted, then.

Mr. ANDERSON. Mr. Chairman, on line 11, it says "if they are available." I am wondering just what effort is made to make the witnesses available? How far do the services go in making witnesses available?

Mr. LARKIN. You mean lawyers?

Mr. ANDERSON. It says that—

at such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available.

Mr. LARKIN. Oh. I beg your pardon.

Mr. ANDERSON. Now, to what extent do the services go to insure the fact that the witnesses will be available?

Mr. LARKIN. We have provided in another section which we will come to soon that there shall be equal opportunity to obtain witnesses by all parties. Heretofore the statute provided that the witnesses were to be obtained by the judge advocate and the defense requested their witnesses through him.

It is our contemplation that the trial counsel will be the specific administrative agent who will still obtain witnesses. But by providing that there is equal opportunity to obtain them, in the event that the defense feels his request has been unjustly overruled, then we contemplate that that request of the defense would be forwarded to the convening authority and he would have the discretion of obtaining the witnesses for the defense. But the principle enunciated is that there shall be equal opportunity.

Some accused occasionally insists that General Eisenhower or the President be called or some other request of that character is made which is inappropriate. You have to leave it to somebody's discretion of course and we have placed it in the convening authority.

Mr. ANDERSON. What I had in mind was the possibility that a witness that was called by the accused to be cross-examined might have prior to the investigation been transferred to another unit or another theater of operations. What effort will be made to make him available and what does available cover? How far away does he have to be or where he is to be available?

Mr. SMART. It is subsequently prescribed in article 49 (d) (1) that more than 100 miles may be construed as reasonable distance. It might very well be that circumstances would be such that it would be more than that, but I think that the general rule would be, Mr. Anderson, that if they would say that the prosecution may bring witnesses for a distance extending 100 miles, then that right would likewise apply to the accused.

Mr. ANDERSON. It would be equal.

Mr. SMART. And if they limited the prosecution to that distance then that would limit the accused. And then his right to take depositions would intervene.

Mr. NORBLAD. I think the one important factor to keep in mind on this is that this is not the trial. It is merely the preliminary investigation to satisfy the officer investigating that there is probable cause that the man did commit the crime and there is enough evidence to warrant that he should be put on trial.

They are not trying to decide whether he is guilty or innocent. So I don't think it is so important here as it is in the trial of the case to have the witnesses available.

Mr. LARKIN. What I said as applying here refers to the trial. I probably gave the wrong impression.

Mr. NORBLAD. Just like a hearing before a justice of the peace, to determine whether a man is being lawfully held or if there is enough evidence to try him.

Mr. SMART. A prima facie case.

Mr. NORBLAD. Yes.

Mr. LARKIN. This I should say goes further than you usually find in a proceeding in a civil court in that not only does it enable the investigating officer to determine whether there is probable cause, as you point out Mr. Norblad, but it is partially in nature of a discovery for the accused in that he is able to find out a good deal of the facts and circumstances which are alleged to have been committed which by and large is more than an accused in a civil case is entitled to.

But this (a) and (b) follow almost verbatim the present article of war 46, subsection (b), which I think as a matter of fact was considered by your committee last year.

Mr. ANDERSON. Mr. Larkin, let us take this hypothetical case: A man commits a crime in Germany. His unit is transferred out the following day. He is shipped to the United States. He may wind up at Fort Sill. The charge against him doesn't catch up with him until he is here. The witnesses are all still in Germany. Are they available or are they not available?

Mr. LARKIN. You are talking about both witnesses, I take it: Prosecution witnesses and defense witnesses?

Mr. ANDERSON. Right.

Mr. LARKIN. Well, they are available as soon as they can get them all here, I suppose.

Mr. ANDERSON. What would they do—subpena them or would they send each back here?

Mr. LARKIN. Well, it would depend on who the witnesses are. If they are subject to military control, why they can transfer them. If they are local nationals, why I don't believe they can.

Mr. ELSTON. You do provide for the taking of depositions.

Mr. LARKIN. We do.

Mr. GAVIN. They have brought them back. I was interested in a case where they brought a witness right back from Italy. He was located in Italy at that time. I think it was during the war. The witness was returned to the States.

Mr. LARKIN. I think whether they move either witnesses or the accused depends upon the circumstances.

Mr. NORBLAD. I think the whole difficulty, Mr. Anderson, is through your entire court-martial system. There is nothing you can do to correct it. As for instance during the war at the time the boat would sail somebody would be a. w. o. l. Well, he committed the crime at Camp Kilmer or Camp Dix.

All the witnesses had been shipped to Europe, including the first sergeant who had the morning report and the man who had the bed next to him. It made it almost impossible to try the man because jurisdiction was here and the witnesses were in Europe. There was charge after charge dismissed. I know of a case in our own unit. I don't know how you can correct the thing.

Mr. LARKIN. That is right.

Mr. BROOKS. You won't contemplate, Mr. Larkin, would you, that in a preliminary examination such as this bringing the witnesses back to this country from Germany?

Mr. LARKIN. Well, you would have to if they are material witnesses because this preliminary investigation must be held before you can refer the case to a general court-martial.

Mr. BROOKS. But you merely have to establish prima facie cases, is that all?

Mr. LARKIN. That is right.

Mr. BROOKS. And if you can do it without bringing material witnesses back from Germany they won't be available in the sense that you refer to in this article.

Mr. LARKIN. That is right.

Mr. SMART. Not only that, Mr. Chairman, but for the purpose of investigation it could be referred through channels and an investigating officer could be appointed over in Germany to take the statements of witnesses and send them back here, without moving any personnel from where they were presently located.

Mr. HARDY. Then, in that case they are available to the prosecution but not the defense.

Mr. SMART. That is right. In that event they may very well want to send the accused. It would be much easier than bringing back a lot of witnesses.

Mr. BROOKS. Now, is there any further discussion on the Article?

Mr. ELSTON. Yes, I would like to ask for a little clarification on subsection (d), where you say that failure to follow the requirements of this article shall not constitute jurisdictional error. Why was that put in? I think the record ought to be clear on it.

Mr. LARKIN. I think that is right, Mr. Elston. There has been a considerable amount of difficulty in construing the binding nature of the pretrial investigation as provided, and that has been provided in the Army I guess since 1920. The Federal courts on writs of habeas corpus have scrutinized it and some have held that the absence or the failure to hold a pretrial investigation may be such jurisdictional error as requires a reversal of the verdict after trial. The point we are trying to make clear is that the pretrial investigation is a valuable proceeding but that it should not be a jurisdictional requirement.

It is a valuable proceeding for the defendant as well as for the Government. We desire that it be held all the time. But in the event that a pretrial investigation, less complete than is provided here, is held and thereafter at the trial full and complete evidence is presented which establishes beyond a reasonable doubt the guilt of the accused, there doesn't seem to be any reason when he has had his day in court and where it is clearly demonstrated that he is guilty, that despite that demonstration the case should be set aside if the lack of full compliance doesn't materially prejudice his substantial rights.

In other words, this is an investigation for purposes of determining whether there is probable cause and it is an investigation to assist the accused. It is not the trial. His day in court is at the trial and if there is demonstrated at the trial that he is guilty beyond a reasonable doubt it seems that that verdict should stand and should not be disturbed unless the lack of a pretrial investigation or the fact that there has been less than full compliance has materially prejudiced his substantial rights.

Now if it has, that is and should be a grounds for reversal of a verdict of guilty. But by this article, we are trying to cure the interpretation that you require full compliance with it even though the lack of full compliance doesn't prejudice his rights when in truth and fact on the trial there is a full amount of competent evidence which demonstrates beyond a reasonable doubt the guilt.

That in our opinion was the construction and intention of Congress when they wrote it in and it seems to us clear from the legislative history. Strangely enough, one of the courts—I have forgotten which one of the circuit courts, that is the United States court of appeal—reading that legislative history, have come to just the opposite conclusion and have decided that the Congress intended it to be completely jurisdictional. It is analogous, I should say, to the indictment proceedings you find in a civil court.

Let us assume that you had less than full compliance before the grand jury but they indict nevertheless. Then the accused comes to trial and is convicted after the presentation of adequate, full and competent evidence. Then you would say that the conviction should be set aside even though the evidence on the trial is clearly sufficient to support the verdict because the indictment itself wasn't supportable.

There is that rule actually in New York State, or at least that construction has been placed. But it is an odd one and it is one that is not uniformly acceptable at all.

By virtue of this provision here in other words, if there was less than full compliance and that fact did not prejudice the substantial right of the accused and further there was ample evidence on the trial to sustain the verdict, then the lack of full compliance would not be such a jurisdictional defect as would result in setting aside the findings.

But, nevertheless, any authority in the military who does not hold a full pretrial investigation would be guilty of an offense. What we are trying to do here is require that it always be held.

Now if it isn't, the person responsible for holding it is guilty of an offense. But even though it isn't, if you prove on your trial thereafter a full case and the lack of full compliance hasn't materially prejudiced the substantial rights, then it does not become jurisdictional error.

Mr. ELSTON. Of course that is undoubtedly the way it ought to be.

Mr. LARKIN. Well, that is the way we feel it ought to be and we believe——

Mr. ELSTON. But the only thing that is bothering me is whether or not without some explanation of what this language means it might be interpreted to mean that the requirements of this section are directory and not mandatory.

Mr. LARKIN. It is our intention that they be mandatory on the military authorities who have the obligation to hold it, but that as I say a failure to hold it or less than full compliance which does not materially prejudice the substantial rights is not jurisdictional error.

I agree with you entirely. I was going to volunteer this explanation if you hadn't asked it because it has been a chronic and difficult problem insofar as the military's relations with the Federal courts for the last several years.

Mr. BROOKS. Mr. Hardy.

Mr. LARKIN. Yes, sir.

Mr. HARDY. If an officer who fails to carry out the provisions of this section is guilty of an offense, how is it dealt with?

Mr. LARKIN. He can be court-martialed himself.

Mr. HARDY. Well, what would be the charge and what would be the penalty?

Mr. LARKIN. The charge would be under article 98 (2), which reads—

any person subject to this code who knowingly and intentionally fails to enforce or comply with any provision of this code—

this provision is that it shall be binding—

relating to the proceedings before, during or after trial—

this is before trial—

shall be punished as the court martial may direct.

That punishment would be set forth in the table of maximum punishments.

Mr. HARDY. That takes care of it.

Mr. SMART. One more objective of this article is to permit the court martial to take pleas of guilty which have not been preceded by a pretrial investigation. If you made this jurisdictional it would be necessary to conduct a pretrial investigation for every accused even though he wants to enter a plea of guilty.

Mr. ELSTON. Well, I think the matter will be taken care of if in the record it is clear that this section means just what you have stated. If any court later on is confronted with the question they necessarily go back or should go back to determine what the congressional intent was. But if it is in the record there won't be any question about it.

Mr. LARKIN. We certainly hope so, Mr. Elston.

Mr. ELSTON. Too many courts decide in their own mind what the congressional intent is and don't go back to the record to find out.

Mr. LARKIN. Well, we are surprised at the construction in the previous legislative history. We thought it was quite clear. Apparently the court did not. I hope what I said is clearer than the last time.

Mr. BROOKS. Well, Mr. Larkin, really the closest approach to what you have here is the hearing before a United States Commissioner, even more so than a hearing before a grand jury. There the procedure is similar to that set forth in these articles. Now I think it is fair and the record ought to show that Colonel Oliver of the Reserves felt like the requirements of subsection (d) which relate to jurisdictional error should be changed.

But the Federal rule is in accordance with the rule that we have discussed here.

Mr. LARKIN. I think most State rules are, too. The procedure of most States is as you know that there are hearings before committing magistrates. But on the other hand grand juries can and do indict right out of hand without a preliminary hearing at all.

Mr. BROOKS. A grand jury, too, is secret whereas your commissioner hearings are open.

Mr. LARKIN. That is right.

Mr. BROOKS. The grand jury proceedings normally contemplate in civilian Federal courts that the defendants or the accused not be present normally.

Mr. LARKIN. That is right.

Mr. BROOKS. Whereas in your commissioner hearings it is the reverse and the accused is present.

Mr. LARKIN. That is right.

Mr. BROOKS. He is confronted with witnesses and has an opportunity to question them.

Mr. LARKIN. That is right.

Mr. BROOKS. And he must be advised that he is entitled to counsel and that his testimony may be used against him and that he gives it freely.

Mr. LARKIN. That is right.

Mr. BROOKS. Without hope of reward or fear of punishment.

Mr. Smart?

Mr. SMART. I have nothing.

Mr. NORBLAD. Mr. Chairman, in my opinion, I think the most important thing in connection with this section is that those matters you put in the record be spelled out in the Courts-Martial Manual, for this reason. I doubt that there is one-tenth of 1 percent of the court-martial cases that are ever appealed to a Federal court. Would you agree on that?

Mr. LARKIN. I think that is right, Mr. Norblad.

Mr. NORBLAD. And there is even a less proportion of the officers who are trying the cases or law officers who are familiar with the construction you have put on it and the one you said the Federal courts have put on it.

I raised that question once where there had been no preliminary hearing or preliminary investigation. Immediately the court and the law members went to the Courts-Martial Manual, which is the bible on the conduct of the cases and which interprets all this statutory legislation, and in there it is spelled out very plain that the failure to have this hearing shall not constitute jurisdictional error.

It is my wish and my request to the Judge Advocate Division—three of them are sitting in the room at the present time—that that be spelled out and put into the Courts-Martial Manual because that is where the law is actually made in the trial of the case.

It is not made in the Federal court—because none of the law officers or members of the court know what some Federal court in New York has decided. They will go to that Courts-Martial Manual, and for all intents and purposes that is where your decision is made.

Mr. LARKIN. I agree with you.

Mr. NORBLAD. That should be in the Courts-Martial Manual by all means.

Mr. LARKIN. I agree with you, Mr. Norblad, and we will make sure that it is.

Mr. NORBLAD. You won't write the Courts-Martial Manual, though.

Mr. LARKIN. I hope not.

Mr. NORBLAD. No. The gentleman in the back of the room——

Mr. BROOKS. If there is no further discussion on that point——

Mr. GAVIN. Now we will take a case where the accused is found guilty and he feels that the preliminary investigation was not sufficient. Then he requests a reversal. He appeals for a reversal of that decision. Who takes it from then on?

Mr. LARKIN. Well, he might make the objection on the trial, actually. Then it would probably, after conviction, if it was made soon enough——

Mr. GAVIN. Assume he doesn't make it at the trial. What does he do?

Mr. LARKIN. Well, his counsel by provision here and in another article may write a brief on points of law that he thinks are erroneous. It would be considered by the staff judge advocate of the convening authority. It would be considered by the board of review.

Mr. NORBLAD. An officer would first do it.

Mr. LARKIN. Pardon?

Mr. NORBLAD. The commanding officer would be the first one.

Mr. LARKIN. That is right—well, the staff judge advocate and the commanding officer.

Mr. NORBLAD. Yes.

Mr. LARKIN. And then the board of review and in certain type of cases, as we will see when we discuss the appellate procedures outlined, the Judicial Council.

Mr. NORBLAD. Yes.

Mr. LARKIN. They would all have an opportunity to review.

Mr. GAVIN. Well, we can go through various steps from the command up to get reconsideration.

Mr. LARKIN. Yes, Mr. Gavin; that is correct.

Mr. DEGRAFFENRIED. Mr. Norblad, as to that suggestion you made just now, do you think it is advisable for you to make that in the form of a motion?

Mr. NORBLAD. I would like to make it in the form of a motion if I may. I think Mr. Larkin agrees that is the only way we will get a proper interpretation of this section.

Mr. BROOKS. Make a motion.

Mr. NORBLAD. I move that Mr. Larkin's interpretation of subsection (d) of article 32 on page 30 of the proposed bill, H. R. 2498, as it stands now be written substantially the same into the Courts-Martial Manual.

Mr. BROOKS. How is that interpretation worded, Mr. Larkin?

Mr. LARKIN. Well, it is quite long. I suggest that it be taken from the record. With your permission I would like to look over the language and make sure I have no split infinitives.

Mr. NORBLAD. I amend my motion accordingly.

Mr. BROOKS. If you mean to put that bill by reference we better have copies.

Mr. NORBLAD. No. Mr. Chairman, this is your bais for the law. Then they will write it up in the Courts-Martial Manual, which is so long and talks about rules of evidence and interpretations of sections and it goes on and construes what the Army thinks the Congress intended.

There is the book right there. It is a big thing. That is where it should be placed, the interpretation given by Mr. Larkin.

Mr. BROOKS. You make the motion that this committee go on record as in favor or as suggesting that the interpretation of that provision be made in accordance with your provision?

Mr. LARKIN. I will transmit the resolution to the three Judge Advocate Generals.

Mr. NORBLAD. To be placed in the Courts-Martial Manual, which is the only bible that the officers sitting on the court go to decide court-martial cases.

Mr. BROOKS. You heard the motion. All in favor say "aye." Opposed, "no." The "ayes" have it and the motion is carried.

Mr. GAVIN. May I ask a question?

Mr. BROOKS. Surely.

Mr. GAVIN. Are all officers participating in these cases and trials, furnished each with a copy of these manuals?

Mr. SMART. Certainly.

Mr. LARKIN. Yes, Mr. Gavin, they all have the manuals.

Mr. GAVIN. There was a new one recently issued, wasn't there?

Mr. LARKIN. That is right. It was revised to take care of the provisions of the Elston Act as passed by the Congress last year. This is a copy of it.

Mr. NORBLAD. And misinterpreted the act and the intention of Congress in a couple of places.

Mr. BROOKS. Any further discussion on this article? If not, is there any objection to it? If there is no objection to the article as amended, then we approve it.

We will proceed to article 33.

Mr. ANDERSON. The House is in session.

Mr. BROOKS. In that case, gentlemen, we will adjourn to meet tomorrow morning at 10 o'clock.

(Whereupon, at 11:05 a. m., the subcommittee adjourned to reconvene on Friday, March 25, 1949, at 10 a. m.)

UNIFORM CODE OF MILITARY JUSTICE

FRIDAY, MARCH 25, 1949

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The subcommittee met at 10 a. m., Hon. L. Mendel Rivers presiding.

Mr. RIVERS. The committee will be in order.

Mr. Smart, I believe we had come to article 33.

Mr. SMART (reading):

ART. 33. Forwarding of charges.

When a person is held for trial by general court martial, the commanding officer shall, within 8 days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If the same is not practicable, he shall report to such officer the reasons for delay.

References: A. W. 46c.

Commentary: This article is derived from A. W. 46c.

Mr. RIVERS. Is there any comment on that article?

Mr. LARKIN. I might say, Mr. Chairman, it is adopted from article of war 46c. It does not involve any changes and is a provision that has been in the law for some period of time.

Mr. RIVERS. The figure is just an arbitrary figure?

Mr. LARKIN. That is right.

Mr. RIVERS. Without objection, the article as read, is approved.

At this point, before we go any further, Captain Woods wants to correct the record. Captain, you may correct it in your own words. I think all that is necessary is for you to make a statement concerning it, for the record.

Captain WOODS. Upon inquiry from the Bureau of Personnel, in response to your question, as to whether acquittals were made part of the officer's record and considered by selection boards, I find that they are. Consequently, my testimony that they were not was incorrect and the record should be corrected to that effect, sir.

Mr. RIVERS. The record will be corrected as indicated. Colonel Dinsmore I believe had something he wanted to say.

Colonel DINSMORE. I was asked one day whether the National Guard, when they came into the Federal service, took a new oath and I promised to get the answer. I have been seeking a convenient opportunity to put that into the record and this may be a convenient time.

Mr. RIVERS. Yes.

Colonel DINSMORE. The officers of the federally recognized National Guard take two oaths at the time of Federal recognition, sir. This

has nothing to do with being called into Federal service. One oath is to the United States and one to the State. Thereafter, when they are called in, no further oath is required. It is just like the oath that any of us takes. The enlisted men take only one oath, but it is a double oath, to the United States and to the State, and no additional oath is required from them.

As a matter of ceremony it sometimes happens that when they are called into the service, they have a big affair and everybody raises his hand and takes the oath, but that is just a patriotic gesture of no legal significance.

Mr. RIVERS. Then, whenever they are called to active service, they are just mobilized?

Colonel DINSMORE. That is correct, sir.

Mr. RIVERS. Mr. Smart, will you proceed to article 34.

Mr. SMART (reading):

ART. 34. Advice of staff judge advocate and reference for trial.

(a) Before directing the trial of any charge by general court martial, the convening authority shall refer it to his staff judge advocate or legal officer for consideration and advice. The convening authority shall not refer a charge to a general court martial for trial unless it has been found that the charge alleges an offense under this code and is warranted by evidence indicated in the report of investigation.

(b) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence may be made.

References: A. W. 47b; M. C. M., paragraph 34 (d)

Commentary: This article is derived from A. W. 47b. Subdivision (b) makes clear that in addition to formal corrections, changes in the charges may be made in order to make them conform to the evidence brought out in the investigation without requiring that new charges be drawn and sworn to. The Manual for Courts Martial provides that if an essentially different offense is charged as a result of the investigation, the convening authority should direct a new investigation to allow the accused to exercise his privileges with respect to new or different matter alleged.

Mr. BROOKS. Is there any discussion on this article?

Mr. ELSTON. I would like to ask a question or two about it. Does not that section practically leave it up to the staff judge advocate to say whether or not there is sufficient evidence to warrant the charge even being made?

Mr. LARKIN. It requires, Mr. Elston, that he review the findings of the investigation and advise the convening authority whether, in his opinion, there is sufficient evidence. It is left, however—that is, the decision is left to the convening authority, which is the present procedure.

Mr. ELSTON. Do you think the language "unless it has been found that the charge alleges an offense under this code and is warranted by evidence" pretty much makes the staff judge advocate the final judge?

Mr. LARKIN. No, I think not. If it does, it should not.

Mr. RIVERS. It certainly sound like it, to me.

Mr. LARKIN. The subject of the sentence is the convening authority, in the very beginning.

The convening authority shall not refer a charge to a general court martial * * *

Mr. SMART. Mr. Chairman, I think the words "unless it has been found" should be considered this way: The question arises from an interpretation. Do the words mean by the staff judge advocate or by the convening authority? My feeling about that is that in the first instance you should not make that choice hinge upon the staff judge advocate, but rather upon the convening authority, assuming that the command remains the convening authority.

Mr. ELSTON. That is exactly the point that I was making. The way it reads it would seem that it might be up to the staff judge advocate to make the decision; and I know that is not what you want.

Mr. LARKIN. That is right.

Mr. RIVERS. It should be rewritten; should it not?

Mr. ELSTON. I do not know; it certainly might be susceptible of a different interpretation.

Mr. LARKIN. I think so, unless the legislative history, or this discussion here is used as the guide. We might change "unless it" to "unless he."

Mr. ELSTON. Could you not have it read something like this: "unless he finds after being advised by the staff judge advocate that the charge alleges an offense" and so forth, so as to leave it to the command, the convening authority, to be the final judge?

Mr. LARKIN. Yes.

Mr. SMART. I think I can suggest an amendment which will do that for you, sir.

Mr. BROOKS. What is your suggestion, Mr. Smart?

Colonel DINSMORE. This was the subject of some discussion. Mr. Larkin and I talked about it briefly. I would like to have permission to give Mr. Smart the benefit of whatever that situation was at that time in connection with drawing the amendment.

Mr. SMART. May I ask Colonel Dinsmore this: It is your understanding, is it not, Colonel, that the choice as to whether or not charges and specifications will be referred to trial rests with the convening authority and not with the staff judge advocate?

Colonel DINSMORE. That is correct; that is so, indeed.

Mr. SMART. With that understanding I would suggest, on page 30 of the bill, line 21, that the word "he" be substituted for the word "it" and after the word "has" delete the word "been." So that the sentence would now read:

> The convening authority shall not refer a charge to a general court martial for trial unless he has found that the charge alleges an offense under this code—

and so forth.

Mr. ELSTON. I think that takes care of it.

Mr. BROOKS. Are there any further suggestions?

Mr. RIVERS. I think we must keep in mind that all this comes under pretrial procedure.

Mr. SMART. Exactly.

Mr. GAVIN. Have there been any changes made in this article, Mr. Chairman?

Mr. BROOKS. Mr. Elston has suggested a change, which Mr. Smart put in certain language. The change is:

> The convening authority shall not refer a charge to a general court martial for trial unless he has found that the charge alleges an offense under this code and is warranted by evidence indicated in the report of the investigation.

Mr. GAVIN. The only question I wanted to raise was as to the term, "the convening authority." That refers to the staff judge advocate; does it not?

Mr. BROOKS. That was the purpose of this suggested amendment or change, to strike that out.

Mr. GAVIN. What are you putting in its place?

Mr. SMART. The change is on line 21, Mr. Gavin.

Mr. GAVIN. I see it in lines 18 and 20.

Mr. SMART. I think I understand the point you are raising, Mr. Gavin.

Mr. GAVIN. The point that I am making is that it still leaves it in the convening authority, leaves it in the command authority.

Mr. SMART. That comes back again to what you want to do about the convening authority. This does not say that the convening authority is command nor does it say that the convening authority is staff judge advocate. It merely says, whoever is the convening authority will approve the charges and specifications.

Mr. GAVIN. Going back to page 29, line 7, you state there:

by counsel appointed by the officer exercising general court-martial jurisdiction over the command.

Now you come along here and say:

officer exercising general court-martial jurisdiction.

Who is going to exercise this jurisdiction? The officer exercising general court-martial jurisdiction over the command. Here you come back and say, the officer exercising general court-martial jurisdiction.

Mr. SMART. You have two different problems. The first problem that you raised regarding counsel represents a completely different situation than the one as to who will refer the charges? The counsel provisions on page 29 say that the authority exercising general court-martial jurisdiction will appoint the counsel, but this article has nothing to do with counsel. This is the question, Who will refer the charges? This says the convening authority. The committee has not yet determined who will be the convening authority.

Mr. GAVIN. Is it the intention of the chairman to come back to articles 33 and 34 for discussion?

Mr. BROOKS. I do not think it will be necessary under that interpretation because when we decide who the convening authority is, that disposes of it.

Mr. RIVERS. It must be subject to the section that we passed over.

Mr. BROOKS. When we decide that, it may change the meaning of that particular section.

Mr. SMART. I might add that if you do change the intent of the provision of article 22, that it will be necessary to amend the bill in many places other than in article 22.

Mr. GAVIN. That is exactly what I am talking about.

Mr. BROOKS. That is the reason I thought that we should have started today to settle the point of command control. I think this: I am not critical of anyone, because we are earnestly trying to do the best we can to write the best bill. After all, these matters refer to pretrial procedure and the vital thing in the bill is the trial—not the pretrail, it seems to me. We can spend weeks on this pretrial procedure without affecting a great many of the fundamental rights of the accused.

Mr. ELSTON. We have only one more article before we take up trial procedure.

Mr. RIVERS. Was not the reason why the chairman passed it over, among other things, in order to give anyone who cared to testify further an opportunity to appear?

Mr. ELSTON. I do not believe trial procedure would be affected much by our subsequent decision about command authority, because it is more or less procedure that is already laid down by the code.

Mr. BROOKS. As to this pretrial matter, you have already decided that it is not a reversible error and so, regardless of what you put in here, if it is not carried through, it is not going to affect the fundamental rights of the accused a great deal.

Mr. RIVERS. If the commanding officer has some inkling that there is a violation in the articles of this code, he has got to be able to find it somewhere down the line here. But the ultimate result of the trial is another matter, as I see it.

Mr. BROOKS. Why not, since we have gone thus far in the pretrial procedure, try to go ahead and finish it?

Mr. LARKIN. I would like to point out one thing. Article 22 has to do with the appointment of members of the court. This article, 34, has to do with the referral of the charges by the convening authority which is a different concept and which is supported by the people who are criticizing 22; the witnesses who have said that they would like to see the appointment of court members by a judge advocate and not by the convening authority are the same people who say that they believe it perfectly appropriate for the convening authority to refer the charges. They do not criticize that part of the convening authority's function. So that you can decide 22 and the position of the command and convening authority insofar as the appointment of court members is concerned, without affecting 34 at all.

Mr. RIVERS. Of course, if he has control over the fitness reports of the members he appoints as a result of the charges, after having gone to trial, then there might be some difference and I think there is some difference.

Mr. LARKIN. It is a different concept.

Mr. RIVERS. But so far as referring the charges, I think it is entirely different, as you have observed.

Mr. LARKIN. That is right. I do not think any witness has recommended to you that there be any difference or any change.

Mr. GAVIN. I am sorry I was a few minutes late this morning. However, going back to article 33, to the matter of the officer exercising general court-martial jurisdiction, that would still leave it in command control; would it not?

Mr. RIVERS. He is referring to charges at that point. This is all pretrial.

Mr. BROOKS. Gentlemen, an amendment has been suggested. If there is no further question in reference to the amendment, then the question is on the amendment.

(The amendment was agreed to.)

Mr. BROOKS. Is there any further discussion with reference to article 34?

Mr. ELSTON. Just one other question. What corrections are contemplated in subsection (b)? What corrections could be made?

Mr. LARKIN. It is contemplated that language changes could be made or, if the evidence adduced pretrial indicated that there was a technical variance between the specification and charge as written, and the evidence, that change could be made.

In other words, if the original allegation had been that the accused had stolen a black horse and it turned out in the investigation that it was a white horse, they could make language changes of that kind, which would be technical.

Mr. ELSTON. In other words, changes as to form, but not substance.

Mr. LARKIN. That is right. If it appears from the preinvestigation that the original charge and specification is not sustained or that the investigation has spelled out a different crime, then it will be necessary that the charges and specifications be redrawn and there be a new investigation on the different charge.

Mr. ELSTON. In other words, if a man is charged with being A. W. O. L., they could not change that to desertion?

Mr. SMART. That is a greater offense and a different offense, and I would say "no."

Mr. LARKIN. I think that is right.

Mr. BROOKS. Take the matter of grand larceny and petit larceny. Suppose the investigation shows the value of the article purloined was different from that originally claimed. Could a change be made either way there?

Mr. SMART. I would say that if it is a lesser and included offense—if he were initially charged with grand larceny but subsequently it was found out that the value of the merchandise taken would not substantiate grand larceny but would substantiate petit larceny, then the accused would not be prejudice by reducing the charges.

Mr. BROOKS. In the case of a more serious offense, such as murder, could a finding of a lesser offense be made?

Mr. LARKIN. I should say so; yes.

Mr. ELSTON. On a charge of manslaughter, you could not make it murder in the first degree.

Mr. SMART. You could not change it to a more severe crime, but I think you could make corrections to a lesser and included offense only.

Mr. RIVERS. Why not insert something in their along these lines, in favor of the one who is charged?

Mr. LARKIN. May I point out that we tried to spell out the idea in the commentary which says:

> Changes in the charges may be made in order to make them conform to the evidence brought out in the investigation without requiring that new charges be drawn and sworn to. The M. C. M. provides that if an essentially different offense is charged as a result of the investigation, the convening authority should direct a new investigation to allow the accused to exercised his privileges with respect to new or different matter alleged.

The purpose here is, because your charges and specifications are drawn after the receipt of the original complaint, when there is only a moderate amout of evidence, the next step is this pretrial investigation, which is a very much more extensive investigation and it may be that, as a result of that greater and more extensive investigation, some technical changes for the purposes of accuracy are necessary.

However, if the information adduced in the pretrial investigation is such that it warrants a different charge, then the new charge and

specification must be drawn at that point and a new preinvestigation must be held, so that the accused can meet, if he desires, the new charge which he was not aware of during the first preinvestigation. That is the present practice, but we have inserted it here in the statute because in making this preinvestigation uniform, we were faced with this situation. The Navy at the present time does not have the same formal preinvestigation that the Army has. They do not have this formal investigation spelled out in this fashion. They make a preinvestigation which is substantially the same, but it has never been spelled out in a statute. Under the Navy practice, further, they do not draw the formal charges and specifications until after the preinvestigation.

In making it uniform and adopting the Army practice of statutory preinvestigations which are preceded by charges and specifications, we have provided this to insure that these technical changes can be made without sending it back to the original person who drew the charges in the first instance.

Mr. ELSTON. Let me ask you this question. You have your Army manual of court martial. After this proposed legislation is completed, if it becomes law, is there to be a uniform service manual?

Mr. LARKIN. There is; yes. At the present time, as you know, the Navy has a manual which is entitled "Navy Courts and Boards."

Mr. ELSTON. If the Navy is going to have one manual and place an interpretation on the law and the Army is going to have another and place another interpretation on it, there is going to be a lot of confusion.

Mr. LARKIN. That is right. That will not and cannot happen, Mr. Elston, because we have provided that the President will promulgate the rules for all, with one single manual. And there again, jumping away ahead of the story, the judicial council was provided, so that there is one final spot which will insure uniformity of interpretation.

Mr. BROOKS. That is one of the duties of the judicial council?

Mr. LARKIN. That is right.

Mr. BROOKS. There is an article somewhere here which says, in effect, that if a trial uncovers other offenses, nothing in the proceeding shall prevent the filing of separate charges as to these additional offenses discovered as a result of the trial. Is there anything in this article that will affect the subsequent article?

Mr. LARKIN. No; I think not. In that event, there would have to be a separate and distinct preinvestigation of the statutory charges.

Mr. DEGRAFFENRIED. If a man is charged with murder and the evidence discloses that he is guilty of, say, manslaughter only, would you have to make that change? In civil courts murder embraces all the charges; it embraces murder in the first degree, murder in the second degree, manslaughter in the first degree, and even manslaughter in the second degree. If the evidence discloses that he is guilty of a lesser crime than murder, would there have to be a change in the charges, or could he be found guilty of manslaughter?

Mr. LARKIN. I am quite sure that is possible here. We have provided in another article, article 59, that a lesser included offense may be found.

Mr. ELSTON. Do you have a definition anywhere of what is a lesser included offense?

Mr. LARKIN. I do not think we have a definition set out, but it is set out in the commentary.

Mr. BROOKS. What article is that?

Mr. LARKIN. Fifty-nine. The commentary in that connection says:

Subdivision (b) is taken from A. W. 47 (f), 49 (a) and article 39 (d), (e) of the proposed A. G. N. M. C. M. paragraph 78 (c) defines a lesser included offense as follows. "The test as to whether an offense found is necessarily included in that charged is that it is included only if it is necessary in proving the offense charged to prove all the elements of the offense found."

That is quoted from the manual at the present time.

Mr. DEGRAFFENRIED. That is all right.

Mr. BROOKS. Is there any further discussion on this article? If not, article 34 will stand approved as amended, and we will take up article 35, Mr. Smart.

Mr. SMART (reading):

ART. 35. Service of charges.

The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had. In time of peace no person shall, against his objection, be brought to trial before a general court martial within a period of 5 days subsequent to the service of the charges upon him, or before a special court martial within a period of 3 days subsequent to the service of the charges upon him.

References: A. W. 46 (c); A. G. N., article 43; proposed A. G. N., article 37.

Commentary: This article is derived from A. W. 46 (c) and is in accordance with present Navy practice. The period of 3 days between service of charges and trial by special court martial is derived from proposed A. G. N., article 37.

Mr. BROOKS. Is there any discussion on this article?

Mr. RIVERS. Would it be a great burden on the convening authority to serve the man with an information as to his rights? For instance, the accused does not have access to libraries, and so forth. They give him a copy of the charges, but is that sufficient?

Mr. SMART. I may say there that we must remember that counsel is mandatory for all these accused persons before a special court as well as before a general court. Certainly I believe we are safe in assuming that anyone appointed as defense counsel is going to know or inform himself of the rights of the accused.

Mr. RIVERS. Before the accused has the opportunity to plead guilty?

Mr. SMART. Absolutely; beyond any doubt in my mind.

Mr. RIVERS. My good friend on my right knows that a lot of times these solicitors try to get a man to take a lesser plea, in order to get the case off the docket. Frequently the dockets are cluttered up with so many cases.

Mr. BROOKS. The matter of the 5-day period was brought into question, Mr. Larkin. Do you see any necessity for a change there?

Mr. LARKIN. I do not think so, Mr. Chairman. It is a protection against a too speedy trial. That is the purpose of it.

Mr. ELSTON. In line 6 you refer to court-martial charges without indicating what kind of court-martial charges.

Mr. LARKIN. That is right. That refers to any of the three courts.

Mr. ELSTON. Even the summary; they are entitled to be served with a copy of the charges there?

Mr. LARKIN. That is right.

Mr. ELSTON. There is no limitation as to the time in which a summary offender can be brought to trial?

Mr. LARKIN. That is right.

Mr. BROOKS. As long as we are discussing this more fully, what do you think of limiting that 5-day period to times of peace? Why should it be limited to times of peace?

Mr. LARKIN. In times of war, the operational problems are such that we felt it inappropriate to tie it down to a time limit.

Mr. BROOKS. You think that that right should be suspended, and that a man should go to trial instanter?

Mr. LARKIN. I think so, although if he did and he could show that it prejudiced his rights I think he would have a point of reversible error. However, we hesitate to tie it down to a time limit in war.

Mr. ELSTON. Of course, most of the complaints arose during wartime and by reason of wartime prosecutions.

Mr. LARKIN. You see, this is subsequent to the service of charges for trial. By virtue of preceding articles which we have discussed, you will recall that he is to be informed of the accusation or the charges against him as soon as he is incarcerated. Then follows the preinvestigation. In addition to having been informed upon incarceration he is able to ascertain just what the charge is against him and become familiar with it. This provides an added protection in time of peace and gives some further opportunity to prepare a defense. It is not mandatory, you will observe; it is at the election of the accused himself. It comes into effect only if he objects to coming to trial sooner. If he does not object, it could be sooner.

Mr. BROOKS. Suppose it is a time of war and he is charged with something, conviction for which would take away his liberty for his whole life. Under this, if it is a special court martial, he is only entitled to 3 days.

Mr. LARKIN. That is, after the formal charges have been made.

Mr. RIVERS. A special court could not take away his liberty for that length of time.

Mr. LARKIN. That is right; only 6 months maximum.

Mr. ELSTON. In time of war, there could be a very speedy trial. They could prepare the charges and bring him to trial immediately, even though he objected. He could be brought to trial in a lesser period of 5 days or 3 days, if it is a special court martial?

Mr. LARKIN. That is right.

Mr. ELSTON. Of course, he may be deprived of his liberty. It might even be a death penalty. Do you not think he is just as much entitled to the same period of time during the war as during peacetime?

Mr. LARKIN. Well, in a death case, of course, such a penalty can be imposed only by a general court and that requires, of course, the whole preinvestigation procedure. I should say, as I pointed out before, that if the too speedy trial can be shown to have prejudiced his rights substantially, it will have been reversible error, anyhow.

Mr. ELSTON. If that rule prevailed, you would not need this 5-day and 3-day period?

Mr. LARKIN. Actually I do not think it would be needed, but it was spelled out for the sake of completeness and as a guide to inform him that within these periods he had the right to object. Perhaps some of the officers would care to comment on the matter of these periods.

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Captain WOODS. On board ship, in time of war, ordinarily you try to conduct these trials while you are in port. You simply do not have the manpower to do it properly at sea, because all of the officers are engaged at their war stations. You are rarely in port long enough to afford a period longer than 5 days, or to guarantee even that.

In my own experience, I was navigator of the *Nashville* in the Aleutians and we went into Kodiak to pick up stores. We were there 3 days. We had a case pending and that was the time that we had in which to do it.

Mr. RIVERS. Where did you conduct your trial?

Captain WOODS. In Kodiak, Alaska.

Mr. RIVERS. You convicted the man, and then what did you do with him?

Captain WOODS. He was transferred back to the States. Clemency powers were exerted back here and he was put on probation and then sent back to sea.

Mr. RIVERS. But you put him ashore at Kodiak?

Captain WOODS. Yes, sir. I have a couple of other thoughts I would like to present. If we are compelled to try him at sea, if we cannot handle him while we are in port, one of two things will result. The more mature officers will all be at battle posts and necessarily the trial will be conducted by the younger people, which I think might be unfortunate. The alternative would be to hold him without trial until the next time we hit port, which might be a very long period.

Mr. ELSTON. I think the captain's explanation in the record will be helpful to us in explaining to the Members of the House why this provision is perhaps necessary.

Mr. RIVERS. Of course, your difficulty is much greater than that of the Army.

Captain WOODS. I think so, sir.

Mr. BROOKS. If there is no further discussion on this article, it will stand adopted as read and you may proceed with article 36, Mr. Smart.

Mr. SMART (reading):

ART 36. President may prescribe rules.

(a) The procedure, including modes of proof, in cases before courts martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which shall not be contrary to or inconsistent with this code.

(b) All rules and regulations made in pursuance of this article shall be reported to the Congress.

References: A. W. 38; A. G. N. articles 34, 64 (e); proposed A. G. N., article 48.

Commentary: This article is derived from A. W. 38. Proposed A. G. N., article 48 is similar except that the Secretary of the Navy would be authorized to prescribe rules instead of the President.

I think that raises a question which Mr. Elston had a minute ago as to how this new manual was to be written. That is what is anticipated by article 36. I think it is anticipated, and I think it would be impossible to do otherwise, that the services will sit down to write a manual as a joint effort in the same manner as the services have sat down together to write this very bill.

Mr. BROOKS. I think it would be unthinkable, after we go to all of this painstaking trouble to get a unified bill, that the President would prescribe three separate rules.

Mr. SMART. That is correct, Mr. Chairman. And when you provide such provisions as the jurisdictional features in here which provide for reciprocal jurisdiction, certainly the services must sit down and come to a very full and complete understanding and agreement as so how that is going to be exercised before it is submitted to the President for his approval. So I think it is impossible that they could write any manual except as a joint enterprise, and that one manual would be used by all three services.

Mr. ELSTON. It is not spelled out here that they have to do it. And I am not sure that we should not put it in here, that it is to be done, so that the President may not come along and provide some rules that would be applicable to one service and other rules that would be applicable to another service.

Mr. BROOKS. Furthermore, in paragraph (b) we do not specify the limit of time within which he has got to get that information to Congress.

Mr. RIVERS. As a result of this, neither the President nor any of the three services could have any authority to agree on any rules of procedure contrary to the discussion before this committee or the intent of the Congress?

Mr. LARKIN. I think that is provided, Mr. Rivers: "shall not be contrary to or inconsistent with this code." Further, of course, these rules and regulations are to be submitted to the Congress and the Congress will have an opportunity to scan them and see if they do not feel that they do conform.

Mr. ELSTON. But I do not see anywhere in here that there must be a uniform manual of courts martial. This, of course, is a uniform code in itself, but I am thinking about our making it mandatory that there be a uniform manual of courts martial.

Mr. SMART. I doubt that you should tie them with an amendment to where they could not even breathe; but I could offer some wording as an amendment to subsection (b) which would make the subsection read as follows:

> All rules and regulations made in pursuance to this article shall be reported to the Congress and shall be uniform insofar as practicable.

That leaves them enough leeway to provide a different provision where it is absolutely necessary and, there are some differences in the services, which is recognized. But it will show what the intent of Congress is, that it shall be uniform in every possible instance.

Mr. HARDY. With respect to all of the services?

Mr. SMART. Yes, sir.

Mr. ELSTON. I think that reaches it. Of course, there might be some slight differences that would pertain as to the Navy in contrast to the Army, but at least it is an expression of the congressional intent that we want it to be as uniform as possible.

Mr. RIVERS. That is right.

Mr. LARKIN. I certainly have no objection. It was our thinking that the manual could not be otherwise, under this section. But in order to clarify it further, the suggested language is appropriate.

Mr. BROOKS. Without objection, the amendment is agreed to.

Mr. ELSTON. One other question, Mr. Chairman, and that is about the rules of evidence. I am referring to subsection (a) which says:

> The procedure, including modes of proof, in cases before courts martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, * * *

Can you give us any case in which the rules of evidence generally recognized in the United States district courts should not apply?

Mr. LARKIN. I think some of the provisions in the code now vary somewhat from the Federal law; in other words, double jeopardy.

Mr. ELSTON. That is a different thing. That is where you state it in the code and again you refer, in this code, to any provision which is inconsistent with the general rules of evidence. But what I am talking about is a rule made by the President, after we have enacted this code. Can you conceive of any case where he might by regulation change the rules of evidence as they generally apply in a criminal case?

Mr. LARKIN. No, I cannot think of one so far as a criminal case is concerned, at this minute. But I have not tried to make a comparison throughout.

Mr. RIVERS. Under this section why could not the President say, I do not deem it practicable that the generally accepted rules of evidence apply under this? The President might be a layman.

Mr. ELSTON. He could say that.

Mr. RIVERS. Surely.

Mr. SMART. As a matter of practice, of course, the President approves the rules of procedure and modes of proof which are recommended by the services.

Mr. RIVERS. Because he is Commander in Chief. And it is just perfunctory.

Mr. SMART. Of course, he merely signs his name to a recommended set of regulations which the services bring up to him. The experts work them up before they are presented.

Mr. RIVERS. Some Presidents do not have the advantage of legal experience.

Mr. ELSTON. He could say, for example, that hearsay evidence shall be admissible.

Mr. RIVERS. That is right.

Mr. ELSTON. May I ask the Army, the Navy, and the Air Force if they know of any case in which the rules of evidence generally applying in criminal cases could not be applied in the military trial.

Colonel DINSMORE. A striking example is the rule with reference to judicial notice, for example. We have a great body of orders and regulations, that sort of thing. I would have to ask for a little time to explore that, if I am going to give a complete answer.

Mr. BROOKS. Colonel, may I ask you, What about this rule against self-incrimination under article 31? It is different from what it is in ordinary civilian courts.

Colonel DINSMORE. That is correct.

Mr. BROOKS. Do you think that would make a difference in the rules that the President might promulgate?

Colonel DINSMORE. If Congress enacts this, he could use that language and it would make a difference.

Mr. ELSTON. The President is bound by this code?

Colonel DINSMORE. I think so, yes, sir.

Mr. ELSTON. What we are complaining about is when you get outside of the code and he issues regulations saying what the rules of evidence shall be.

Colonel DINSMORE. Yes.

Mr. ELSTON. Those rules of evidence are the accused's protection. Those rules of evidence have grown up over a long period of time. Practically all the rules of evidence stem from the common law other than from statutes. If the President can just waive them by mere regulation it seems to me he is taking from the accused person in the military services a very fundamental right that every accused person has in the civil courts.

Colonel DINSMORE. I agree with you. We have followed all through these years the rules of the Federal courts. There may be a few exceptions. And I feel sure we could present a good reason for each one of those.

Mr. BROOKS. The Federal courts I think use the term "as near as may be" to state rules, which comes as close as you can come in the matter of language to being identical to the rules of evidence of another jurisdiction.

Mr. RIVERS. What kind of rules would obtain in the trial of a saboteur, such as those Germans, for instance, whom Kenneth Royall prosecuted? That was all secret. What kind of rules obtain there?

Mr. LARKIN. They are rules that are promulgated by the President, I believe.

Mr. RIVERS. Would that have any relationship to what we are considering? It would, would it not?

Mr. LARKIN. Yes; it would.

Mr. SMART. We are not prescribing rules of procedure for military commissions here. This only pertains to courts martial.

Mr. LARKIN. But we permit the President to provide for the rules in those tribunals.

Mr. RIVERS. They were tried by the Articles of War—those saboteurs. The present Secretary of War was the prosecutor, I believe.

Mr. SMART. He was the defender.

Mr. RIVERS. I knew he had some part in it. Of course, he had a lost case before he got started.

Mr. LARKIN. I think you may face this problem if you require that the regulations and principles of law and rules of evidence be followed that are generally recognized in the United States district courts. Every time a Federal court reconstrues a rule of evidence, construes in a different way, you will have the necessity of changing them for the court martial.

Mr. HARDY. Would not Mr. Brooks' suggestion take care of that "as near as may be"?

Mr. BROOKS. That is the verbiage that is used in the Federal courts.

Mr. HARDY. That seems to me more satisfactory than saying "so far as he deems practicable."

Mr. ELSTON. Those words, "so far as practicable," are in my opinion going to be rather dangerous in some statutes. We use that phraseology too much and it completely nullifies everything that you have laid down.

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Mr. ELSTON. Those words, "so far as practicable," are in my opinion going to be rather dangerous in some statutes. We use that phraseology too much and it completely nullifies everything that you have laid down.

Mr. LARKIN. Of course, this is not an innovation here. This is in the present statute and has been for a very long period of time, article of war 38 is the same. All we have done to it is we have added "principles of law." Heretofore it covered only rules of evidence. We have added "principles of law." But the phrase, "as far as he deems practicable" is in the present statute.

Mr. RIVERS. A lot of people have complained—and I think my colleague, Mr. Elston, will agree with me on this—that for a long time a great many of the books which we used to purchase for our libraries, as lawyers, have become useless because of a practice that has gained notoriety, under what is known as the Executive order, whereby Supreme Court decisions do not amount to very much at times. If you had access to the Federal Register or wherever they codify those things, you would not need your lawbooks. All you would need would be to get the latest communiqué and then go on about your business, if you had any business by that time.

Mr. LARKIN. It is perfectly true that Congress gives the President, under any number of laws, the right to regulate.

Colonel DINSMORE. I think I might be able to clarify the matter of Mr. Elston's mind if I read paragraph 124 of the Manual of Courts Martial.

The rules stated in this chapter are applicable before courts martial. So far as not otherwise prescribed in this manual, the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States and when not inconsistent with such rules, the common law will be applied by courts martial. On interlocutory matters relating to the propriety of proceeding with the trial, as when a continuance is requested, the court may, in its discretion, relax the rules of evidence to the extent of receiving affidavits, certificates of military and civil officers, and other writings of similar apparent authenticity and reliability, such as the certificate of a physician as to the illness of a witness unless on objection to a particular right it is made to appear that the relaxation might injuriously affect the substantial rights of an accused or the interests of the Government.

Mr. ELSTON. You have stated a rule very fully there that goes much further in protecting an accused person than this does. If the first part of what Colonel Dinsmore read were inserted here, there would not be any doubt about it.

Mr. LARKIN. What Colonel Dinsmore read is a construction of this language as contained in article 38.

Mr. ELSTON. I understand that, but the President by some regulation could make it impossible to place that construction on it. The President, of course, does not himself make rules of evidence. What I think we want to get away from is somebody in the Secretary's office sitting down and writing the rules of evidence to govern the trials of courts-martial cases.

Mr. LARKIN. It is a question certainly, whether or not the services who, in the first instance, will draft the manual, will change their attitude from their present attitude, because when they drafted the construction of article 38 they set forth what Colonel Dinsmore has just read, which will be submitted to the President. Whether there is a danger that they are going to radically change that—I frankly do not think so, but that is the point you were addressing yourself to, I think.

Mr. BROOKS. You have heard the article, gentlemen. My own personal opinion is, if we make a change, we had better investigate

the wording used in the Federal courts in the matter of the use of the rules of evidence of a State where they use the term "as near as may be." That is well covered by many a decision. I think this generally has been the law and it has worked very well and you have rules supporting it. So is there any necessity for a change? What is the opinion of the committee?

No amendments are offered.

Mr. RIVERS. Why not cut out "so far as he deems practicable"?

Mr. ELSTON. Those are the words that I object to. I would suggest, Mr. Chairman, that we pass this until the next meeting and in the meantime let us get the rule that the chairman is referring to and then have some further discussion on it.

Mr. BROOKS. We will take that up this afternoon. We are planning to meet this afternoon and tomorrow to try to finish up.

Mr. LARKIN. Mr. Chairman, may I inquire whether the striking out of those words would require us to use rules before the United States district courts in criminal cases which may not be applicable and see if I can uncover any tangible instance? If not, I am sure we would have no objection.

Mr. BROOKS. Could you be ready this afternoon?

Mr. LARKIN. I shall try to.

Mr. BROOKS. Then we will pass that by, and take it up later today. We will now take up article 37, Mr. Smart.

Mr. SMART (reading):

ART. 37. Unlawfully influencing action of Court.

No authority convening a general, special, or summary court martial, nor any other commanding officer, shall censure, reprimand, or admonish such court or any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this Code shall attempt to coerce or, by any unauthorized means, influence the action of a court martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

References: A. W. 88; proposed A. G. N., articles 9 (45), 39 (j).

Commentary: This article incorporates the provisions of A. W. 88. In addition it prohibits the convening authority from influencing the law officer or counsel. This is similar to the proposed A. G. N. except that the Secretary of the Navy would control such coercion by regulation.

This article is not intended to preclude a reviewing authority from making fair comment on errors of the court in an opinion which is made in the course of review, or from returning a record for revision of errors, or from taking appropriate action when a member of a court has so misbehaved as to abandon his judicial responsibilities or duties.

Article 98 of this code would make violations of this article an offense.

Mr. RIVERS. Where are the teeth?

Mr. LARKIN. Article 98.

Mr. SMART. Practically speaking, as has been previously pointed out to the committee, it is a matter of extreme doubt that anyone would ever be court-martialed under this section. You will recall that it was recommended, I think by General Riter who represented

the American Legion, that this be made an indictable offense in the civil courts. I frankly do not subscribe to that position. I think it is going too far.

While I do not believe anyone is going to be court-martialed under article 37, I think it does say in good, plain strong, understandable language, what the intent of Congress is so far as influencing courts is concerned.

Mr. BROOKS. Mr. Smart, I was impressed with what Mr. Riter said. But thinking it over I was wondering, suppose an offense of this kind, coming under article 37, should be committed we would say in the Philippine Islands or in China, what would be the jurisdiction to try it, if it were assigned to a civilian court?

Mr. LARKIN. There would not be any, in my opinion.

Mr. BROOKS. You would have to go into the question of jurisdiction in all cases of that character, it seems to me.

Mr. SMART. That is right. You have some technical difficulties here in addition to the practical matters involved.

Mr. BROOKS. I think it is a very important article, though.

Mr. HARDY. I think it is very important. Insofar as article 98 applies to this, who would bring the charges under article 98 against anyone who violated this provision?

Mr. LARKIN. Anybody subject to the code could bring charges, Mr. Hardy. This is the language of Public Law 759. We have adopted it in toto except that we have added "law officer, or counsel thereof." In other words, censure, reprimand, or admonition of any member of the court is forbidden.

Mr. HARDY. Suppose the commanding officer raised the devil with somebody on the court for a decision that he made. That fellow would not dare bring charges under article 98.

Mr. SMART. I think that depends upon whom you mean by "that fellow." In the Army as of today I think the records will show that there are more Reserve officers on active duty than there are Regular officers. I cannot escape the feeling that if any action is ever taken under this article it will be initiated by some Reserve officer who was shocked and mad because of the action of some convening authority.

Mr. HARDY. A Regular Army officer would not do it.

Mr. SMART. I agree with you.

Mr. LARKIN. An enlisted man might be on the court.

Mr. HARDY. You do not have any idea that an enlisted man would do it, do you?

Mr. LARKIN. Well, I do not know.

Mr. HARDY. Not unless he wanted to get a dishonorable discharge very quickly.

Mr. RIVERS. What about the man who under the fitness report of the officer allegedly violates these provisions? Do you think he would do it?

Mr. LARKIN. I think if a man complains and charges are drawn, and the commanding officer were acquitted, he would be in a very difficult spot so far as bringing sanctions against the man who made the charges is concerned.

Mr. GAVIN. What do you think would happen then?

Mr. LARKIN. I think the commanding officer, even if he were acquitted, would find it very embarrassing to bring sanctions against somebody who had complained because it might look that he was

trying to wreak vengeance on the man. I think he would think twice about it, myself.

Mr. HARDY. Well, there are a lot of ways of skinning a cat, though.

Mr. SMART. I would say that I still believe, regardless what you write into the law, as was pointed out by Mr. Spiegelberg, any smart CO can get through this section here or through this article 50 different ways if he really wants to influence a court. And if there is a commanding officer of that character, he is going to do it in such a way that no one is ever going to know anything about it. And I feel that so far as the law is concerned and as far as the Congress can go effectively, all it can do is to express its opposition in good plain words, as here, to such practices. Practically, I do not believe you can go any further than that.

Mr. RIVERS. There are two ways of getting at it; one, leave these provisions as they are and make an absolutely separate JAG set-up; and that would be the nearest thing that would be foolproof that I know of. Then he can make all the trouble he wants. And the man who conducted the trial can always say, his stooge down below can say; "It was not my fault, it was the JAG's fault." It is just like these mayors from the various cities who attended the convention here in Washington just recently. They criticized the Congress for rent controls, because then they would not have anybody to pass the buck to. If you have somebody to whom you can pass the buck, that makes an ideal set-up.

Mr. BROOKS. What is the disposition of the committee?

Mr. GAVIN. I would suggest, Mr. Chairman, after line 23, have it read:

or the action of any appointing, convening, approving, or reviewing authority with respect to his judicial acts.

The convening or some other officer is going to do the appointing of the court rather than the commanding officer convening the court.

Mr. SMART. May I suggest that the words "appointing" and "convening" are used interchangeably and mean one and the same thing.

Mr. GAVIN. Then you would not have any objection to putting it in.

Mr. SMART. It is merely surplusage. I do not say that it hurts, but it does not help any.

Mr. LARKIN. Convening, as used here, is the broader term.

Mr. GAVIN. It comes back again to your other articles, 33 and 34, the convening authority. Who is going to convene this court? That is what I am particularly interested in.

Mr. RIVERS. I just got through making that observation a while ago.

Mr. GAVIN. You mean the Judge Advocate General set-up?

Mr. RIVERS. Yes. I think convening contemplates that personally.

Mr. BROOKS. Is there any further discussion of this article? If no amendments are offered and if there is no objection, the article will stand approved as read.

We shall take up article 38, Mr. Smart.

Mr. SMART (reading):

ART. 38. Duties of trial counsel and defense counsel.

(a) The trial counsel of a general or special court martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of the proceedings.

(b) The accused shall have the right to be represented in his defense before a general or special court martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel duly appointed pursuant to article 27. Should the accused have counsel of his own selection, the duly appointed defense counsel, and assistant defense counsel, if any, shall, if the accused so desires, act as his associate counsel; otherwise they shall be excused by the president of the court.

(c) In every court-martial proceeding, the defense counsel may, in the event of conviction, forward for attachment to the record of proceedings a brief of such matters as he feels should be considered in behalf of the accused on review, including any objection to the contents of the record which he may deem appropriate.

but it does not help any.

Mr. LARKIN. Convening, as used here, is the broader term.

(d) An assistant trial counsel of a general court martial may, under the direction of the trial counsel or when he is qualified to be a trial counsel as required by article 27, perform any duty imposed by law, regulation, or the custom of the service upon the trial counsel of the court. An assistant trial counsel of a special court martial may perform any duty of the trial counsel.

(e) An assistant defense counsel of a general or special court martial may, under the direction of the defense counsel or when he is qualified to be the defense counsel as required by article 27, perform any duty imposed by law, regulation, or the custom of the service upon counsel for the accused.

References: A. W. 11, 17, 116; proposed A. G. N., articles 18 (b), 18 (c), 24 (b), 38.

Commentary: Subdivisions (a) and (b) are derived from A. W. 17 and A. W. 11.

Subdivision (c): A similar provision appearing in the proposed A. G. N., article 78, made it mandatory for defense counsel either to submit a brief of such matters as he felt should be considered on review or a statement setting forth his reasons for not so doing. This provision was not adopted because it was felt that if the latter alternative were chosen it might actually prejudice the accused on review. The permissive provision is inserted in the code to encourage defense counsel to submit briefs in appropriate cases.

Subdivisions (d) and (e) are derived from A. W. 116. Stricter requirements governing the circumstances under which assistant counsel may act independently of the trial counsel or defense counsel are imposed in order to maintain the quality of counsel and to protect the accused.

Mr. BROOKS. Do you have a comment on that, Mr. Smart?

Mr. SMART. I have not. It, substantially, perpetuates existing law. I think the article is well drawn and is entirely adequate.

Mr. BROOKS. How does it differ from the Elston bill?

Mr. LARKIN. I think only by addition. In (c) we provide the manner in which a defense counsel may write a brief, if he desires, and have it included in the record so that any legal points he cares to raise will be available for consideration upon review.

In addition, it provides in (d)—it tightens up the present regulations a little bit so that an assistant trial or defense counsel who may be sitting in on the case can conduct the case only if he is qualified in the same manner that the trial counsel himself is qualified.

In article 27 which we passed temporarily, the qualifications for trial counsel are set out, they briefly being that he either be a judge advocate, or a member of the Federal or State bar; and that in any event he be certified as to his ability by the Judge Advocate General.

We require here that any assistant who would take over be so qualified or, if he engages in part of the conduct of the trial and is not so

qualified, he may do so only if the qualified trial counsel is present. That is a tightening up, as I say.

Other than that, this is an adoption of the present law. It is an adoption of parts of different articles, specifically Articles of War 117 and 116, and provisions that were in the proposed Navy bill.

Mr. ELSTON. I am wondering why, in section 27 we did not say, a member of the Federal court, the highest court of the State or the Territory? Suppose the prosecution were being conducted out in Hawaii? They have counsel who are admitted to practice out there who are very able and competent. And it would hardly be pract cable to go to the United States to get counsel, whereas counsel there might be easily available.

Mr. LARKIN. Is not that a Federal court, Mr. Elston, in Hawaii?

Mr. SMART. I think it is. I think it is so construed.

Colonel DINSMORE. May I say something off the record?

Mr. BROOKS. Yes.

(Statement off the record.)

Mr. BROOKS. Is there any further discussion on this article, which is a rather important one? If not, it will stand adopted as read and we will proceed with article 39, Mr. Smart.

Mr. SMART (reading):

ART. 39. Sessions.

Whenever a general or special court martial is to deliberate or vote, only the members of the court shall be present. After a general court nartial has finally voted on the findings, the court may request the law officer and the reporter to appear before the court to put the findings in proper form, and such proceedings shall be on the record. All other proceedings, including any other consultation of the court with counsel or the law officer shall be made a part of the record and be in the presence of the accused, the defense counsel, the trial counsel, and in general court-matrial cases, the law officer.

References: A. W. 8, 30; N. C. and B., sections 373, 402.

Commentary: This article expands the provisions of A. W. 30 to require the presence of all parties and the law officer except when the members of the court retire to vote or deliberate, or when the law officer is to record the findings. In the latter case, the reporter is to accompany the law officer and a verbatim transcript of the proceedings is to be kept. The article also prohibits the court from consulting with either the trial counsel, counsel for the accused, or the law officer in the absence of the others. The requirement of A. W. 8 that no evidence be received in the absence of the law officer is extended in that the law officer must be present at all times except when the members are to vote or deliberate. The law officer is not a "member" of the court and is not to be present during deliberations or voting. See article 26.

Mr. BROOKS. This is a disputed article, gentlemen.

Mr. SMART. Mr. Chairman, I might say that this article goes a good deal farther than existing law. In Navy proceedings there is no law member. In Army proceedings there is a law member who retires with the court to deliberate on findings and sentence.

You will recall that under this bill, the committee adopted the article which excludes the law member from retiring to deliberate upon the findings and sentence of the court. This goes further than existing law in that if the court has a question arise they will call in the law member, but they must also bring in the accused and bring in counsel both for the prosecution and the defense. So that there will

be no more of this cloak-and-dagger session in the back room. Everything will be on the record. And from that standpoint it is a much improved article and I suggest its adoption.

Mr. RIVERS. In a general court you have got the law officer, because that contemplates the maximum which can be imposed and the reason it is left out for the other courts is obviously that they do not have that jurisdiction.

Mr. SMART. That is correct. They have an extremely limited jurisdiction compared to a general court martial.

Mr. RIVERS. They could not render a dishonorable discharge, any way.

Mr. SMART. I might interject here some figures to show that it would be utterly impracticable to attempt to furnish a law member for every special court. I think the most recent figures—and this is subject to correction by the representatives of any of the departments here—show that there are approximately 37,000 special court-martial cases a year in the Army; approximately 24,000 in the Navy, approximately 8,500 in the Air Force. If you had to supply a law officer for each, we would have to put the civilians out of business in order to get enough lawyers into the service to have law members in each of these cases. It just cannot be done, in my opinion, gentlemen.

Mr. RIVERS. Was not that observed some time ago by somebody? Did you not bring it up, Mr. Chairman?

Mr. BROOKS. Someone brought up the point as to whether or not the law officer should be allowed to sit in on the secret sessions.

Mr. RIVERS. I know we discussed that somewhere down the line.

Mr. LARKIN. Various witnesses who appeared before the committee recommended that a law officer continue to be a law member, a member of the court, and retire with it and deliberate with it and vote with it in the manner that they do under the Articles of War.

Mr. ELSTON. That comes in in another section, does it not?

Mr. SMART. Article 26.

Mr. LARKIN. That is in article 26, which we have not discussed. That is part of section 5, which we have delayed discussion on.

Mr. BROOKS. Are there any suggested changes or amendments, gentlemen?

Mr. HARDY. I have a question, Mr. Chairman. I am not quite clear on the first sentence. Does that mean that when a court begins its deliberations or operations to vote, it cannot call in a law member or counsel for any assistance that it might need?

Mr. LARKIN. No, it does not mean that.

Mr. HARDY. That is the way it reads, although the last sentence seems to say the opposite.

Mr. LARKIN. You have to read them both together.

Mr. HARDY. The only thing that bothers me is the intervening sentence which speaks of after the vote has been taken. I suppose it is just a question of construction there.

Mr. LARKIN. Under the language the following practice would be required. When a court retires to deliberate, only the members may be present for the deliberations. In the event that they desire further construction, further instruction, they may ask for it and in that case the law officer who is to give the further instruction may join the court but, of course, the accused, his counsel and the prosecutor also join

the court and his further instructions are on the record. After he has given them, the court members themselves continue the deliberations outside the presence of the law officer, the accused and the prosecutor and then in the event the court has come to a conclusion and has voted on findings, if they desire technical assistance from the law member in drafting their findings, in the event, for instance, that they have found the accused guilty of a lesser included offense and they feel that they need technical assistance in casting that verdict into language, they may call him back again, with the reporter and ask him to assist them. Specifically he can come back for that purpose on the record. He can come back for further instructions, but he cannot be present during deliberations nor can he vote on the findings or the sentence.

Mr. HARDY. I am glad to get that explanation for the record, because the way it has been set up was confusing to me.

Mr. BROOKS. Whenever one is present, the others must be present following generally the practice of civilian criminal courts; is not that true?

Mr. LARKIN. That is correct. May I point out, the accused and the prosecutor do not have to be present for this technical legal drafting service, but the reporter does. But they must be present for any further instructions that are requested.

Mr. BROOKS. Let us put it this way. The defendant must be present prior to the reaching of a decision.

Mr. LARKIN. That is right.

Mr. BROOKS. Subsequent to arriving at the decision, the law member and the reporter may be present to frame the verdict.

Mr. LARKIN. That is right.

Mr. ELSTON. But it must go in the record.

Mr. LARKIN. That is right, it must go in the record.

Mr. BROOKS. You have heard the article read and discussed. If there is no further comment, it will stand adopted as read. We will proceed to article 40, Mr. Smart.

Mr. SMART (reading):

ART. 40. Continuances.

A court martial may, for reasonable cause, grant a continuance to any party for such time and as often as may appear to be just.

References: A. W. 20; proposed A. G. N., article 37.

Commentary: This article follows the present Army and Navy provisions.

Mr. BROOKS. Is there any discussion on article 40? If not, it will stand adopted as read. Proceed with article 41, Mr. Smart.

Mr. SMART (reading):

ART. 41. Challenges.

(a) Members of a general or special court martial and the law officer of a general court martial may be challenged by the accused or the trial counsel for cause stated to the court. The court shall determine the relevancy and validity of challenges for cause, and shall not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

(b) The accused and trial counsel shall each be entitled to one peremptory challenge, but the law officer shall not be challenged except for cause.

References: A. W. 18; proposed A. G. N., articles 18, 24(b), 25.

Commentary: This article adopts present Army and Navy provisions except that the Navy has not heretofore permitted a peremptory challenge.

Mr. ELSTON. I think there, Mr. Chairman, there was some thought on the part of someone who testified before us that this might be interpreted to mean that if several accused persons are tried together, there would be only one challenge.

Mr. SMART. One peremptory challenge, Mr. Elston.

Mr. ELSTON. Yes. Perhaps we could solve that and make it clear in subsection (b) by saying "each accused person".

Mr. LARKIN. You could, if that is what you desire to do. May I point out in connection with this question of peremptory challenges that we discovered a difference between Army and Navy practice. The Army has had a peremptory challenge, the Navy has not. This article represents a unification of previous diverse practices.

The Army provision that set up a peremptory challenge, however, gave the peremptory challenge to each side, so that if there was a joinder of accused, the accused joined in the challenge and it was not a challenge for each of the accused which, as a matter of fact, is I think more common civilian practice. If you try defendants jointly they all join in the challenged, they do not individually have a peremptory challenge.

Mr. DEGRAFFENRIED. If you try them in civil courts in a good many of the States, if you are trying more than one defendant, each defendant has the right to demand a severance and be tried separately. Do they have that right before a military tribunal, in a court martial?

Colonel DINSMORE. No, sir; you can ask for a severance, but it is discretionary.

Mr. LARKIN. It is discretionary in civil courts, too, I believe.

Mr. DEGRAFFENRIED. In our State it is mandatory.

Mr. ELSTON. You can readily see, where you have two or more persons who are tried together, and they may not ask for separate trials——

Mr. DEGRAFFENRIED. I should say, except in a conspiracy case, of course, they have to be tried together.

Mr. ELSTON. You can see, if two or more persons are tried together, and they do not have the right to ask for separate trials, there may be a considerable difference of opinion between them as to who should be challenged.

Mr. LARKIN. That is right.

Mr. ELSTON. One of them wants to challenge one member of the court and the other one says, "I do not want him challenged, I think he is all right, he is on my side." He wants to keep him. It seems to me the only fair way is to give each of the accused one challenge.

Mr. LARKIN. It should either be changed by saying "each of the accused" or reworded to say that in a general and special court each side should have a peremptory challenge.

Mr. ELSTON. If you say each side——

Mr. LARKIN. That gets back to the Army practice and the practice in a good many civil courts. If, in your State, a severance is not permitted, do the defendants join in the challenge or does each defendant have a separate challenge?

Mr. DEGRAFFENRIED. In our State, of course, in the State courts, we do not have challenges, we strike the jury. The defense has two

strikes and the State has one. Of course, in the Federal courts, that is not true.

Mr. BROOKS. I would like to hear from the Navy on this, since this represents a complete change of the Navy rule.

Captain WOODS. It is quite satisfactory to us to have the peremptory challenge.

Mr. BROOKS. For each side?

Captain WOODS. No, sir; there I want to point out the practical difficulties involved. Again we have the situation where officers are engaged at their posts and it is sometimes very difficult to get a court together in the first instance. If you are going to allow challenges, you are reduced to a situation where an officer might have very important other work that he has to be doing at that time and could not be spared, but would have to be made available because of a challenge.

Mr. HARDY. He would not have to be available very long if he were challenged.

Captain WOODS. But the point is that he would have to be replaced by some other officer who was not selected in the first instance because of the importance of the duties that he was then engaged upon.

Mr. ELSTON. You could solve it by giving each of them separate trials.

Captain WOODS. Yes; that could be done, if it were desirable

Mr. ELSTON. If you tried them together, how would it be fair to one defendant who was perfectly satisfied with the court to have someone else challenged as a member of the court?

Captain WOODS. That would be a difficulty that would have to be resolved between the defendants.

Mr. ELSTON. But they may not be able to reconcile their differences.

Captain WOODS. I think in a situation like that, where their interests were so adverse, they should ask for a separate trial and it probably would be granted.

Mr. ELSTON. But they have no assurance of that.

Captain WOODS. No. It is discretionary. I think ordinarily it would be granted, though.

Mr. BROOKS. How has the rule worked in the Navy, where they do not permit any challenges?

Captain WOODS. I think the answer to that is that the Navy does permit challenge for cause.

Mr. BROOKS. I mean peremptory challenges.

Captain WOODS. I think the answer is that we have been very generous in challenging for cause. If there is any reason at all to accept the challenge, it is sustained.

Mr. BROOKS. Thank you very much. What about the Army, Colonel?

Colonel DINSMORE. We have had this since 1920. We have not had it before. There has been no question, so far as I know, and I think I am rather familiar with the history of courts martial during that period; and I would like to point out this to the committee. I would not for a moment wish to be understood as in favor of depriving any accused of any substantial right which is necessary to protect his interests. If you give each accused a challenge, a peremptory challenge, it seems to me that you may be injuring the rights of some of them. Mr. Elston cited the case in which one of the accused is satisfied with the court and he wants all the members to sit; and the

other accused does not. Well, they cannot get together. If you give each of them a challenge, the No. 2 man exercises his option and then you have done something that is injurious to the interest of the first man.

There is another thing that I would anticipate.

Mr. BROOKS. Let me see if I understand you. The No. 1 defendant is satisfied with the court and he passes. The No. 2 man feels that by using his right peremptorily to challenge a member of the court, he would be protecting himself, but you think he might be injuring the No. 1 man.

Colonel DINSMORE. No. 1 is deprived of the full court which he wanted.

Mr. ELSTON. Yes, but when they call the new member of the court, if he is not satisfied with that member, not having exercised his challenge, he may then exercise it.

Colonel DINSMORE. That is correct; he could, yes.

Mr. ELSTON. And he has had his challenge.

Mr. HARDY. But you come up against the situation that you mentioned a while ago. One of the accused feels that the court may be favorable to him and he does not want any member of the court taken off. If you will permit the other defendant a peremptory challenge, he may challenge the very individual that the first man wants to remain on the court.

Mr. ELSTON. Of course, it works both ways.

Colonel DINSMORE. I think also it will probably tend to create a situation where all these fellows are impelled to get rid of a lot of people just because they have the right without any very strong reason.

Mr. DEGRAFFENRIED. Do I understand that you believe that if there is more than one defendant being tried, just the side ought to have one challenge?

Colonel DINSMORE. That is my personal opinion. I do not know that the Army has any strong views on it one way or the other.

Mr. ELSTON. Suppose you have two defendants and each have counsel of their own and they cannot agree about which one of the court should be challenged?

Colonel DINSMORE. That is right. You can have that situation.

Mr. BROOKS. Would it create any hardship if we gave each one a peremptory challenge?

Colonel DINSMORE. It would be a question of having members available for the court.

Mr. ELSTON. But if they did not have the men available they can always raise them by giving them separate trials.

Colonel DINSMORE. That is right, sir.

Mr. BROOKS. What is the view of the Air Force on this?

Major ALYEA. The Air Force agrees with the Army in the matter of the one peremptory challenge in common trials.

Mr. BROOKS. Do you believe it would be a hardship to give one challenge to each defendant?

Major ALYEA. In common trials we do it now.

Mr. RIVERS. Does it work a hardship?

Major ALYEA. I have not seen that it does.

Mr. ELSTON. On page 35, line 10, insert before the word "the" the words "each of"; and then strike out in the same line the word

"each" which follows the word "shall". I offer that suggestion. It would read:

Each of the accused and trial counsel shall be entitled to one peremptory challenge, but the law officer shall not be challenged except for cause.

Mr. BROOKS. You strike out the second "each"?

Mr. ELSTON. Yes.

Mr. BROOKS. You have heard the motion; if there is no objection, the motion will be agreed to.

(There was no objection.)

Mr. BROOKS. Is there further discussion on article 41? If not, 41 will be approved as read and amended. We will take up article 42.

Mr. SMART (reading):

ART. 42. Oaths.

(a) The law officer, all interpreters, and, in general and special courts martial, the members, the trial counsel, assistant trial counsel, the defense counsel, assistant defense counsel, and the reporter shall take an oath or affirmation in the presence of the accused to perform their duties faithfully.

(b) All witnesses before courts martial shall be examined on oath or affirmation.

References: A. W. 19; A. G. N. articles 28, 40, 41; proposed A. G. N. articles 19, 25.

Commentary: This article requires that officials and clerical assistants of general and special courts martial be sworn. The oaths are not specified in the code as it is felt that the language of the oaths is suitable matter for regulations.

The article does not require the court to be resworn in every case. The language would allow a court to be sworn once a day where there is to be more than one trial, if the accused in each trial is present at the time that the court is initially sworn.

Mr. BROOKS. Gentlemen, I think at this time the subcommittee will have to adjourn, and we shall do so until 3 o'clock this afternoon or tomorrow morning. I have been informed that it is possible the House will have adjourned by that time.

(Whereupon the committee adjourned to reconvene at 10 a. m. Saturday, March 26, 1949.)

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UNIFORM CODE OF MILITARY JUSTICE

SATURDAY, MARCH 26, 1949

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The subcommittee met, pursuant to adjournment, at 10 a. m., room 304, House Office Building, Hon. Overton Brooks (chairman of the subcommittee), presiding.

Mr. BROOKS. The subcommittee will please come to order.

Mr. SMART. Mr. Chairman, may I make an inquiry?

Mr. BROOKS. Before we do that, let the record show that when we recessed yesterday we did so with the idea of taking up one controversial matter; and that was the changing of the words in article 36 (a).

Mr. SMART. I think, Mr. Chairman, that Mr. Larkin has sufficient information available now to prove the wisdom of retaining the section as it is written rather than changing it.

Mr. LARKIN. I think so. Our brief inquiry seems to us conclusive on the matter; but I wonder if I might make this suggestion: Mr. Elston, I think, is particularly concerned. Subject to your decision, should we wait?

Mr. BROOKS. Let us let it go over.

Mr. LARKIN. I think he would be interested in hearing some of the information.

Mr. BROOKS. We will let it go over until later on this morning.

Mr. SMART (reading):

ART. 43. Statute of limitations.

(a) A person charged with desertion or absence without leave in time of war, or with aiding the enemy, mutiny, or murder, may be tried and punished at any time without limitation.

(b) Except as otherwise provided in this Article, a person charged with desertion in time of peace or any of the offenses punishable under Articles 119 through 132 inclusive shall not be liable to be tried by court martial if the offense was committed more than three years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

(c) Except as otherwise provided in this Article, a person charged with any offense shall not be liable to be tried by court martial or punished under Article 15 if the offense was committed more than two years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command or before the imposition of punishment under Article 15.

(d) Periods in which the accused was absent from territory in which the United States has the authority to apprehend him, or in the custody of civil authorities, or in the hands of the enemy, shall be excluded in computing the period of limitation prescribed in this Article.

(e) In the case of any offense the trial of which in time of war is certified to the President by the Secretary of the Department to be detrimental to the prose-

cution of the war or inimical to the national security, the period of limitation prescribed in this Article shall be extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

(f) When the United States is at war, the running of any statute of limitations applicable to any offense—

(1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not; or

(2) committed in connection with the acquisition, care, handling, custody, control, or disposition of any real or personal property of United States; or

(3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency;

shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

References: A. W. 39; proposed A. G. N., article 5 (b); title 18, United States Code, section 3287 (1948), (wartime suspension of limitations).

Commentary: Subdivision (a): Adopted from A. W. 39 and proposed A. G. N., article 5 (b). "Aiding the enemy" is added to the list of offenses which may be tried and punished at any time.

Subdivision (b): Adopted from A. W. 39. The time when the period of limitation will stop running is changed from the time of arraignment to the time sworn charges and specifications are received by an officer exercising summary court-martial jurisdiction over the command. This provision is considered preferable to the more indefinite provision in A. W. 39 that the statute is tolled when "by reason of some manifest impediment the accused shall not have been amenable to military justice."

Subdivision (c): This covers all other offenses. The period of limitation is made applicable to trials by court-martial and to punishment by a commanding officer.

Subdivision (d): The language used in the second proviso of A. W. 39 is changed because of its indefiniteness. The clause "in the custody of civil authorities" and "in the hands of the enemy" are adopted from Navy proposals.

Subdivision (e): Adopted from A. W. 39.

Subdivision (f): Incorporates the provision in title 18, United States Code section 3287, which otherwise might not be applicable to court-martial cases.

Mr. DEGRAFFENRIED. Are there many changes in those sections from the existing?

Mr. LARKIN. There are some, Mr. deGraffenried. I might point them out quickly if we follow the subdivisions.

Mr. BROOKS. Might I take up subdivision (a) first, and then we can tentatively approve it?

Mr. LARKIN. Very good. Subdivision (a) is the same as the existing law with the exception that we have added the offense "aiding the enemy" as a type of offense that should not have any statute at all, by virtue of its extreme seriousness. It is an offense which carries a death penalty, and in our minds it is of equal seriousness with murder, mutiny, and desertion in time of war.

Mr. BROOKS. Let me ask you this question: What has been the definition of the offense "aiding the enemy"?

Mr. LARKIN. In answer to your question, Mr. Chairman, the offense of "aiding the enemy" is set forth in article 104 of the code, which reads:

Any person who—

"(1) aids, or attempts to aid the enemy with arms, ammunition, supplies, money, or other thing; or

"(2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with, or holds any intercourse with the enemy, either directly or indirectly: shall suffer death or such other punishment as a court-martial or military commission may direct."

Mr. BROOKS. So wih reference to this particular crime article 104 limits the crime to these spcifications.

Mr. LARKIN. Exactly.

Mr. BROOKS. Otherwise it would seem to me that it would be a rather embracing crime.

Mr. LARKIN. No. It is limited definitely by article 104 which is titled "Aiding the Enemy."

Mr. RIVERS. Let me ask you this: Does that mean that for general courts martial there is no statute of limitations?

Mr. LARKIN. This is a statute throughout, Mr. Rivers.

Mr. RIVERS. It is 3 years. There is no statute of limitations for mutiny and murder?

Mr. LARKIN. Yes, but you said by general court martial only. The statute covers offenses not connected with the type of court.

Mr. RIVERS. I mean, for anything the subject of a summary or special court the statute runs against that?

Mr. LARKIN. No, sir. The statute is tied to the offense, regardless of where it is tried.

Mr. RIVERS. Regardless of which court?

Mr. LARKIN. Yes.

Mr. RIVERS. I see.

Mr. ELSTON. I was just wondering if this was not the section in which we should make some provision about the statute continuing to run, notwithstanding a person's separation from the service, so as to take care of that Supreme Court case which recently decided, wherein it was held that if a person had been separated from the service, even though he had reenlisted, the military authorities had no jurisdiction to try him.

Mr. LARKIN. I think, Mr. Elston, that was not by virtue of a statute of limitations. That was by virtue of the discharge.

Mr. ELSTON. I understand. We have not as yet put it in here.

Mr. LARKIN. The committee has not as yet decided upon the wording of section 3 (a). The wording, I should say, would definitely contain a provision which makes it subject to this article. In other words, I should say it would start out "subject to the provisions of article 43" and then go on with whatever continuing jurisdiction you provide.

Mr. ELSTON. Just so we do not overlook it.

Mr. LARKIN. Yes, sir. That, as a matter of fact, is one of the elements of 3 (a), that the committee decided should be considered. So there is the connection with the statute of limitations.

Mr. ELSTON. I am wondering why in section (a) of article 43 you refer only to desertion or absence without leave in time of war or aiding the enemy, mutiny, or murder. What about other cases that are labeled felonies in the civil courts, such as rape, robbery, burglary, arson, maiming, and countless others?

Mr. LARKIN. Well, I am not familiar with all the statutes of limitations in the different States. I think it is very rare that those crimes specifically do not have a statute in civil jurisdictions.

Mr. ELSTON. I think in most such jurisdictions you will find that the more serious offenses are never outlawed. There is a statute of limitations generally as to assault and battery and gambling and the minor offenses, but as to the serious cases, the felonies, ordinarily there is no statute of limitations.

Mr. LARKIN. As I say, I do not know what the percentage is among the States. One example out of the 48 is certainly not conclusive but the one I am most familiar with is New York where only murder and treason are without statutes of limitation. The felonies all have statutes; and the misdemeanors have shorter statutes.

There is one further consideration: The Articles of War and the Articles for the Government of the Navy have heretofore exempted these crimes only, and we added "aiding the enemy," which is now exempted from the statute.

Mr. ELSTON. I would say that treason is aiding the enemy.

Mr. BROOKS. Treason is defined by the Constitution.

Mr. LARKIN. That is right.

Mr. ELSTON. Well, treason is defined as "declaring war against the Government or giving aid and comfort to the enemy," so that if you said "treason" it would include "aiding the enemy."

Here is the situation you are up against: If these are the only offenses that are outside the statute of limitation, a man who commits the crime of rape can simply desert or become a. w. o. l. and stay away 3 years and will thereupon go scot free. That is true, is it not?

Mr. LARKIN. That is right.

Mr. DEGRAFFENRIED. Mr. Larkin, would that be true if the charges were sworn out?

Mr. LARKIN. Not under the provisions of (b) and (c), Mr. deGraffenried. That represents a somewhat complicated compromise. It may be pertinent here, Mr. Elston, to go ahead and discuss those two subdivisions and then reopen the idea you have in mind.

Mr. BROOKS. I think our idea in discussing this paragraph by paragraph was to maintain the discussion as much as possible in the proper order rather than to approve them individually.

Mr. LARKIN. I appreciate that, Mr. Chairman, except that the device adopted in (b) and (c), since it differs from the previous practice, might well answer the specific question that Mr. Elston is posing at this minute. There is a link for that reason.

I certainly am anxious to proceed and conclude each one subdivision individually if we can. In this case I think it would throw some light on it.

Mr. BROOKS. Subsection (b) merely says that, if the prosecuting official does not take action in 3 years after he knows about the violation, then it becomes limited by the statute of limitations; is that correct?

Mr. LARKIN. Not quite. The 3-year period in the first instance is measured from the time the crime is committed rather than from the time an official discovers it.

Mr. BROOKS. Would it not be better to change that and have it read from the time the proper official has knowledge of it?

Mr. LARKIN. That, I think would be an extension over both present military and civilian practice. Speaking from recollection only, I think the only type of offense which you find in civil jurisdictions that measures the running of the statute from the time of discovery is in the case of fraud. I think otherwise, they all uniformly start from the time of commission.

Perhaps, if I quickly tried to explain what is involved in (b) and (c), you would see the connection.

In (b) specifically we provide a 3-year statute of limitation. The crimes stated are the important ones that have heretofore in the

Army had a 3-year statute. Some of those crimes, incidentally, have had a 2-year statute in the Navy. They are uniform in this code.

The point I have been referring to specifically is that the statute would cease to run under the provisions of (b) and (c) or would be be tolled on the signing of the charges and specifications and the delivery of those charges and specifications to the officer with summary court-martial jurisdiction.

That represents a difference from the present Army and Navy practice in this respect. At the present time the Army statute of limitations is stopped or tolled upon the arraignment of the accused. You follow the process of formal charges and specifications, and the statute does not become tolled until he is in custody and arraigned.

In the Navy at the present time the statute is tolled at the time of the referring or the signing of the charges and specifications, but under present Navy practice that does not take place until after the preinvestigations.

The Army's procedure, if you will recall, involves the signing of charges and specifications and then preinvestigation. The Navy's calls for investigation and after that the signing of charges.

By the provisions of this code we have unified that practice and have provided for a signing of charges and specifications initially and then follow with a preinvestigation at which, of course, the accused must be present.

In unifying the system of signing of charges and specifications, preinvestigation, and so forth, we were faced with selecting a point of time when the statute should be tolled. Should we wait until the arraignment, as in the Army, or should we do it in the fashion that the Navy does, when the charges are signed?

We changed the Navy practice, and the signing of the charges now takes place in the beginning, not after, as it does in the Navy. We felt, observing civilian practice, that the signing of the charges, which is equivalent to the filing of the indictment—which, incidentally, in civil jurisdictions almost uniformly tolls the statute whether the defendant is present or not—we felt that, since the Navy does that, although at a different time, and the civilian jurisdictions do, we should adopt the signing of the charges as the time when the statute is tolled, whether or not the accused is present, because you may have a number of situations where you will have a full case against a person, a full amount of information and evidence, but where you may not have him.

Now, if you have to wait until you get him in custody and arraign him, you may find yourself beyond the period of limitations. If you can toll the statute upon the signing, then, of course, it does not matter whether you have him or not at that minute. The statute is tolled; and, if you can pick him up later, at least he cannot use the statute as a defense.

Mr. RIVERS. Well, the thing to do is to always sign them.

Mr. LARKIN. We selected that. It is similar to the Navy's, although the Navy's did happen at a different time. It is similar to the civilian jurisdiction——

Mr. RIVERS. Is that what you call signing affidavits?

Mr. LARKIN. However, we were concerned in adopting this provision, and I think some witness suggested it to the committee, that it might be subject to abuse. Inasmuch as any person subject to the

code can sign charges, it might happen that someone might draw up charges and sign them and put them in his desk. In other words, in order to toll the statute he could sign charges, put them in his desk, and then confront the person with those charges several years later. Several years later the accused would not have the opportunity of invoking the statute of limitations.

In order to preclude that possibility, we have provided, as you see here, that the statute is tolled only upon receipt of the sworn charges and specifications by an officer exercising summary court-martial jurisdiction.

Unless the accuser forwards the charges after he signs them to an officer exercising summary court-martial jurisdiction, who is, under the present practice, the next normal step, such signing of charges would not toll the statute. They would only be so effective if they are formally in the due course of business transferred to the summary court officer. It at least would prevent a person from writing up charges and then putting them in his desk and tolling the statute.

You see, you could not go any further than this now, if you did not have the defendant. You could not go to your pretrial investigation if you did not have the defendant, because you cannot hold one if he is not around.

So we have adopted all of that.

Now, in most jurisdictions, if there is the evidence available before the period elapses, if there is sufficient evidence to swear out charges, that tolls the statute, whether or not you have the accused. It does not depend on the circumstances of having him in custody.

I think this is germane to your original question.

Mr. ELSTON. In other words, if the charges are duly filed and are submitted to the officer exercising either special or general court-martial jurisdiction, and that is done within either 3 years or 2 years, depending upon the offense, no matter when they apprehend the accused, they can proceed to try him?

Mr. LARKIN. That is right.

Mr. ELSTON. Do you not think that maybe we should make it clear that the pretrial investigation may continue, even in the absence of the accused if the accused's presence cannot be obtained?

Mr. LARKIN. Well, I would think——

Mr. ELSTON. The reason I suggest that is this: If the authorities have to suspend a pretrial investigation until after the apprehension of the accused, it might be very difficult to examine witnesses and prepare a case.

Mr. LARKIN. I think there is a good deal of merit to that, Mr. Elston. Of course, it does dilute considerably the preinvestigation procedure that the Congress has provided and has regarded as a most important safeguard.

Mr. ELSTON. We do; but at the same time, if an accused person has voluntarily deserted or become a. w. o. l. and has made it impossible by reason of his own acts to go ahead with the pretrial investigation, certainly he cannot complain.

Mr. LARKIN. I certainly do not disagree.

Mr. BROOKS. The statute is tolled anyway when he leaves the jurisdiction.

Mr. LARKIN. That is right.

Mr. BROOKS. He has no complaint.

Mr. DEGRAFFENRIED. You could not have what we call a preliminary in the absence of the accused, but I do not see why his absence should stop the investigation.

Mr. LARKIN. The preinvestigation cannot be held without the accused.

Mr. BROOKS. Mr. Larkin, all the evidence can be accumulated during his absence and put in affidavit form or otherwise preserved, but the formality of the pretrail investigation cannot proceed without his presence. Under our present set-up, is not the reason for that the constitutional right of the accused to be present and to be confronted by his witnesses?

Mr. LARKIN. No, sir; he has no constitutional right in the preinvestigation. On the trial, yes; but in the preinvestigation I do not believe there is any constitutional right of that kind.

Mr. ELSTON. It seems to me that we ought to put something in there that nothing in that section as to pretrial investigation should be construed as depriving the authorities of the right to go ahead and make whatever investigation they see fit to make if the accused has voluntarily absented himself from the jurisdiction.

Mr. LARKIN. May I ask one question to bring the problem to its logical conclusion? Would you then have the preinvestigation as provided held once you do get him?

Mr. ELSTON. It would seem that you should.

Mr. LARKIN. Yes.

Mr. ELSTON. But someone may come along someday and say that the authorities did it unlawfully because the accused was not present. In other words, they can go ahead and make whatever investigation they want. Then, when they apprehend him, he is entitled to whatever hearings can be conducted at that time. It may be that the witnesses are dead. They may be gone. It may not be possible to subpena them.

Mr. LARKIN. But in the meantime you would have committed to a permanent record or perpetuated whatever testimony is available.

Mr. DEGRAFFENRIED. At the trial, if you prove they were deceased or unavailable, would there be any way to use that testimony that they have given?

Mr. LARKIN. I think if it is made by statute a judicial proceeding it would be tentamount to a deposition. It would not be completely so, because defendant had not been represented and had not been afforded a right to cross-examine.

Mr. RIVERS. That is the thing.

Mr. LARKIN. I just do not know what the admissibility of such statements would be, in evidence.

Mr. ELSTON. I do not think that those things should be admissible against him if they are otherwise inadmissible.

Mr. LARKIN. Yes.

Mr. ELSTON. What I was thinking of is this: That the authorities should not be deprived of every opportunity to investigate the case because the accused is absent.

Mr. BROOKS. Is there anything there that prevents your investigation?

Mr. LARKIN. I think not, but I think Mr. Elston's idea is to give specific authority to undertake such investigation. I think by very simple amendment or addition to the preinvestigation section we could provide that.

Mr. BROOKS. Why should we tamper with the preinvestigation section in order to give them a right to go ahead and make the investigation?

Mr. ELSTON. The only thought I had along that line, Mr. Chairman, was this: If we do not give them the right to go ahead some accused person may some day say they are not authorized to go ahead until he is apprehended, and then have a pretrial investigation in his presence. The statute that we have enacted does provide that he shall have the right to be present.

Mr. BROOKS. Then if you are going ahead without him the whole matter of a pretrial investigation is just an idle formality?

Mr. ELSTON. You still have to have that, after he is apprehended.

Mr. BROOKS. You would have another pretrial investigation.

Mr. LARKIN. You would have the one called for in article 32. Mr. Elston's idea, I think, is in the absence of being able to hold such an investigation until you can find the accused that some provisions should be made for perpetuating the evidence.

Mr. BROOKS. Why not simply place a stipulation there that nothing in this code shall prevent full investigation being made even in the absence of the accused.

Mr. RIVERS. That would be all right.

Mr. ELSTON. That is just what I suggested.

Mr. LARKIN. Fine.

Mr. BROOKS. But not as a change of the pretrial set-up.

Mr. LARKIN. I think that is a good suggestion.

Mr. RIVERS. About your depositions, of course, you will not have the opportunity like we do of the cross-examining of depositions in civil law. It will keep the witnesses from changing their testimony once you do get them. That is another thing.

Mr. LARKIN. That is right.

Mr. ELSTON. In civil courts you could not take depositions without giving the accused the right to be present.

Mr. RIVERS. That is right.

Mr. LARKIN. Here we have depositions, but a counsel on behalf of the accused has to be present, or be present when the interrogatories are settled.

Mr. ELSTON. That is where you are giving testimony against the accused. In the investigation you are not giving testimony against the accused, and the deposition can be read at the trial. A statement by an investigating officer could not be read at a trial.

Mr. BROOKS. In your Federal process the average case comes from the Secret Service or the FBI or other agencies. They make a full investigation of the case, even before any hearing at all is held, in complete absence of the defendant.

Now, during the course of that investigation the witnesses are called in individually, and in most cases they are asked to give statements. If they do not give statements, then they are allowed to make verbal statements and the testimony, as I recall, is prepared in a report accumulated by this agency. Then the showing is made in the presence of the committing officer, the grand jury, of the facts assembled in these investigations. Following that the defendant is apprehended, a warrant is put out for him, and he is apprehended, and he is brought up for a preliminary hearing before the commissioner, or his bond is set by the United States judge.

Mr. LARKIN. Yes.

Mr. BROOKS. So that in our present process there is nothing which prevents a full investigation being made before a warrant is issued or an indictment is obtained. I think that is a very salutary arrangement. That is along the line you have in mind.

Mr. ELSTON. Yes.

Mr. BROOKS. Mr. Smart?

Mr. SMART. I realize, Mr. Chairman, that the committee which drafted the bill had great difficulty with this particular article. I specifically remember when the House committee was considering H. R. 2575 that Mr. Elston had grave misgivings about a provision which would permit a man to just hide long enough to escape punishment.

I further remember the response of General Hoover, who at that time was testifying on behalf of the Judge Advocate General's Department, who pointed out the difficulty of prosecution when the witnesses, who presumably were mostly service people, had scattered to the four corners of the country, and their evidence or testimony had not been perpetuated.

I would like to point out what I think are the impracticabilities of this particular provision in (b) and (c). Let us find out who a summary court officer is.

I think we should consider this as a matter of wartime rather than peacetime. In peacetime, I do not think you are going to have so much difficulty in apprehending these people within the statutory period of limitations; whereas at the close of war you have units deactivating. I am thinking of divisions particularly, of the Ground Forces, where you will have a complete division deactivation.

The question then immediately arises as to who is the summary court officer having jurisdiction over that command. The command is deactivated. The only thing you can say is that it must go up through channels. I do not know whom they would designate in that event. Maybe Mr. Larkin can say.

I say at that point it returns to the desk-drawer operation. I just do not think it is a practical situation. I would much rather see, if you have misgivings about an offender escaping and you want to have continuing jurisdiction over him for a period of time, that you extend the statute of limitations from 3 to 5 years or whatever period of time you think appropriate, rather than to hook it to such a nebulous process as this. I just do not think it is practical. Maybe I am completely in error. I would like to hear Mr. Larkin's reaction to that.

Mr. LARKIN. The difficulty described by Mr. Smart turns around, I believe, the situation where a unit may be deactivated and it specifically no longer has officers who have summary court-martial jurisdiction or greater court-martial jurisdiction.

I believe the practice in the Military Establishment is that when units are deactivated that another active or permanent outfit takes over those records; and for the purposes of this, for instance, the summary court-martial officer in the continuing unit would be the substitute officer.

Now I would like to check the accuracy of that from an operational standpoint.

Is that about the way it works, in connection with a unit that is deactivated, Colonel Dinsmore, do you know?

Mr. SMART. I can point out an analogous situation. You could take the situation of Korea. We went in there with three divisions. The Fortieth Division went in first, and then the Sixth and Seventh Divisions followed. The Fortieth Division went straight on through and when it got to the southern end of Korea it was deactivated. The Sixth Division then occupied the southern half of Korea and the Seventh Division occupied the northern half of Korea, and the Twenty-fourth Corps, under General Hodges, was in over-all command. When the Fortieth Division deactivated, certainly we in the Sixth Division had nothing to do with the records. I do not know how many men they left in the particular part of Korea who had committed offenses, but certainly the Sixth Division in command of the tactical situation had nothing to do with their records or personnel. We inherited some of their men, but those men whom we did not inherit did not have their records come to us. I do not know whether General Hodges had the records or not, but I think as a matter of regulation that those records are bundled up and sent back to Washington. If I am right I would appreciate hearing it, and if I am wrong, likewise.

Colonel DINSMORE. That is correct. The records are deactivated when the division is deactivated, by forwarding to the Adjutant General, and being placed in his custody.

Mr. ELSTON. Could we not write a provision in the law and say that if an outfit is deactivated the filing of the charges with the Judge Advocate General would suffice?

Mr. LARKIN. May I point out this: Do you not observe a practical defect. Up to the time it is deactivated nobody has sworn out a charge. If they have sworn it out on July 1, and then they deactivated on July 30, they are under an obligation to give it to the summary court officer who still exists. After July 30, when it is deactivate, they are transferred to other places. If they swear out charges after July 30 they are under an obligation to forward it to the summary court-martial officer whom they are under at that time.

I just do not see how you could have it otherwise. After July 30 when they have been deactivated and are transferred elsewhere, any attempt to date back something would not operate because they would have been under an obligation as of the day they claim to have sworn out charges to forward them to the summary court officer who was there as of that time.

Mr. ELSTON. Of course, the statute, as it is written here, provides that the sworn charges may be filed with an officer exercising court-martial jurisdiction.

Mr. LARKIN. That is right.

Mr. ELSTON. That would limit them to the command authority except, it says, "exercising jurisdiction over the command." That would depend on what "the command" means.

Mr. SMART. That is the point. It is almost beyond my conception, that a man would remain in military control and in a military status, et cetera, to believe tht he could cover up a serious offense longer than 3 years.

Now, if in time of war, subsection (a) provides if he is absent from his command, he then goes either into desertion or into AWOL, in time of war the statute of limitations does not run.

Mr. ELSTON. How would you correct it? What is your suggestion?

Mr. RIVERS. Yes; what is your suggestion?

Mr. SMART. I would prescribe what I wanted to be the statute of limitations, and omit the last part of (b) and (c). In time of war the statute of limitations will not run if he leaves the command. If he is in the command, in 2 or 3 years you will find out if he has committed a serious offense.

I think this is too nebulous to hook to for a statute of limitations.

Mr. ELSTON. If you do not have (b) and (c) in, your statute of limitations simply lets a man go scot free, whereas (b) and (c) make it possible to file charges within 2 or 3 years, depending upon the nature of the offense, and he can stay away 10 years and still be prosecuted if they catch him.

Mr. SMART. I am sorry if I have not made myself plain, or if I repeat. My point is this: In peacetime I still say that they will apprehend him in 9 cases out of 10, because of your regular troop activity, and the greater control over them. That is contrasted to wartime situations. where you have great fluidity and movement of people all over the country and in all foreign countries. In wartime situations you would have the man under desertion or AWOL, against which the statute does not run and the punishment for which, in case of desertion, is death, which is more serious than most of the articles covered in subsection (b).

Mr. ELSTON. We had testimony before us, you will recall, by a Member of Congress from up in Michigan who called to our attention the case of a veteran who had some home and married and had a family; and then they came in and arrested him for an offense committed several years before.

Mr. SMART. It was less than 3 years, I think. I believe that was the testimony of that particular case.

Mr. ELSTON. I might easily have been more than 3 years.

Mr. SMART. I will grant you that it might have been more than 3 years. If they were not alert enough to apprehend that man within 3 years, I personally doubt if they should have jurisdiction to try him.

Mr. ELSTON. The civil authorities very often are not able to apprehend a fugitive in 2 or 3 years. A pretty smart criminal can hide himself. He may leave the country and go to some foreign country and may be gone for 5 years. Then he can figure, "I am all washed up with my case. I can go back now."

I do not think we want to take the position that any man can leave the country and by his own act outlaw his crime.

Mr. DEGRAFFENRIED. The thing I have on my mind is that a man might commit murder and hide the body. The body might not be found for a long length of time. When the body is finally found there might be some method of identifying the deceased, by some peculiarity of the teeth, or something like that, and where the body could be positively identified they might get the evidence against this defendant. Then they could not try him until they had some way to prove the corpus delecti, that the person was actually killed and had not just walked off and disappeared.

Mr. SMART. I agree with the possibility which you raise, Mr. deGraffenried, but I do think it is an extreme possibility.

Mr. DEGRAFFENRIED. I think it is, too, in the murder case. I can see the difference in these other cases, where a woman was ravished, if she did not make a complaint within 3 years. If some crime of

that kind occurred you would have a different situation, but where a person just disappeared and you did not know where he had gone, whether he had walked off or not, or what had happened to him for several years, that is a case of different circumstances. If after that you found the body in a state of decomposition, but you were able to identify the deceased by some method, even though the defendant had gone, I still think that in a murder case like that, especially, we ought to devise some means of preferring charges against the accused at that late date.

Mr. BROOKS. What would you and Mr. Smart think of this approach: Instead of approaching it from that angle, would it be much more paper work if we wrote in here a specification that copies of these charges should be sent to the Judge Advocate General of the respective services, and that he would be the officer indended, rather than the stipulation in the present provision which refers to an officer exercising summary court-martial jurisdiction?

Mr. SMART. That would certainly answer one of my criticisms, because I think this question as to who is an officer exercising summary court-martial jurisdiction over a command which has been deactivated is a most nebulous place to hook the statute of limitations.

Mr. ELSTON. I suggested, and I think the chairman suggested the same thing that the charges be forwarded to the Judge Advocate General. You can even say, "If the command is no longer activated then the charges shall be filed with the Judge Advocate General."

I think all our problems are taken care of by subsections (b) and (c), and by continuing a case in the manner of filing the charges. Those cases are continued, but they have to file them within 3 years. or 2 years, as the case may be.

In other words, they cannot just let them rest for 5 years and then bring up a charge against a person. If a charge has been made in 3 years, or 2 years, depending upon the offense, whether or not it is filed is of no tremendous importance, so long as it is filed in the proper place. That would be with the command if still activated, or with the Judge Advocate General if the command has been deactivated.

Mr. BROOKS. I would like to hear from Colonel Dinsmore.

Colonel DINSMORE. Mr. Chairman, may I suggest that it be filed with The Adjutant General, because he is the custodian of all the records.

Mr. BROOKS. What do you think of that idea of requiring copies of the charges in these cases to be filed within a certain period of time with The Adjutant General?

Colonel DINSMORE. I would be in favor of that, Mr. Chairman.

Mr. BROOKS. What does the Navy think about that?

Captain WOODS. I think that would be entirely acceptable to the Navy, sir.

Mr. BROOKS. Do you think it would help the present language?

Mr. LARKIN. I think it would insure that there is no tabling of charges. We, as I say, recognized the possibility and attempted to cure it. I think your suggestion just nails it down that much more. We certainly would be happy to take it.

Mr. BROOKS. We do not want to overlook the Air Force. Who represents the Air Force?

Mr. LARKIN. Major Alyea. I will speak on behalf of the Air Force, sir.

Mr. BROOKS. Is that all right with the Air?

Major ALYEA. Yes, sir.

Mr. RIVERS. How do you reconcile that to your terminology, Captain Woods?

Captain WOODS. It would have to be the Chief of Naval Personnel.

Mr. RIVERS. You do not speak about deactivating a command in the Navy, do you?

Captain WOODS. Decommissioning, or commissioning in reserve.

Mr. ELSTON. Mr. Chairman, I move that the amendment be drawn up in the appropriate language by Mr. Smart and Mr. Larkin, along the lines that we have discussed.

Mr. BROOKS. You have heard the motion. Is there any objection? If not, it is so ordered.

Now, we had better finish this paragraph.

Are there any other suggestions with reference to the paragraph?

Mr. ELSTON. I would like to know just what paragraph (d) means. If you have (b) and (c), what does (d) mean, when you say "periods in which the accused was absent from territory in which the United States has the authority to apprehend him, or in the custody of civil authorities, or in the hands of the enemy, shall be excluded in computing the period of limitation prescribed in this article."

What do you mean by the period of limitation there?

Mr. LARKIN. Depending upon whatever type of offense it is, whether it is 2 years or 3 years.

Mr. ELSTON. Would you mean by that that the articles, the charges, would not have to be filed until he had returned to the territory of the United States?

Mr. LARKIN. Yes. If he is outside the territory of the United States that is another circumstance which tolls the statute, which is a typical provision of statutes of limitation. That is an additional circumstance.

Mr. BROOKS. Do I get that right, (d) refers to the statute of limitations for filing charges, referring to the limitation following the filing of charges?

Mr. LARKIN. That is right.

Mr. RIVERS. In point of time?

Mr. LARKIN. Yes, sir.

Mr. RIVERS. That is like that Bergdoll case in Philadelphia, the case of Grover Cleveland Bergdoll.

Mr. LARKIN. Yes, I remember that.

Mr. RIVERS. I think he was away God knows how many years.

Mr. LARKIN. In other words, if an offense is committed in 1 year and the man leaves the territory and stays away for 5 years and comes back and you indict him while 6 years have expired since the commission of the offense you nevertheless exclude the period that he has been out of the territory and you are still within the 3-year limit.

Mr. RIVERS. That is right.

Mr. ELSTON. That is the law now.

Mr. LARKIN. Yes, sir; it is the law now. We have made a change in wording to broaden it a little bit or, at least, to clarify the definition of the word territory in which the United States has authority to apprehend him.

The significance is that normally you would consider jurisdiction as the continental limits of the United States. However, if a man is

in Mexico that would be territory over which we would have no power to apprehend him. If he was in England and we were at war and England was an ally of ours we would have the power to apprehend him even though he is outside the territorial limits of the United States.

Mr. BROOKS. It would cover the occupied territories too, would it not?

Mr. LARKIN. That is right.

Mr. BROOKS. Mr. Larkin, if there are no further questions on (d), I would like to ask you to go to (e), and I wish you would explain the idea of (e) to the committee.

Mr. LARKIN. Well, (e) is a continuation of a provision of article of war, No. 39 and is to cover extraordinary cases where a trial during the course of a war might be adverse to the interests of national security and for that purpose the President upon certification by the Secretary of the Department could extend the statute of limitations to a period of 6 months after the termination of hostilities.

Mr. BROOKS. Now, that does not give the President or the Secretary of any Department the authority to define new offenses, does it?

Mr. LARKIN. Oh, no, sir. It applies to the operation of time and its application to the statute of limitations.

Colonel DINSMORE. A case of that kind is the Kimmel and Short case.

Mr. RIVERS. It is just like all of our statutes of that kind, it shall be confined to the duration of the war and 6 months thereafter. Everything we wrote during the war was that way.

Mr. LARKIN. That is right. This is an adoption of present provisions.

Mr. BROOKS. Are there any further explanations?

Mr. LARKIN. I can go on with (f), if it is agreeable, Mr. Chairman.

Mr. BROOKS. Yes; why not go on with (f)?

Mr. LARKIN. (f) is an incorporation of a provision in the United States Code, title 18, section 3287 which provides generally for frauds against the Government itself, and in that type of case provision now exists in the Federal law that the statute is suspended until 3 years after the termination of the war.

We have provided it here because it is not clear that it applies to court-martial cases by virtue of being in title 18.

It is Federal law for United States courts, and while courts martial are generally construed as Federal courts, in order to insure its construction and application here we have adopted the wording of title 18 of the code and provided it here.

Mr. ELSTON. Would subsection (3) of section (f) contemplate making any persons not under military authority subject to military trial?

Mr. LARKIN. No, it would only be those persons who are subject to military law by virtue of article 2. Other civilians would not be subject, but they would be subject to this provision under the United States Code.

Mr. RIVERS. Would that include people employed in enemy territory or occupied countries?

Mr. LARKIN. If they are accompanying and serving with the armed forces, those people would be covered and others would not.

Mr. RIVERS. What about the people in Germany now, those who are teaching school for the War Department over there?

Mr. LARKIN. For the War Department?

Mr. RIVERS. I went to Europe and there were about 65 of them a year or so ago who were there teaching the children of enlisted personnel in the Army.

Mr. LARKIN. They are paid by the Army?

Mr. RIVERS. The War Department hired them.

Mr. LARKIN. I should say they are subject to this provision.

Mr. RIVERS. A lot of them are billeted at Heidelberg.

Mr. LARKIN. Yes.

Mr. RIVERS. I think they are subject to the code.

Mr. LARKIN. They would be subject to the provisions of this code until 3 years after they get back in the event they commit a fraud against the Government.

Mr. RIVERS. I am talking about that.

Mr. LARKIN. That is right.

Mr. BROOKS. Do you think that time limit of 3 years is sufficient? We are dealing with fraud here and, of course, I do not know when the war will be formally over, but it is conceivable that we might be engaged in a conflict where it will be over the day when the last shot is fired. Is 3 years long enough to run down fraud, especially when you have these contracts involved?

Mr. LARKIN. Well, we do not care to extend it further than the Federal court jurisdiction at present as provided by this section. I think our experience has been, although it can always change, as you indicate, that the official termination of the war is usually not declared until a considerable period after the cessation of actual hostilities, and we provide for 3 years after that, so I should say that it is adequate.

Mr. RIVERS. Would you say the cessation or the "secession" of hostilities?

Mr. LARKIN. Either one.

Mr. ELSTON. Is there anything in the statute of limitations defining fraud that defers the running of the statute until the fraud is discovered?

Mr. LARKIN. You mean in the code, Mr. Elston?

Mr. ELSTON. Yes.

Mr. LARKIN. I think not—no.

Mr. ELSTON. Then you might have a case where fraud was not discovered until 4 or 5 years afterward.

Mr. LARKIN. That is right.

Mr. ELSTON. Until 4 or 5 years after the offense was committed, and the offending persons would be entirely absolved from any liability. Now, that is different from the civil law. Under the civil law the primary fraud statute defining fraud provides that there is no statute outlawing the offense, that it applies until the fraud is discovered.

Mr. LARKIN. I know that is common in civil practice, Mr. Elston.

I would point out that on close reading this article indicates that the running of this statute of limitations shall be suspended until 3 years after the termination of hostilities.

Now, we have not arrived at the termination of war and it is now 2 years after hostilities. Assuming that we have a termination of

hostilities now, then for 3 years there is a tolling and the statute does not start to run until after those 3 years have elapsed.

Now, of course, throughout that whole period you still may not discover fraud. I will concede that.

Mr. ELSTON. You are placing the Government in a different position than you place other persons who may be defrauded. In the civil courts generally there is no statute of limitations as to a felony, so that a fraud which was committed against a corporation or against an individual could be prosecuted any time the fraud was discovered, whereas the fraud perpetrated against the United States could not be prosecuted regardless of how serious it was unless it was discovered within 3 years after the termination of the war.

Mr. LARKIN. No, whatever period is fixed as the termination date.

Mr. ELSTON. Yes, whatever period is fixed.

Mr. LARKIN. That is true, but it is not an innovation with us, and this is a Federal court rule, so that both of them, perhaps, are wrong, or both of them certainly are different than many State fraud statutes of limitations.

Mr. BROOKS. Does the Federal-court rule contemplate the idea that that fraud must be known to the prosecuting officer before the limitation shall begin to run?

Mr. LARKIN. This is it; subsection (f).

Mr. BROOKS. It is identical to this?

Mr. LARKIN. Yes; section 3287 of title 18 of the United States Code.

Mr. DEGRAFFENRIED. Some States make a distinction between criminal actions for fraud and civil actions. In our State you cannot prosecute a man for embezzlement or any kind of fraud after 3 years whether you discover it in the 3-year period or not. In a civil suit the statute of limitations does not begin to run until after the fraud is discovered.

Mr. LARKIN. I think, Mr. deGraffenried, it more often applies to a civil action than to criminal.

Mr. DEGRAFFENRIED. As I understand it under this provision, if the 2-year statute applied you would have 3 years after the cessation of hostilities, and the statute would not begin to run until 2 years after the cessation of hostilities.

Mr. LARKIN. Three years.

Mr. BROOKS. Of course, the limitation is intended just to close the book, and I suppose in this case it is the same as others.

Are there any further suggestions on or is there any further discussion of this article? If there are not, and there are no further objections to article 43 as read and amended, the committee will approve the article.

Article 44.

Mr. SMART (reading):

ART. 44. Former jeopardy.

No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this Article until the finding of guilty has become final after review of the case has been fully completed.

References: A. W. 40; N. C. and B., section 408.

Commentary: This article is derived from the first paragraph of A. W. 40. The second paragraph of A. W. 40 is covered in article 62 of this code.

Mr. ELSTON. May I ask where you got that definition of jeopardy?

Mr. LARKIN. The first sentence?

Mr. ELSTON. No; all of it.

Mr. LARKIN. Up to the first semicolon it is an exact copy of article of war 40, and the balance is a very close copy of the first paragraph in article 40.

The only change is that article 40 said that no proceeding in which the accused has been found guilty, and so forth, shall be a trial in the sense of the article until review if there be one and the confirming authority shall have taken final action upon the case.

Since we have abandoned the language of reviewing and affirming authority in our appellate system and have adopted uniform language, we have revised the language to take care of the same situation without using the words "review" or "confirming authority". Other than that it is the same.

Mr. ELSTON. I am wondering about the last part of the section there. Any person accused of a crime in the civil courts is in jeopardy ordinarily when a jury has been impaneled and sworn.

Mr. LARKIN. That is right.

Mr. ELSTON. You do not have to wait until the case has been finally reviewed.

Mr. RIVERS. That is right.

Mr. ELSTON. Suppose you had a prosecution by court martial. The court martial has assembled, and some evidence has been presented, and the Government decides, or the military authorities decide, that they perhaps do not have enough evidence, and that if they delay the trial they can get more evidence. So, they just dismiss the proceeding.

Now, the accused is not in jeopardy in that case because there has not been a completion of the trial and final review has not been had; is not that right?

Mr. LARKIN. Yes, sir; that is right.

Mr. ELSTON. Suppose there has been a court-martial trial and the accused has been found guilty and the sentence has been imposed. Say the sentence was 1 year, and the commanding officer or somebody thought that it ought to be 5 or 10 years, life, or death, or something else, and they do not wait until the case is finally completed, or it may be that the accused does not want to proceed with it, or assuming that he has started an appeal proceeding, what would prevent you from assembling another court martial and trying the accused before final review under this section?

Mr. LARKIN. I do not think anything would, except, of course, that the second trial by virtue of other provisions in the code could not impose a higher sentence than the first sentence.

Mr. ELSTON. It seems to me that the language in here is tremendously confusing and at variance with the law.

Mr. LARKIN. I would not say it is not at variance with the present military law. But the military law has been at variance with the general civil law.

Mr. ELSTON. Former jeopardy is a constitutional right. The Constitution provides that no person shall be twice put in jeopardy for the same offense.

Mr. LARKIN. That is right, and the question is whether the constitutional provision of jeopardy follows the military. The constitutional provision of a trial by jury does not, for instance.

That problem, as you know, is before the Supreme Court at this time, and I hope it will be decided in the Wade case, although it is possible that the Supreme Court will decide that case on another ground.

That case, very briefly, and I think it has been mentioned by witnesses here, concerns circumstances where a man was tried by a court martial, and the court retired to deliberate, and before it concuded its deliberations, and before arriving at a verdict it opened court and adjourned the trial for the purpose of securing additional witnesses on the court's own motion.

During the course of its adjournment, the convening authority withdrew the charges and sent them to another command, and in the meantime, or at that time the whole unit was moving very rapidly through Germany, and it covered tremendous distances in a very short time.

Wade was retried, if you remember, or there was a rehearing of his case in another command, and the question now is before the Supreme Court. It was argued about 2 weeks ago.

The point there, of course, was whether the tactical problems of the command in its moving so rapidly through Germany in the last stages of the war, whether there was such an imperious necessity by virtue of tactical considerations that it was appropriate to terminate the first trial.

Whether the Supreme Court is going to determine the case on the question of the imperious necessity, in which case it was appropriate to retry the case, or whether they will touch on the constitutional problem of whether double jeopardy attaches in that kind of a case is something I do not know at this time. In view of the speculation on what they will do we have not tried to guess and have incorporated the same provision as has been in military law. As Colonel Weiner has pointed out that is tantamount to the common-law notion of jeopardy.

There is one other consideration, if I may be indulged another moment, that I think has to be kept in mind in connection with this problem, and that is that the review provided in the military system and in the uniform code by the convening authority in the first instance, and by the board of review in the second instance, is mandatory and automatic.

Now, of course, in civil courts it is not automatic. If a man is convicted and there is a verdict against him, the appellate tribunal in the civil jurisdiction can consider the case and they can set aside that verdict of guilty and order a new trial, but they do so upon waiver by the defendant in the form of his petition for review and his request for reversal.

Now, in the military organization as you know, most cases are automatically reviewed. The convening authority or the board of review may determine for one reason or another that the verdict of guilty is not sustainable. They change that verdict, make it a nullity by setting it aside and send the case back for rehearing, or in some instances under another provision a new trial may be provided. If jeopardy first attached in the beginning of the case, then if the verdict was set aside and not sustained you could not have a rehearing unless you got the consent of the accused because jeopardy would probably

prevent rehearing. This it seems to me would involve a major change in the automatic appellate system that is provided in military law.

If, of course, you had no mandatory appeal, and you had jeopardy attach as soon as the court was sworn, or the first witness was sworn, then you would not have the problem because you would require the appeal to be on the motion of the accused. The Supreme Court may settle the whole question for us, I do not know, but if they do, or if anybody else is disposed to change this you should bear in mind that it materially affects this automatic review, which is, of course, a protection over and above anything that is found in civilian jurisprudence.

Mr. RIVERS. What would be the reason for having another case until it has been reviewed? I do not understand that.

Mr. LARKIN. What would be the reason for having a retrial?

Mr. RIVERS. Another case or a retrial, because as Mr. Elston says, you could have a number of them.

You know, under the GI bill of rights it gives you a review, too. Does this change the GI bill of rights?

Mr. LARKIN. No; it does not.

Mr. RIVERS. Under the GI bill of rights it gives you a review.

Mr. LARKIN. It provides a review for special and summary courts. You do not have one for general courts or for dishonorable discharges or bad conduct discharges.

Mr. RIVERS. It refers to bcd's?

Mr. BROOKS. Does that involve jeopardy? Under the GI bill of rights, does that involve jeopardy, or is that civil rights?

Mr. LARKIN. That is a correction of records. I do not think there is any authority to order a retrial.

Mr. RIVERS. It says until the review has been fully completed.

Mr. BROOKS. Let us hear from the colonel now.

Colonel DINSMORE. This provision went in in 1920 in the provision in the Articles of War at that time, and as far as I know it has caused no trouble over the years.

It may be that the decision in the Wade case will effect an interpretation of this article, but the Wade case was an unusual set of circumstances. A rehearing can be ordered. That is the language we use, but no man can be convicted of any offense at the rehearing of which he was not convicted before, and he cannot be punished any more severely. Any sentence in excess of a sentence that was adjudged in the first instance may be changed at the rehearing.

This code provides that a rehearing can be ordered in case there is a lack of evidence.

If Mr. Elston and the other members of the committee are not satisfied when I have finished I would like the opportunity to refresh my recollection about the history of the whole thing back in the twenties. You cannot carry these things in your mind over the years.

The purpose of it, however, was to prevent a situation where an obviously guilty man would escape punishment on a technicality. He has every protection, and he cannot be punished any more severely and cannot be convicted of any offense of which he was not convicted before unless you have a new set of charges and a new investigation and consolidate the two cases.

Mr. BROOKS. Does the Navy want to say anything on this?

Captain WOODS. This does represent an extension of our present law. The charge is entirely acceptable to us.

Mr. BROOKS. It is aceptable?

Captain WOODS. Yes.

Mr. BROOKS. What about the Air Force; do you want to say something about it?

Major ALYEA. It does go a little further than the present law requires the appellate authority to go. I do not think we have any objection to it.

Mr. RIVERS. You do not object to having any more authority.

Mr. LARKIN. I don't think it goes further. The present language says that no proceeding in which the accused has been found guilty by a courtmartial upon any charge or specification shall be held to be a trial in the sense of this article until after review, if there be one, and the confirming authority shall have taken final action on the case.

Mr. BROOKS. Mr. Smart.

Mr. SMART. There has been a suggestion made as to a change in the language on page 38, lines 2 and 3. It only involves proper wording It has been suggested that we change the words in line 2 to read:

of this article until the finding of quilty has been affirmed, reversed, or modified.

What would be the effect of that language; would it change the sense of the article in any degree, and if not, would not that be a better choice of words than those which are presently used?

Mr. LARKIN. I think the word "final" has been used because we do not know in any case at what point it will be final. Whether the Judicial Council is going to review a case may be dependent upon the fact of whether they grant a petition. We just do not know when they will, and when they will not grant a petition, so that a finding of guilty may be in fact final with the action of the board of review.

In other cases it may not be final until the Judicial Council has acted, but we just do not know under what circumstances or in what specific cases they will act. It will depend upon the law involved, so that I think the word "final" is the better word.

Mr. BROOKS. Well, like in most instances, regardless of what we write into this article, the Supreme Court is going to be the last authority.

Mr. LARKIN. I think that is perfectly true.

Mr. BROOKS. We could undertake to try to cover every case of double jeopardy, but our definition would not necessarily hold water.

Mr. LARKIN. That is right. It is so very speculative as to just what the Supreme Court will say, that is is hard to guess in advance, but since it is a provision that has existed for so long, and since it is connected with the automatic appeal we adopted what was in the law and if the Supreme Court says this violates the Constitution or that the Constitution follows a person into the military for a court martial, or that it should apply otherwise, that will be binding and that is all there is to it.

Mr. RIVERS. A lot of witnesses have testified that when a man takes an oath to serve in the military forces he does not forthwith lose his constitutional rights. When this Supreme Court decision comes out, in effect, will that then be settled?

Mr. LARKIN. Not as to all of them.

Mr. RIVERS. As to any of them. He should not suspend any of his constitutional guaranties by virtue of the fact that he submits to an oath to serve in the armed forces.

Mr. SMART. Well, I think he very definitely does surrender some of them, Mr. Rivers.

Mr. RIVERS. I am wondering whether the Supreme Court would so hold.

Mr. SMART. I am sure they would agree with that because as a civilian you can go down the street and cuss out anybody you care to, but if you are in the Army or Navy you cannot do that, and to that extent he has certainly surrendered his constitutional right of free speech.

Mr. RIVERS. The Supreme Court does not give you a windshield when you start to cuss people out.

Mr. LARKIN. Trial by jury is a constitutional right that has held not to apply.

Mr. RIVERS. Your answer would be no.

Mr. BROOKS. If that were not the case, why would the Supreme Court be sitting today on what is double jeopardy under the Constitution?

Mr. LARKIN. As Colone Dinsmore points out, they may decide the Wade case on the question of the imperious necessity rather than on constitutional grounds and the question may still be open after they finish with that case.

Mr. ELSTON. Has that case been argued?

Mr. LARKIN. Yes; it has been argued.

Mr. ELSTON. And the decision may come down any day?

Mr. LARKIN. I think so.

Mr. ELSTON. Perhaps by the time we finally write this bill there will be a decision by the usual divided opinion.

Mr. COLE. Mr. Chairman.

Mr. BROOKS. Mr. Cole.

Mr. COLE. With your permission, Mr. Chairman, I should like to go back to the question which Mr. Smart has raised with respect to a strict interpretation of that proviso. As you interpret it would it make it possible for an individual to be found guilty by a court and upon review to be acquitted by the higher authority and still come back and be tried again?

Mr. LARKIN. No.

Mr. COLE. Taking the strict interpretation of it you say, "until the finding of guilty has become final."

What you mean is until the question of guilt has been resolved and becomes final?

Mr. LARKIN. Yes; Mr. Cole, I think that is a very germane analysis and the language is perfectly susceptible of that inference. The difficulty is that this has to be read in connection with article 62, if I might bring it to your attention, where we provide that wherever there is an acquittal of any charge that it cannot be sent back for rehearing or any other proceeding.

Mr. RIVERS. But this has to be approved by the reviewing authority——

Mr. LARKIN. An acquittal may be reviewed for jurisdictional purposes only.

Mr. RIVERS. I see.

Mr. LARKIN. An acquittal may not be sent back for retrial at all.

Mr. ELSTON. It is awfully hard to define jeopardy even in civil courts. There are countless decisions trying to define it.

It is not technically correct to say that no person shall, without his consent, be tried the second time for the same offense because he can be tried a second time for the same offense where a case has been appealed by himself.

Mr. LARKIN. That is right.

Mr. ELSTON. And where there has been a reversal, and it is tried again, he may want a second trial, but he gets it because he was the one who instituted the appeal.

Mr. LARKIN. There I guess the reasoning is that the first is a nullity for the same reason and you are trying it de novo, but in reality it is the second time.

Mr. RIVERS. Do we not have a lot of these two-trial cases where we try a man in the Federal courts or the State courts?

Mr. LARKIN. We have no control over that. This jeopardy here would apply to a court martial or a military tribunal.

Mr. DEGRAFFENRIED. Is it true when the second trial has been had that the defendant could get more punishment than in the first?

Mr. LARKIN. Yes; if he is tried the second time and the crime for which he is tried carries a mandatory sentence which was not imposed the first time.

Mr. GAVIN. Proceed from there, Mr. Larkin.

Mr. LARKIN. Then the court in the second case can and must impose a mandatory sentence because the first court has made a mistake of law in not imposing it, but other than that if the sentence is legal the first time, whatever it is, on rehearing the court cannot impose a greater sentence.

For instance, if at the first trial he was sentenced to 5 years for a crime which carried a maximum of 30 years, on a rehearing he could not be sentenced to more than 5 years again.

In a case where he is tried for a crime which carries the mandatory sentence of death, and the court in the first instance did not follow the law and did not give him that mandatory sentence, but gave him some other confinement or sentence, and if the second time he is found guilty, they would have to give him the mandatory sentence that was called for.

Mr. BROOKS. My suggestion in reference to this article, if it meets with the approval of the committee, would be to approve it as it is subject to reopening it in the event of the Supreme Court decision, which is entirely possible, before we terminate the hearings.

Is there any objection to that? If not, it stands approved subject to that exception.

Article 45.

Mr. SMART (reading):

ART. 45. Pleas of the accused.

(a) If an accused arraigned before a court martial makes any irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded guilty.

(b) A plea of guilty by the accused shall not be received in a capital case.

References: A. W. 21; N. C. and B., sections 413, 416, 417.

Commentary: Subdivision (a): Drawn from present Army and Navy provisions, except for the provision for entering the plea of not guilty in the record, which is new. The question whether the plea of not guilty should be entered, in the situations covered in this subdivision, will be treated as an interlocutory question, according to the procedure prescribed in article 51 of this Code.

It is not intended that a plea of not guilty to the offense charged, but guilty to a lesser included offense, will be an irregular pleading within the meaning of this article.

Subdivision (b) is new but enunciates a rule now followed by the Army, and, as to certain capital offenses, by the Navy.

The provisions of this article will be supplemented by regulations issued by the President. It is contemplated that the recommendations of the Keefe board as to the procedure to be followed by a court martial when a plea of guilty is entered will be adopted. The proposed procedure is as follows (see Keefe report, p. 142):

(1) In general and special court martial cases, the plea should be received only after the accused has had an opportunity to consult with counsel appointed for or selected by him. If the accused has refused counsel, the plea should not be received.

(2) In every case the meaning and effect of a plea of guilty should be explained to the accused (by the law officer of a general court martial; by the president of a special court martial; by the summary court), such explanation to include the following:

(*a*) That the plea admits the offense as charged (or in a lesser degree, if so pleaded), and makes conviction mandatory.

(*b*) The sentence which may be imposed.

(*c*) That unless the accused admits doing the acts charged, a plea of guilty will not be accepted.

(3) The question whether the plea will be received will be treated as an interlocutory question.

(4) The explanation made and the accused's reply thereto should be set forth in the record of trial exactly as given.

It is also contemplated that the regulations will provide that the law officer or the court shall explain the meaning of any special defenses or objections which may appear to be available to the accused, in any case in which he is not represented by counsel, and shall advise him of his right to make them, both as to the offense charged and lesser included offenses, before pleading to the general issue.

The provisions contained in chapter XIII of the Manual for Courts Martial, United States Army, 1949, dealing with the procedure for raising special defenses and objections by motion, were considered by the ad hoc committee in connection with this article and approved as a sound basis for similar provisions to appear in the new regulations. The ad hoc committee also considered, and approved, the provisions in the 1949 Manual for Courts Martial requiring that if it appears from the charges that the statute of limitations has run against an offense, or in the case of a continuing offense, a part of an offense charged, the court will bring the matter to the attention of the accused and advise him of his right to assert the statute. If the accused pleads guilty to a lesser included offense against which the statute of limitations has apparently run, the court will advise the accused of his right to interpose the statute in bar of trial and punish-

ment as to that offense. Similarly, at the time the court is making its findings, if by exceptions and substitutions the accused is found guilty of a lesser included offense, to which he has not entered any plea, the court will advise him in open court of his right to avail himself of the statute in bar of punishment.

Mr. BROOKS. Is that substantially the present provision?

Mr. LARKIN. Yes.

Mr. RIVERS. It is the same as the civil law in that respect.

Mr. LARKIN. It is substantially the same. However, we have extended it a little bit, and I think we have by virtue of our explanation in the commentary, which becomes a part of the record, supplied in much greater detail all the instances in which we feel the plea of guilty should be accepted.

Those circumstances, in general, are that the plea will be accepted only after the accused has had an opportunity to consult with counsel. If the accused refuses counsel or refuses to consult with him then his plea will not be taken.

That is an added protection that we feel should be forced on him.

Mr. BROOKS. In other words, the court, in effect, arbitrarily says he will enter a plea of not guilty.

Mr. LARKIN. If he refuses to consult with counsel, if he comes forward and says, "I desire to plead guilty," it is our opinion that the court should ask, "Have you consulted with counsel?" and if he has not consulted with counsel we should force him to consult with counsel, and if he does not, do not accept his plea.

In addition to that we feel that the meaning and the effect of the plea of guilty which he proposes to take should be explained to him and that explanation should consist of a statement telling him that the plea amounts to an admission that he committed the crime that is charged against him, that it makes conviction mandatory, and that he should be told the sentence which can be imposed upon him if he admits doing the acts which are charged against him.

If he refuses, if he does not want to take the plea under those circumstances, or if he wants to make the plea and will not conform to those circumstances which are to make sure that he understands what he is doing, then, the plea should not be accepted.

We feel that is a procedure which will give an added amount of protection to the innumerable cases where pleas of guilty are taken, particularly among the younger men.

I think it would have the added advantage of settling once and for all that he is the man who did what he is charged with doing and we would be relieved thereafter of the continually complaint of accused that they did not understand what they were doing when they took their plea.

In addition to that, we would have the colloquy between the court and the accused at the taking of the plea and the record transscribed verbatim and not just have a form which is printed and says the accused was informed of his rights.

Mr. BROOKS. Does this contemplate a plea of nolle contendere?

Mr. LARKIN. No, sir, it does not.

Mr. BROOKS. That is not a proper plea in a court martial?

Mr. LARKIN. That is right, Mr. Chairman; I do not know of any such plea.

Mr. ELSTON. What is meant by the statement, "irregular pleading"?

Mr. LARKIN. I think that would cover a pleading where a man says guilty, but I want to make an explanation.

Mr. ELSTON. There is no provision in the military courts for the filing of a demurrer, a plea in abatement, a motion to quash the charges, or anything of that sort, is there?

Mr. LARKIN. No, sir: There is no provision for special pleas. A motion practice is provided and the regulations spell out the different kinds of motions which can be made.

Again in the commentary on this article, which will be a part of the record, we have spelled out the procedures for such motions as they are now contained in the Army Manual so that the drafters of the new manual will understand that it is part of the legislative history of this provision here, and that this motion practice as it is now provided in Army courts martial will be continued. As I say, it is on page 65 of this commentary.

Mr. RIVERS. You mean the proper motions to make?

Mr. LARKIN. That is right.

Mr. RIVERS. Corresponding to the ones that Mr. Elston has mentioned?

Mr. LARKIN. That is right.

Mr. RIVERS. Can you make that more definite and certain?

Colonel DINSMORE. You will recall they have abolished all of these special pleas in the Federal courts and provided that the same points shall be raised by motion.

Mr. RIVERS. I see.

Colonel DINSMORE. The reason being that the pleas became so technical that a lot of the lawyers did not understand them themselves, perhaps, and we are following exactly the Federal rules of procedure both in the present manual and in this code.

Mr. BROOKS. That all preliminary pleas should be by motion?

Colonel DINSMORE. Yes, sir, that is right, sir.

Mr. GAVIN. Supposing a boy is accused of a crime now and defense counsel is appointed, how much defense does this counsel actually give this boy? Supposing the case is a bad one, does he indicate to him that he should plead guilty or he should not plead guilty, and when he goes into court how much defense does he give him; that is what I would like to know from somebody.

Mr. ELSTON. The code that we are drafting provides that counsel must be qualified counsel, that they must be admitted to practice in the district court of the United States or the supreme court of one of the States of the Union, and it is assumed that if they have been admitted to practice in one of those courts and approved by a Judge Advocate General that they are qualified counsel.

Mr. BROOKS. Furthermore, it provides that he may have assistant counsel in certain cases.

Mr. ELSTON. And if he is not satisfied with any counsel that might be selected for him, he can employ his own counsel.

Mr. GAVIN. Does he know that, is he apprised of that fact?

Mr. ELSTON. We have put in here that they must notify him of his rights.

Mr. RIVERS. The way it is now a good deal depends on who has charge of his fitness reports.

Mr. BROOKS. In many respects he has a greater amount of protection than in civil courts.

Mr. SMART. In line 14, as subsection (b) is now written it says—

A plea of guilty by the accused shall not be received in a capital case.

A man may be charged with a capital offense and in the same charges and specifications be charged with a noncapital offense, and this language would prevent taking a plea of guilty in the noncapital offense. At that point I would delete the words "in a capital case" and substitute "to an offense for which the death penalty may be adjudged."

Mr. LARKIN. I will certainly be content with the committee's decision on that. I can see Mr. Smart's point, and we considered it ourselves. It is one of these little technical things that sometimes causes difficulty. As it reads it is perfectly true that the circumstances set forth may happen, if a man was charged with murder and decided or wished to plead guilty of manslaughter, the lesser included offense, if you will, it would appear by this language that he could not make such a plea.

We tried to take care of that by spelling out in the commentary that we did not intend that.

The reason we did not use the word "offense" is because it brings up the same problem in the special court. Now, it does not happen very often, but, of course, a special court can try capital cases or a capital offense.

When they do try a capital offense, of course, they cannot impose more than the jurisdiction allows them to impose. They cannot impose more than 6 months, which, of course, operates to the favor of the accused. If you say a plea of guilty shall not be received in a capital offense then, of course, he could not plead guilty to a capital offense tried by a special court, even though he cannot get more than 6 months there, so it is a question of which word makes it clearer.

I will be content with either word. That is not arguing with Mr. Smart, but just trying to explain our thought on the matter.

Mr. SMART. You might go farther and say, then, "except as provided in article 19," which prescribes the jurisdiction of special courts martial. That would certainly clarify it beyond any doubt.

Mr. LARKIN. That is right.

Mr. BROOKS. Is there any further discussion of that? In other words, change it to read:

A plea of guilty by the accused shall not be received to an offense for which the death penalty may be adjudged.

You have heard the suggested amendment. All in favor of the amendment signify by saying "aye," and all opposed "no."

The ayes seem to have it.

Is there any further discussion of this article?

Mr. DEGRAFFENRIED. Does article 19 refer to the jurisdiction of special courts martial?

Mr. LARKIN. Yes.

Mr. DEGRAFFENRIED. Suppose he was to be tried before a general court martial, could he not still plead guilty to a lesser offense than the one charged?

Mr. LARKIN. We hope he could. I think using the word "offense" is all right there because it would be the lesser included offense.

Mr. BROOKS. This as originally written was intended to cover a case like we had in Chicago, the Loeb case, where the defendants pleaded guilty and threw themselves on the mercy of the court.

Mr. LARKIN. This is new in the statute, but it has been a regulation of the services for years. The intention is that you do not permit a man in a case in which the death penalty is possible to plead guilty, which is uniform practice in civil courts. You just do not let a man plead himself into the death penalty.

Mr. ELSTON. Some States permit him to plead guilty, but they require that evidence be taken to determine the degree of homicide involved.

Mr. BROOKS. If there is no further discussion of this article, we will proceed to article 46.

Mr. SMART (reading):

ART. 46. Opportunity to obtain witnesses and other evidence.

The trial counsel, defense counsel, and the court martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, its Territories, and possessions.

References: A. W. 22; A. G. N. article 42 (b); proposed A. G. N. article 35.

Commentary: This article is based on A. W. 22 and proposed A. G. N., article 35. The first sentence of the article is intended to insure equality between the parties in securing witnesses. It is felt appropriate to leave the mechanical details as to the issuance of process to regulation.

Mr. BROOKS. Is there any discussion of that? If there is no discussion, we will proceed. That is substantially the law as it has been?

Mr. LARKIN. That is right. It preserves the addition to the old article 22 which the Elston bill provided. We have reworded it a little more. You gentlemen in the last session added the provision that witnesses for the defense shall be subpenaed upon the request of the defense counsel through process issued by the trial judge advocate. That was in addition to the previous provision. We have reworded it by saying "shall have equal opportunity to obtain witnesses and other evidence."

We go a little further; but in essence it is the same as the provision now in effect.

Mr. GAVIN. Supposing that in an emergency some of the witnesses were in other parts of the world other than the United States, its Territories, and possessions, how would you bring those witnesses back to testify in a trial that may be held here in the United States?

Mr. LARKIN. Well, you would bring them back if you could under any circumstances, but if it were physically impossible you just could not do it. If it turns out that they are most material to the issue or that they are the only witnesses to the case, why, you just could not try the case without them.

Mr. ELSTON. If you could not bring them back, you could certainly take their depositions.

Mr. LARKIN. That is possible.

Mr. BROOKS. And the defendant would have the same opportunity that the prosecution has?

Mr. LARKIN. That is the way we have tried to spell it out in here, yes, sir.

Mr. RIVERS. There would certainly be ground for a motion to postpone.

Mr. LARKIN. Yes, sir.

Mr. SMART. The defendant would actually have more opportunity in this respect than the prosecution would have because you will later find that the prosecution cannot take depositions in a capital offense case, whereas the defendants can.

Mr. BROOKS. In what article is that?

Mr. SMART. Article 49.

Mr. BROOKS. Article 49?

Mr. LARKIN. Yes, sir.

Mr. BROOKS. If there is no further discussion of article 46, it will stand adopted as read.

Gentlemen, it is high noon. If there is no objection we will adjourn until 1:30, and it is the thought of the chairman that, unless there is objection, we will run on until 4 o'clock and try to finish what we can. The committee stands adjourned until 1:30.

(Thereupon, the committee adjourned until 1:30 p. m.)

AFTERNOON SESSION

(The subcommittee reconvened, at 1:30 p. m.)

Mr. BROOKS. The subcommittee will come to order.

Mr. SMART (reading):

ART. 47. Refusal to appear or testify.

(a) Every person not subject to this code who—

(1) has been duly subpoenaed to appear as a witness before any court-martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such court, commission or board; and

(2) has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the courts of the United States; and

(3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which such person may have been legally subpoenaed to produce:

shall be deemed guilty of an offense against the United States.

(b) Any person who commits an offense denounced by this Article shall be tried on information in a United States District Court or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, and jurisdiction is hereby conferred upon such courts for such purpose. Upon conviction, such persons shall be punished by a fine of not more than $500, or imprisonment for a period not exceeding six months, or both.

(c) It shall be the duty of the United States district attorney or the officer prosecuting foi the Government in any such court of original criminal jurisdiction, upon the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute any person violating this Article.

(d) The fees and mileage of witnesses shall be advanced or paid out of the appropriations for the compensation of witnesses.

References: A. W. 23; A. G. N. article 42 (c); proposed A. G. N., article 35 (b).

Commentary: This article is derived from A. W. 23. Proposed A. G. N., article 35 (c) is similar. The proviso in A. W. 23 making certain offenses in title 18, U. S. C. applicable to proceedings before courts martial is omitted, since the language of title 18 includes the important offenses against military justice, such as perjury and bribery or judicial officer. (See title 18, U. S. C., secs. 206, 210, 1621, 1622 (1948).)

Mr. BROOKS. That is the same as the Articles of War 23?

Mr. LARKIN. That is right, Mr. Chairman.

Mr. BROOKS. How about the Navy?

Mr. LARKIN. The Navy article 42 (c) is similar; and article 35 (b) of the proposed Navy bill in the eightieth session has a similar provision. You will note specifically that an offense of this character is not tried by court martial but by the United States courts It is an. adaptation of what has been in the law.

Mr. RIVERS. And he is tried on information?

Mr. LARKIN. That is right.

Mr. DEGRAFFENRIED. Mr. Larkin, does that section 2 mean that in order to require him to come up to a hearing you have to either pay him or tender him the fees before he gets there? It says "has been duly paid or tendered the fees" and so forth.

Mr. LARKIN. I should say so.

Mr. DEGRAFFENRIED. Usually you just summon them to appear and then after they testify they pay them mileage and so forth?

Mr. LARKIN. Well, you see by virtue of having difficulty with civilian witnesses we are going to an extreme. If one is subpenaed and he says he will not come we will go further and say, "Here are the fees right now."

Mr. BROOKS. You have a different situation, also, when you get to this jurisdiction, from the State jurisdiction. Your distances are greater, and the expenses are greater.

Mr. LARKIN. That is right. A person might have a legitimate reason to refuse.

Mr. RIVERS. As the chairman says, that is absolutely right.

Mr. SMART. We had the same thing as far as the subpenas to Congress are concerned in the last Congress, when our committee had the subpena power and we had an appropriation to support that. The rule is that if we subpena witnesses here they may demand and must receive the round trip first class rail transportation plus at least 1 day of authorized Federal per diem. Otherwise they are under no obligation to appear.

Mr. RIVERS. That is fair.

Mr. SMART. That is fair, and this perpetuates that rule.

Mr. BROOKS. Mr. Gavin, article 47 was just read. There seems to be no controversy about it. It is a rule that has been in force for a long time. It is with reference to the enforced attendance of witnesses and provides for punishment in the Federal civilian courts.

Mr. SMART. This is for witnesses not subject to this code.

Mr. BROOKS. Yes.

Mr. GAVIN. I thank the gentleman for that explanation.

Mr. RIVERS. Also, it provides for payment before he gets there.

Mr. BROOKS. Is there any controversy about it?

If there is no objection to the article as read, we will approve it.

Mr. SMART (reading):

ART. 48. Contempts.

A court martial, provost court, or military commission may punish for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder. Such punishment shall not exceed confinement for 30 days or a fine of $100, or both.

References: A. W. 32; A. G. N. article 42 (a); proposed A. G. N. article 35.

Commentary: This article is derived from A. W. 32. The proposed A. G. N. article 35 would require contempts by persons not subject to this code to be tried in civil courts. It is felt essential to the proper functioning of a court, however, that it have direct control over the conduct of persons appearing before it.

Mr. Chairman, I think that there are two things that should be clarified for the record here. One is that this section contemplates the right to punish for contempt civilians who may be testifying or appearing as counsel in a court-martial case. Secondly, while the article does not say so, it anticipates that the military court may punish summarily.

Mr. RIVERS. Civilians?

Mr. SMART. That is correct.

Mr. RIVERS. Not subject to it?

Mr. SMART. When civilians come before a court martial they must be bound by the same rules of decorum as the other people before it.

Mr. BROOKS. Is the Federal rule 30 days or 10 days?

Mr. LARKIN. I think it is 30. The present article of war from which this was drawn for 30 days. That is article of war 32. Also a $100 fine. It is exactly the same.

Mr. BROOKS. Well, it is substantially the same rule that you have in the Federal criminal courts?

Mr. LARKIN. And the same rule that we have in the Articles of War right now.

Mr. BROOKS. Yes.

Mr. LARKIN. It is designed to operate in the court's presence. If the court martial cannot conduct its proceedings in an orderly quiet way it just cannot get to the issue, and you cannot in a contemplative manner decide what is right and what is wrong. Unless it has the power to discipline those before it you may have the most erratic kind of proceedings, and the most disturbing circus atmosphere, as you very frequently have in some sensational civil cases. If the court cannot operate its own proceedings in a dignified manner its proceedings become intolerable.

Mr. BROOKS. Is there any appeal from this?

Mr. SMART. There is none. There is a limited punishing power and there is no appeal. It is a summary citation for contempt.

Mr. BROOKS. This is 30 days for each successive or each offense, plus the fine of $100?

Mr. LARKIN. I should say so.

Mr. RIVERS. Do we have the authority to write in this particular code any proviso for punishing civilians who interfere with a MP who is arresting someone subject to his jurisdiction?

Mr. LARKIN. No.

Mr. RIVERS. Would he have go go into a Federal court on information?

Mr. LARKIN. I would think so, obstructing justice or interfering with an officer in the performance of his duties.

Mr. RIVERS. In a State court or a Federal court? You see, a United States marshal has jurisdiction.

Mr. LARKIN. I do not know about the Federal court, in general.

Mr. RIVERS. There must be plenty of those cases already.

Mr. LARKIN. I think probably the jurisdiction provided in the State court is adequate for that purpose.

Mr. BROOKS. I would like to ask one question. It is going back, and I think it has been covered, but I did not fully understand it. Exactly what is the definition of a provost court?

Mr. LARKIN. Well, I suppose the name itself is derived from the Provost Marshal's Department, which is generally the Department that controls the military police.

Mr. BROOKS. How does that differ from a court martial?

Mr. LARKIN. Well, a provost court, like other military commissions and tribunals which are usually used in occupied territories and which are the creatures of the occupying authority, is operated in accordance with whatever rules are prescribed for them. Many of the military or provost courts, for instance, that operate in occupied territories will follow, to a large extent, the court-martial procedures, but they may specifically apply the local law.

In many recent cases in occupied territory they have followed the procedures of court martial, but specifically they applied the German law. They are ad hoc special courts for a special purpose.

Mr. BROOKS. Are they not intended to cover the civilians?

Mr. LARKIN. Civilians who are not subject to the code.

Mr. BROOKS. Civilians who are not subject to the code. Is that right, Colonel?

Colonel DINSMORE. It is for the trial of civilians for the occupied territory.

Mr. SMART. I might add, if you will forgive the personal reference, that I was a provost court overseas appointed by virtue of the proclamations which gave General MacArthur the authority, which subsequently was delegated down to the Sixth Division. My jurisdiction was 5 years confinement or $5,000, either one or both. I sat alone as one judge and I tried nothing but civilians not subject to the Article of War.

Mr. RIVERS. I guess you gave them the limit?

Mr. SMART. Some of them.

Mr. BROOKS. In the light of that fact, gentlemen, do you want to approve this provision?

Mr. GAVIN. Let us go on.

Mr. BROOKS. Is there any objection to article 48?

There is no objection.

Mr. SMART. Do you want to revert to article 36 now that Mr. Elston is here, sir?

Mr. BROOKS. Yes, let us take up article 36.

Mr. SMART. In order to restate the issue, Mr. Chairman, may I briefly say that the question revolves around the use of the words, in lines 5 and 6 of page 32, "so far as he deems practicable."

The question which Mr. Elston placed was whereabouts in the military do we depart from Federal procedure.

I think Mr. Larkin is now prepared with specific facts to show that there are differences, which make these words necessary.

Mr. RIVERS. Were you not also supposed to fix up the problem of men?

Mr. SMART. Well, if you are going to delete those words it would be very simple. It is a question of keeping the words or deleting the words.

Mr. BROOKS. We will hear from Mr. Larkin.

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Mr. LARKIN. Since the committee considered this article the other day we have made a very brief comparison of what we think are the rules of evidence generally recognized in the trial of criminal cases in the United States courts with the general evidentiary problems that we face in courts martial. It is not a complete study or comparison by any means. We just have not had the time.

As mentioned by Colonel Dinsmore, one evidentiary principle that differs considerably is the one on judicial notice. If the phraseology here is deleted and the manual must apply the principles of law and rules of evidence generally recognized in the Federal courts, then the question arises on a problem of judicial notice whether the multitude of records that are kept by the military and the great number of official documents, or documents kept in the regular course of business, could be judicially noticed by virtue of the fact that they would not be entitled to judicial notice under the Federal rule in a Federal court.

For that reason judicial notice in the military is broader than the Federal court rule.

There is an added protection, however, in that when a court martial takes judicial notice of these records, there is, in accordance with the regulations, a provision that a copy of the regulation or the official paper is given to the court, so they are not taking judicial notice of a principle only, but of the specific language. There is a difference.

You have certain evidentiary rules for the authentication of foreign documents, for instance, in the Federal system which require that they be authenticated by consul before they become admissible. There is a lot of documentary evidence and printed material that would come before the military courts martial in an occupied area, or in a battle zone or close to one which you could not get authenticated by a consul. He is just not anywhere near where this court is held.

So if we were required to follow the Federal and were bound by it, we could not use the document unless it were authenticated by a consul.

The rule on searches and seizures, for instance, is not exactly the same as it is in a Federal court. It is, of course, applied where military personnel or their families are billeted in a home of their own, where a warrant would be required, but on camps, stations, and posts and so forth we do not follow the normal search and seizure. Frequently you could not find anybody to issue a warrant.

There are other problems. For instance, there is the question of admissibility of medical records. I think, as a matter of fact, there is a difference in the admissibility of medical records in the different circuit courts.

We would be faced, in other words, if that language is deleted, and the manual by this article requires that the principles and laws of evidence generally recognized by adopted, with following rules that are actually not practicable.

In addition, we would be faced with this problem: We would try to set out in the manual what we think is generally recognized. Of course, we are going to try to do that anyway. But the question is, if we are forced to set out what is generally recognized there will always be a question, and an accused might use this very neatly by saying, "I do not believe that is the generally recognized rule in the Federal courts." Then we would be faced with the question of whether

it is or is not. You would have to poll each circuit court and say that three hold one way and one the other way, and, therefore, it is generally recognized. If it were two and two, I do not know what would be generally recognized.

I think the laws of evidence as spelled out in the manual would always be subject to a collateral attack.

If it is true that despite our good faith in writing them it turns out that some court construes our understanding of what is generally recognized to be wrong, then I should think that the accused would have a right to a writ of habeas corpus, and it might cause a great deal of trouble.

Mr. RIVERS. What if the President should consider it practicable to permit the use of tapped conversations on telephones? He could do so under this.

Mr. LARKIN. Taking an extreme case like that——

Mr. RIVERS. It would not be extreme on a post, where it comes from a central exchange.

Mr. LARKIN. No. I say that we could take a case which I would think would be extreme on the President's part, to make such a regulation.

Mr. RIVERS. He would have the authority, would you not say, under this?

Mr. LARKIN. He perhaps would, except that he would then not be following what is generally recognized in the trial of criminal cases in the United States court because section 605 of the Communications Act of 1934 specifically prohibits the admissibility of such evidence in a Federal court. That would be a clear misinterpretation on his part; and actually the manual is to come to Congress. If the services have in the past written a manual which has been approved and promulgated by the President which does generally follow Federal law, I think they can be trusted to do so in the future, in addition to the fact that the manual will come to Congress.

Now, Congress can object to any rule of evidence in the manual by saying, "We do not think this is the generally recognized Federal rule, and we want you to change it."

I think it is better to do it that way than to strike out the discretionary language and put these rules in a strait-jacket.

Now, there may be other important differences. As I say, we just have not had time to compare each and every Federal rule and try to understand what is the generally recognized one. That is one of the difficulties.

Mr. ELSTON. Mr. Chairman, I did not object to it before. I said I had an open mind on it, but I thought we ought to be advised.

Mr. LARKIN. Surely.

Mr. ELSTON. As to how far they might go under that language. It seems to me, in view of Mr. Larkin's explanation that the words could hardly be deleted. With his explanation in the record—I assume the manual will more or less indicate the same thing—if that is done, perhaps no harm will be done, particularly since the rules have to be reported to Congress.

Mr. LARKIN. Yes.

Mr. ELSTON. Congress will have an opportunity to pass on them later anyway.

Mr. LARKIN. That is right.

Mr. BROOKS. I think the time was well spent in the investigation; and Mr. Larkin's explanation will certainly help.

Mr. GAVIN. Just one thing.

You mentioned in your statement about questioning the admissibility of hospital records in a case. How would that come about, that they would question the admissibility of hospital records?

Mr. LARKIN. Well, a hospital record, or a record of autopsy, for instance, may be hearsay, if the medical examiner who did the autopsy is available as a witness.

Then you have the fact that the autopsy record is frequently a combination of findings of fact, what the personal physical condition is, temperature and so forth, and also may include opinions and diagnoses.

There are a number of evidentiary problems in connection with it in addition to the possible problem of the hearsay rule.

As a result, to attempt to pick what you think is the generally recognized one is an almost impossible task, and almost anybody's guess.

Mr. GAVIN. Suppose that a boy had a bad beating and was sent to the hospital and the records proved that he received a bad beating. Could the court deny the admission of those records into the testimony or trial?

Mr. LARKIN. Well, they conceivably could deny that portion of the record which states that in the doctor's opinion such and such happened, if the doctor is available to come in and testify himself so that he can be cross-examined

Mr. ELSTON. The same rule would apply to the defendant as would apply to the prosecution.

Mr. LARKIN. Exactly so. What I was trying to point out was the difficulty of picking what is supposed to be the generally recognized rule. I am frank to say I just do not know what it is.

Mr. ELSTON. Ordinarily, hospital records and such are admissible if they are original records.

Mr. LARKIN. That is right.

Mr. ELSTON. And if the opinions expressed are the opinions of experts like doctors.

Mr. LARKIN. That is right.

Mr. ELSTON. But if it is an opinion of some nurse or some other person appearing in the record—if she were not qualified as an expert—then the court might exclude that.

Mr. LARKIN. That is right. It depends on the circumstances of what is in the record. All kinds of information seems to find its way into records of this kind.

Mr. ELSTON. I can see where it might be just as much to the advantage of the defendant as it is to the prosecution to bring in records of that kind.

Mr. LARKIN. Yes, there is no question about it.

Mr. BROOKS. If there is no further question about this article, we will go on to the next article.

Mr. SMART (reading):

ART. 49. Depositions.

(a) At any time after charges have been signed as provided in article 30, any party may take oral or written depositions unless an authority competent to convene a court martial for the trial of such charges forbids it for good cause. If a

deposition is to be taken before charges are referred for trial, such an authority may designate officers to represent the prosecution and the defense and may authorize such officers to take the deposition of any witness.

(b) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition.

(c) Depositions may be taken before and authenticated by any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

(d) A duly authenticated deposition taken upon reasonable notice to the other party, so far as otherwise admissible under the rules of evidence, may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or military board, if it appears—

(1) that the witness resides, or is beyond the State, Territory, or District in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing; or

(2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing, or

(3) that the present whereabouts of the witness is unknown.

(e) Testimony by deposition may be adduced by the defense in capital cases.

(f) A deposition may be read in evidence in any case in which the death penalty is authorized by law but is not mandatory, whenever the convening authority shall have directed that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court martial.

References: A. W. 25, 26; proposed A. G. N., article 36.

Commentary: Subdivision (a) is derived from the third proviso of A. W. 25. The first sentence is new in that it permits any party to take a deposition after charges are signed unless an officer with authority to convene a court martial for the trial of such charges forbids it for good cause. When such an authority is to designate officers to take depositions, he should consult the accused prior to designating an officer to represent the accused, or if the accused has counsel representing him in other pretrial matters, such counsel should be designated to represent the accused if available.

Subdivision (b) conforms to present practice in all services.

Subdivision (c) is derived from A. W. 26 and conforms to present Navy practice.

Subdivision (d) is derived from A. W. 25 and proposed A. G. N., article 26. The admissibility of a deposition is made dependent upon the need for its use at the time of trial. The same rules of evidence apply to testimony in depositions as apply to oral testimony.

Subdivisions (e) and (f) are derived from A. W. 25. The proposed A. G. N. does not contain similar provisions.

Mr. BROOKS. That all deals with depositions. How does this differ from the present articles of war 25 and 26 which we have now?

Mr. LARKIN. I think only in the first sentence, Mr. Chairman, of (a). It differs in this manner: The Elston bill added to the Articles of War the proviso that at any time after the charges have been signed as provided in article 46, and before the charges have been referred for trial, any authority competent to appoint a court martial for trial may designate officers to represent the prosecution.

We have gone a little bit further and have said that while he, of course, may still do so, that a deposition may be taken unless he forbids it for good cause. So it is just a rephraseology of the same provision from another viewpoint. It permits a little more freedom of action, if you will, than there has been, but it preserves what has

been in the law as to depositions, and what was added last year by the Congress.

Mr. BROOKS. Are there any questions on this article, gentlemen?

Mr. ELSTON. You did not take anything away from the law that was written last year?

Mr. LARKIN. No, sir. You added, last year, if you will recall, in the last proviso of article 25, that notion.

Mr. ELSTON. Article 25 last year?

Mr. LARKIN. Yes.

Mr. BROOKS. Subsection (a).

Mr. ELSTON. At one place we speak about giving notice to every other party, and at another place, line 11 page 41, we just say notice to "the other party." It occurred to me that the language should be the same so that all defendants will be notified.

Mr. SMART. That is on page 41 of the bill. There is subsection (b) which states:

> The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition.

Then in subsection (d) you say:

> A duly authenticated deposition taken upon reasonable notice to the other party, so far as otherwise admissible under the rules of evidence, may be read into evidence—

I am sure you mean the same thing in both places.

Mr. LARKIN. Yes.

Mr. RIVERS. Let us put it in.

Colonel CURRY. When you take it, you know who all the other parties are, but if he is not heard then, it means you must have given notice to the party against whom you are using it. If it is against someone where there isn't any evidence, you could stymie the procedure.

Mr. ELSTON. Suppose you have a case where you have codefendants and they only seek to use the deposition against one, but the codefendants are all tried together? It could be very prejudicial to the others.

Colonel CURRY. In which place the others can object. Either of them can object if he did not have notice. Suppose that one man has come in since it was taken. It could not be used against him.

Mr. ELSTON. If you have to notify all the codefendants or their counsel, then they will have an opportunity to object. It may be too late at the trial. At the trial they read the deposition and the damage is done. You can strike out the evidence and tell the jury to disregard it, but if you have done so, it may not do too much good. I have never had a whole lot of faith in that provision. I have seen it work both ways. There were times when I thought it was not so bad.

Mr. BROOKS. In this case what would happen? I believe you would take the deposition and check it over to see whether or not there was anything wrong, would you not? You would rule on the question of the admissibility of that deposition?

Mr. LARKIN. The law officer in the court would rule.

Mr. BROOKS. The law officer?

Mr. LARKIN. Yes. It would have to be a deposition whose admissibility is based on the general rules of admissibility, plus the fact that it is a deposition of a person in one of the three categories in subsection (d).

Mr. BROOKS. Under our theory, as presently set forth in the bill, the law officer would not sit with the court when they decided on guilt or innocence. Therefore, he might withhold that deposition from the knowledge of the court.

Mr. LARKIN. What would happen, I should say, is that the deposition is taken before trial generally, or even when it starts, at some distant place. Then when it is offered by either party on the trial it is scrutinized for admissibility based on all these conditions and general rules of admissibility.

Mr. BROOKS. Why should the court scrutinize it for reasons of admissibility when the law officer will determine whether it is admissible?

Mr. LARKIN. I think I said the law officer.

Mr. BROOKS. If the law officer determines that then why should the court ever see the deposition which is inadmissible?

Mr. SMART. It should not.

Mr. BROOKS. Is that not a superior rule, really, that the supreme courts have? In a jury trial the party offering the deposition always arranges to get it in before that jury if he can.

Mr. LARKIN. He may, but frequently an alert judge or an alert law officer looks at it first. He listens to the objections, and may even conduct an examination on the manner in which it was taken and entertain objections to what might be hearsay in it and everything else.

Mr. BROOKS. Of course, he says to the jury, "You can retire," but in a case like this the law officer will dispose of the matter. It seems to me it could be disposed of without reaching the court.

Mr. LARKIN. I should think it would be.

Mr. SMART. That would become an interlocutory question and it would be up to the law member to rule; and his ruling would be final. There would be no occasion which I can foresee whereby a general court-martial court would be authorized to look at any part of that deposition if the law member, as a matter of law, ruled it was not admissible.

Mr. LARKIN. I think it would be very similar to a confession. The prosecution can offer a confession in evidence, and the accused objects to the introduction of the confession on the ground that it was involuntary or untruthful. That would require a ruling of law at that point, or perhaps even the taking of testimony as to the conditions under which it was taken in order to determine its voluntary character.

In the same way the admissibility of depositions, subject to the objection by the accused, or either party, would be scrutinized before it is specifically put in.

Mr. BROOKS. Then if the law officer rules it inadmissible and the court insists on seeing what is in it, the question might arise as to whether that is reversible error.

Mr. LARKIN. That is right.

Mr. SMART. Of course, you would have this exception: You are basing your conversation on the basis that these depositions are used only by general courts martial. As a matter of fact, they are used by special courts where you may not have a law officer. The president of the court, in that event, is charged with the duty of determining matters of law, and he will certainly look at it.

The rule we are discussing would apply only in the general court-martial cases.

Mr. DEGRAFFENRIED. It will only do good in the general court-martial cases. It might apply in the others.

Mr. LARKIN. That is right.

Mr. BROOKS. They are, of course, the most serious cases.

Mr. LARKIN. That is right.

Mr. ELSTON. I am wondering why you suggested that depositions cannot be taken by the prosecution in capital cases.

Mr. LARKIN. Well, that is a rule that has existed for some time, that you cannot use a deposition against the defendant in a capital case. He can use it in a capital case for his own defense. It is just an added protection to the accused, that is all.

Mr. ELSTON. You certainly have given the defendant all the best of it there.

Mr. LARKIN. That is right.

Mr. ELSTON. On page 42, where you say, "Testimony by deposition may be adduced by the defense in capital cases" do you not think you ought to make it clear that if the defendant takes a deposition the prosecution shall have the right to cross-examine and that that testimony is admissible? It might be interpreted to mean that only the defense testimony is admissible.

Mr. LARKIN. I think, perhaps, Mr. Elston, that that comment applies to (e) and (f). I do not think it is very clear. I think, perhaps, we ought to amend (e) and (f) by saying at least "subject to the requirements of subsection (d) above, testimony by deposition may be introduced by the defense" so that they just cannot automatically introduce anything. That would be so that this is not construed that they automatically introduce it when the witnesses are available. At least, that was our intention, that it is limited by all these conditions set forth in subsection (d).

I think the way we wrote it here it is not too clear. I think you have brought up a good point, and I think it would clarify it if we start it by saying, "subject to the requirements of subsection (d) of this article."

Then depositions, when they are used by the defense in capital cases, can only be used if those conditions are satisfied. Is that not your idea?

Mr. ELSTON. Yes, but I am just wondering if (d) goes far enough. Does (d) go far enough to make it clear that if a deposition is taken by the defendant the prosecution shall have the right to cross-examine and the cross-examination, as well as the direct examination, is admissible.

Mr. LARKIN. Well, it would depend, I suppose, on whether all of that is in the deposition, depending upon whether written interrogatories are used, or not. If you have a deposition taken by officers who are questioning and cross-examining, it would be contained. If it is taken by interrogatories of which are settled by counsel and are sent to a distance, and the questions are just put and the answers recorded by an appropriate official, you would not have your cross-examination but you would, of course, have the settlement in advance by both counsel and the phrasing of the questions.

Mr. ELSTON. You would have a rather unusual situation if the defense could produce tsetimony and the prosecution could not refute it by the same witnesses.

The way this subsection is written it might be interpreted that way. "Testimony by deposition may be adduced by the defense in capital cases," period. You do not go on and say—

but if depositions are adduced by the defense in capital cases the prosecution shall have the right to cross-examine such witnesses and testimony adduced on such cross-examination is also admissible.

Mr. LARKIN. Cross-examination that is to be perpetuated is the cross-examination taken at the time of the deposition or thereafter? I just do not follow you.

Mr. ELSTON. When you take a deposition the accused has the right to be present in person and with counsel. If it is taken orally and not by way of interrogatories both sides can examine the witness. Now, then, the reporter is present and he takes down the testimony. If the defense can examine the witness and use that testimony then it ought to be clear that the prosecution can cross-examine the same witness and use that cross-examination.

Mr. LARKIN. What you are saying is that the whole deposition must go in?

Mr. ELSTON. Yes.

Mr. LARKIN. I would agree with that, certainly.

Mr. SMART. I think that is the intent of it, that any part of the deposition, be it direct or cross-examination, if the deposition is offered by the defendant in his own behalf, would certainly be admissible.

Mr. LARKIN. It is further drawn to my attention that under the Army manual for courts martial now the principle which you have just enunciated is spelled out.

If I may read it, from section 131 of the manual for courts martial, it says:

Testimony taken by deposition may be introduced for the defense in capital cases if otherwise admissible. If the defense calls for such testimony in a capital case the deponent may be cross-examined by written interrogatories or otherwise as fully as a witness in a case not capital.

The same idea was intended, certainly.

Mr. ELSTON. I did not know it was in there. That is exactly what ought to be there.

Mr. LARKIN. That is right. I think with that legislative history and the amendment that, in addition, it is subject to these conditions of (d), we have nailed it down.

Mr. BROOKS. How would you phrase your amendment there? Would you tie it onto (e)?

Mr. SMART. Page 42 at line 3, beginning with subsection (e), insert the words "Subject to the requirements of subsection (d)." That is immediately before the word "testimony."

Do the same thing in line 5 at the beginning of subsection (f), and immediately preceding the word "A" insert "Subject to the requirements of subsection (d)."

Mr. BROOKS. "Subsection (d) of this article."

Mr. LARKIN. That is right.

Mr. RIVERS. The first is (e), "subject to" so and so. You start off with "subject to"?

Mr. LARKIN. That is right.

Mr. SMART. "Subject to the requirements of subsection (d) of this article."

Mr. RIVERS. And the other is "subject to" also?

Mr. SMART. The same wording in subsection (f) at the beginning of the section.

Mr. BROOKS. You have heard the amendments, gentlemen. If there is no objection to them, they will stand adopted.

May I ask you this question, Mr. Larkin: Under small 2 subsection (d) what is meant by "military necessity?"

Mr. LARKIN. I take it that covers the situation where there is a witness subject to the code, or military personnel who are on such an important military mission, or by virtue of military operations, that it is impossible in performing their duty to also be at the place of the trial. In that case it is permitted that their deposition be read at the trial.

Mr. BROOKS. Of course, that could be badly abused if they wanted to.

Mr. LARKIN. I suppose it is a question of the good faith in operating or administering it.

Mr. BROOKS. Is there any further discussion? Are you ready to approve it?

All in favor of the article say "aye."

(General response of "aye.")

Mr. BROOKS. Opposed "no."

(No response.)

Mr. BROOKS. Article 49 is approved.

Mr. Smart, we will take up article 50.

Mr. SMART [reading]:

ART. 50. Admissibility of records of courts of inquiry.

(a) In any case not capital and not extending to the dismissal of an officer, the sworn testimony, contained in the duly authenticated record of proceeding of a court of inquiry, of a person whose oral testimony cannot be obtained, may, if otherwise admissible, be read in evidence by any party before a court martial or military commission if the accused was a party and was accorded the rights of an accused when before the court of inquiry or if the accused consents to the introduction of such evidence.

(b) Such testimony may be read in evidence only by the defense in capital cases or cases extending to the dismissal of an officer.

(c) Such testimony may also be read in evidence before a court of inquiry or a military board.

References: A. W. 27; A. G. N. article 60; proposed A. G. N. article 44.

Commentary: This article is derived from A. W. 27 and is similar to present Navy practice. As to parties before courts of inquiry, see article 135 (c).

The effect of the use of the words "not capital and not extending to the dismissal of an officer" is that if the prosecution uses the record of a court of inquiry to prove part of the allegations in one specification, neither death nor dismissal may be adjudged as a result of a conviction under that specification. The introduction of the record of a court of inquiry by the defense shall not affect the punishment which may be adjudged.

Mr. BROOKS. Why do you put in there the question of the dismissal of an officer?

Mr. LARKIN. Well, now, this is similar to depositions except that it refers to the record that is taken in a court of inquiry. So far as those records are concerned, traditionally in the case of dismissal of

an officer before a court martial, as well as a capital case, that provision has obtained. To say that it is tradition is no answer, and I do not know why, from a tradition standpoint.

However, I assume it is because the courts of inquiry are used very frequently, particularly in the Navy, and this does stem, to some extent, from present Navy law.

As you know, in a large number of circumstances in which property is damaged or the conduct of an officer comes under inquiry, a court of inquiry is held. It is a fact-finding body which makes a finding but cannot return a verdict of guilty, nor impose punishment. However, since it is used very frequently in connection with officers, I assume for the protection of officers who are thereafter tried, based on what is uncovered in the court of inquiry, the added protection has been in the law. It has been in for a long time.

Now there may be other and better explanations.

Do you know the origin, Captain Woods, other than that?

Captain WOODS. No. I think you have explained it very well. The thought was that the court of inquiry is a court of very considerable dignity and powers, which has subpena powers and sits under oath. There is every reason to believe that the testimony elicited by that court, both sides being represented, is sound testimony. Still I would think that there may have been some limitation on the ability to bring out information from the particular witnesses, or the scope of the examination.

Mr. BROOKS. I raise the question as to why you left out enlisted men.

Captain WOODS. I think Mr. Larkin has touched that point very well, Mr. Chairman. The enlisted-man situation is usually investigated by a board of investigation or an investigating officer under our past practice, not under oath, and the information elicited is not so sound.

Mr. LARKIN. This applies to enlisted men, of course, in capital cases, as do depositions.

Colonel DINSMORE. Mr. Chairman, I think the effect ought to be emphasized, that these courts of inquiry concern themselves almost exclusively, if not entirely exclusively, with officers' cases.

Mr. RIVERS. For negligence and the like?

Colonel DINSMORE. Yes, sir.

Mr. BROOKS. Such testimony would not be available in cases where enlisted men were accused?

Colonel DINSMORE. You would not have a court of inquiry in that case, Mr. Chairman.

Mr. RIVERS. Does a court of inquiry, for instance, follow such a case as I notice by the newspaper, where a destroyer ran over a sub here in the Pacific right off of California a few days ago? Would that follow, unless there would be evidence of negligence or gross negligence?

Captain WOODS. It will amost always have a board of investigation, at least. If there is death involved, and a serious question as to the responsibility, there will be a court of inquiry.

Mr. RIVERS. I see.

Mr. BROOKS. Is there any further discussion?

Mr. ELSTON. I have noticed a couple of things about which we might raise some question.

For example, a court of inquiry does not necessarily have to extend to the same matter that resulted in the charges against the accused. It would mean that any court of inquiry could be concerned where he was present. They could be making an inquiry into a general subject, and later on the accused might be charged with some particular offense that he was not charged with at the time of the inquiry.

Under this section it could be introduced against him if the witness was not otherwise available, and even though he took no part in the inquiry other than just being present.

Mr. LARKIN. If the language is susceptible to that it is unfortunate, because we specifically did not intend that, Mr. Elston. We intended that the courts of inquiry records and there admissibility in a trial should only apply where the same issue is presented on the trial as the man was confronted with in the court of inquiry, and only under the circumstances where he was a party to the court of inquiry and had counsel and was accorded the rights of an accused before the court of inquiry.

It was our notion that you should read that in such a way that it is limited to the same issue.

Mr. ELSTON. I think that ought to be spelled out in the article, "where the same issue was involved."

Mr. LARKIN. Yes.

Mr. ELSTON. Should there not also be a notation that the record of the court of inquiry is still subject to the rules of evidence; and should we not begin that sentence with words like this, "So far as otherwise admissible under the rules of evidence in any case not capital," and so forth?

Mr. LARKIN. In the fifth line of subsection (a), line 16, we say "may if otherwise acceptable," which is just that idea.

Mr. BROOKS. "Otherwise admissible?"

Mr. LARKIN. "Otherwise admissible."

Mr. ELSTON. Let us say "under the rules of evidence."

Mr. LARKIN. All right. That is certainly what we meant.

Mr. BROOKS. Would that not cover both objections, if you would say "otherwise admissible" rather than how you worded it?

Mr. ELSTON. That covers it. That is the same language.

Mr. BROOKS. It will cover both cases where the issues are not identical.

Mr. LARKIN. I think that is perhaps so.

Mr. ELSTON. I think you ought to be clear and say, "where the same issue is involved."

Mr. LARKIN. As a matter of practice, that is the controlling feature of admissibility at this time. Certainly, for that reason, we would have no objection to spelling it out and making it completely clear.

Mr. BROOKS. Yes.

Mr. LARKIN. Naval Courts and Boards I think in a little different language says just the same thing as that, and I might read from section 734, subsection (c):

> If the rights of a defendant be not accorded when they should be, the court of inquiry or investigation, so far as concerns the person denied his rights, will be held of no evidential effect.

Then in italics it says:

> This is one of the most important rules to be observed.

That just further confirms the same idea you have, to leave it to Mr. Smart and myself to try to work out this language.

Mr. ELSTON. Right after the word "admissible" you could simply put "if otherwise admissible and involving the same issue."

In line 16 it says, "if otherwise admissible." I suggest you simply add the words, "under the rules of evidence."

Mr. LARKIN. And involving the same issue.

Mr. ELSTON. That may go somewhere else.

Mr. LARKIN. That is my thought, yes, that that may go in somewhere else.

Mr. ELSTON. For instance, in line 18, "if the accused was a party and if the same issue was involved," or something of that sort.

Mr. LARKIN. That is right.

Mr. ELSTON. I suggest that we leave it to Mr. Smart and Mr. Larkin to take it up together and work it out.

Mr. BROOKS. Are there any further suggestions in regard to article 50?

If not, we will approve it as written, subject to the reservation that we just made.

Article 51.

Mr. SMART (reading):

ART. 51. Voting and rulings.

(a) Voting by members of a general or special court martial upon questions of challenge, on the findings, and on the sentence shall be by secret written ballot. The junior member of the court shall in each case count the votes, which count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

(b) The law officer of a general court martial and the president of a special court martial shall rule upon interlocutory questions, other than challenge, arising during the proceedings. Any such ruling made by the law officer of a general court martial upon any interlocutory question other than a motion for a finding of not guilty, or the question of accused's sanity, shall be final and shall constitute the ruling of the court; but the law officer may change any such ruling at any time during the trial. Unless such ruling be final, if any member objects thereto, the court shall be cleared and closed and the question decided by a vote as provided in article 52, viva voce, beginning with the junior in rank.

(c) Before a vote is taken on the findings, the law officer of a general court martial and the president of a special court martial shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge the court—

(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in favor of the accused and he shall be acquitted.

(3) that if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no such doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the Government.

References: A. W. 31; proposed A. G. N., article 24.

Commentary: This article is derived from A. W. 31. The provision of A. W. 31 allowing the law officer to consult with the court before making a ruling is deleted. In subdivision (c) the law officer and the president of a special court martial are required to instruct the court as to the elements of the offense in addition to those matters specified in A. W. 31.

The proposed A. G. N. does not require a secret written ballot, but does require the law officer to instruct the court as to the elements of the offense.

Mr. ELSTON. Do you not think that wording should be, "may be in a lower degree," instead of "must"? That is mandatory, and under that you would have to find him guilty of some offense.

Mr. LARKIN. Of which there is no reasonable doubt.

Mr. SMART. If there is a reasonable doubt as to the greater offense, but there is no doubt as to the lesser included offense.

Mr. LARKIN. If there is a reasonable doubt at all he must be acquitted of the offense. If there is a reasonable doubt as to the degree of guilt, then the finding must be in a lower degree, of which there is no reasonable doubt.

Mr. ELSTON. Yes; but suppose that all of the elements of the included offense are not established?

Mr. LARKIN. Then there is a reasonable doubt, or at least, there is not even a prima facie case.

Mr. BROOKS. The only thing I think in reference to that, along the line of Mr. Elston's idea is whether or not we should add after the word "doubt," which is next to the last word in the paragraph, the two words "of guilt," so to that it would read, "the finding must be in a lower degree as to which there is no such doubt of guilt."

Mr. ELSTON. Or, "if the elements of such lower degree offense have been established beyond a reasonable degree of doubt."

Mr. LARKIN. You can switch it either way to meet that.

Mr. DEGRAFFENRIED. "Shall have been established by the evidence beyond a reasonable doubt."

Mr. LARKIN. Actually this is language we took intact from Public Law 759. (c) (1), (2), (3), and (4) were all added to the law by Congress last year, and we have taken it as such.

Mr. ELSTON. I will admit that it is rather technical, but the whole subject is technical.

Mr. LARKIN. That is right.

Mr. ELSTON. And if you think we are technical, wait until we get out on the floor.

Mr. LARKIN. I was just pointing out what a good draftsman you are, Mr. Elston.

Mr. BROOKS. I cannot imagine a court misconstruing subsection (3).

Mr. ELSTON. No; I do not believe so, but it just occurred to me that when you commence to tell somebody that they must find someone guilty that may influence them.

Mr. LARKIN. Yes, unless you understand the meaning. At first blush it may seem to be the wrong way to do it. The idea taken as a whole certainly is the way it should be.

Mr. DEGRAFFENRIED. It seems to me that if they really believe, from the evidence, beyond a reasonable doubt that he is guilty it is their duty to find him guilty.

Mr. BROOKS. For the purpose of the record, Mr. Smart, why is the vote beginning with the junior member of the court?

Mr. SMART. Well, they have to have a so-called leg-boy and it is always the junior member who does that. All that means is that he gathers up the votes and looks at them, and then the president looks at them, and the court confirms the count of the junior member.

Mr. ELSTON. Is there not another reason for that, if the senior officer votes first there is always the possibility the juniors may follow suit?

Mr. SMART. Well, they vote in secret ballot.

Mr. LARKIN. It says "shall be by secret ballot."

Mr. RIVERS. It does not say that here.

Mr. SMART. Yes, you will find it in article 51 (a).

Mr. BROOKS. I suppose that it is just historical there. In 51 (a) you say the junior member shall in each case count the votes.

Mr. LARKIN. He does not vote first or make known his vote, if voting by secret ballot.

Mr. RIVERS. (b) deals with interlocutary questions?

Mr. LARKIN. That is right, it deals with interlocutory questions.

Mr. BROOKS. What about (b)?

Mr. RIVERS. He wants to get started off so he will not influence anybody but himself.

Mr. LARKIN. Do you have a question on (b), Mr. Chairman?

Mr. BROOKS. Yes, in reference to the junior member voting first. I would like to have the record show the reason for that.

Mr. LARKIN. There, of course, the vote is on the two or three legal questions on which the court can vote at all. It is limited to that.

On the question of the junior member voting first, it is so he can express himself independently without having heard what the votes of his superiors are, and, as Mr. Elston suggests, perhaps be reluctant to express a different or an independent view.

Mr. RIVERS. Of course, the record will indicate what happened later on. That is where nothing is final.

Mr. LARKIN. That is on the several questions on which they have the opportunity to overrule the law officer.

Mr. RIVERS. But it is not final.

Mr. LARKIN. They can make it final.

Mr. RIVERS. That is right.

Mr. BROOKS. Is there any further discussion on this article? If not, is there any objection to it?

Then it stands approved as read.

Article 52.

Mr. SMART (reading):

ART. 52. Number of votes required.

(a) (1) No person shall be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court martial present at the time the vote is taken.

(2) No person shall be convicted of any other offense, except by the concurrence of two-thirds of the members present at the time the vote is taken.

(b) (1) No person shall be sentenced to suffer death, except by the concurrence of all the members of the court martial present at the time the vote is taken and for an offense in this Code made expressly punishable by death.

(2) No person shall be sentenced to life imprisonment or to confinement in excess of ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.

(3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.

(c) All other questions to be decided by the members of a general or special court martial shall be determined by a majority vote. A tie vote on a challenge shall disqualify the member challenged. A tie vote on a motion for a finding of not guilty or on a question of the accused's sanity shall be a determination against the accused. A tie vote on any other question shall be a determination in favor of the accused.

References: A. W. 43; A. G. N. article 50, proposed A. G. N. article 28.

Commentary: This article is derived from A. W. 43. Proposed AGN, article 28 would require only a majority vote to convict of any offense, but is the same as A. W. 43 as to the number of votes required for sentences.

Paragraph (3) of subdivision (b) clarifies A. W. 43 as to the number of votes required for a sentence which does not extend to death or imprisonment in excess of 10 years.

Subdivision (c) clarifies the method for determination of issues to be decided by a majority vote when the vote is tied. It is felt that a tie vote on a challenge should disqualify the person challenged regardless of whether the challenge is by the prosecution or by the defense. It is also felt that a motion for a finding of not guilty and the question of the accused's sanity should not be decided by a tie vote as these are considered again in the vote on the findings. All other tie votes are determined in favor of the accused.

Mr. BROOKS. Referring to that last item there about the question of insanity being determined by a tie vote, that was a matter covered in the general hearings, and I think two witnesses brought that out.

Mr. SMART. Objection was raised, Mr. Chairman, as to why we should not resolve the tie vote in these two cases in favor of the accused, the same as we have in all other instances here.

Mr. BROOKS. What is your answer?

Mr. SMART. Well, so far as I am concerned, I realize what the argument is for leaving it as it is, resolving the tie vote on the question of the sanity of the accused against the accused.

It is argued that even though they hold that the accused is mentally responsible for his acts that they subsequently have another opportunity to pass upon sanity when they vote upon the findings as to guilt or innocence.

With that argument I cannot agree.

I think that the question of the accused's sanity is a single issue which must rise or fall upon its own merits and at the time it is raised I think that all of the possible testimony which is pertinent and relevant to that particular issue should be placed before the court, and then and there they should make their ruling.

I cannot conceive of anything additional developing in the trial which would touch on the issue that should not have been produced to the court at the time the issue itself was raised, so I cannot agree that a tie vote on the sanity of the accused should be resolved against the accused for such a reason.

Mr. DEGRAFFENRIED. Let me ask you this: Ordinarily a man is presumed to be sane until proven insane, and in many jurisdictions the burden of proof is upon him in a criminal case to establish his insanity beyond a reasonable doubt by the evidence, to reasonably satisfy the jury that he is insane.

In other words, he is presumed to be sane, and on that particular issue in many jurisdictions the burden is on him to establish by the preponderance of the evidence to the reasonable satisfaction of the jury that he is insane.

Mr. SMART. I agree with you.

Mr. DEGRAFFENRIED. My thought is that it is from that presumption, from the burden that he has there of showing that he is insane, that that is the reason why that provision was put in there.

Of course, in many jurisdictions the burden is on him to proceed, and if he raises a reasonable doubt as to his sanity, then the jury finds him insane, but in other jurisdictions they make him prove his insanity to the reasonable satisfaction of the jury.

Mr. BROOKS. Do you want to say something more, Colonel?

Colonel DINSMORE. I think Mr. deGraffenried has stated the reason for this very clearly.

The burden is on him who asserts a proposition and if there is a tie vote he has not sustained it, and that is true in the Supreme Court of the United States.

These people go up there and ask for a review and if there is a tie vote it is refused.

Of course, the point has been raised throughout these hearings that this code has to go much further than any civil law has to go, any Federal or State law, so far as clothing the accused with many safeguards is concerned.

Maybe we are leaning over backward and going too far, but it was my theory in this particular instance that if you are going to clothe the defendant with these extra safeguards that you do not have in any civil court it might be well to go this far here.

Mr. LARKIN. The questions of a motion for a finding of not guilty or a motion on the question of insanity are extremely important questions. They are usually questions that contain mixed questions of fact and of law.

A person, as a matter of fact, may be established to be of sound or unsound mind, or that determination may be one of law. For that reason the law officer has not in present practice nor in this code been given the final say in ruling on either of those questions.

He does rule, but it is subject to veto by the court because of the combination of facts and law. In the event the court votes on the question it does so only if they do not agree with the law officer who makes the first ruling.

In the event that they are split the question arises, in whose favor should it be resolved? As Mr. deGraffenried pointed out, normally a split works against the proponent of a proposition, but I do not think this can be said even in that instance to be a disadvantage to the accused because either of these motions will be made during the course of the trial, the insanity one at the beginning of a trial or during the course of a trial, and the motion for a finding of not guilty at the end of the Government's case or at the end of the whole case. If the court is split it may be further enlightened by a continuation of the trial because there is more evidence to be put in, and that is true even in a case where insanity is the problem because if the accused were to testify the court itself may be enlightened on the question of the sanity or the insanity of the accused by the way he comports himself on the witness stand.

Actually the court is not bound by anybody in determining sanity or insanity. Expert medical opinion may be given to it. They may have the results of a medical survey, and so forth, but in the last analysis it is the court's determination. In the event that the split persists in the court on the question, the accused is protected, since they cannot convict him of any offense at all unless there is a two-thirds concurrence.

If after hearing the rest of the evidence in the case they are still split, why, no conviction is possible, so the accused is protected anyhow.

Mr. ELSTON. Do you not set up a different rule where insanity is set up as the defense than you do for an alibi or self-defense or something else? because in section 3 you say:

all other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.

Now, if the accused sets up the defense of insanity, we will say, and half the members of the court feel that he is insane, they have to resolve that against him, do they not?

Mr. LARKIN. Well, that is for the purpose of that motion, is it not?

Mr. ELSTON. Well, it does not say motion. There is a tie vote on the motion for a finding of not guilty, but on a question of the accused's sanity, when you raise the question of a person's sanity then does not the court determine whether or not he was insane at the time the act was committed, and if so he is not guilty on the ground of insanity just the same as if it were self-defense, an alibi, or something else?

Mr. LARKIN. That is right.

Mr. ELSTON. You are giving the accused person less protection where he sets up the defense of insanity than for some other type of defense.

I can understand the motion for a finding of not guilty, because that is a motion made before the court deliberates, which is generally made at the close of the prosecution's evidence, or at the close of all of the evidence, but it is before the court begins to deliberate on the facts.

However, the question of insanity goes right into the jury room with them and has to be considered along with all of the other evidence, and they have to be satisfied that the defendant is guilty beyond a reasonable doubt.

Of course, as Mr. deGraffenried said, if the defendant sets up insanity as a defense, he only has to establish it by a preponderance of the evidence.

Mr. DEGRAFFENRIED. In some jurisdictions he has to prove to the reasonable satisfaction of the court by a preponderance of the evidence. In other words, he has just to raise a reasonable doubt.

Mr. ELSTON. In our State it is by a preponderance of the evidence, but the court has to consider insanity along with every other fact in the case, and it may be that his sole defense is insanity. That is his sole defense, and if half of the court say he is not insane, then they have to find him guilty, do they not?

Mr. LARKIN. Well, it requires at least a two-thirds vote to find him guilty.

Mr. ELSTON. In every other case by a two-thirds vote, but in insanity 50 percent.

Mr. LARKIN. How can they find him guilty of anything if half of then think he is insane?

Mr. ELSTON. You say it will be resolved against him.

Mr. LARKIN. For motion purposes.

Mr. ELSTON. Do you make any motion with respect to his insanity?

Mr. LARKIN. I think so. Usually it is an interlocutory question.

Mr. BROOKS. I want to raise this question. It seems to me that you are going to have to decide whether or not you mean insanity of the accused at the time of the trial, or the insanity of the accused

at the time of the commission of the act, because if it is a question of the sanity of the accused at the time of the trial it will have to be raised on a preliminary motion.

Mr. LARKIN. I think it is both, Mr. Chairman.

Mr. BROOKS. If it is insanity at the time of the commission of the act it can be raised either way.

Mr. LARKIN. That is right.

Mr. BROOKS. But you cannot find him guilty if he was insane at the time of the act, and sane at the time of the trial.

Mr. LARKIN. That is right.

Mr. BROOKS. Suppose you do not present the question of the insanity of the accused at the time of the commission of the act as a preliminary or interlocutory matter, but reserve that for the final verdict, in that instance the court will either find him on the question of guilt, guilty or not guilty; on the question of sanity, sane or insane.

Mr. LARKIN. Well, if he does not bring it up in some way the presumption rests against his insanity in the first place.

In other words, there is a presumption of sanity, and if he does not bring it up in any way, unless there is some indisputable evidence there that would indicate that he was insane, or is now, probably the court would not have it before it at all.

Mr. BROOKS. Suppose he does not bring it up until the final argument of the case.

Mr. DEGRAFFENRIED. If it is a tie vote it works against the accused.

Mr. LARKIN. That is, as far as the motion is concerned.

Mr. ELSTON. Let us get it clear about what motion is made with regard to insanity.

Mr. LARKIN. A motion is made to dismiss which is based on the insanity of the defendant either at the time of the alleged commission of the act or at the time of trial.

Mr. ELSTON. Then you better say, "a tie vote on a motion for a finding of not guilty, or on a motion with respect to the accused's sanity."

The way it reads now, all questions about sanity shall be determined against the accused if there is a tie vote.

Mr. LARKIN. We could repeat the word "motion" again in that same sentence after "or," "on a motion relating to the question of the accused's sanity."

Mr. ELSTON. Even then it should be made clear that it is before the submission of the case.

Mr. LARKIN. During the course of the trial.

Mr. ELSTON. Before final submission of the case.

Mr. LARKIN. That is right.

Mr. BROOKS. The thing that bothers me and that bothers Mr. Elston is if you do not raise the question of sanity until the whole thing goes to the court, are you going to apply the majority rule, or are you going to apply, as in a capital case, the rule that you must have a unanimous verdict. Do you see the point?

Mr. LARKIN. Yes, I do. It is our intention that, as spelled out in (a) and (b) and its subdivisions that there might not be either a verdict or sentence except on the minimum percentages, on a verdict the minimum percentage being two-thirds, and the minimum percentage on a sentence being two-thirds.

On the other interlocutory questions, however, where the court is forced during the course of the trial or at the beginning of the trial to determine a motion made either for a finding of not guilty or on the question of insanity, as to those motions a tie vote shall be determined against the accused for that purpose.

Then when the deliberate they cannot convict him unless there is a two-third concurrence.

Mr. DEGRAFFENRIED. Mr. Larkin, there is this thought that you have in mind there in your construction of section (c) of this article, that after the Government concludes its case against the accused during the course of a trail the defendant has a right in most civil jurisdictions to make a motion to exclude the evidence or for a directed verdict of not guilty on the grounds that as a matter of law the prosecution has not made out a case against the defendant.

Mr. LARKIN. That is right.

Mr. DEGRAFFENRIED. And that there is not sufficient evidence to make the question of the defendant's guilt vel non a question of fact for the court to determine.

In other words, that the prosecution has failed to make out a prima facie case against the defendant as a matter of law.

Further at this stage of the proceedings, or any other stage, that the accused has a right to file a motion that he be found not guilty by reason of insanity based on the evidence and that if there is a tie vote the ruling on the motion should be adverse to the accused; but that after the ruling the trial shall proceed and after the conclusion of the trial and the deliberations of the court, then either two-thirds or three-fourths of the court, depending on the nature of the charges, would have to believe the defendant guilty from the evidence beyond a reasonable doubt and be reasonably satisfied by a preponderance of the evidence that he is sane before he could be convicted.

Mr. LARKIN. That is a very clear statement and very much better than I have given.

Mr. ELSTON. You have not said that in this connection so that it is clear.

Mr. LARKIN. That may be. That was the intention that the tie vote is against the accused insofar as determining the motion is concerned.

Mr. ELSTON. If it is on the motion that is entirely different.

Mr. BROOKS. Then why not put in something about an interlocutory tie vote.

Mr. LARKIN. Mr. Smart and I can submit language to make that clear.

Mr. RIVERS. In subparagraph (a) (1) it states:

> No person shall be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all members of the court martial present at the time the vote is taken.

That is a general court?

Mr. LARKIN. That is right.

Mr. RIVERS. What constitutes a quorum?

Mr. LARKIN. It must be not less than five members of the court.

Mr. RIVERS. Not less than five members of the court?

Mr. LARKIN. Yes.

Mr. RIVERS. What is the maximum?

Mr. LARKIN. There is no maximum.

Mr. SMART. They may have started out with, we will say, seven members, and some catastrophe may have come along and two of them were killed, but you would still have five remaining members, and then you would still have a legal court.

Mr. RIVERS. Well, say two of them are absent without any explanation.

Mr. SMART. They had better have a good explanation. They are subject to court martial if they are absent without an explanation.

Mr. RIVERS. I ask that because I can conceive of a case where one might want to vote to acquit the defendant.

Mr. LARKIN. We have already considered article 29, but there we have said that no person may be absent except for physical illness, nor may they be removed by the convening authority except for good cause, illness or whatever else it may be, and in another section in the same way we have said that if the court is reduced below this minimum number of five members then, of course, it cannot carry on unless new members are appointed to bring the number up to five.

Mr. RIVERS. I am talking about a situation where they still maintain that five, but less than the maximum number.

Mr. LARKIN. Less than the number they started with?

Mr. RIVERS. Yes, less than the number they started with.

You see, a man can be sentenced to the death penalty by a minority of the court, in substance.

Mr. LARKIN. The provision in article 29 that I referred to is found in subdivision (a) which says:

> No member of a general or special court martial shall be absent or excused after the accused has been arraigned except for physical disability or as a result of a challenge or by order of the convening authority for good cause.

Mr. RIVERS. But all of those things could be questioned. Would there be an appealable exception to that?

Mr. LARKIN. They might show it was not good cause. The facts would be in the record.

Mr. RIVERS. Would that be cause for an appeal if that were established?

Mr. LARKIN. If it could be demonstrated that it materially prejudiced or substantially prejudiced the rights of the accused I should say so.

Mr. RIVERS. I would like to have that in the record. The defense counsel could contend that and be overruled and then you would have the minimum required by the code and still a man would go to his death under sentence by a minority vote of the court.

Mr. BROOKS. Is there any further discussion?

Mr. GAVIN. Are you satisfied with that or are you going to write in any specific number of members that should be present?

Mr. RIVERS. If the explanation was not satisfactory, if counsel on the other side does not think the excuse sufficient, I would like to have the record indicate that there would be ground for an appeal.

Mr. LARKIN. As you recall, we have a provision that the defense counsel may set out in a brief any matters which he thinks are sufficient to affect the accused.

Mr. GAVIN. Has it not been the rule in military trials, and courts martial in the Navy that they can be convicted by a three-fourths vote?

Mr. LARKIN. The percentage, Mr. Gavin, differs between the Army and the Navy, and this represents the percentages of the Army

at the present time which are higher percentages than they have heretofore been in the Navy. The Navy agrees that this is appropriate. They are willing to apply it to their service as well. So, on an over-all three-service basis, this is a higher percentage than they used to have in the Navy, but it is exactly the way it has been in the Army.

Mr. GAVIN. In the Federal courts where a man is charged with a crime you have to have 12 jurors.

Mr. LARKIN. Yes, in many States you do; there is no question about that, Mr. Gavin.

Mr. GAVIN. May I ask Colonel Dinsmore if he knows of any important general court-martial case where the court consisted of less than five members?

Colonel DINSMORE. It could not consist of less than five, Mr. Gavin, but I will say it is very unusual for a court to be reduced below the original number that the court started with.

Mr. GAVIN. What I had in mind is in a Federal court it requires a unanimous verdict to find a man guilty.

Colonel DINSMORE. Of course, we have that in reference to the death sentence.

Mr. BROOKS. A great many State courts now use a percentage for minor crimes.

Mr. DEGRAFFENRIED. That is right.

Under this provision here, however, a man can be sent up for life if three-fourths of the members, believe he is guilty. That is a pretty long sentence.

Colonel DINSMORE. That is correct.

Mr. RIVERS. Why do they not put life in there under the same article with the capital offenses; what would be wrong with that?

Mr. LARKIN. I suppose you may find circumstances where the court is reluctant to impose the death penalty or where one member of the court is, but he believes that life imprisonment is sufficient punishment. He would vote for life imprisonment but he would not vote for the death penalty, and if there was no leeway provided in between he would be faced with either the death penalty for the defendant or something much less, and he might feel that it is so serious that he would be tempted to vote for death.

Mr. BROOKS. I think it is fair to call your attention to this, that in a great many jurisdictions where you bring in a verdict which would normally carry the death penalty, the court has some authority, in his, discretion, to prescribe life imprisonment instead of death.

Mr. LARKIN. That is true. I am not familiar with all the State variations in that respect. I know in New York, for instance, in the case of a felony that it is possible for the court to reduce the sentence to life.

Mr. HARDY. As long as a man gets a life sentence, and as long as he is alive he has still some hope of clemency or of bringing up the possibility of securing a pardon, but when a court gives a man a death sentence he does not have that chance.

Mr. BROOKS. Are there any further discussions or arguments on this article? If not, it stands adopted.

Article 53.

Mr. SMART (reading):

ART. 53. Court to announce action.

Every court martial shall announce its findings and sentence to the parties as soon as determined.

References: A. W. 29; proposed A. G. N. article 28.

Commentary: This article is derived from proposed A. G. N. article 28 and requires the trial counsel, the accused, and the defense counsel to be informed of the findings and sentence as soon as the sentence is determined. The findings may be announced as soon as they are determined if it is believed appropriate to do so. A. W. 29 requires an acquittal to be announced, but leaves the announcement of the sentence and findings of guilty to the discretion of the court It is felt appropriate, however, that the accused and his counsel be informed as to the outcome of the trial as soon as the results are determined.

Mr. BROOKS. Is there any comment or any discussion on that article?

Mr. GAVIN. Is that usually done?

Mr. LARKIN. Yes; it usually is, but it is not required as this requires it. There is a requirement that an acquittal be announced but not that the conviction be announced.

Mr. GAVIN. Let us hear from Colonel Dinsmore on that.

Colonel DINSMORE. It is almost universally done, Mr. Gavin, and the only exceptions are cases in which, for reasons of public policy the court feels that it is not advisable to announce the sentence.

As a striking example of that kind, take a case in some community where some soldier is being tried for an offense committed in which the civil community has a great interest, and the feeling runs high, it may be that it is advisable for good public relations and public policy not to announce the sentence in such a case because the man might be acquitted, you understand, or he might not.

Mr. RIVERS. Off the record.

(Discussion off the record.)

Captain WOODS. For the sake of the record, I would like to remark that this is not true of the Navy. The Navy does not announce the findings of the court until the first reviewing authority has completed its action. We have no objection to this provision.

Mr. BROOKS. Does the Navy tell the accused what the findings are immediately?

Captain WOODS. No, sir; we wait until the first reviweing authority has acted on the case and then tell the accused what the finding is.

We have no objection to the change suggested.

Colonel DINSMORE. I would like to correct my former statement for the record. I am reminded that we are required to announce the acquittal forthwith, so my illustration would only be good in the event somebody thought the sentence was not severe enough.

Mr. BROOKS. Do I understand you, Colonel, to interpret this as meaning that the finding shall not be given immediately to the defendant?

Colonel DINSMORE. No, sir; this requires that it shall be. I understood Mr. Gavin to be asking about the present practice which now prevails.

Mr. BROOKS. Is there any objection to the article as read? If not it will be adopted.

Article 54.

Mr. SMART (reading):

ART. 54. Record of trial.

(a) Each general court martial shall keep a separate record of the proceedings of the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the law officer. In case the record cannot be authenticated by either the president or the law officer, by reason of the death, disability, or absence of such officer, it shall be signed by a member in lieu of him. If both the president and the law officer are unavailable for such reasons, the record shall be authenticated by two members.

(b) Each special and summary court martial shall keep a separate record of the proceedings in each case, which record shall contain such matter and be authenticated in such manner as may be required by regulations which the President may prescribe.

(c) A copy of the record of the proceedings of each general and special court martial shall be given to the accused as soon as authenticated.

References: A. W. 33, 34, 111; A. G. N. articles 34, 64; proposed A. G. N., articles 16 (e), 21, 29.

Commentary: Subdivision (a) contains provision similar to those of proposed A. G. N. article 29, but differs from A. W. 33 in that the law officer and the president authenticate the record of a general court martial. A. W. 33 requires the trial counsel and president to authenticate the record. It is intended that records of general courts martial shall contain a verbatim transcript of the proceedings.

Subdivision (b) is derived from A. W. 34. This article is subject to this provision of article 19 which requires a complete record to be kept in cases where a bad-conduct discharge is adjudged.

Subdivision (c) is new. Under A. W. 111 a copy of a general court-martial record is given to the accused if he demands it. Under Navy practice, the accused is automatically given a copy of the record of a general court martial. This article goes further in that a copy of the record of a general or special court martial is required to be given to the accused. It is felt to be appropriate that the accused should have a copy of such records for his personal use. If such records contain classified matter, means of safekeeping should be provided.

Mr. RIVERS. We discussed that the other day, ad infinitum, ad extremum, and several other ways. This just gives the summary of it.

Mr. SMART. In checking back over these cases we find that there are about 37,000 special court-martial cases a year in the Army, about 24,000 a year in the Navy, and 8,500 a year in the Air Force. I cannot vouch for the exactness of those figures, but I think that they are substantially correct.

We find that in the present table of maximum punishments, which prescribes the punishment for each of those offenses, about 90 percent of the offenses tried by summary courts in the Navy have the power to adjudge bad-conduct discharges, but as a matter of fact only about 15 percent of that group got a bad-conduct discharge.

That means that we are furnishing reporters in 85 percent of the cases where bad-conduct discharges are not given, even though they are authorized by the table of maximum punishments.

That would mean, under the current situation, that the Army would be furnishing a reporter in about 24,000 cases where a bad-conduct discharge was not adjudged as part of the sentence.

Mr. RIVERS. With the enlistment of reserves and the establishment of women's corps in the respective services, could you not institute a program to teach them to take down testimony? Of course, every stenographer is not a reporter, but still all reporters are stenographers.

That would probably be an insuperable task.

Colonel DINSMORE. Of course, that could be done to a certain extent; but, Mr. Rivers, as Mr. Smart's figures indicate—and I do not want to reopen something and take up your time on the thing unnecessarily—it is a monumental undertaking. There is a big personnel problem involved there with 24,000 cases a year to be reported; and, whether you do it by civilian court reporters and pay them or whether you do it by having somebody in the service, they have to be pretty high ranking, as they are well paid.

Mr. BROOKS. And they have to be awfully good, too.

Colonel DINSMORE. Yes; and it is going to be a serious problem.

Then there was this other pertinent thought that occurred to me since the matter was discussed the other day. You know every year in compiling the budget the President very properly says how much money can be used for national-defense purposes and how much can be used for other purposes, and then that will be allotted among the Army, the Navy, and the Air Force, and that will be the over-all ceiling that you cannot exceed.

Now, of course, I do not know, but I doubt if the budget is going to take into account the fact that this additional burden has been imposed on us. We are going to have to do it in some way.

Mr. BROOKS. What is it going to cost you, Colonel?

Colonel DINSMORE. I do not know what court reporting costs, Mr. Chairman.

(Discussion off the record.)

Mr. RIVERS. Why would it be impossible to start training them to be reporters? Say we set up an independent JAG group for the service, why would it be impossible to train these people to be capable of taking down testimony?

Colonel DINSMORE. It would not be impossible, Mr. Rivers. I am just pointing out the fact that we would have to have a great many of them and it is going to cost a great deal of money whichever way you do it.

Mr. RIVERS. It would be awfully good publicity if the armed services could do that, because the Members of Congress are very frequently told by their constituents or by one of their colleagues about some case involving a court martial where there was a miscarriage of justice. What we want to do is avoid situations of that kind. The best publicity that we can get is to show how great the cooperation is and the justice which attends all of these trials, and in that connection I am not unmindful of what the budget may do. If we could start now while time is not of the essence and we do not have that pressure on us all of the time, it might be a good thing to do so.

Colonel DINSMORE. We have already decided on having the reporting done.

Mr. BROOKS. If you are going to take these proceedings down, you should do a good job of it. I have seen some records of proceedings where I thought it would have been far better not to have attempted

to take them down than to do it in the manner in which they were taken down. So that involves this thought: First, you have got to have a person who is really an expert, and you cannot do it for small amounts; and, secondly, if you put it over into the women's branches you are going to have to disperse Waacs, Waves, and Spars all over the earth where there are trials to be conducted, but you are not going to be able to have them available when you need them; is not that true?

Colonel DINSMORE. Yes, sir.

Mr. HARDY. This thing will possibly cost a good many millions of dollars, will it not?

Colonel DINSMORE. Yes, sir.

Mr. BROOKS. I would like to have the committee go back and reappraise our requirement in reference to bad-conduct discharge cases in that connection.

Mr. RIVERS. We can amend the Selective Service Act and draft reporters.

Colonel DINSMORE. May I make one further observation on that subject?

Mr. BROOKS. Go right ahead, Colonel.

Colonel DINSMORE. The language of the present law, the Elston bill, and the language of this code as drafted is that in these bad-conduct cases the proceedings shall be transcribed.

Now, the other day the amendment that the committee adopted read, "unless a reporter is present at the trial." There is a difference. The proceedings can be transcribed without a reporter being present. They can be transcribed in handwriting by an officer, as was done for many, many years.

Mr. BROOKS. That is just what I am complaining about, however. When that officer transcribes the proceedings, it is not a true reflection, very often, of the trial.

Mr. GAVIN. You mean for accuracy and correctness?

Mr. BROOKS. Yes; and for use of words. The officer very often to rush the thing along may change the verbiage to shorten it so that it does not reflect the proceedings.

Mr. RIVERS. What about the use of this recording equipment; would it be beyond the realm of possibility to use that?

Mr. SMART. What variety do you refer to, Mr. Rivers?

Mr. RIVERS. Well, the very best kind.

Mr. GAVIN. Do you find the difficulty in finding personnel to record these cases, or do you find the difficulty in finding personnel to review the cases after they have been determined?

Colonel DINSMORE. It is a serious problem.

Mr. GAVIN. How long do you take before you get to the review of a bad-conduct discharge case?

Colonel DINSMORE. How long do we take?

Mr. GAVIN. Yes.

Colonel DINSMORE. It does not take very long. The case is tried: it is acted on on appeal; and it comes up here. I do not know whether Major Solf has any further information to give you on that, but the review work is practically current at the present time.

Mr. BROOKS. Off the record.

(Discussion off the record.)

Mr. BROOKS. If there is no further discussion on this article, we will adopt it as read and proceed to article 55.

Mr. SMART (reading):

ART. 55. Cruel and unusual punishments prohibited.

Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, shall not be adjudged by any court martial or inflicted upon any person subject to this code. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

References: A. W. 41; proposed A. G. N., article 31.

Commentary: This article incorporates present Army and Navy provisions.

Mr. BROOKS. Is there any comment or discussion of this article? This is based on the forty-first article of war, is it not?

Mr. LARKIN. That is right.

Mr. SMART. That just takes us out of the dark ages.

Mr. BROOKS. If there is no objection, and I assume there is not, we will approve article 55 and proceed to article 56.

Mr. SMART [reading:]

ART. 56. Maximum limits.

The punishment which a court martial may direct for an offense shall not exceed such limits as the President may prescribe for that offense.

References: A. W. 45; proposed A. G. N., article 33 (b).

Commentary: This article authorizes the President to establish maximum limits of punishment for an offense, except one for which a mandatory punishment has been prescribed.

That refers, Mr. Chairman, to the table of maximum punishments which is already included in the Manual of Courts Martial, and the Navy has a comparable procedure in their court-martial proceedings.

Mr. BROOKS. What about putting at the end, "exceeds the limits prescribed by this code?"

Mr. RIVERS. Certainly the President is not going to prescribe anything different than the statutory law provides. He could not if he desired to.

Mr. SMART. That is right.

Mr. RIVERS. Is that your understanding of it, too?

Mr. LARKIN. Yes, sir.

Mr. BROOKS. Someone has questioned this article.

Mr. RIVERS. They will ask us that question on the floor about this, and we want to be prepared to answer that the President cannot fail to comply with statutory authority.

Mr. LARKIN. If he fails to comply with statutory authority, it would be an illegal sentence; it would have to be in accordance with the code.

Mr. HARDY. He can do that in those cases where we have provided discretionary power.

Mr. LARKIN. Unless it is mandatory, he could.

Under article 18, which we have covered before, we have said that a general court martial may adjudge any punishment not forbidden by this code. Those which are forbidden are branding, marking or tattooing on the body, and so forth, as contained in article 55, which has just been read.

The only other provisions as to punishment are that certain punitive articles carry the provision for a mandatory death penalty. Otherwise, the court may impose such punishment as it may direct, but in so directing it is bound by the maximum limits that are set by the President.

Mr. RIVERS. And the President's policy historically has been to cut them down rather than to try to raise them.

Mr. LARKIN. He himself sets the maximum.

Mr. RIVERS. That is, above those which the code provides.

Mr. LARKIN. Yes, beyond what the code has provided.

Mr. RIVERS. That is what I want the record to indicate.

Mr. BROOKS. This article 56 gives him that authority?

Mr. LARKIN. No, article 18 prevents that.

A court martial may adjudge any punishment not forbidden by the code. Now, take a death case. In one or two instances it is mandatory. In several others it may be imposed or not. In all other cases it may not be imposed, even if the President says he would like to have it imposed.

Mr. RIVERS. That is right.

Mr. LARKIN. Because it has not been specified, he could not provide for it.

Mr. RIVERS. Like we observed the other day before the Elston Act went into effect, for certain offenses they automatically give the death sentence in the occupied countries, and it might be good publicity to point out that as soon as a man leaves the country the President generally takes a few years off his sentence.

Mr. BROOKS. That was the point I raised when article 18 came up. In the last sentence it says:

General courts martial shall also have jurisdiction to try any person who by the law of war is subject to trial by military tribunal and may adjudge any punishment permitted by the law of war—

and yet you get over here, and you say the power to punish—

shall not exceed such limits as the President may prescribe for that offense.

Mr. LARKIN. Well, in that case, again——

Mr. BROOKS. There is nothing that says there is a limit set by this code.

Mr. LARKIN. There are no limits set by this code, except that the death penalty can be imposed only in such articles as the code provides. Otherwise there is no limit except for cruel and unusual punishments.

Mr. GAVIN. Would you repeat that again, Mr. Larkin?

Mr. LARKIN. Yes, sir. Perhaps I can start from another tack. As we come to the punitive articles, starting with 77, you will see each one specifically says that the person found guilty can be sentenced as the court martial may direct. In a certain few a death penalty is provided on a mandatory basis, and in a certain additional number there is the death penalty or such other sentence. Except where it is spelled out that the death penalty can be imposed, it cannot be imposed. In no other case, the President to the contrary notwithstanding, can an offense draw a death penalty. Unless Congress provides it specifically in the article, no one else can provide it.

Mr. RIVERS. That is right.

Mr. LARKIN. As to that, the President and everybody else is bound. He cannot raise any sentence to the death penalty, unless it is already provided in here.

Mr. RIVERS. All right.

Mr. LARKIN. Now, in setting maximum limits he can set whatever maximum limits, aside from the death penalty—20 years, 10 years, 30 years, or whatever it may be—and the court martial may not exceed

any of those maximums. However, there is no particular limit of the maximum except the death penalty.

When I say no limit to the maximum, I am talking about confinement, as distinguished from the death penalty.

The President cannot, in addition, prescribe any punishment which would be cruel or unusual or any punishment that would call for tattooing, marking, and others prohibited.

Mr. GAVIN. He can use that?

Mr. LARKIN. He cannot.

Mr. RIVERS. Neither can the court.

Mr. LARKIN. Neither can the court. Exactly.

I think a reading of 18, 55, 6, and the specific punitive articles makes it clear how it is bound, reading one with the other. It is the same as the present situation.

Mr. RIVERS. That is historically the way it was operated?

Mr. LARKIN. That is right.

Mr. RIVERS. He has to put "30 days" or so much fine or whatever it is?

Mr. LARKIN. He is free to set the maximum, except that he cannot do anything inconsistent with what Congress has passed in this code. Once he sets them, then the courts martial cannot do anything in violation of the code and what he has set.

Mr. BROOKS. Are they any further questions or discussion?

Mr. RIVERS. I think that is plain.

Mr. BROOKS. We will take up article 57.

Mr. SMART (reading):

Article 57. Effective date of sentences.

(a) Whenever a sentence of a court martial as lawfully adjudged and approved includes a forfeiture of pay or allowances in addition to confinement not suspended, the forfeiture may apply to pay or allowances becoming due on or after the date such sentence is approved by the convening authority. No forfeiture shall extend to any pay or allowances accrued before such date.

(b) Any period of confinement not suspended included in a sentence of a court martial shall begin to run from the date the sentence is adjudged by the court martial.

(c) All other sentences of courts martial shall become effective on the date ordered executed.

References: A. W. 16, 47 (d); proposed A. G. N., article 39.

Commentary: This article is new. Subdivision (a) prohibits the forfeiture of pay or allowances becoming due before the date of approval by the convening authority. Formerly an Army court-martial sentence could forfeit such earnings. In addition, subdivision (a) permits the forfeiture of pay and allowances becoming due after the date of approval by the convening authority but before the date of final approval by the Secretary, where such final approval is necessary. It is felt appropriate that where an accused is sentenced to both forfeiture and confinement, the forfeiture should reach all pay becoming due while the accused is in confinement awaiting final approval of the sentence. Under article 71 such pay cannot be taken until the sentence is ordered executed after any such required final approval.

Subdivision (b) requires a sentence of confinement to begin to run on the date that it is adjudged even though the accused is not actually in confinement, unless the sentence is suspended.

A. W. 16 has been held to prohibit the forfeiture of pay of an accused until the sentence has been finally approved. This has resulted in a

prisoner under sentence of a court-martial drawing full pay until a dismissal or discharge is finally approved. The proposed Navy A. G. N. would make all sentences of forfeiture or confinement effective as soon as adjudged.

Mr. DEGRAFFENRIED. In other words, even if it goes up on review he starts getting credit on his sentence from the date of the sentence. He does not just stay there until after the board of review has passed on it

Mr. SMART. That is exactly right, Mr. deGraffenried.

The other particular change in here is that heretofore you could make a forfeiture of pay and allowances due or to become due. This applies only to pay and allowances due. That is, those that have already become due must be paid.

Mr. RIVERS. None of them can be taken away before the day of the sentence?

Mr. SMART. That is correct, sir.

Mr. BROOKS. "Allowances" can be the family allowance?

Mr. SMART. Pay and allowances would cover it.

Mr. RIVERS. That is the reason for the allowance, to protect the family of the defendant.

Mr. SMART. That is exactly what it does. It is a broader provision, so far as they are concerned, relating to pay already due before the date of the sentence.

Mr. BROOKS. It does not protect them in the future on the family allowance?

Mr. SMART. That raises the point, of course, that you have in civil courts. When a man is convicted no one undertakes to take care of his family. You have the same thing in the military. I do not know whether we should have a different rule for dependents of people in the military who are convicted than we have for civilian courts or not. It is an unfortunate thing, but it is always true that the innocent dependents suffer more than the guilty person.

Mr. RIVERS. Could we not write some kind of provision making it possible for the accused to show the financial circumstances of the dependents of the accused?

Mr. SMART. I hesitate to think that it would be proper, as humane as it might be, Mr. Rivers.

Mr. BROOKS. There is a big difference, though, between a man in service who has been taken in, especially by selective service, and a man in civilian life. A man goes into service sometimes against his will. He goes in not knowing the rules of the game, and in a brand new life. He leaves his family, and it makes them dependent upon a certain amount which is stipulated, and then he gets into trouble and you take all of that means of support away from them when he is at a very far distant point, in many instances, and the local people do not know anything about the circumstances. Maybe the family does not know anything about the circumstances, and they do not understand it.

Mr. SMART. The point you raise is very true, Mr. Brooks, but you refer to the soldier who, because of inadvertence and because of a strange way of life is in this situation, and you are assuming he is a draftee who gets into trouble and is court-martialed and has his pay taken away, not only from him but his family. How are you going to distinguish between that type of a fellow and the willful criminal in

the service who would have committed a crime any place he might be?

Mr. BROOKS. Only this way: If you gave some discretionary authority to the court. Well, you do give them discretionary authority to take these allowances away in certain cases.

Mr. SMART. That is correct. That could be exercised first by the convening authority in his exercise of clemency.

Mr. RIVERS. I do not know how it would take away from the dignity of the statute to write in there some kind of amendment and say, "forfeiture of pay and allowances——"

Mr. GAVIN. "Shall not occur in hardship cases."

Mr. RIVERS. "Shall be at the discretion of the authority, considering mitigating circumstances."

Mr. SMART. That is true as of this moment.

Mr. RIVERS. Why could we not write it in there?

Mr. LARKIN. Actually the general court is the only kind of court that can impose as a part of the sentence a forfeiture of allowance as well as pay. That is one point. I think it is sparingly imposed.

There are, of course, a number of authorities starting with the convening authority who can exercise clemency and limit that portion of the sentence.

In this connection I recall that the Navy generally, in these cases, exercises discretion in the cases where allowances have been forfeited, and does remit the allowances so that the family get them, even if they have been imposed in a general court-martial case. That is all done administratively and is permissible and is being done.

I do not know how the Army operates in that regard.

Mr. RIVERS. Do they take that into consideration, Colonel?

Colonel DINSMORE. I think not, sir.

Mr. RIVERS. Do they consider it when they take the man's money?

Mr. BROOKS. Does the Navy not send them to naval charity?

Captain WOODS. No, sir. We limit his contribution so that he can draw allowances.

Mr. BROOKS. The Army does not?

Colonel DINSMORE. No, sir.

Mr. RIVERS. As Mr. Smart says, with regard to a person who habitually violates these laws, whether an enlisted man or an officer, whether or not a draftee, places his family in the same plane.

Mr. GAVIN. Maybe Colonel Dinsmore can give us the reasons why.

Colonel DINSMORE. Thank you, Mr. Gavin.

Mr. Chairman, this is a problem which is very appealing. There is no week passes, scarcely a day, that letters do not come over my desk where a man is in one of our barracks and he has forfeited his pay and so on, and his family is in dire distress. It touches your heart. It is a problem, however, that society has not solved, as Mr. Smart pointed out, with the same situation existing in the civil courts, where a man is convicted and sentenced.

There is one other aspect I would like to mention for your consideration. It is a matter of policy, of course. This would be in the nature of a gratuity to the family; and if this committee in Congress feels that that is advisable, then we would have nothing to say about that, but there is another aspect that I think should be considered. You are, in effect, creating a type of special consideration for the man whose family is on the border line of distress. You are giving him the privi-

lege of committing offenses when his buddy, whose family is not in that situation, cannot do it with impunity.

Mr. RIVERS. That is not necessarily true: If he does it two or three times you will kick him out.

Colonel DINSMORE. Yes.

Mr. RIVERS. His family should not be held accountable for the man's indiscretion or ignorance.

Colonel DINSMORE. I do not like to see the family suffer.

Mr. GAVIN. At the same time, it is not so comparable to civilian life because he is inducted into the service. He is taken from civilian life, and he now finds himself in these circumstances.

Colonel DINSMORE. Mr. Gavin, that is true in wartime. At the present time most of them are volunteers.

Mr. GAVIN. It is different, then.

Colonel DINSMORE. I am afraid that with that sort of a provision there would not be that certain deterrent that exists. A man, no matter how bad he is, has his family in mind, and that holds him back to some extent. I am afraid that if you remove that deterrent a good many border-line fellows will say, "It will not make an difference to my family; they will be taken care of."

Mr. RIVERS. That is true, but when you compare them with the civilian, or compare them with the Navy men, it is a little different. We can compare them with the civilian, first. A civilian has greater opportunity, normally, to save money than the enlisted man because he has a greater opportunity to make money. An enlisted man cannot put up a nest egg so well as the average civilian can.

Colonel DINSMORE. I am not so sure. At the present rate of pay, if you take the average man who is an enlisted man, I rather think they are in a better position to save money in the Army than outside.

Mr. RIVERS. Take an enlisted man on a position out in some isolated area, where he knows no civilians, and deprive that family of subsistence. Where on earth will they go to get it?

Colonel DINSMORE. Charity.

Mr. RIVERS. There would not be any charity on the post.

Colonel DINSMORE. Of course, we have charity organizations, too. It is a matter of policy.

Mr. HARDY. What you are saying, Colonel, is that the type of man who is the enlisted man on that post, if he were in civilian life, would not particularly be a problem?

Colonel DINSMORE. That is right.

Mr. HARDY. Did I understand the implication awhile ago that if the Congress comes to the humanitarian pressure for protecting the dependents of the enlisted personnel, that we might also find ourselves subjected to the same sort of pressure to protect families of people convicted in civilian courts?

Colonel DINSMORE. No, sir; I did not intend that. I just said that it would be a discrimination between the man whose family is in want and the man whose family is not in want.

Mr. RIVERS. It might be a deterrent.

Mr. BROOKS. I have this suggestion: For the next article, I am informed by Mr. Smart that we have some witnesses here who have been here most of the day waiting to testify. This particular article here is one where the Navy and the Army are handling it differently. I do not know about the Coast Guard and the Air Force. We have not heard from them.

My thought is this. Can we not pass this over until later, since it is a quarter of four now, and let the services discuss the matter between now and next week? Then, perhaps, we can all get together on a uniform policy.

Captain WOODS. May I speak off the record?

(Discussion off the record.)

Mr. BROOKS. If there is no objection, we will pass by that article, for the present.

Mr. GAVIN. Pardon me, Mr. Chairman. Are you going to pass by article 57 and then come back to it?

Mr. BROOKS. Yes.

Mr. GAVIN. That is understood, because I would like to get a clear definition of section (b) of article 57.

Mr. BROOKS. We will pass by, Mr. Gavin, on account of these witnesses who have been waiting here, if there is no objection, out of courtesy to them. We will take up the next article.

Mr. SMART (reading):

ART. 58. Execution of confinement.

(a) Under such instructions as the Department concerned may prescribe, any sentence of confinement adjudged by a court-martial or other military tribunal, whether or not such sentence includes discharge or dismissal, and whether or not such discharge or dismissal has been executed, may be carried into execution by confinement in any place of confinement under the control of any of the armed forces, or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use; and persons so confined in a penal or correctional institution not under the control of one of the armed forces shall be subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District, or place in which the institution is situated.

(b) The omission of the words "hard labor" in any sentence of a court-martial adjudging confinement shall not be construed as depriving the authority executing such sentence of the power to require hard labor as a part of the punishment.

References: A. W. 37, 42; A. G. N. article 7.

Commentary: Subdivision (a) is derived from A. G. N. article 7 which permits the Navy to transfer court-martial prisoners to institutions under the control of the Department of Justice. The Navy has found this practice to be beneficial both to the service and to the prisoner. Both the Army and Navy officers in charge of correctional policies recommend the adoption of subdivision (a). It is the policy of the armed forces to segregate youthful and rehabilitable prisoners from the hardened criminals and incorrigibles and to provide for the maximum rehabilitation of prisoners for the purpose of restoration to duty or successful adjustment in civil life. However, due to lack of facilities and personnel with long and continuous experience in the highly technical and specialized phases of penology, the armed forces have serious handicaps in dealing with prisoners with long civilian criminal records, criminal psychopaths, sex deviates, violent incorrigibles and other prisoners requiring special treatment. The Army in operating under A. W. 42 has met with great difficulty in segregating the varied types of prisoners and in giving them specialized treatment. It is felt that the rehabilitation of prisoners who create special problems could be expedited by transferring them to the highly specialized institutions under control of the Department of Justice, which range from training schools and reformatories to major penitentiaries and provide for the treatment of prisoners according to their needs.

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From past experience, the services have found that the type of treatment suited for individuals does not depend on the type of offense or on the length of the sentence. Many of the prisoners who cause special problems in disciplinary barracks are those convicted of military offenses, such as a. w. o. l. or desertion.

Subdivision (b) incorporates the second proviso of A. W. 37 and conforms to present Navy practice.

Mr. BROOKS. Do we have two witnesses?

Mr. SMART. I believe it will probably be a little bit better, before they come on, to let Mr. Larkin set the stage, for those witnesses.

Mr. BROOKS. All right.

Mr. LARKIN. This article 58, Mr. Chairman, modifies the present provisions of the Articles of War but follows more closely the present provisions of the articles for the government of the Navy, in that it sets a flexible standard under which the military may transfer to institutions in the Federal penitentiary system approved by the Department of Justice a larger number of prisoners.

Now the reason why we brought Colonel Garrison of the Army and Captain Maginnis of the Navy in in connection with this section is because both those gentlemen, who are in charge of the correctional services of the Army and Navy, consulted with the committee when it considered this problem; and this is substantially their recommendation of an ideal provision to cover this problem.

Further, we brought them in to put before you the meaning of this article, because of the fact that several witnesses who have appeared before you have criticized this article as granting too broad a power, and from their reading of it they believed, I think, that it would enable the services to transfer too many prisoners. They envisioned under this that the services would send an offender who had been convicted of a minor military offense to Alcatraz. I think that is about the way they epitomize this whole article. Of course, that was not our intention at all. The usefulness of it and the necessity for it, I think, can be well explained to you gentlemen by both Captain Maginnis and Colonel Garrison.

I would say once more that you should bear in mind that it now conforms to the Navy statutory authority which has worked extremely well and is broader than the Army authority which has been so restrictive that the Army has encountered a number of hardships in connection with the transfer of prisoners.

I do not know which of these gentlemen you prefer to hear first. This is Colonel Garrison, Mr. Chairman, and this is Captain Maginnis.

Mr. BROOKS. We are happy to have you gentlemen here.

We will be pleased to have either of you lead off in this discussion.

STATEMENT OF COL. LLOYD R. GARRISON, AGD, CHIEF, CORRECTION BRANCH, AGO

Colonel GARRISON. I reduced my remarks to writing, and if you do not mind I will read them.

Mr. BROOKS. All right, sir.

Colonel GARRISON. It is the policy of the Department of the Army to segregate, as far as practicable, youthful and rehabilitable general prisoners from hardened criminals and incorrigibles, and to provide for the maximum rehabilitation of all general prisoners for the purpose

of restoration to active duty or successful adjustment in civil life. We feel that rehabilitation in prisons, to get people back in civil life, able to make their own living, is extremely important.

The populations of Army disciplinary barracks include prisoners of all types, ranging from youthful, impressionable first offenders to men with long civilian criminal records, criminal psychopaths, sex deviates, and violent incorrigibles. Adequate segregation for purposes of protecting young, impressionable offenders from detrimental influences and unwholesome contacts with the criminal types mentioned, and the operation of suitable rehabilitation programs to fit the varying needs of the individuals concerned cannot be accomplished in an institution in which all types are confined together. It is, therefore, considered desirable to provide for the confinement of different types of general prisoners in separate institutions having adequate facilities, trained personnel, and rehabilitation programs designed to meet the needs of the particular groups.

The Department of the Army does not have the number and diversified types of confinement facilities under its jurisdiction to provide for completely adequate segregation, control, and rehabilitative treatment of general prisoners by type. Further, military personnel assigned to duty at Army disciplinary barracks are subject to frequent rotation, and do not have the opportunity to gain the maturity of experience and training in the highly specialized professional and technical work involved in the administration of major correctional institutions, and in the control and treatment of the types of offenders involved. It would not be economical or in keeping with the primary mission for the Department of the Army to operate the number and types of institutions and provide the trained personnel required to meet these needs.

For the reasons stated above, it is considered highly desirable for the armed services to have authority to transfer to appropriate Federal institutions those prisoners who, by reason of incorrigibility, criminality, or personal characteristics create special problems of control in disciplinary barracks, and who should be segregated from younger and rehabilitable offenders. However, the restrictive nature of legislation governing confinement of general prisoners, reflected in article of war 42, prevents such transfers.

In addition, it is considered desirable that the Department of the Army have access to the specialized facilities of the Federal Prison System for the rehabilitative treatment of individual offenders where transfer to such Federal institutions would result in benefit to the prisoner, such as transfer of medical and mental patients to the Medical Center for Federal prisoners, and transfer of some youthful offenders to the National Training School and Federal reformatories. The Federal Prison System, which was limited to a few major penitentiaries without particular provision for rehabilitation at the time the existing legislation governing the confinement of Army prisoners was enacted, is now composed of a classified system of 29 well-organized institutions. Such institutions, ranging from training schools, training camps, and reformatories to major penitentiaries, provide for the complete segregation and rehabilitation of prisoners in keeping with their individual needs.

Authority to effect transfers and to determine places of confinement should not be subject to restrictive legal provisions related to the type

of offense and length of sentence. A great many of the most hardened and incorrigible criminals and vicious personalities now in confinement in disciplinary barracks are serving sentences for military offenses, such as a. w. o. l. or desertion. Many prisoners sentenced for military offenses have long vicious civilian criminal records, and others are criminal psychopaths, sex deviates, and dangerous individuals. It frequently develops that a prisoner, following initial confinement, becomes violently intractable. The prompt transfer of such prisoners to Federal institutions where adequate physical facilities and trained personnel are available for their control would contribute to the correction and adjustment of such prisoners and prevent further deterioration resulting from necessary close segregation in disciplinary barracks for long periods of time because of inadequate facilities.

The proposed article is considered adequate to meet the needs of the Department of the Army. It is believed that the authority contained therein for freedom of transfer of prisoners will result in material benefit to the Department of the Army and to the individual prisoners concerned and will further the Army's policy of segregation and rehabilitation.

I have visited a good number of Federal institutions operated, and I greatly admire the facilities that they have for all different types of individuals.

Mr. RIVERS. That reformatory system is quite an up-to-date organization, is it not?

Colonel GARRISON. It certainly is, sir.

Mr. HARDY. Colonel, do you have a correctional institution at New Cumberland, Pa?

Colonel GARRISON. That is a temporary disciplinary barracks there; yes, sir.

Mr. HARDY. Do you have a variety or type of prisoners there?

Colonel GARRISON. We have to have.

Mr. HARDY. I have had a lot of complaints about the way that is run, from a good many different people.

Colonel GARRISON. What were the complaints, sir?

Mr. HARDY. We will not go into that now. That is why I asked you if you had a variety there.

Colonel GARRISON. The worst ones, if they cannot be handled there well, sir, are sent to a place like Fort Leavenworth, or Milwaukee, or even Camp Cook, Calif., which are somewhat more secure. They are permanent-type installations.

Mr. HARDY. You do have a sundry type of prisoners there?

Colonel GARRISON. Indeed we have to; yes, sir.

Mr. RIVERS. Is that one of the reasons for this provision here that you can segregate the various prisoners?

Colonel GARRISON. It is; yes, sir. That is just an ordinary camp, so to speak. We wire around it, and they do a great deal of fine work there, but they cannot take care as adequately of the many types of people who have to be confined at that one place than they could if we had access to the 29 institutions that the Department of Justice owns.

Mr. HARDY. When I get a chance, I am going to show you some of the letters I have about it from the families of prisoners up there who have been up to see them.

Colonel GARRISON. I would be glad to see them, sir.

Mr. BROOKS. Colonel, this new article would permit you to send a boy, for instance, who might be a narcotic addict, to one of these two Federal places for adequate rehabilitation?

Colonel GARRISON. Yes, sir.

Mr. BROOKS. One of them, I know, is up in Kentucky.

Colonel GARRISON. Ashland; yes, sir.

Mr. BROOKS. Are there any further questions?

Mr. RIVERS. If you were to build up within the armed services a system of institutions comparable to those of the Department of Justice, it would almost be preventative because of the cost; whereas you can have access to the same type of institutions by a minimum of whatever the per diem or the expense or contract you enter into with the Department of Justice would involve for the same services, is that correct?

Colonel GARRISON. Yes, sir. I may say I have found that they understand our problems very well, indeed. A great many of their custodial personnel are reserve officers of the Army, Navy, and Marine Corps, and practically all of the guards who start in their work have to be ex-soldiers now because they get preference that way. So they really are people who understand the men they are getting, even though they have military background.

Mr. RIVERS. How would this thing operate at the time of the trial? When a sentence is imposed would that be delayed until the court could look into that? Who would that be left up to?

Colonel GARRISON. The reviewing authority would designate the place of confinement.

Mr. RIVERS. I see.

Mr. BROOKS. If I may suggest this thought, I would like to hear from the captain, because the hour is drawing late. After that we can ask them both any questions we want.

I would like for the whole subcommittee to hear the Captain.

Captain MAGINNIS. I subscribe wholeheartedly to the colonel's observations. We have had the authority which you are presently writing in article 58, which article 58 will continue.

I have noted in some of the discussions a fear that there might be an indiscriminate use of that authority to the detriment of the individuals who have committed minor offenses.

I have a statistical report here with regard to general court-martial prisoners.

Mr. SMART. Mr. Chairman, I suggest that the report be incorporated in the record at this point.

(The report is as follows:)

GENERAL COURT-MARTIAL PRISONER STATISTICAL REPORT

JULY 1 THROUGH DECEMBER 31, 1948

INTRODUCTION

Information furnished in this report includes trends in the population of general court-martial prisoners for the 6-month period July 1, 1948, through December 31, 1948. It is a continuation of information included in the statistical report on the general court-martial prisoner population as of June 30, 1948. Data has been compiled from daily muster reports and commitment cards received from retraining commands and disciplinary barracks during this period. Data from tabulated records was available on 2,454 of the total in confinement at the end of the period.

SUMMARY OF FACTS

1. As of December 31, 1948, there were a total of 2,555 general court-martial prisoners in confinement; 2,114 in disciplinary barracks and retraining commands, 186 in other naval activities and 255 in Federal institutions. This is a total of 342 less prisoners in confinement than there were at the beginning of the period.

2. Average population for the period at retraining commands and disciplinary barracks was 2,333 in comparison to 2,717 during the previous 6-month period.

3. There was a decrease of 137 new commitments and 15 fewer men released than for the previous 6 months. Sixteen fewer men were restored to duty and the percentage of men restored compared with those for the previous quarter dropped from 2,686 to 2,598.

4. Increase in the number of transfers petween activities is shown and is reflected in the fact that 90.47 percent of all men were restored to duty from retraining commands in comparison to 71.82 percent the previous period.

5. No significant change in the type of offenses is noted during this period. 15 percent continue to be offenses of a military nature with desertion continuing to lead all military offenses.

6. The average length of sentence as approved by the convening authority has dropped from 2 years 3 months to 2 years but the average as approved by the Secretary of the Navy remains 1 year and 10 months. The average time served by all releases for this 6 months' period is 6 months 12 days as compared to 7 months 11 days as previously reported. Sixty-two percent of all releases were the result of clemency action.

7. At the end of this period there were 255 general court-martial prisoners confined in Federal institutions. All but 10 percent of such offenders are serving sentences, the chief charge of which is of a nonmilitary nature. This group includes 11 serving on charges of murder, 14 for voluntary manslaughter, 124 for aggravated assault and 35 for rape. The 10 percent serving for military offenses, includes custody risks and prisoners with serious personality disorders.

8. Data tabulated on the 2,454 prisoners confined as of December 31, on which commitment data was available, shows that this group committed a total of 6,603 military offenses (including current offenses) or 2.7 offenses per man.

9. Average age of all men in confinement as of December 31 was 23 years 2 months. Average claimed grade completed was 8.97. Approximately 74 percent of the prisoners are single and place of legal residence claimed includes all States and the District of Columbia.

SECTION I. POPULATION TRENDS

Total population.—As of December 31, 1948, there were a total of 2,114 general court-martial prisoners in confinement at retraining commands and disciplinary barracks. There were 186 confined in other naval activities and 255 in Federal institutions, making a grand total of 2,555. Table I shows total population at each command on the last day of each month for this 6 months' period.

TABLE I.—*Monthly population by command*

	Norfolk	Mare Island	Portsmouth	San Pedro	Total
July	555	312	553	941	2,361
August	599	326	535	894	2,354
September	600	362	556	857	2,375
October	638	347	585	817	2,387
November	690	348	607	763	2,408
December	593	322	551	648	2,114

Intake.—A total of 2,637 prisoners were received at retraining commands and disciplinary barracks. This included 2,181 new commitments, 97 probation violators, and 325 transfers between retraining commands and disciplinary barracks; 34 were committed for "other reasons." These included escapes and prisoners transferred from hospitals. Table II gives total monthly intake by commands and table III total monthly intake by type of commitment.

TABLE II.—*Total monthly intake by commands*

	Norfolk	Mare Island	Portsmouth	San Pedro	Total
July 1948	162	79	56	97	394
August 1948	177	94	47	85	403
September 1948	165	128	65	83	441
October 1948	217	80	76	96	469
November 1948	209	111	57	48	425
December 1948	188	114	75	128	505
Total	1,118	606	376	537	2,637

TABLE III.—*Type of commitment—total monthly intake*

	New	Probation violators	Transfers	Other	Total
July 1948	300	23	71	0	394
August 1948	338	22	36	7	403
September 1948	374	15	40	12	441
October 1948	388	16	64	1	469
November 1948	365	5	50	5	425
December 1948	416	16	64	9	505
Total	2,181	97	325	34	2,637

Releases.—A total of 2,948 prisoners were released from retraining commands and disciplinary barracks from July 1 to December 31, 1948. Of this group, 1,820, or 73.53 percent, were discharged from the service and 642, or 25.94 percent, were restored to duty; 62 percent of all direct releases were the result of clemency action. Table IV shows total monthly releases by type of release. Table V shows total direct release exclusive of transfers.

TABLE IV.—*Type of release—monthly*

	Discharged	Restored	Transfers	Others	Total
July 1948	265	90	92	7	454
August 1948	256	83	68	7	414
September 1948	227	97	83	13	420
October 1948	253	115	66	23	457
November 1948	209	117	66	12	404
December 1948	572	135	82	10	799
Total	1,782	637	457	72	2,948

TABLE V.—*Releases by type of release (transfers excluded)* [1]

Type	Number	Percent
Dishonorable discharge	621	25.08
Bad-conduct discharge	1,173	47.37
Restored	642	25.93
Administrative discharge	26	1.05
Escape	11	.45
Set aside	2	.08
Officers dismissed	1	.04
Total	[1] 2,476	100.00

[1] Difference of 15 is accounted for by the fact that some men were transferred to receiving stations to await action and later coded as released. Releases from Federal institutions are included in this total.

Summary and conclusions

1. As of December 31, 1948, there were a total of 342 less general court-martial prisoners in confinement than there were at the beginning of the period; 317 less in retraining commands and disciplinary barracks, 46 less in Federal institutions and 21 more in other naval activities.

2. Average population for the period at retraining commands and disciplinary barracks was 2,333 in comparison to 2,717 for the previous 6 months.

3. Intake figures for the period show a total increase of 161. This is accounted for primarily by an increase in the number of transfers between activities. There was a decrease of 137 in new commitments and probation violators.

4. There was a total of 15 fewer men released than for the previous 6 months. However, 42 more were released by transfer. It is also noted that there was a net decrease of 16 men restored to duty and the percentage of men restored compared with those discharged dropped from 26.86 percent for the preceding 6 months to 25.94 percent for this period.

5. Of the men restored during this period, 90.47 percent were restored from retraining commands. During the previous 6 months only 71.82 percent of the restorations were from retraining commands.

SECTION II. OFFENSES AND LENGTH OF SENTENCES

Types of offenses.—As indicated in table VI below, 1839 of the total 2,199 prisoners confined in retraining commands and disciplinary barracks as of December 31, 1948, were serving sentences for offenses the principal charge of which constituted violations of military regulation. This represents 84 percent of the total confined. Desertion constituted the largest single group, accounting for 748 cases, 34 percent of the total offenses, or 41 percent of all military offenses. Larceny and theft account for 128 of the nonmilitary offenses. Offenses range in degree of seriousness from murder to drunk and disorderly.

TABLE VI.—*Length of sentence as approved by the convening authority and the Secretary of the Navy by offense (exclusive of those confined in Federal institutions)*

	Approved by convening authority		Approved by the Secretary of the Navy	
	Number	Sentence	Number	Sentence
Murder	1	Death		
Voluntary manslaughter	6	6 years 8 months	5	5 years 1 month.
Aggravated assault	5	1 year 2 months	3	1 year 7 months.
Involuntary manslaughter	5	2 years 8 months	3	2 years 6 months.
Rape	3	3 years 8 months		
Morals offenses	40	do	31	2 years 4 months.
Robbery	37	3 years 9 months	25	3 years 1 month.
Burglary	4	2 years 6 months	3	1 year 10 months.
Housebreaking	18	3 years 9 months	12	2 years 6 months.
Larceny and theft	128	2 years 2 months	86	1 year 9 months.
Fraud and embezzlement	31	2 years 6 months	22	2 years 4 months.
Forgery	12	3 years 1 month	7	2 years 11 months.
Misappropriation	5	2 years 1 month	3	1 year 3 months.
Postal offenses	1	1 year 9 months	1	1 year 9 months.
Desertion	748	3 years 2 months	586	2 years 9 months.
Breaking arrest	185	1 year 6 months	126	2 years 2 months.
A. w. o. l.	536	9 months	370	9 months.
A. o. l.	286	1 year	122	1 year 2 months.
Other naval offenses	84	1 year 5 months	49	Do.
Assault and battery	41	2 years 4 months	30	2 years.
Escape	3	7 years 6 months	3	6 years 4 months.
Assault (threat)		1 month		
Destruction of property	1	1 year 3 months		
Drunk and disorderly	3	11 months	3	1 year 3 months.
Other civil offenses	16	2 years 11 months	12	2 years.

Length of approved sentences.—Table VI shows the length of sentences by offense as approved by convening authority compared with approval of the Secretary of the Navy. Secretary of the Navy approval was received on 1,502, or 68 percent of the cases. Average length of sentence as approved by the convening authority, exclusive of one death sentence and six with sentences over 120 months, was 24 months; average length of sentence as approved by Secretary of the Navy is 22 months. Longest sentences, exclusive of murder, were for voluntary manslaughter (convening authority average 6 years 8 months; Secretary of the Navy 5 years 1 month). Table VII shows total sentences as approved by convening authority as compared with Secretary of the Navy and tables VIII and IX show length of sentences by command for both convening authority and Secretary of the Navy.

TABLE VII.—*Length of sentence as approved by convening authority compared with Secretary of the Navy*

Months	Convening authority		Secretary of the Navy	
	Number	Percent	Number	Percent
0 to 3	46	2.09	17	1.13
4 to 6	368	16.73	221	14.71
7 to 9	262	11.91	178	11.85
10 to 12	223	10.14	155	10.32
13 to 18	238	10.82	194	12.92
19 to 24	314	14.28	258	17.18
25 to 36	321	14.60	213	14.18
37 to 60	254	11.55	224	14.91
61 to 120	162	7.37	42	2.80
121 and over [1]	10	.46		
Life				
Death	1	.05		
Total	2,199	100.00	1,502	100.00
Average sentence by months	24		22	

[1] Not included in average sentence.

TABLE VIII.—*Length of sentence as approved by convening authority, by command*

Months	Portsmouth		San Pedro		Norfolk		Mare Island		Total	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
0 to 3			1	0.15	34	5.39	11	3.26	46	2.09
4 to 6	1	0.18	34	5.00	219	34.71	114	33.83	368	16.73
7 to 9	11	2.00	39	5.73	135	21.39	77	22.85	262	11.91
10 to 12	32	5.81	44	6.47	101	16.01	46	13.65	223	10.14
13 to 18	59	10.71	74	10.88	66	10.46	39	11.57	238	10.82
19 to 24	114	20.69	92	13.53	62	9.82	46	13.65	314	14.28
25 to 36	149	27.04	163	23.97	9	1.43			321	14.60
37 to 60	114	20.69	133	19.56	4	.63	3	.89	254	11.55
61 to 120	68	12.34	92	13.53	1	.16	1	.30	162	7.37
121 and over [1]	3	.54	7	1.03					10	.46
Death [1]			1	.15					1	.05
Total	551	100.00	680	100.00	631	100.00	337	100.00	2,199	100.00
Average sentence by months	36		35		10		10		24	

[1] Not included in average sentence.

TABLE IX.—*Length of sentence as approved by Secretary of the Navy, by command*

Months	Portsmouth		San Pedro		Norfolk		Mare Island		Total	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
0 to 3					14	3.84	3	1.48	17	1.13
4 to 6	2	0.46	20	3.99	136	37.26	63	31.19	221	14.71
7 to 9	10	2.31	28	5.58	94	25.75	46	22.77	178	11.85
10 to 12	51	11.78	22	4.38	56	15.34	26	12.87	155	10.32
13 to 18	71	16.40	59	11.75	32	8.77	32	15.84	194	12.92
19 to 24	102	23.55	100	19.92	26	7.12	30	14.85	258	17.18
25 to 36	85	19.63	122	24.30	5	1.37	1	.50	213	14.18
37 to 60	93	21.48	128	25.50	2	.55	1	.50	224	14.91
61 to 120	19	4.39	23	4.58					42	2.80
Total	433	100.00	502	100.00	365	100.00	202	100.00	1,502	100.00
Average sentence by months	29		31		9		11		22	

Length of time served.—The average time served by the 2,476 prisoners released from confinement for the period was 6 months and 12 days (table X). In this average are included 32 men released in November and December on Federal parole but excluded from the average are 5 cases in which the period of confinement was remitted. Average length of time served at retraining commands was 4 months 24 days as compared to 11 months at disciplinary barracks (table XI). Of the total released, 1,528 (62 percent) were released as a result of clemency action, 27 (11 percent) as a result of parole, and 5 (0.27 percent) as a result of a combination of parole and clemency action (table XII)

TABLE X.—*Releases by length of confinement served, by offense*

Offense	Number	Time served
Murder	1	3 years, 4 months.
Voluntary manslaughter	1	Do.
Aggravated assault	2	10 months.
Involuntary manslaughter	3	8 months.
Rape	7	1 year.
Morals offenses	26	Do.
Robbery	19	1 year, 2 months.
Burglary	2	1 year, 8 months.
Housebreaking	17	11 months.
Larceny and theft	92	Do.
Fraud and embezzlement	27	Do.
Forgery	11	1 year.
Misappropriation	13	9 months.
Postal offenses (except theft)	2	4 months.
Desertion	613	9 months.
Breaking arrest	193	8 months.
A. w. o. l.	711	4 months.
A. o. l.	556	5 months.
Other naval offenses	108	6 months.
Assault and battery	41	8 months.
Escape	1	Do.
Assault (threat)	6	1 year.
Drunk and disorderly	8	4 months.
Other civil offenses	11	1 year.

NOTE.—2,470 men released; average time served: 6.38 months.

TABLE XI.—*Average and median time served, by command*

	Average	Median
Norfolk	4 months 21 days	4 months 15 days.
Mare Island	5 months 3 days	Do.
Portsmouth	12 months 24 days	12 months 7 days.
San Pedro	9 months 7 days	8 months 16 days.

TABLE XII.—*Releases by offense by clemency action*

Offense	Clemency		No clemency		Clemency and parole		Parole		Total	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Murder	1	.06							1	.04
Voluntary manslaughter	1	.06							1	.04
Aggravated assault			1	.11			1	3.70	2	.08
Involuntary manslaughter	1	.06	2	.22					3	.12
Rape	1	.06	5	.55			1	3.70	7	.28
Morals offenses	15	1.04	9	.98	1	20.00	1	3.70	26	1.05
Robbery	9	.59	5	.55			5	18.52	19	.77
Burglary	1	.06			1	20.00			2	.08
Housebreaking	10	.65	5	.55			2	7.41	17	.69
Larceny and theft	63	4.12	16	1.74	2	40.00	11	40.75	92	3.72
Fraud and embezzlement	15	.98	9	.98			2	7.41	26	1.05
Forgery	8	.52	2	.22			2	7.41	12	.48
Misappropriation	9	.59	4	.44					13	.52
Postal offenses	2	.13							2	.08
Desertion	521	34.10	91	9.93					612	24.72
Breaking arrest	138	9.03	55	6.00			1	3.70	194	7.84

TABLE XII.—*Releases by offense by clemency action*—Continued

Offense	Clemency		No clemency		Clemency and parole		Parole		Total	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
A. w. o. l	312	20.42	401	43.78					713	28.80
A. o. l	304	19.89	253	27.62					557	22.50
Other naval offenses	69	4.51	38	4.14	1	20.00			108	4.36
Assault and battery	31	2.03	9	.98			1	3.70	41	1.66
Escape	1	.06							1	.04
Assault (threat)	3	.19	3	.33					6	.24
Drunk and disorderly	4	.26	4	.44					8	.32
Other civil offenses	9	.59	4	.44					13	.52
Total	1,528	100.00	916	100.00	[1] 5	100.00	[1] 27	100.00	2,476	100.00

[1] Includes Federal releases for November and December only.

Federal institutions.—At the close of the period, 255 general court-martial prisoners were confined in Federal institutions. Of this group, all but 26 (10 percent) were confined for offenses, the chief charge of which was, of a nonmilitary nature (table XIII). Seven of these men were confined for "breaking arrest," which indicates that they were escape risks and the remainder of those in this category presented behavior or personality problems requiring special confinement facilities. In this group were 8 serving life sentences and 148 (58 percent) serving sentences of over 5 years as finally approved by the Secretary of the Navy (table XIV).

TABLE XIII.—*Number of men in Federal institutions by offense*

Murder	11	Fraud and embezzlement	9
Voluntary manslaughter	14	Forgery	4
Aggravated assault	24	Misappropriation	3
Involuntary manslaughter	2	Desertion	19
Rape	35	Breaking arrest	7
Morals offenses	40	Other naval offenses	1
Robbery	25	Assault and battery	3
Burglary	6	Other civil offenses	2
Housebreaking	9		
Larceny and theft	41	Total	255

TABLE XIV.—*Length of sentence as approved by Secretary of the Navy (Federals)*

Months	Number	Percent
19 to 24	4	1.57
25 to 36	23	9.02
37 to 60	80	31.37
61 to 120	82	32.16
121 and over	58	22.74
Life	8	3.14
Total	255	100.00

Summary and conclusions

1. The percentage of military offenders compared with nonmilitary offenders remains the same as it did for the last 6-month period, 75 percent.
2. There is no significant change as to the type of offenses noted, desertion continues to lead all military offenses and larceny and theft continue to account for the principal nonmilitary offenses.
3. Average length of sentence as approved by convening authority has dropped from 2 years 3 months to 2 years. Average sentence as approved by the Secretary of the Navy remains 1 year and 10 months.
4. Average time served by all releases for this 6-month period is 6 months 12 days compared to 7 months 11 days as previously reported for the first 3 months of the period.

5. There were 46 less (255) general court-martial prisoners confined in Federal institutions at the end of the period than there were at the beginning of the period (301). Ninety percent of such offenders are serving sentences the chief charge of which is of a nonmilitary nature. This group includes 11 serving on charges of murder, 14 for voluntary manslaughter, 124 for aggravated assault, and 35 for rape.

SECTION III. CHARACTERISTICS OF OFFENDERS

Commitments by geographical areas.—Tabulations show that commitments were received from all naval districts except 17 and that 8 percent were committed from commands afloat. For convenience this is expressed in terms of naval districts and commands afloat. Information was available on 2,454 prisoners confined. All districts are represented except 17. The Eleventh Naval District contributed the largest number, or 16.22 percent; 198, or 8.07 percent, were from commands afloat, and all but 12, or 0.49 percent, of these from commands afloat, Pacific.

Probation violators.—During this period 97 probation violators were recommitted to serve the unexecuted part of their sentence. This represents 4 percent of the total intake for the period. This figure, of course, does not represent the total number who violated probation during the period since data is not available on those whose probation was terminated and discharges executed.

Previous military offenses.—Of the total population at the end of this period, 793, or 32 percent, had no previous military offenses during the current enlistment. The remaining 1,661 prisoners committed a total of 4,149 previous military offenses. Broken down by types of offenses, this represents 579 general courts martial, 1,034 summary courts martial, 891 deck courts, and 1,645 captains mast. The 2,454 prisoners confined as of December 31 committed a total of 6,603 military offenses (including current offense), or 2.7 offenses per man.

Branch of service.—Table XV shows the total men in confinement as of December 31, 1948, by branch of service. Naval personnel makes up 80.45 percent, Marine 18.86 percent, and the remainder are Coast Guard and merchant marine.

TABLE XV.—*Branch of service (population, Dec. 31, 1948)*

Branch of service	Number	Percent
Navy	1,728	70.42
Marine Corps	432	17.60
Coast Guard	13	.53
Naval Reserve	235	9.58
Marine Corps Reserve	31	1.26
Coast Guard Reserve	2	.08
Navy (inductee)	11	.45
Marine Corps (inductee)		
Coast Guard (inductee)		
Other	2	.08
Total	2,454	100.00

Age.—Average age of all men in confinement as of December 31, 1948, is 23 years 2 months, median age is 22 years 3 months, and age range is from 17 to 47; 509, or 20.8 percent, fall within the range of 20 years and below; 1,480 (60.48 percent) between 21 and 45; 331 (13.52 percent) between 26 and 30; 118 (4.82 percent) between 31 and 40; 10 (0.4 percent) over 40. Average age of the total population as to June 30, 1948, was 22 years 7 months.

Educational level.—Grade level as based on education claimed shows that the average grade completed was 8.97, median 8.98; 39 (1.77 percent) claimed below the fifth grade while 1,293 (58.6 percent) claimed completion of high school or above; 21 (0.95 percent) claimed completed work beyond the high-school level.

Race.—Table XVI gives the break-down of total population as of December 31, 1948, by race.

TABLE XVI.—*Race*

Race	Number	Percent
White	2,226	90.71
Negro	215	8.76
Indian	3	.13
Filippino	5	.20
Other	5	.20
Total	2,454	100.00

Marital status.—Table XVII gives total population as of December 31, 1948, by claimed marital status.

TABLE XVII.—*Marital status*

	Number	Percent
Single	1,804	73.93
Married	598	24.51
Separated	2	.08
Divorced	18	.74
Widowed	18	.74
Total	2,440	100.00

State of residence.—A tabulation by States of the legal residence claimed shows that the ratio between general population of the State and percentage of prisoners claiming residence in the State is generally consistent. New York (7.97 percent,) Pennsylvania (7 percent), California (6.64 percent), and Texas (6.11 percent) are States claimed by the largest number of prisoners. They also rank among the first 10 in general population. All States and the District of Columbia were represented.

Distribution of naval prisoners, Federal Bureau of Prisons, Mar. 25, 1949

United States penitentiaries:	
Leavenworth, Kans	18
Alcatraz Island, Calif	1
Lewisburg, Pa	60
McNeil Island, Wash	26
Atlanta, Ga	16
Terre Haute, Ind	35
Oahu prison, Oahu, T. H	05
United States medical center, Springfield, Mo	8
Federal correctional institutions:	
Danbury, Conn	5
Milan, Mich	1
Sandstone, Minn	2
Seagoville, Tex	2
Federal reformatories:	
Petersburg, Va	3
El Reno, Okla	27
Chillicothe, Ohio	36
Total	241
7 penitentiaries	157
4 correctional institutions	10
3 reformatories	66
1 medical center	8
Total	241

Captain MAGINNIS. I have some figures here with respect to the Navy. As of January 1 we had a total of 2,555 prisoners. We had 10 percent, exactly, in Federal institutions. There were 255 at that time. There are now 241. Only 10 percent of that number had been convicted of offenses which could be classified as a military offense.

Mr. RIVERS. What percentage?

Captain MAGINNIS. Ten percent. Those were transferred because of their rebellious and intractable nature and evidence of psychopathic attitudes and deviations, and some of them were sex psychopaths.

If it is of any interest, the type of offenders whom we have transferred are those convicted of major offenses. There are 11 convicted of murder. There are 14 convicted of voluntary manslaughter. There are 24 convicted of aggravated assault. There are two convicted of involuntary manslaughter. There are 35 convicted for rape. There are 40 convicted for morals offenses. There are 25 convicted for robbery. There are six convicted for burglary. There are nine convicted for housebreaking. There are 41 convicted for larceny and theft. There are nine convicted for fraud and embezzlement. There are four convicted for forgery. There are three convicted for misappropriation. There are 19 whose primary charge was desertion. There are seven who were convicted of breaking arrest. There is one convicted for other naval offenses. There are three convicted for assault and battery, and there are two convicted for other civil offenses. So, out of 255 persons so confined in Federal institutions under this authority which we now have, there were roughly 30—actually 27—who might be considered to have been convicted for military offenses.

So I suggest that indiscriminate use of this to get rid of personnel is not the policy of the Department.

All that the colonel said about the facilities in Federal institutions for the treatment of these individuals who have committed felonies and who remain for long terms is true.

In the naval service our personnel manning these institutions are men who enlisted in either the Navy or the Marine Corps as a career and to whom custodial work is not a chosen vocation. They do the best that they can, but we feel that the treatment the individual would obtain under Federal jurisdiction is much better when they are guided by those people who have that as their vocation and their life work.

Mr. BROOKS. This is a case where we have beaten the Hoover Commission to a decision?

Captain MAGINNIS. I think it is.

Mr. RIVERS. Let me ask you this question: This could be the first step toward the elimination of institutions like yours up at Portsmouth, and yours at Leavenworth, and integrating all of the Federal custodial or correctional institutions?

Captain MAGINNIS. We would like to retain in the future what we term our retraining commands. Presently we segregate our prisoners in two types of institutions. We have a retraining command and a disciplinary barracks. We would not be too regretful to see the disciplinary barracks taken over wholly by a Federal prison system, but we do feel that about 25 or 30 percent of the people who get into trouble, we can rehabilitate and bring back into the naval service, which is what we now do. We would want to retain that type of confinement activity.

Mr. RIVERS. You could eliminate some of the existing ones?

Captain MAGINNIS. Yes. We would eliminate the disciplinary) barracks which are the places where we now confine those people who will be discharged into civil life.

Mr. RIVERS. And you could also recoup their future value, to bring them back into the service?

Mr. SMART. Captain, may I ask one question to make it clear for the record? Those prisoners whom you release for confinement in Federal facilities are the ones you do not have any hope to restore to military service; is that right?

Mr. RIVERS. Yes; he does.

Mr. GAVIN. He just said that.

Mr. SMART. For civilian life; not military service.

Captain MAGINNIS. Those that we transfer into the Federal institutions are carefully screened in our disciplinary barracks before they are sent. By the nature of their offenses, as I read them here, they are not individuals whom we would bring back into the naval service.

Now, all of our general court-martial prisoners, those whom we believe are salvagable, we bring into retraining commands, as long as their sentence begins to run, or as soon as we identify them as being restorable, and prepare them for possible restoration to duty. Some of them may make it, and some may not.

Mr. BROOKS. Who does the screening?

Captain MAGINNIS. We do, at the places of confinement.

Mr. RIVERS. When you say "we" who is "we"?

Captain MAGINNIS. The Navy.

Mr. RIVERS. Are they trained for that vocation?

Captain MAGINNIS. They are, sir. We have several civilians in each institution who are classification experts and educational supervisers and technical supervisers for the whole institution, who maintains that.

Mr. RIVERS. I was kind of mixed up then because I heard the colonel say, with reference to the institution which my colleague has referred to, so frequently are they put together where they rub elbows with these hardened criminals that the thought was that maybe you could take these same "kids" and put them in an institution which you do not possess but is now under the Federal system of penitentiaries, where you might rehabilitate them and bring them back into the service.

Mr. HARDY. You can do that better in the retraining commands.

Mr. RIVERS. That is the testimony.

Captain MAGINNIS. Our testimony is that we would rather have them down in our retraining commands where we give them refresher training.

Mr. RIVERS. Then you can weed out the bad ones to whom I referred.

Captain MAGINNIS. We can weed them out almost permanently.

Mr. RIVERS. I see.

Captain MAGINNIS. There is an escape provision in our administrative procedure where we can take prisoners back from a Federal institution if they are strongly recommended and bring them back into our commands for study to decide whether we will accept their recommendation.

Mr. HARDY. Do you sometimes use your retraining command for confinement of prisoners prior to sending them to your own correctional institutions?

Captain MAGINNIS. The retraining command, sir, is a correctional institution.

Mr. HARDY. I understand that.

Captain MAGINNIS. To the disciplinary barracks?

Mr. HARDY. Yes. Like the one you have at Portsmouth.

Captain MAGINNIS. Yes. We have a free flow between them. As a matter of fact, we have an airplane flight every 2 weeks. If we bring a prisoner into the retraining command whom we decide is not retrainable, or who exhibits traits of character which makes him completely useless, we transfer him to the disciplinary barracks.

Mr. HARDY. Then you may eventually transfer them to the Federal institutions?

Captain MAGINNIS. That is correct. If they continue and become even more rebellious, we propose them for transfer to the Federal institution, and they are so accepted.

Mr. BROOKS. Mr. Smart?

Mr. SMART. I want to raise one more question here just for the consideration of the committee.

That is the reciprocal authority of the various services to confine the prisoners of another service.

Let me give you a specific example which I ran into in October at Fort Knox, Ky. Godman Field lies immediately adjacent to it and is perhaps no more than a mile from the stockade on Fort Knox. Under the new set-up the Air Force, tries all of its court-martial cases. Godman Field, which has a small complement of troops of about 275 enlisted men and 30 or 40 officers, is maintained there to keep flying facilities for Reserve personnel at Louisville, Ky., and the surrounding territory. The day I went there they tried their first two special court-martial cases, but they have no jail there. Those fellows received sentences of 2 or 3 months of confinement, and since they had no jail and since the divorce was complete between the Army and the Air Force, they were not authorized to put these two Air Force prisoners, who were only going to serve 3 or 4 months and then go back to duty, over in the stockade at Fort Knox. So they put them in an airplane and flew them a hundred miles up to Fort Benjamin Harrison for confinement.

To me that is absolutely absurd. It is a waste of the taxpayers' money.

Here is where the problem becomes multiplied. Up and down the east coast are 16 or 17 radar stations all in the jurisdictional area of the First Air Force. In addition to that, we have many more of these small flying fields, for reserves, that are somewhat isolated from the major Air Force commands where they have confinement facilities but which are close to the Army facilities. It seems to me absurd that the services cannot work out some reciprocity for the confinement of men at each of those facilities where the confinement is of a minor, short-term character.

Mr. HARDY. This would take care of it, would it not?

Mr. SMART. I do not know.

Mr. HARDY. It sounds like it would to me.

Mr. SMART. I am wondering if the services contemplate doing that.

Mr. BROOKS. I would like to hear from the Air Force, also. What do you think about it, sir?

Major ALYEA. I believe it is a good idea, sir, but I am not authorized to speak.

(Discussion off the record.)

Mr. SMART. That is exactly right.

Mr. BROOKS. What does the Coast Guard do?

Captain MAGINNIS. We now in the Navy, sir, accept prisoners from any service for temporary confinement in any of our facilities. We do hold Coast Guard prisoners in our confinement activities.

Mr. BROOKS. And the Coast Guard subscribes to your methods and procedure?

Captain MAGINNIS. Yes, sir. As a convenience to the Coast Guard it is done, because they do not have facilities of their own. We confine their prisoners for them.

We do the same thing for the Army or the Air Force if they request it, although we have no jurisdiction with them now.

Mr. LARKIN. On page 48, Mr. Chairman, lines 2 and 3, it says:

> may be carried into execution by confinement in any place of confinement under the control of any of the armed forces, or in any penal or correctional institution under the control of the United States.

So you have statutory authority provided here for the first time to take care of what Mr. Smart points out, which I think is perfectly logical.

I think Mr. Smart is perfectly right that it should be that way. There has been an absence of statutory authority to do it to date. Perhaps on an administrative basis it has been done. It has not been done enough.

Certainly if this article is passed as is, why, there will be the authority to do it which has not heretofore existed in the statute.

Mr. Smart is perfectly right.

Mr. GAVIN. May I ask a question?

Mr. BROOKS. Mr. Gavin.

Mr. GAVIN. Does the Army have a similar program to the Navy's, to give these people an opportunity to return back into the service?

Colonel GARRISON. Yes, sir. The prisoners in the Army who get general court martial sentences and suspended sentences of dishonorable discharge with confinement of 6 months or less are not sent to disciplinary barracks. They are kept in Army guardhouses at various places, and there they frequently are restored to duty before their time is up. That is quite usual.

Mr. GAVIN. If the sentence is what?

Colonel GARRISON. If the sentences are 6 months or less than 6 months they are never sent to disciplinary barracks, even though the sentence may include dishonorable discharge and suspension. They have a chance and are given a chance there to make good. After they get to the disciplinary barracks they are very carefully classified by people we have employed for that purpose, who are well trained for that. There they may be recommended for a restoration to duty, and if they come within the accepted classes under the Secretary's policy, they are then sent to a military training company and allowed to take a short course there and then allowed to reenlist in the service.

Mr. GAVIN. If the sentence is 6 months or more, then what?

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Colonel GARRISON. That is when they go to the disciplinary barracks, if they have a sentence in excess of 6 months.

Mr. GAVIN. If they are given a sentence of more than 6 months and a dishonorable discharge, do they still have an opportunity to be restored to duty?

Colonel GARRISON. Yes, sir; and there have been a few cases where on strong representation from the Federal institution where they are confined, men were taken out of places like that and given restoration.

Mr. SMART. I think it should be pointed out there, Mr. Gavin, that the Secretary of the Army has a policy wherein he prescribes certain types of offenses, such as larceny, where even though the discharge has been suspended by the convening authority, regardless of that fact, when the man has served the appropriate amount of his sentence the dishonorable discharge will be executed and he will be dishonorably discharged and he will not be given an opportunity to reenlist under any circumstances.

Colonel GARRISON. That is true. I want to insert in the record at this point the policy of the Department of the Army on the matter of restoration to duty and the present status of Army general prisoners.

ARMY POLICY WITH REFERENCE TO RESTORATION TO DUTY OF GENERAL PRISONERS

The policy of the Army as to restoration of general prisoners over a period of years has remained essentially the same; that is, "to encourage all physically, mentally, and morally qualified general prisoners to earn restoration to duty with a view to eventual honorable discharge."

In the absence of exceptional circumstances, conviction of serious-type civil offenses has precluded restoration, as has conviction of desertion or absence without leave from units engaged in combat, unless the offender was an obvious victim of combat exhaustion or had considerable prior good combat service.

During active combat operations in the war, restrictions as to the nature of offenses committed were somewhat relaxed when it appeared that enlistment in a combat unit subjected a soldier to personal danger, and the possibility existed that he might expiate his crime by valorous service or by even laying down his life on the field of battle. In the matter of restoration by enlistment in the peacetime Army it has been deemed necessary to make the restoration program less inclusive by a return to the general policy barring the enlistment of those convicted of serious civil type offenses.

DEPARTMENT OF THE ARMY,
OFFICE OF THE ADJUTANT GENERAL,
Washington 25, D. C., April 5, 1949.

Memorandum for Chief, Legislative and Liaison Division.

Attention: Col. John P. Dinsmore, GSC, Room 3C937, The Pentagon.

Subject: The number of Army institutions and individuals possibly affected by article 58 of the Proposed Uniform Code of Military Justice (H. R. 2498).

1. As of April 1, 1949, approximately 2,700 general prisoners were confined in Federal institutions under the supervision and control of the Attorney General of the United States, and less than 4,100 were in Army disciplinary barracks.

2. General prisoners confined in post, camp, and station guardhouses are not at this time considered, as they may or may not ever be sent to disciplinary barracks.

3. As of April 1, 1949, there are in operation five United States disciplinary barracks, with population as indicated below:

United States disciplinary barracks, Fort Leavenworth, Kans	980
Branch United States disciplinary barracks:	
Milwaukee, Wis	644
Camp Cooke, Calif	989
New Cumberland, Pa	971
Fort Hancock, N. J	[1] 437
	4,021

[1] Includes prisoners employed on Fort Jay Work project, which is a detachment of Fort Hancock.

Of the institutions named above, the first three are permanent-type installations, and the last two are temporary, barracks-type, wire-enclosed installations.

4. The branch United States disciplinary barracks, Fort Hancock, N. J., was established primarily as a receiving station for general prisoners arriving in the zone of the interior from the European theater. It is limited to a maximum capacity of 300 prisoners. It is planned that this institution will be closed whenever funds are obtained for the conversion of hospital cars to prison cars so that these prisoners may be taken directly from shipside to an inland disciplinary barracks.

5. Should H. R. 2498 be passed with article 58 as now written, its possible effect on Army institutions and individuals is estimated as follows:

As soon as practicable after the enactment of this legislation, approximately 1,500 general prisoners confined in United States Army disciplinary barracks for civil-type offenses, but not now eligible for transfer to Federal institutions, would become so eligible under the provisions of article 58, and could be transferred. The 2,500 general prisoners remaining in the custody of the Department of the Army, and who are now serving sentences for military-type offenses, could be confined in two United States Army disciplinary barracks. The number of disciplinary barracks could then be reduced from five to two; exclusive of Fort Hancock, N. J. This would release approximately 90 officers and 1,200 enlisted men for assignment elsewhere in the Army. The services of approximately 70 civilian employees now required in the disciplinary barracks could also be dispensed with.

At some future time thereafter it may be possible to close one of the two remaining disciplinary barracks and retain the other as a rehabilitation training facility. This would release 42 officers and 602 enlisted men for assignment elsewhere in the Army, and the services of 27 civilians now employed in the disciplinary barracks would no longer be required.

For the Director of Personnel and Administration:

LLOYD R. GARRISON,
Colonel, AGD,
Chief Correction Branch, AGO.

Mr. SMART. What offenses does that include, other than larceny?

Colonel GARRISON. They are felonious offenses, those offenses which are punishable as felonies in the District of Columbia or in the various States. That has been the Army procedure, where largely, since the days of the disciplinary barracks' first authorization in 1915—I have seen correspondence between General Crowder and Secretary of War Garrison in which they upheld that thought.

Mr. SMART. My point there is that I think it is a foolish thing to permit a convening authority on a review of a case to suspend a dishonorable discharge when, as a matter of fact, we know that that discharge will subsequently be executed. It creates a lot of false hopes in the minds of this boy's parents that the dishonorable discharge is suspended, and he has a chance to work himself out when, as a matter of fact, he does not have a ghost of a chance.

I think there should be some kind of a policy where they have a statement as a matter of policy of the Secretary of the Army that he is going to be dishonorably discharged and that the convening authority cannot raise any false hopes by suspending that dishonorable discharge upon the initial review.

Mr. BROOKS. You think that should be a question of policy rather than law?

Mr. SMART. Yes; but it is bad the way it presently exists.

Mr. BROOKS. We will commend your ideas there to the services.

Mr. RIVERS. How long has the Navy been practicing this procedure?

Captain MAGINNIS. This retraining procedure or commitment to Federal institutions?

Mr. RIVERS. Both.

Captain MAGINNIS. The transfer to Federal institutions, I think, goes back into 1908 or thereabouts. I could not give you the exact figure. The rehabilitation set-up was established in 1944 and has been carried on since.

Mr. RIVERS. It is not statutory, though?

Captain MAGINNIS. It is not statutory. It is policy.

Mr. BROOKS. Gentlemen, this is very interesting. I think we ought to have lots more information on this subject. I am wondering if the services could not give us some figures on the number of men in these institutions and the arrangement of them according to institutions, and the number of institutions which would be affected by such a program so that we could put that in the record and use it on the floor of the House?

(See p. 1105.)

Mr. BROOKS. I do not think there is any objection to this provision. If there is no objection it will stand adopted as read.

The hour being 4:20, the committee will stand adjourned until next week. We will have to give notice, because Monday morning the committee intends, as I understand it, to go down to observe the swearing in of the Secretary of Defense. Then, on Tuesday, we will have the regular committee meeting.

(Thereupon, at 4:21 p. m., Saturday, March 26, 1949, an adjournment was taken to meet at the call of the chairman.)

UNIFORM CODE OF MILITARY JUSTICE

WEDNESDAY, MARCH 30, 1949

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The subcommittee met at 10 a. m., Hon. L. Mendel Rivers (vice chairman) presiding.

Mr. RIVERS. The chairman won't be here for a moment, so he has requested I take over until he gets here.

Mr. Smart, what is on the program this morning?

Mr. SMART. Mr. Chairman, you will recall that it was concluded to withhold articles 22 to 29, inclusive, for a special day of hearing at which time Professor Morgan and witnesses from the departments would be heard.

Today is a convenient day for that. Professor Morgan is here. The Undersecretary of the Navy, Mr. John Kenney, is here. The Judge Advocate of the Navy, Admiral Russell, is here. They are prepared to open up that question today. So with the indulgence of the committee, may I suggest that we go back to Article 22 and you consider the proposition as to whether or not you will keep the article as written, which permits command to appoint the courts, or whether you shall change it and say that a superior command or a judge advocate will appoint courts from a panel of officers submitted by command.

Mr. RIVERS. That is article 22.

Mr. SMART. Article 22.

Mr. RIVERS. I am glad to see the chairman back.

Who is the first witness?

Mr. SMART. Professor Morgan.

Mr. RIVERS. Professor Morgan.

Professor MORGAN. I understand, Mr. Chairman, that you wanted simply to get my views on this matter of command control by the appointment of a panel, is that right, sir?

Mr. RIVERS. That is right.

Now do you want to take over, Mr. Chairman?

Mr. BROOKS [presiding]. That is correct, yes, sir.

Professor Morgan. Well, my notion about its practicability is stated as well as it could be stated in the statement that you got from General Riter, who appeared here in behalf of the American Legion on that.

I think that panel idea is one that theoretically is very attractive. I think it will not work practically.

I was here when Mr. Farmer read his statement about it. He conceded that in 99 cases out of a hundred even by that system the

members of the court would come from the command of the accused and the command of the commanding officer under whom they served.

Now the panel idea is proposed in order to avoid as I understand it the indirect influence of the commanding officer upon members of the court and not any direct influence on them because of the fact the code specifically provides against any attempt to influence the officers or to censure them thereafter. It also specifies that any violation of that prohibition is an offense under proposed article 96.

In peacetime there is a possibility that it will work. In wartime I suppose that is absolutely impossible, for a commander to determine in advance what men he could spare for a panel.

We think we have removed the influence of the command as far as that is humanly possible by the provision which I suggested to you which forbids the command to censure any person connected practically with the administration of the court-martial system or to attempt improperly to influence them.

We think also that it is very largely removed by the position in which the code places members of the court. These officers who are on the court under the new set-up really correspond to the civilian jury. We have a law officer who instructs them on the law.

The instructions are made a part of the record. The instructions are subject to review. The board of review which is situated far away and far from the influence of command reviews both law and facts and has power to approve only so much of the findings and so much of the sentence as they think ought to be approved under the terms of the contract.

There is also provided as you know in the so-called Judicial Council a review of the law and that is a civilian body. Consequently, we believe that we have as thoroughly removed command influence as is humanly possible.

It is true whether you have the panel system or any other system, if the commanding officer is determined to beat it he can beat it.

Mr. ANDERSON. Mr. Chairman.

Mr. BROOKS. Yes.

Mr. ANDERSON. Will you permit an interruption?

Professor Morgan. Yes.

Mr. ANDERSON. Do you think that if the members of the court martial were selected from a panel by the judge advocate in place of being selected as provided for in part V, it would weaken discipline?

Professor MORGAN. I am strongly of the opinion that it would as a matter of fact disrupt the commanding officer's control over his officers for other than courts martial. That is true.

Mr. ANDERSON. We all recognize that.

Professor MORGAN. I do not know, sir, just what effect that would have on discipline. I suppose the system contemplates that these officers will go back to line of duty as soon as they are relieved from this court martial duty. They will be entirely subject to discipline there. Whether it would have any effect, you mean on the discipline of the troops rather than the discipline of the——

Mr. ANDERSON. I mean, we recognize the fact that in a military organization you must have discipline.

Professor MORGAN. Yes.

Mr. ANDERSON. You are attempting in this bill to not only see that every man is tried impartially by, you might say, a jury of his peers——

Professor MORGAN. That is right.

Mr. ANDERSON. But that the case can be properly reviewed.

Professor MORGAN. That is it.

Mr. ANDERSON. Without weakening the necessary discipline within the military organization itself.

Professor MORGAN. That is quite right, sir.

Mr. ANDERSON. But my fear is that if we adopt this panel idea perhaps we do weaken the discipline which a commanding officer no matter what his rank, has over those immediately under his command.

Professor MORGAN. Certainly you remove them from his control for a period at any rate. But I think you never want to forget that in this panel there would also have to be enlisted men.

Mr. ANDERSON. That is if the accused desires them.

Professor MORGAN. Well——

Mr. ANDERSON. If the accused wants those enlisted men.

Professor MORGAN. Exactly. But don't you see before the commanding officer can make this panel he has to contemplate whether or not enlisted men will be on that panel. It would be impossible for him to make a panel I suppose for each trial because you don't know quite when they are going to start, and so forth.

So the commanding officer, according to this theory, will send a list of people up to the higher echelon, men that will be kept apart for court-martial duty. Now, during that period it is bound to weaken discipline with reference to those particular persons.

They are not going to be subject to the ordinary command, and so forth, unless you say why of course they can be. Then that means your panel is going to be entirely disrupted and every time the officer moves or decides to move these particular people out he has to send up substitutes, and so forth. So it seems to me that it may have an indirect effect upon discipline.

How it can remove command influence finally with reference to these enlisted persons is just beyond me.

Mr. ANDERSON. Thank you very much.

Mr. BROOKS. Any further questions of Professor Morgan?

Mr. RIVERS. Professor?

Professor MORGAN. Yes, Mr. Congressman.

Mr. RIVERS. It has been observed that this bill is not so drawn as to make it sufficiently elastic to write a provision in there creating a separate judge advocate's corps. Do you understand it that way?

Professor MORGAN. Certainly not, sir. I think that is not true. On the corps, Congressman Rivers, that was outside of our mandate as you know. It wasn't in our precept. We did not discuss it.

Mr. RIVERS. You didn't discuss it?

Professor MORGAN. Well, we couldn't discuss it because we had so many other things to do and it was definitely stated to be outside our precept, you see.

Mr. GAVIN. Why?

Professor MORGAN. Well, we were appointed by the Secretary of Defense, Congressman Gavin, with precept as to what we were to do, and that had to do with military justice and not with the National Defense Act.

Mr. RIVERS. Let me read you this:

To unify, consolidate, revise, and codify the Articles of War, the Articles for the government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a unified code of military justice.

Professor MORGAN. Yes.

Mr. RIVERS. You mean to say that title is not sufficiently elastic that it would be germane to that subject.

Professor MORGAN. I am telling you that the committee decided.

Mr. RIVERS. Well now——

Professor MORGAN. We had a debate on that.

Mr. RIVERS. Yes.

Professor MORGAN. Now if you want my personal opinion?

Mr. RIVERS. I don't want to embarrass you because I have too much regard for you.

Professor MORGAN. You see, you have me on a spot.

Mr. RIVERS. You have done a pretty fair job.

Professor MORGAN. But I am used to being put on the spot.

Mr. RIVERS. Mr. Vinson doesn't like us—this is off the record.

(Statement off the record.)

Professor MORGAN. Congressman Rivers, officially you can embarrass me. Personally it is impossible.

Mr. RIVERS. Well we have pretty tough hides ourselves.

Professor MORGAN. Well, now, let me answer your question.

Mr. RIVERS. Yes.

Professor MORGAN. Under those conditions, after we had made that decision, we deliberately drew the code so that it would apply whether you had a corps or whether you didn't have a corps.

Mr. RIVERS. I see, sir.

Professor MORGAN. And I think you will find no provision in this code that won't apply equally to the Army with its corps, and to the Navy with is present set-up and to the Air Force with its present set-up.

Mr. RIVERS. So this thing could be ammenable to any such creation as that. I think we ought to recognize that.

Professor MORGAN. Sure.

Mr. RIVERS. But you did not under your directive consider that in your group.

Professor MORGAN. Didn't what?

Mr. RIVERS. You didn't consider a separate corps in your discussion?

Professor MORGAN. We did not spend any time on it.

Mr. RIVERS. I see, sir.

Professor MORGAN. Personally, it was a matter that I would have welcomed a discussion on. I would have welcomed a discussion on it, but as you can see from my standpoint——

Mr. RIVERS. Yes.

Professor MORGAN. You remember, I never had any service in the field. In the First World War, I had 21 months in the Judge Advocate General's department.

Mr. RIVERS. Yes.

Professor MORGAN. I don't know what has happened to the Army organization since that time. If we were going to go into that we should have had to have a lot of evidence and testimony from all the three services to see exactly the way the corps would affect the other

services. Under Congressman Elston's bill we already have it in the Army.

Mr. RIVERS. Have you had any information——

Professor MORGAN. It started in only in February, you remember.

Mr. RIVERS. Yes.

Professor MORGAN. If it works well then it may very well be you will say it ought to go in the Navy and in the Air Force. You have a chance here for what Holmes used to call "experiments."

Mr. RIVERS. Yes.

Professor MORGAN. You remember Justice Holmes used to say "Well, you ought to let this State do this, that State do that and the other State do the other" because you have great laboratories for experiments and legislation here. I think you have a great field for experimentation here now. You put this in the Army. Doubtless your committee considered it very thoroughly, Congressman Elston, because I remember both the Secretary of War and General Eisenhower appeared against it.

Mr. ELSTON. Yes.

Professor MORGAN. Your committee nevertheless thought it ought to be tried.

Mr. RIVERS. They brought up the heaviest artillery they could get.

Professor MORGAN. I beg your pardon?

Mr. RIVERS. I say the heaviest artillery available was brought up in opposition.

Professor MORGAN. Yes. Personally, I read all that material in the hearings about your committee, Congressman Elston, and also before the full committee, and so on. I saw what happened.

Mr. RIVERS. The only thing they didn't bring up is the new guided missiles.

Professor MORGAN. And let me say this, I didn't feel at all badly that we didn't go into the corps since you already had it in the Army, and I thought here was a chance for experimentation.

Mr. RIVERS. Yes.

Professor MORGAN. If this thing works well in the Army, then you may want later to put it in both the other services. You will hear the members of the services after me on this matter of the corps. Under Secretary Kenney and Admiral Russell will speak to you from that standpoint.

Mr. RIVERS. They are very persuasive gentlemen, I know that.

Mr. BROOKS. Professor, what do you think would be a fair trial period?

Professor MORGAN. I should think you would have to try it for a couple of years.

Mr. BROOKS. And then you could judge the result in that time.

Professor MORGAN. I hope we are going to have peace for two years, which would give a good peacetime sample of how it works.

Mr. BROOKS. Yes.

Professor MORGAN. If we get the statistics that we think we are going to get now under this set-up with the judicial council and the three Judge Advocate Generals reviewing the workings of the code in the different services you ought to get statistics on the administration of justice in the Army, Navy, and the Air Force under whatever system you put in, and in 2 years you can tell how it is working.

Mr. BROOKS. Well, that might be a part of the duties of the Judicial Council, too, mightn't it?

Professor MORGAN. Oh, yes. It is.

Mr. BROOKS. To make recommendations on that point.

Professor MORGAN. Oh, yes. I think part of the duties of the judicial council would be to see and consider that kind of thing.

Mr. RIVERS. You mean an evolving process

Professor MORGAN. Yes.

Mr. RIVERS. To observe it.

Professor MORGAN. Observing, yes.

Mr. RIVERS. Yes.

Professor MORGAN. Sure. Because these things will come up through the different JAGS with the Judicial Council they are to meet at least once a year. There is nothing to prevent its meeting more often and surveying just how these things are done. The Judicial Council could report on that particular thing.

You would then be able to see whether military justice under this code with a crops in the Army is any better than in the Navy and in the Air Force without a corp.

You will also, I suppose, be able to tell whether or not the corps idea with its independent promotion list, Congressman Elston, will attract better men into the JAG of the Army than into the JAG of the Navy.

Mr. BROOKS. Professor, Mr. Elston wanted to ask you a few questions.

Professor MORGAN. Yes.

Mr. Elston. Professor, I am certainly glad to have your explanation. I was under the impression that your committee was more or less opposed to a separate Judge Advocate General's Corps from the fact that you didn't include it in this bill.

Professor MORGAN. No.

Mr. ELSTON. I take it we are not to consider that you are opposed to it.

Professor MORGAN. I think you certainly can't say that the committee was opposed to it as a committee because we just didn't consider it.

Mr. ELSTON. Yes, all right. I am glad that is in the record.

Professor MORGAN. All right.

Mr. ELSTON. Now on this matter of experiment——

Professor MORGAN. Yes.

Mr. ELSTON. Go along for a few years and see how things work out.

Professor MORGAN. Yes.

Mr. ELSTON. I am not so sure that is a good idea because you would have to have complete cooperation from the service before you would be able to determine whether or not it was working out well.

Professor MORGAN. Well, you will to a certain extent. But I hope you won't forget that if you put in this Judicial Council—whether you call it a court of military appeals or not, whatever it may be—that a portion of the function of that Judicial Council is to observe the work of these three different Departments.

Mr. ELSTON. Well, they principally pass on cases, don't they—individual cases?

Professor MORGAN. I know, but they also have to investigate the general operation of the code, you see, and make recommendations with reference to it. That is a part of their duties under this set-up here.

Mr. ELSTON. Well, they could pass on those questions either way. You could not set up the separate corps or you could set it up.

Professor MORGAN. No. I don't suppose they would do that unless in considering the matter—for instance when they report there's nothing to prevent the Congress from asking them their reports on the operations of these Codes and from getting their recommendations. They are supposed to give recommendations for amendments.

Mr. LARKIN. Yes. 67 (g).

Professor MORGAN. 67 (g), Congressman Elston.

The Judicial Council and the Judge Advocates General of the armed forces shall meet annually to make a comprehensive surveys of the operation of this code and to report to the Secretary of Defense and the Secretaries of the Departments any recommendations relating to uniformity of sentence, amendments to this Code, and any other matters deemed appropriate.

Mr. ELSTON. Well, I am just wondering, though, if the service is against the separate corps—and they are and there is no use kidding ourselves.

Professor MORGAN. I know.

Mr. ELSTON. They are against a separate Judge Advocate General's Corps.

Professor MORGAN. I think you are right.

Mr. ELSTON. Now are they going out and try to make a good record through a separate corps, and if they don't try to make a good record I am just wondering whether the Judicial Council will be in a good position to make recommendations?

Professor MORGAN. Well——

Mr. BROOKS. If I can say this right here, Professor, just before you talk, I think it is a little unfair assumption there because I was just informed now for instance that the Army was delighted with the present set up of the separate corps.

Mr. ELSTON. I don't want to reflect in the least on them because I know they are honest and sincere about it. But the fact remains that just a year ago General Eisenhower and everybody else from the Army came down and vigorously opposed a separate Judge Advocate General's Corps, even coming down after our subcommittee had reported on it.

Professor MORGAN. I know.

Mr. ELSTON. And urging the full committee to overrule the subcommittee and provide otherwise.

Professor MORGAN. Yes.

Mr. ELSTON. Now, that is the reason why I say I am not certain that they are going to give it a fair trial.

Professor MORGAN. Well, I think you can't be certain, Congressman, about any of these things. As I say, there isn't any rule you can lay down that the people can't beat if they want to beat it.

Mr. ELSTON. Well, that is the point I am making.

Professor MORGAN. There is just no doubt about it. You know the rule is laid down in civil cases, that the court shall not comment on the weight of the evidence or the credibility of the witnesses.

Mr. ELSTON. And then you hear the emphasis the court systems put on a statement which is sufficient of itself to indicate his opinion.

Professor MORGAN. I don't know whether you knew Judge Huff of the second circuit. Judge Huff said to me once, when we were considering that in the Commonwealth Fund Committee—

The worse judge I ever knew on the bench and the best judge I ever knew on the bench could let the jury know exactly how he felt about every witness and the whole case without violating that rule in the slightest degree.

Mr. ELSTON. That is right. There wouldn't be a thing in the record indicating his sneer or his smile.

Professor MORGAN. Not a thing.

Mr. DE GRAFFENRIED. Or the tone of his voice.

Mr. ELSTON. Or the tone of his voice.

Professor MORGAN. Or the way he reads the instructions (demonstrating intonations): "if you find so and so and so and so."—"If you find so and so and so and so."

Mr. ELSTON. "But of course if you find so and so."

Professor MORGAN. Oh sure. So I say none of these things that you can put on paper will work if the people who are to administer them are determined to lick them. I agree, Congressman, that this is a matter of judgment. I am just giving you my best judgment on the thing.

I told you that the committee didn't have a chance to thresh the whole thing out. I think the opinions of the members of the service as to practicability and so forth and as to whether it will operate in the way that you are hoping it will operate are certainly worth more than mine would be because you see I just don't have the same data that they have.

Mr. ELSTON Of course, my own notion is we ought to hear from them and get their viewpoint.

Professor MORGAN. Surely.

Mr. ELSTON. But at the same time this committee went into the matter very thoroughly last year.

Professor MORGAN. Yes.

Mr. ELSTON. And it was, I think, the unanimous or close to the unanimous opinion of the full committee we ought to have a separate corps.

Professor MORGAN. You don't want to be like the judge who said "Sure I will hear him, but I got him licked right now."

Mr. ELSTON. That is why I said we ought to hear from them.

Mr. BROOKS. Well, may I say this, that I doubt that this subcommittee has the time to give the matter full consideration of a separate Judge Advocate Corps for these two Departments. And I doubt also that it has the jurisdiction to do it. Of course the committee can do anything it wants, but it was assigned this one particular bill which is a uniform code of military justice.

If our idea is to unify the Judge Advocate General's Department of each service in this bill, I believe we are transgressing on our jurisdiction.

Mr. ELSTON. Then, Mr. Chairman, is it within your jurisdiction to set up a Judicial Council?

Mr. BROOKS. It is a part of this bill.

Professor MORGAN. Oh, yes; I think it is.

Mr. ELSTON. The fact that something is in the bill does not mean you have to do it.

Mr. BROOKS. I am not trying to tell the committee what to do. I am merely expressing my views on it. We were assigned this bill.

Mr. RIVERS. Will this bill repeal existing Army regulations?

Professor MORGAN. I didn't hear you, sir.

Mr. LARKIN. As far as the corps is concerned?

Mr. RIVERS. Yes.

Mr. LARKIN. No. The provision for the corps in the Elston bill was an amendment to the National Defense Act.

Professor MORGAN. The National Defense Act.

Mr. LARKIN. That is not repealed, modified or affected in any way.

Mr. RIVERS. That is the only way we can get it through the lesser body at the other end of the Capitol.

Mr. BROOKS. Any further questions?

Professor MORGAN. Was there anything else you had in mind for me, Mr. Chairman?

Mr. ANDERSON. I understand, Mr. Chairman, Professor Morgan told me earlier he was hoping to get away early today because I think he has an engagement elsewhere.

Mr. BROOKS. Professor Morgan, we really appreciate your coming here, and I am sure Mr. Anderson who has been wanting to talk to you for several weeks especially appreciates it. But I voice the view of the whole committee I am sure.

Professor MORGAN. Mr. Chairman, I am really greatly obliged for the courtesy the committee has shown me. I know you don't need me on these separate articles. You can see that Mr. Larkin knows just as much about this as I do and probably considerably more.

Mr. BROOKS. We needed you on this particular article and your views are very persuasive.

Professor MORGAN. Yes. Thank you so much, sir.

Mr. ANDERSON. Thank you.

Mr. BROOKS. Thank you, sir.

Mr. SMART. Mr. Kenney.

Mr. BROOKS. Have a seat, Mr. Secretary.

Secretary KENNEY. Mr. Chairman.

Mr. BROOKS. We have Under Secretary W. John Kenney of the Navy. We are happy to have you here, Mr. Secretary. I believe this is the first time you have testified before this subcommittee.

Secretary KENNEY. Yes.

Mr. SMART. Mr. Chairman, I have previously distributed copies of Mr. Kenney's statement and they are before you now.

Mr. BROOKS. Thank you.

STATEMENT OF HON. W. JOHN KENNEY, UNDER SECRETARY OF THE NAVY

Secretary KENNEY. At the outset, Mr. Chairman, I would like to express the appreciation of all of us for the very, very fine work Professor Morgan has done on this. He was the chairman of our committee who drafted this bill and I can assure you he was a rough task master. He had us working 2 days a week there long hours for many months.

I have a prepared statement, which is not very long, which I think expresses my views probably better than if I stated them and with your permission I would like to read that statement.

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 emotion 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, who as you all know, was Secretary of War for many years, an eminent jurist and a man who had great practical experience in the Army in the First World War as a foot soldier, expressed this comment at one time:

> 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 elements 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.

And he knows the character of the courts martial that are required and in my opinion is 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 believe that the system of military justice works well. Of course, an occasional miscarriage receives widespread 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 process of naval justice. The same conclusion was reached by the General Court Martial Sentence Review Board, of which Prof. Arthur John Keefe of Cornell University was chairman, which reviewed over 2,000 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 itself. It is bad only when it is exercised without wisdom, dignity, and restraint.

One of the best guaranties 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 so in the Navy where they are at sea, 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.

That 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 seagoing 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.

There is one further point on which I would like to touch for a moment and that is the point of the separate corps. You will hear more in detail on that from Admiral Russell, the Judge Advocate

General of the Navy, who is much more qualified to comment on that than I.

But I would like to make this passing comment: There is some thought that by reason of the establishment of a separate corps you remove your legal officers from the possibility of influence. Well, I fail to see how that is going to be the case.

I am speaking now with respect to the Navy. I cannot see where anything is to be gained in the Navy by doing this, because in the Navy, the Judge Advocate General does not report to the Chief of Naval Operations. He reports to me.

I prepare the fitness report for the Judge Advocate General and the Judge Advocate General prepares the fitness reports of the officers under him. Oddly enough, in the Army, which has a separate corps, I believe you will find the Judge Advocate General is under the Chief of Staff.

So I think even without a separate corps we have removed our legal officers from military command to a greater extent.

Mr. RIVERS. Of course, Mr. Kenney, as you and I well know, the Navy is altogether different because the Army has what is known as the horizontal and the Navy a vertical set-up. I prefer the vertical because, as you observe, it gives the officers a direct contact with the civilian authority, whereas the Army has always had to go through the staff set-up. Isn't that true, sir?

Secretary KENNEY. That is correct. That is the fundamental difference between the two organizations and that is why I feel that the Navy would gain nothing by the establishment of a separate corps.

Mr. RIVERS. Yes. That might be very, very true.

Mr. BROOKS. Mr. Secretary, I think you have made a very forceful statement, and I have followed you with much interest.

Mr. GAVIN. It is a forceful statement to continue as we are now doing, is that right?

Secretary KENNEY. I don't think that is true, Mr. Gavin.

Mr. GAVIN. The whole argument here is this command control. I think the Secretary has indicated that the present set-up is more desirable than any attempt to remove command control from the services.

Mr. BROOKS. No. I simply indicated it was a very forceful statement. I think it is. I further want to say this: The House is going to be in session in a few minutes, and I promised the chairman of the full committee that I would be over there this morning to present the proceedings before the committee yesterday.

So if the Secretary will excuse me, I will ask Mr. Rivers to preside there and the committee can go ahead as long as they desire. If you will take over, Mr. Rivers, I will discharge my mission, too.

Secretary KENNEY. I am available, as the members of this committee know, and can come here for questioning at any time if there are any further questions you want to ask of me, Mr. Chairman.

Mr. RIVERS (presiding). Mr. Elston.

Mr. ELSTON. Mr. Kenney, I readily see what might be involved if you had the separate panel. But actually if a commanding officer wanted to exert influence he could do it in the appointment of the members of the panel just about as much as he could in the appointment of the members of the court.

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Mr. RIVERS. Surely.

Secretary KENNEY. I think that would necessarily follow. I mean, you can't prevent improper action by merely writing things in a bill.

Mr. ELSTON. After all, he has his command problems which nobody knows more about than he does, and the question of availability of officers at certain times is to me one of the most impressive arguments against the setting up of a panel. You may have a panel all of the members of which are available at one time and none of them available at some other time because of some change of plans.

So I don't exactly see how it would work out very well. And after all, we are interested in removing command influence, but in my own mind, and without going into it any further, it just doesn't seem to me that we can accomplish it by setting up a panel.

Secretary KENNEY. Well, Mr. Elston, I think there has been a tendency on some people's part to sort of assume that command influence and improper influence are one and the same thing. The commander of his force has the interests of it most at heart and he has the problem of discipline. He is the person that is more interested than anybody else to see to it that his men are properly tried.

That is what I would say might be construed as command influence. He knows the men who are best qualified to sit on a case. Now when we talk about—and I know there has been some evidence before this committee—improper influence being exercised by commanding officers, we have tried to prevent that to the fullest possible extent.

No one condones that type of improper influence.

Mr. ELSTON. I don't see how you can go much further than we have gone by making it an offense for an officer to exert improper influence. His record means a lot to him and the mere writing of that into the law is going to have a tremendous influence so far as he is concerned.

Secretary KENNEY. Well, you want to realize, too, Mr. Elston, that this law is written for military people, and military people, I think, understand and comply with laws a lot more than we civilians do. I mean when an order is written, whether it is given by the commanding officer or whether it is given by Congress, that is it.

Mr. ELSTON. Civilians have a lot of regulations governing them these days, but they are not quite in the same position as a man in uniform.

Secretary KENNEY. I think all civilians could learn a little bit of respect of law from military personnel.

Mr. ELSTON. Well, I think they respect the law just as much, but they don't have command over them like a man in uniform does.

Mr. GAVIN. There seems to be a general opinion that there is a scarcity of officers available for these various court trials, that is courts martial. Why couldn't the Judge Advocate General educate more officers in this corps so that they are available and train them for this particular type of specialized legal work?

Secretary KENNEY. Well, I would like you to ask that same question of Admiral Russell when he is here because I have had a number of discussions with him on that and both of us have for some time been working on a program in an attempt to put into the naval service trained lawyers. Now it isn't something that you can do overnight.

It is a gradual process. In fact, within the past month I had a long discussion with Admiral Russell and members of his staff on

taking further steps to increase what we call in the Navy our law specialists.

Mr. GAVIN. Well, we did have some schools of that nature during the war, didn't we, for the training of legal people?

Secretary KENNY. We still have. That is the school of naval justice which is at Port Hueneme in California.

Mr. ELSTON. Well during the war you didn't have any scarcity of lawyers in the service, did you? There were a lot of fine lawyers went in the service, and I am sure their services were utilized in courts-martial cases.

Secretary KENNEY. We had the finest lawyers in the country in the services during the war.

Mr. RIVERS. Mr. Secretary, weren't you general counsel for the Navy at one time?

Secretary KENNEY. I was, Mr. Chairman.

Mr. RIVERS. Wasn't the reason for the creation of that position the fact that there was a scarcity of lawyers of the type which could command, for instance, your type of ability?

Secretary KENNEY. Well, that office was established, Mr. Rivers, to take care of the great mass of procurement and industrial problems that came up during the war. The office of general counsel has never had anything to do with court-martial proceedings, and I don't think that they should because that is primarily a civilian office.

I think the administration of military justice is a problem which the military personnel understand to a far greater extent than I do as a civilian lawyer.

Mr. RIVERS. It doesn't follow that he couldn't do the same job that you did as a civilian. Isn't there a program now to train them where they can do the same work that you were brought in to do? Why shouldn't he be able to do that?

Secretary KENNEY. Well, there is no reason why they shouldn't be——

Mr. RIVERS. I mean why shouldn't the judge advocate be able to do the same job that you were called in to do during the war? Isn't that the idea now of the Navy, to train him to do just such work as you were called in to do?

Secretary KENNEY. Well, those men that we brought in the office of general counsel during the war, Mr. Rivers, were men that were taken from the commercial law firms throughout the country to handle commercial matters.

Mr. RIVERS. Well, now, with the training that you have had and the contact they have had with your type of training and ability, aren't they going to in the future be able to handle a great deal of that work?

Secretary KENNEY. It is not contemplated. We contemplate using our civilian lawyers for doing that type of work because it is predominantly a civilian type of operation. Military personnel will be transferred for military duties elsewhere. Then they lose contact with and get out of that type of operation.

Mr. RIVERS. I am well aware of the outstanding job you did, because we couldn't have done without it at all.

Secretary KENNEY. Well, it is very kind of you to say that, Mr. Rivers.

Mr. RIVERS. I remember vividly.

Mr. SMART. I think one point there, Mr. Chairman, is that you can't have a person doing the type of work that is done in the general counsel's office where you have to know from day to day the latest decision of the Supreme Court and the Federal circuit courts of appeal and other jurisdictions if every 3 years you are going to take a man out of JAG work and rotate him to sea duty.

When he goes to sea duty for 2 or 3 years he loses complete touch. Certainly he couldn't maintain the contacts and the information to make him effective in the office of general counsel.

Secretary KENNY. Whereas that duty is extremely helpful and beneficial to your men in the JAG's office in handling courts-martial cases.

Mr. RIVERS. I can appreciate that, surely.

Secretary KENNEY. It is one of the reasons why I am not in favor of the separate corps for the Navy. The first reason, which I gave, is because I don't think it is necessary, and the other is that officers out in the field and fleet commanders have discovered that lawyers are useful on staff work. We are assigning a lot of them out for that.

Well, those men then serve in that capacity and then come back to the Judge Advocate General's office with a greater breadth of experience and they are more valuable officers to Admiral Russell. And I believe he will testify to that effect when he is here.

In other words, by not having it a separate corps we are able to broaden the type of experience that they get.

Mr. GAVIN. Yes; but if with unification of the services you had one corps, couldn't he supervise all three branches of the services?

Secretary KENNEY. I would not be in favor of one corps for all three services because again you are putting a supportive function out of its proper perspective. I mean, I would hate to think that unification meant the establishment of a lot of little autonomous empires.

Mr. GAVIN. Well, that may be. But within that corps the three branches of the services would be broken down, but it would be under one supervision. In other words, you would have one Department instead of three to refer all matters pertaining to all the branches of the service.

Secretary KENNEY. Of course, in this particular bill you have the judicial council which is to perform that function of bringing them together. I think you get better and more effective administration by the JAGS being a part of the service which they serve, rather than by making them something separate and apart.

Mr. RIVERS. You wouldn't like to make a statement of the advantages which could accrue by the same contact of the JAG of the Army with the Under Secretary of the Navy for the fitness reports? That is not a fair question to ask you——

Secretary KENNEY. Well——

Mr. RIVERS. Because you as Under Secretary have to O. K. the fitness report of the Judge Advocate General of the Navy.

Secretary KENNEY. That is right.

Mr. RIVERS. And that is because of your inherent vertical set-up.

Secretary KENNEY. That is the same way with respect to all Bureau Chiefs in the Navy.

Mr. RIVERS. That is right.

Secretary KENNEY. They report to the Secretary of the Navy and not to the Chief of Naval Operations. The Army has adopted the

system of organization which is known as the general staff type of organization.

Mr. RIVERS. Yes.

Secretary KENNEY. I prefer our own. I presume the Army prefers theirs.

Mr. ELSTON. I take it you figure the Navy has a much different problem than the Army has in the administration of a separate Judge Advocate General's Corps. In other words, you are not undertaking to say that the Army shouldn't have one. You are simply saying that the type of separate corps set up for the Army would not work well in the Navy.

Secretary KENNEY. That is correct, Mr. Elston. I am not making any comment about the Army system.

Mr. RIVERS. And your testimony is not to imply or as proving like or dislike for the present set-up of the Army.

Secretary KENNEY. That is correct, Mr. Rivers.

Mr. RIVERS. You have no comment on that.

Secretary KENNEY. I have no comment on that, sir.

Mr. RIVERS. Thank you. Any questions?

Mr. DEGRAFFENRIED I believe not.

Mr. RIVERS. Any questions?

Mr. ELSTON. I assume we are going to later on decide whether we are going into that question, and then of course we would want all the reasons. I am sure Mr. Kenney would want to elaborate on those reasons a lot more than he has this morning because you only touched on it. You haven't given all of your reasons why you can't have a separate Judge Advocate General's Corps or why it might be advantageous to the Army and not be advantageous to the Navy.

Secretary KENNEY. I have asked Admiral Russell to furnish the committee with those reasons. I merely wanted to just touch on them lightly to let the committee know what my own thoughts were on the subject.

There is no difference of opinion, I might state, between Admiral Russell and myself on that. We are both in accord on that. We are both in accord. And that is—this is off the record.

(Statement off the record.)

Mr. RIVERS. Mr. Secretary, we appreciate your coming up. The chairman has already expressed his appreciation for your statement. I, too, want to thank you very much.

Now, what is the pleasure of the committee?

Mr. ANDERSON. Recess to 10 o'clock, Mr. Chairman.

Mr. RIVERS. Whatever the committee wants. I imagine it will be 10 o'clock tomorrow morning.

Mr. SMART. Ten o'clock tomorrow morning, Mr. Chairman.

Mr. RIVERS. All right.

(Whereupon, at 11:15 a. m., the subcommittee adjourned to reconvene on Thursday, March 31, 1949, at 10 o'clock.)

UNIFORM CODE OF MILITARY JUSTICE

THURSDAY, MARCH 31, 1949

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The subcommittee met at 10 a. m., Hon. Overton Brooks (chairman) presiding.

Mr. BROOKS. The committee will please come to order.

We were on article 22 yesterday when we adjourned. We will commence on article 22 this morning. Now, Mr. Elston, you were here. I had to leave early in order to go over to the floor. I would like to get your opinion as to what you think of article 22.

Mr. ELSTON. Off the record.

(Discussion off the record.)

Mr. BROOKS. Suppose, then, Mr. Smart, we will proceed by reading article 22. Perhaps some of the others will be here before we have finished.

Mr. SMART (reading):

Art. 22. Who may convene general courts-martial.

(a) General courts-martial may be convened by—

(1) the President of the United States;

(2) the Secretary of a Department;

(3) the commanding officer of a territorial department, an Army group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army;

(4) the Commander in chief of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the continental limits of the United States;

(5) the commanding officer of an Air Command, an Air Force, an air division, or a separate wing of the Air Force;

(6) such other commanding officers as may be designated by the secretary of a department; or

(7) any other commanding officer in any of the armed forces when empowered by the President.

(b) When any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority when deemed desirable by him.

References: A. W. 8; A. G. N., article 38.

Commentary: This article is derived from A. W. 8. Provisions for Navy, Coast Guard, and Air Force convening authorities are added. Paragraphs (6) and (7) permit the President and the Secretaries of the Army, Navy, Air Force, and Treasury (for the Coast Guard in peacetime) to empower other commanding officers to convene general courts martial. See article 1 for definition of "department."

Subdivision (b) is derived from A. W. 8. The word "accuser" is used in place of "accuser or prosecutor," and "accuser" is defined in article 1 in order to clarify its meaning.

Mr. BROOKS. Mr. Larkin, where we say in subsection 3 "a separate brigade or a corresponding unit of the Army," what is meant by that phraseology? We have just referred to an Army Group, an Army, an Army Corps, a division, and a separate brigade, and then we say "or a corresponding unit of the Army."

Mr. LARKIN. I think that is provided, Mr. Chairman, to allow for flexibility. In the event that the organization of the Army or its units is changed at any time we would then have the statutory authority for that type of corresponding unit. I don't think there is any specific unit in mind at this minute, but in the event, for instance, that the organization of a whole Army and its divisions and other subdivisions are rearranged, the authority would be provided.

Is that your idea, Colonel?

Colonel DINSMORE. Mr. Chairman.

Mr. BROOKS. Yes, colonel.

Colonel DINSMORE. We have already changed. We have task forces and combat teams and all sorts of things which are comparable to a separate brigade.

Mr. BROOKS. And it was preferable to use these old terms rather than new ones?

Colonel DINSMORE. Yes, sir. They have been understood and construed. Furthermore, we can't anticipate now, as Mr. Larkin points out very pertinently, what may transpire in the future.

Mr. BROOKS. Mr. Elston, do you have any questions?

Mr. ELSTON. No; I do not.

Mr. BROOKS. Mr. deGraffenried, we just read article 22. Have you any questions you wanted to ask on article 22?

Mr. DEGRAFFENRIED. No, Mr. Chairman.

Mr. BROOKS. Mr. Rivers, do you have any questions on article 22?

Mr. RIVERS. No, sir.

Mr. BROOKS. Then, what is the pleasure of the committee? Are you satisfied with article 22 as it is?

Mr. RIVERS. That is the one we had yesterday, isn't it?

Mr. BROOKS. That is the one we discussed; yes, in length.

Mr. DEGRAFFENRIED. I believe since listening to the explanation of Professor Morgan, with the provisions that are in there, that we have about as much restrictions there on command domination or influence or control as we could have, unless we just change the complete set-up and have a panel.

Mr. RIVERS. Mr. Chairman, I would like to ask—excuse me.

Mr. DEGRAFFENRIED. That is all right.

Mr. RIVERS. No; I want you to finish.

Mr. DEGRAFFENRIED. I believe we are just about in as good condition as we could be without studying the system of a panel more fully than we have at the present time. I don't believe we are ready right now to make a change without more study. That is just my idea.

Mr. BROOKS. Mr. Rivers.

Mr. RIVERS. Did I understand the Chair to rule that the consideration of a separate set-up away from the so-called chain of command is not within the purview of this committee?

Mr. BROOKS. That is correct. My understanding is that the committee has no authority to consider any legislation but what is assigned to the committee. No such bill has been assigned to this committee. That is my interpretation.

Mr. ELSTON. Well, Mr. Chairman, does that mean that we are not permitted to offer any amendments to this bill?

Mr. BROOKS. Oh, no.

Mr. ELSTON. Well——

Mr. BROOKS. On the contrary, the committee can do what they want. Of course if the committee goes ahead and exceeds its authority, if the full committee approves it, why then it is approved.

Mr. ELSTON. Well, the setting up of a separate JAG Corps last year was included in the military justice bill. We had jurisdiction then to do it. The bill passed the House and it passed the Senate. There was never any question raised about the authority of the committee to pass on that question. It all pertains to the administration of military justice. I certainly feel that the matter should be considered further by this committee.

Mr. BROOKS. There is no objection to considering it further, but of course that was my thought on it.

Mr. ANDERSON. In other words, there is no objection to considering it as a committee and if the members offer it and adopt it, why it becomes a part of the act; isn't that right?

Mr. ELSTON. I just want to be certain——

Mr. BROOKS. Yes. And frankly I want to be on the record as feeling that we shouldn't attempt to exceed our authority. I feel that we do transgress our authority to try to tie that on the bill.

However, every other member of the committee has his own responsibility. I don't see how we can reach any other interpretation, other than that that is a separate bill. You might as well tie to this bill anything else that you want which is not included within the terms of the Uniform Code of Military Justice.

Mr. RIVERS. May I ask the Air Force? Who is here speaking for the Air Force? Major, are you speaking for them?

Major ALYEA. I have been following this bill, Mr. Rivers.

Mr. RIVERS. I would like to know what your interpretation of the present law relating to your authority to set up a Judge Advocate set-up in the Air Force is.

Major ALYEA. I am not authorized to present the Air Force position on that subject.

Mr. RIVERS. You know what you have set up, don't you?

Major ALYEA. Yes, sir. I have a personal opinion.

Mr. RIVERS. Well let me ask Mr. Larkin and then maybe you can interpolate.

Mr. LARKIN. The Air Force's legal interpretation of title 2 of the Public Law 759 passed last year, which includes at the end four sections which amend the National Defense Act——

Mr. RIVERS. That is right.

Major ALYEA. By setting up a Judge Advocate General's Corps, is that those four sections do not apply to the Air Force but to the Army only.

Mr. RIVERS. What are those four exceptions?

Major ALYEA. Four sections.

Mr. RIVERS. Well, they are four exceptions, too. What are they?

Mr. BROOKS. Let Mr. Smart answer that. I believe he can answer that.

Mr. SMART. Let me state this——

Mr. RIVERS. What is the general law on it? It says it shall apply to the Air Force or something to that effect.

Mr. SMART. Well, you have a situation involving statutory construction, Mr. Rivers. Immediately after or almost simultaneously with the House passage of H. R. 2575, which really pertained to the Army—it started out an Army bill, but at that time the Air Force military justice was administered by the Army——

Mr. RIVERS. That is right.

Mr. SMART. Then a bill, S. 2401, was presented to and approved by the committee, establishing the office of Air Judge Advocate and there were words used in that act which said laws now in effect relating to the administration of military justice would be equally applicable to the Air Force.

Now the question came up in connection with the Judge Advocate Corps that the Congress set up for the Army: Did Congress establish a corps of 750 officers for the Air Force? I can say to you on good information that the question has been submitted to the Attorney General.

It has been submitted to various and sundry people. There is a great diversity of opinion in official circles in Washington whether or not the Air Force has a corps. I know that they interpret it in the Air Force to mean that they do not have a Judge Advocate Corps.

And as a matter of fact a bill on this subject has been introduced and is now awaiting action by this committee—H. R. 1438, to construe title 2 of Public Law 759, Eightieth Congress to make it applicable to the Air Force, except the last four sections which established a Judge Advocate Corps for the Army.

Now that is the situation as of this moment.

Mr. RIVERS. I understand—and I say this is purely through conversation—that the type of corps that the Air Force wants to set up is a corps which is not separate like the Army but every section as applies to the Army that they like they are going to use and the sections they don't like they don't want to use.

That is, they are putting it under the chain of command. And I just want to know if that gossip is true or is it not true? I would just like to know it because it certainly is not good publicity. I thought the Air Force was supposed to have a JAG set-up like the Army.

Mr. SMART. Well, if they do have, Mr. Rivers, it would come purely as a matter of statutory construction and not as a specific enactment of law. That is my personal opinion.

Mr. RIVERS. Was this bill that was introduced—I guess the Chairman introduced it?

Mr. SMART. He did, at the suggestion of the Secretary of the Air Force.

Mr. BROOKS. Let me ask you this: That bill has not been assigned to this subcommittee?

Mr. SMART. It has not been assigned to any subcommittee.

Mr. RIVERS. Does it bring into effect a separate JAG?

Mr. SMART. It does not. The sole purpose of H. R. 1438 is to clarify beyond any doubt the question as to whether or not the Articles of War, as amended, exclusive of a corps, are equally applicable to the Air Force.

Mr. RIVERS. What does it do? Does it say it is or it isn't?

Mr. SMART. It provides that the revised Articles of War are applicable but that a Judge Advocate Corps is not applicable to the Air Force.

Mr. LARKIN. That is right.

Mr. RIVERS. What?

Mr. SMART. The separate corps is not applicable.

Mr. ELSTON. Everything except the corps.

Mr. BROOKS. Yes.

Mr. RIVERS. That is primarily what I understood.

Mr. SMART. But may I make a further comment, Mr. Chairman, for just a moment, with your indulgence here? I said before and I would like to reiterate now I feel that article 22 will stand upon its own feet completely apart from this corps proposition.

I have no intention or idea to influence this committee as to whatever action it might take regarding a corps. I merely want to point out that it seems to me that the attitude of the committee is to go ahead and approve article 22 as to who will appoint courts and leave it in command.

Now, if the committee sometime later, before you conclude your deliberations, decide you want a corps, that is all right. That can stand on its own feet.

Mr. BROOKS. Well——

Mr. SMART. But this can proceed as it is.

Mr. RIVERS. That is right.

Mr. SMART. With or without a corps.

Mr. ELSTON. I agree with Mr. Smart.

Mr. RIVERS. So do I.

Mr. DEGRAFFENRIED. Yes.

Mr. BROOKS. Let us postpone a further discussion of the corps, if it is all right with the committee, and dispose of this article and the succeeding ones. Then we can come back to the corps. And there may be disposition of the other bill by that time by the chairman.

But again I call your attention to the fact that, when the bill is not assigned to the committee, the committee is going to run into grave difficulties should that bill, which has already been put in, be assigned to another subcommittee and we undertook to present it to the full committee as a part of our bill.

Mr. ELSTON. Well, Mr. Chairman, I only make this point. When you sit down to write a uniform code of military justice, any amendment which is germane to that subject the committee should consider. The fact that it is submitted to us in another bill would seem to me to be immaterial.

We either have the right or we don't have the right to amend this bill. If we have the right to amend it, then we should consider any amendment that anyone wants to offer which is germane to the subject. And I certainly propose to offer an amendment to at least the Air Force. The Navy has stated their position, and I think they stated it very well. They have given us some cogent reasons why a separate corps would not work so well in the Navy.

We haven't gone into it completely, because we still want to hear from Admiral Russell. And we certainly want to hear from the Air Force. We ought to know what their views are before we close the door on this.

Mr. BROOKS. We will do this——

Mr. ELSTON. I just wanted to be sure that we are not closing the door now by passing on these sections.

Mr. BROOKS. Well, we have the interpretation of Mr. Smart. I think we can rely on that safely.

We will take that up at a later date. And let the committee as a whole decide what they want in reference to that. As long as the bills are not assigned to this subcommittee, I certainly am not going to take any other position than that; that we are exceeding our authority when we undertake something that isn't assigned to the committee.

If the committee wants to do that in spite of the situation, then it is the committee's responsibility.

Mr. RIVERS. I think it would be helpful if we were to get the spokesmen for the Air Force. Now the Navy sent their Under Secretary up here, Mr. Kenney. Why couldn't the Air Force at some time in the future not too far distant give us the privilege of hearing the feeling of the Air Force on this matter?

Mr. LARKIN. That is contemplated, Mr. Rivers.

Mr. RIVERS. I see.

Mr. LARKIN. As Mr. Elston and Mr. Smart have pointed out, you can consider 22 without reference to the corps in connection with the panel.

Mr. RIVERS. I appreciate that.

Mr. LARKIN. And since you indicate or the committee indicates that it would like to consider the corps after solving its own jurisdictional problem, it is contemplated that there would be further testimony on just that point from Admiral Russell to supplement Mr. Kenney's.

Mr. RIVERS. That is right.

Mr. LARKIN. And from Assistant Secretary Zuckert of the Air Force on behalf of the Air Force. There, again, I would recommend, as you did yesterday when you took time out to specifically consider the panel idea, that you again, when we finish the reading of the whole bill, take time out and have a special session.

Mr. RIVERS. That is right.

Mr. LARKIN. On the corps, with Admiral Russell finishing for the Navy and Mr. Zuckert coming forward for the Air Force.

Mr. BROOKS. There are no amendments offered to article 22 and apparently no objection. If there is no objection to article 22, it will stand adopted as read——

Mr. SMART. I have one suggestion. I don't know whether it is an omission or not.

Mr. BROOKS. What is that?

Mr. SMART. I would like to call it to Mr. Larkin's attention. We seem to have omitted the authority here to the Commandant of the Coast Guard. Don't you think that it should be inserted?

Mr. RIVERS. In section (2)?

Mr. LARKIN. I don't think it is necessary, Mr. Smart, for this reason: In subdivision (6), "Such other commanding officers as may be designated by the Secretary of a Department," by virtue of the definition in article 1 the Secretary of the Treasury is such a Secretary in peacetime.

Mr. RIVERS. Well, the Secretary of the Department up there, too, in article 22.

Mr. LARKIN. Well, the Secretary of the Department in (2) is the person of the Secretary. He may himself convene a court.

Mr. RIVERS. Oh, I see.

Mr. LARKIN. And then in (6) he may designate such further officers. Actually, the same situation obtains for the Superintendent of West Point, and Annapolis. The individual Secretaries of the Department may designate them, if they desire. The Secretary of the Treasury is included by definition.

Mr. SMART. I merely wanted that covered in the record.

Mr. BROOKS. If there is no further objection, then, let us proceed with article 23.

Mr. SMART (reading):

ART. 23. Who may convene special courts-martial.

(a) Special courts-martial may be convened by—

(1) any person who may convene a general court-martial;

(2) the commanding officer of a district, garrison, fort, camp, station, Air Force base, auxiliary airfield, or other place where members of the Army or Air Force are on duty;

(3) the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;

(4) the commanding officer of a wing, group, or separate squadron of the Air Force;

(5) the commanding officer of any naval or Coast Guard vessel, shipyard, base, or station; or of any marine brigade, regiment or barracks;

(6) the commanding officer of any separate or detached command or group of detached units of any of the armed forces placed under a single commander for this purpose; or

(7) the commanding officer or officer in charge of any other command when empowered by the Secretary of a Department.

(b) When any such officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority when deemed advisable by him.

References: A. W. 9, A. G. N., article 26.

Commentary: This article is derived from A. W. 9. Provisions for all the armed forces have been added. An "officer in charge" is an officer of the naval service or Coast Guard who is not known by the title of "commanding officer" but exercises similar authority. Subdivision (b) conforms to article 22.

Mr. BROOKS. You have heard the article. Are there any questions on it? Any changes suggested? If not——

Mr. SMART. It is a restatement of existing law, Mr. Chairman.

Mr. BROOKS. Yes.

Mr. RIVERS. Do you want anything for the record?

Mr. SMART. That is all that needs to be, sir.

Mr. BROOKS. Yes. It is just the same law restated there.

Mr. LARKIN. Yes, sir.

Mr. BROOKS. If there are no objections, then, it stands adopted as read.

Article 24.

Mr. SMART (reading):

ART. 24. Who may convene summary courts-martial.

(a) Summary court-martial may be convened by—

(1) any person who may convene a general or special court-martial;

(2) the commanding officer of a detached company, or other department of the Army;

(3) the commanding officer of a detached squadron or other detachment of the Air Force; or

(4) the commanding officer or officer in charge of any other command when empowered by the Secretary of a Department.

(b) When but one officer is present with a command or detachment, he shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases brought before him. Summary courts-martial may, however, be convened in any case by superior competent authority when deemed desirable by him.

References: A. W. 10; A. G. N. article 64; proposed A. G. N., article 15.

Commentary: This article is derived from A. W. 10. Provisions for all the armed forces have been added. It is felt appropriate that all persons empowered to convene superior courts-martial should also have power to convene inferior courts-martial.

Mr. BROOKS. Is that a restatement of the present law?

Mr. SMART. That is right, sir.

Mr. LARKIN. Yes, it is.

Mr. BROOKS. Any questions on it?

Mr. RIVERS. May I ask this question. We had the question brought up a few days ago by Commander Webb, I think, about these Coast Guard stations. Don't let us overlook the authority which we have to give those people.

Mr. SMART. I think, Mr. Rivers, that the interpretation which the committee has already placed upon that, recognizing the difference between the interpretation of an officer in charge in the Navy and an officer in charge of the Coast Guard, will adequately cover this situation.

Mr. RIVERS. Whether or not he is a commissioned officer.

Mr. SMART. Exactly.

Mr. LARKIN. That is right.

Mr. RIVERS. I just wanted to show that, because everybody is familiar with these Coast Guard stations up and down the coast, and they have to have adequate provision for discipline.

Mr. LARKIN. That is right.

Mr. BROOKS. Yes. Any further discussion on it? I think it speaks for itself pretty well. If not, article 24 will be adopted as read.

Article 25.

Mr. SMART (reading):

"ART. 25. Who may serve on courts-martial.

(a) Any officer on active duty with the armed forces shall be competent to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty with the armed forces shall be competent to serve on general and special courts-martial for the trial of any person, other than an officer, who may lawfully be brought before such courts for trial.

(c) Any enlisted person on active duty with the armed forces who is not a member of the same unit as the accused shall be competent to serve on general and special courts-martial for the trial of any enlisted person who may lawfully be brought before such courts for trail, but he shall be appointed as a member of a court only if, prior to the convening of such court, the accused has requested in writing that enlisted persons serve on it. After such a request, no enlisted person shall be tried by a general or special court-martial the membership of which does not include enlisted persons in a number comprising at least one-third of the total membership of the court, unless competent enlisted persons cannot be obtained on account of physical conditions or military exigencies. Where such persons cannot be obtained, the court may be convened and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

For the purposes of this article, the word "unit" shall mean any regularly organized body as defined by the Secretary of the Department, but in no case shall it be a body larger than a company, a squadron, or a ship's crew, or than a body corresponding to one of them.

(d) (1) When it can be avoided, no person in the armed forces shall be tried by a court-martial any member of which is junior to him in rank or grade.

(2) When convening a court-martial, the convening authority shall appoint as members thereof such persons as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No person shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case."

References: A. W. 4, 16; A. G. N., article 39; proposed A. G. N., article 24 (a).

Commentary: Subdivisions (a), (b), and (c) make officers, warrant officers, and enlisted persons competent to sit on the courts martial of any armed force, without regard to whether they are members of the same armed force as the convening authority, or of the same armed force as the accused. Placing no limitation on competency in this respect will give the convening authority a maximum number of persons to draw on for membership of a court martial in a situation where he is in command over several small units of different armed forces, or will permit the appointment to a court of persons belonging to the same armed force as the accused in a case in which reciprocal jurisdiction is being exercised. In such cases it is contemplated that the President's regulations on reciprocal jurisdiction will specify what percentage of members will be from the same armed force as the accused. (See article 17.) As a practical matter, the appointment of mixed courts will not be a common practice.

Subdivision (c) limits the competency of enlisted persons to cases where they are not members of the same unit as the accused. By section 212 of Public Law 759, Eightieth Congress, second session (1948) (see A. W. 16) Congress similarly limited competency to enlisted persons not assigned to the same company or corresponding military unit. A corresponding military unit aboard a ship is felt to be the ship's crew, which, though it may in some cases be a larger group than the Army company, is the same kind of integrated body, living and working in close association.

The last sentence of the first paragraph of subdivision (c) was added to make it possible to proceed with a trial where competent enlisted persons cannot be obtained. This is to avoid long delays in the administration of justice and the expensive process, which might otherwise be necessary, of transporting witnesses or court members great distances. Such delays and expenses would arise in connection with offenses committed on ships at sea or in isolated units ashore, such as remote weather stations. The language of the subdivision makes it clear that mere inconvenience is no ground for proceeding with a trial without enlisted persons on the court, and the requirement of a detailed written statement of the ground insures that the purpose of the subdivision will be complied with.

Mr. BROOKS. You have heard the article. Do you have some questions, Mr. Rivers?

Mr. RIVERS. May I ask you this for the record. Do you consider this strong enough to assure the minimum of criticism of the enlisted man serving on the juries when an enlisted man is tried? There is a detailed report there.

Mr. SMART. It is my opinion, Mr. Rivers, that this answers the complaint of enlisted people. I have some statistics which I would like to submit for the record on the ideas of enlisted persons, as to whether or not this is a good section.

Mr. RIVERS. Yes.

Mr. SMART. At the time we included the enlisted-man provision for Army courts martial we really didn't know how enlisted men felt about it. Ranking officers then and since that time have stated to me that they doubt that it will be of any assistance or benefit to enlisted persons.

Mr. RIVERS. Well, it can't hurt.

Mr. SMART. I don't agree necessarily. It may hurt them because some of these "crusty" noncoms might throw the book at these boys where officers would probably be a little more lenient.

Mr. RIVERS. That is right.

Mr. SMART. But I would like to point out, and I have found this to be true beyond any doubt through interviewing 930 enlisted men during last October: I find that, excluding the 60 to 80 young men who were recruits or OCS candidates from the total, about 93 percent of the men expressed the desire to have the option to have enlisted men on their courts if they want them.

Mr. RIVERS. Well, that is all right.

Mr. SMART. And I asked three different questions. First, how many of you would like to be tried by an all-officer court? Second, how many of you would like to have the option to have at least one-third enlisted men on your court? Third, how many of you would like to be tried by an all-enlisted-man court? Out of 930, only 1 soldier stated that he would like to be tried by an all-enlisted-man court.

Ninety-three percent want the option to be tried by a court partially composed of enlisted men, as is provided in this article.

Mr. RIVERS. One other thing. Can we say that this whole provision here gives a man an opportunity to be tried by a jury of his peers?

Mr. SMART. A jury composed of at least one-third of his peers, I would say.

Mr. DURHAM. Mr. Chairman?

Mr. BROOKS. Mr. Durham. We are happy to have you here this morning. Mr. Durham is the chairman of subcommittee No. 3.

Mr. DURHAM. Thank you very much.

This provision is practically the same as was placed in the act last year, with the exception of the inclusion of the Navy?

Mr. SMART. It is substantially the same.

Mr. DURHAM. Now the term "ship's crew"; would that eliminate a lot of men from serving on courts martial to a large extent?

Mr. SMART. In my opinion, it would, sir. On a small ship, and I don't care whether it has 25 men or 125 men, they are so closely confined by the very nature of the operation, that you must consider them a unit. I think you could not get away from prejudice among enlisted persons in that situation. I think it is intended that enlisted men would not be provided under those circumstances.

Mr. DURHAM. In the Navy.

Mr. SMART. Yes, sir.

Mr. BROOKS. Well, let me ask you this, Mr. Smart. By having this provision regarding enlisted men in here, at least you remove the criticism that has been leveled at these trials which prohibited the use of enlisted men?

Mr. SMART. That is correct, sir.

Mr. BROOKS. To that extent it will have a good moral effect, don't you think?

Mr. SMART. I think so. An experiment, I might point out to the committee, has been tried since you have been conducting these hearings. That was at Scott Field, Ill., where an 11-person court was convened. Four of them were officers. The trial judge advocate challenged one of the officers for cause and another one peremptorily.

The defense counsel did the same thing. So all they had left was seven enlisted persons. Those seven enlisted men served as the trial court of the accused. I think they gave him a $50 forfeiture for 2 months and perhaps about 60 days of confinement.

That is completely in line with sentences which have been given for the same offense by officer courts

Mr. RIVERS. That is right.

Mr. SMART. So this provision doesn't seem to be detrimental to enlisted men..

Mr. DEGRAFFENRIED. May I ask a question, Mr. Chairman?

Mr. BROOKS. Mr. deGraffenried.

Mr. DEGRAFFENRIED. Mr. Smart, just for my information, is there any provision in this act or in existing law where the court is sitting both as a jury and a court for asking to see if the members are really qualified to ask them questions such as these, whether each of them believes in capital punishment or whether they would convict on circumstantial evidence or whether they heard so much about the case and are so familiar with the facts that they couldn't give the defendant a fair trial?

Mr. SMART. No.

Mr. DEGRAFFENRIED. There is nothing provided like that, is there?

Mr. SMART. No, because trial by jury is a civilian protection, a constitutional right that does not follow a man into the service.

Mr. RIVERS. Wouldn't the law officer rule on whether or not questions of the court would be admissible?

Mr. SMART. The only way that can be reached, Mr. Rivers, is to challenge a member of the court for cause. After you have once exercised your one peremptory challenge, then the only remaining challenge you have is a challenge for cause which must rise or fall upon its own merits.

Mr. RIVERS. Well, that is the way you could reach Mr. deGraffenried's objection, there.

Mr. LARKIN. That is right.

Mr. RIVERS. On the separate merits of the individual's statements.

Mr. SMART. That would be the only way.

Mr. PHILBIN. Do you have any way provided by which the accused can object to the members of the court?

Mr. LARKIN. Yes. There are challenges for cause as to each member. And then you have a peremptory challenge where you can challenge one member, that is any one member, without reason at all.

Mr. RIVERS. Each defendant could challenge one man?

Mr. LARKIN. According to the modification we have made, yes, sir.

Mr. DEGRAFFENRIED. What I had in mind, though: There are oftentimes where the counsel doesn't have any information. The only way he has of getting the information is by asking the person himself as to whether he has heard so much about the case that he is prejudiced on one side or the other and couldn't go by the evidence

in the case. You wouldn't have heard one thing about it one way or the other. That is what I had in mind.

There are certain people who don't believe in capital punishment under any circumstances. Well, he might not have expressed his opinion. You wouldn't know it. But the only way you could find it out would be by asking him.

Mr. LARKIN. That is right.

Mr. ELSTON. There is no limit to the number of challenges for cause?

Mr. LARKIN. No, sir.

Mr. ELSTON. And my understanding is that the rules are practically the same as they are in the civil courts. You may examine any member of the court and if the court is satisfied that any member of the court is prejudiced against the accused or he doesn't believe in capital punishment or there is any reason why he can't grant a fair and impartial trial, a challenge for cause will lie?

Mr. LARKIN. That is right, and be sustained, I should say, on the proof of any of those circumstances.

Mr. ELSTON. Yes.

Now, Mr. Chairman, Mr. Smart mentioned about his having talked to a number of enlisted men. I think the record ought to show the facts with regard to Mr. Smart's investigation into this subject and where he interviewed these men.

Mr. BROOKS. Would you like to elaborate a little bit on that, Mr. Smart?

Mr. ELSTON. It is quite illuminating.

Mr. BROOKS. I think it is very important.

Mr. ELSTON. Because Mr. Smart took a lot of time last summer and fall while we were not in session.

Mr. BROOKS. Mr. Smart, will you give us a little more detail about your investigation?

Mr. SMART. Well, I would merely like to say three things. These interviews included 140 colored troops out of the total of 930, so there is a fair representation of both colors in these totals.

I would further point out that the colored enlisted man expressed his preference for this option for exactly the same reasons as the white soldier did. They have two particular reasons for wanting it.

One is that they feel that officers, in the main, have never served in the enlisted grades and do not understand the problems of enlisted people. While they don't expect any particular sympathy from the court because of that, a court which might include enlisted persons, nevertheless they feel that they would have more understanding.

The second reason is this: They say it is much more democratic. They just like the idea that they have a choice. They say "We would have it in civilian life and we like the idea that we can have it here."

Now as to the number of places I visited, they are seven in number. They represent only Army and Air Force installations. I tried but was unable to get the time to make a similar survey of naval installations.

Rather than impose on the time of the committee any more, Mr. Chairman, I would offer a tabulated result of my interview with the men. It is prepared for the record, if I may offer it for the record.

Mr. BROOKS. Tell me this: Do you have copies of that? Of course the committee can get those from the record when it is printed.

Mr. SMART. I can furnish each of you with copies if you so desire, sir.

Mr. BROOKS. If it isn't much work, that would be fine. I think every member of the committee would like to study that while we are deliberating on the bill.

Mr. RIVERS. It is very good information.

(The information referred to is as follows:)

Military justice interviews, enlisted men, Oct. 4–Oct. 24, 1948

Place	Designation of unit	Number in unit	Prefer all officer court	Prefer court with at least one-third enlisted men	Prefer all enlisted men court with 1 legal officer
Lackland Air Force Base	Headquarters, noncommissioned officers.	34	4	30	0
ATC-Induction Center	OCS class	20	14	6	0
San Antonio, Tex	Trainee flight	60	25	35	0
Headquarters, 4th Army, Fort Sam Houston, San Antonio, Tex.	Headquarters Detachment, Medical Field Service School.	51	4	47	0
	25th TC Co. (colored troops)	20	1	19	0
	Specialist noncommissioned officers: Cooks, bakers, etc.	50	1	49	0
	Miscellaneous group of noncommissioned officers.	40	4	36	0
Kelly Air Force base, Air Matériel Command, San Antonio, Tex.	3050 Air Support Command Headquarters.	18	0	18	0
	(Colored troops) Headquarters Squadron.	22	0	22	0
	Miscellaneous group, headquarters personnel.	25	0	25	0
Topeka Air Force Base, Topeka, Kans.	55th Strategic Reconnaissance Wing.	50	0	50	0
	311th Air Division Headquarters.	50	0	50	0
Scott Air Force Base, Belville, Ill.	3310th Base Service Squadron (colored).	50	0	50	0
	Student typing class	111	23	88	0
	Headquarters and Headquarters Squadron.	34	4	30	0
Fort Knox, Ky., 3d Armored Division, Armored Center.	School troops	38	4	34	0
	2128th Headquarters Co	40	4	36	0
	3d Armored Group (colored)	43	0	42	1
	Miscellaneous group of enlisted men (mixed).	40	1	39	0
Wright-Patterson Air Force Base, Dayton, Ohio.	Headquarters and Headquarters Squadron, 2750th Air Force Base.	33	6	27	0
	3060th Air Matériel Command Headquarters Support Squadron.	50	0	50	0
	Miscellaneous enlisted men [1]	51	4	40	0
Total		930	99	823	1

[1] 7 did not vote.

Mr. ELSTON. Now, Mr. Chairman, I have a question or two about the section.

Mr. BROOKS. Mr. Elston.

Mr. ELSTON. First of all, I would like to ask whether or not article 25, subsection (a), is the section that permits naval officers to sit as members of a court convened by an Army commander and vice versa?

Mr. LARKIN. That is right, Mr. Elston. It is purposely made broad to tie in with the other article which provides reciprocal jurisdiction. The exercise of the reciprocal jurisdiction of one service over another as you will recall will depend upon the rules set out by the President.

But this does provide the statutory authority whereby officers of one service can sit on the courts of others.

Mr. RIVERS. That is like the MATS?

Mr. LARKIN. That is right.

Mr. ELSTON. Now what has been the position with respect to warrant officers heretofore?

Mr. LARKIN. Heretofore of course they have not been eligible or competent. They were made so by the Elston bill last time.

Mr. ELSTON. Yes.

Mr. LARKIN. And this is a continuation of the provision provided in Public Law 759.

Mr. ELSTON. I think you have explained already the other question I had and that was a definition of the word "unit" in line 15, where you say "where a person is not a member of the same unit."

Mr. LARKIN. That is partially defined, I should say, in the second paragraph of subdivision (c). Your bill, if you will recall, last year provided for the Army only that no enlisted person in the same company or corresponding unit would be eligible to sit on the court of an accused from that unit. We have continued the same idea of a unit, but since we were dealing with the Navy as well, the nearest unit we could arrive at was a ship's crew.

The definition is not very complete, I concede, but it is difficult to find an exact comparison. Actually there is none. So we left it or we felt it best to leave it to the departmental secretaries to determine the units that they think appropriate for their own services, but we have restricted them by not permitting them to say that anything bigger than a ship's crew is a unit.

Now of course in some few instances that may be a large body of people, such as on a battleship, but we just couldn't find any other unit and at least they can't say that a unit is something bigger than a ship's crew, you see.

Mr. ELSTON. Now, it seems to me that perhaps the language in lines 19 and 20 might need a little clarification. The provision there is "but he shall be appointed as a member of the court only if prior to the convening of such court the accused has requested in writing that enlisted persons serve upon it." Now does that mean when the notice is given that the court is to be convened or does it mean prior to the actual convening of the court?

Mr. LARKIN. I think it extends all the way up to the time that the court sits or actually convenes as you put it. It is after, in other words, the time when he is first served with charges. He has time to decide whether he desires to request enlisted men on his court.

Of course it may cause some administrative problems in that we won't know up to the convening of the court whether he intends to ask for enlisted men and if he does and there are none available the trial may have to wait several other days until some enlisted men are available. I think some consideration ought to be given to that.

Mr. ELSTON. Well, it isn't entirely clear then as to just when the time ends for his requesting enlisted men on the court.

Mr. LARKIN. I should say a fair construction of this language is that it doesn't end until he is arraigned. In other words we may be faced with the fact that the court trial is all ready to start and while in most cases I would assume the accused and his counsel would make his request known before the day, a number of them may purposely not do so just to delay the start of the trial.

Mr. DURHAM. The man might have to spend several days in the brig.

Mr. ELSTON. Yes. Of course they would know that, if he had to spend several days in the brig.

Mr. LARKIN. Oh, yes. Then I think he could not complain about that, certainly.

Mr. ELSTON. After all, it could be taken care of by always having some enlisted men available in the event the question is raised even at the last moment.

Mr. LARKIN. I suppose that is so; except it would be administratively easier if we could provide some fair time in advance of the actual sitting of the court but after the serving of charges. Otherwise you will have enlisted men sitting around not knowing whether they are going to be used or not or whether it is necessary to have them.

Mr. ELSTON. Well, do you think we should spell it out in this section or leave it for regulation?

Mr. LARKIN. Well, if the committee is content to construe the language as meaning some short reasonable time before arraignment, some time after the signing of charges, I think that is sufficient. It is difficult to spell out numbers of days because then it becomes very inflexible and the time that elapses between the referring of the charges and the start of the trial varies so greatly that any 1 day or any number of days is really difficult to determine.

Do you have anything you can add to that, Colonel? That is the point you had in mind, I think.

Colonel DINSMORE. Yes.

Mr. Chairman, the difficulty as pointed up by this situation is this: It is standard practice to appoint a general court martial and continue it in operation for a given period of time or for a given number of cases. That is administratively desirable.

Now, if you don't know beforehand whether the accused who is an enlisted man is going to ask for enlisted men on the court, you may have to appoint a new court for each case which although not an insuperable administrative difficulty leads to a good deal of inconvenience.

Mr. RIVERS. Why couldn't you circularize that amongst the enlisted men and find out what they are going to do?

Colonel DINSMORE. You could, Mr. Rivers, but as Mr. Larkin points out here this says he can make his election any time up to the time the court meets.

Mr. BROOKS. Why wouldn't this be the better way to approve that, Colonel: At the time he is advised of his rights—and we have specified that he shall be advised of certain rights as Constitutional rights—we also insert in that particular provision a requirement that he be advised of his rights to request enlisted men, provided he does that before the court is convened.

Colonel DINSMORE. That is in connection with investigation.

Mr. BROOKS. Yes.

Colonel DINSMORE. Yes, sir.

Mr. BROOKS. We could do that, so that he could be well posted and make his decision early.

Mr. ELSTON. Of course he might not have an opportunity to talk to his counsel until after that.

Mr. LARKIN. I think that is right. I think it should be after the formal referring rather than just in the preliminary step.

Mr. SMART. Not only that, but the charges which are sent down for pretrial investigation may not result in trial at all, in which event he is selecting an enlisted man jury for a case that may not be tried.

Mr. BROOKS. Well, I don't refer to it specifically as necessary to be made at the pretrial investigation, but at some date when he is advised of his rights that particular right can be stipulated.

Colonel DINSMORE. Mr. Chairman, we are not by any means disposed to deprive the enlisted man of this right. I merely point out that there is an administrative difficulty there on account of the uncertainty of the present language.

Mr. LARKIN. We copied this language exactly from your provision, Mr. Elston. But there is that possibility. Perhaps Mr. Smart and I could work out language of this kind, that no enlisted person shall be tried without enlisted men when requested in writing by the accused within a reasonable time after the referring—which is a word of art meaning the formal referring for trial by the convening authority—of these charges and before the actual convening of the court. Perhaps something like that would work out.

Mr. ELSTON. Then you would have to interpret what was a reasonable time.

Mr. LARKIN. Well, that is right.

Mr. BROOKS. Does "reasonable" add anything to what you have, because, let us assume that no court is going to be unreasonable.

Mr. LARKIN. Well, under the present language the request can be made right up to the minute the court is scheduled to sit.

Mr. ELSTON. It seems to me that is the way it ought to be.

Mr. LARKIN. I should say that is the clear construction of this language. Now if the committee decides that is the way they want it to be, I wouldn't tinker with it.

Mr. ELSTON. Yes.

Mr. LARKIN. I think it is construed that way in the commentary and if not, I think this discussion would so indicate.

Mr. ELSTON. You can see where a man may not get counsel until the day before his arraignment or even on the day of his arraignment. He might change his mind. He may in the beginning think that he doesn't want enlisted men and then he may decide that he does want them. He may find out something about the personnel of the court that would make him change his mind, perhaps.

Mr. BROOKS. That is the point exactly. I don't think that an enlisted man ought to have two bites at the cherry, any more than anybody else should. If he doesn't like the court that is appointed to try him, he then shouldn't have the right to say, "Well, I want another court," any more than an officer should have that right.

Mr. ELSTON. I don't mean after the court is convened. I mean up to say the time of his arraignment.

Mr. LARKIN. Yes.

Mr. ELSTON. When he is asked to plead to the charges.

Mr. BROOKS. Mr. Smart, you have a suggestion?

Mr. SMART. I honestly believe, in view of the provisions for counsel which are provided in this bill, that an enlisted man is going to know that he has the right before he goes to trial to have enlisted persons on that court. As a practical situation I think it is going to be a rare thing where an accused is going to wait and try to gum up the works,

so to speak, and delay trial by waiting until the time the court is convened and then request enlisted men.

I think that is going to be a rare case. And when it does happen, in that rare case, he is the person who is going to suffer because he is going to lay in the "clink" until they get to trial. I think he is harmed more than anyone else. I think, practically, it is not going to cause any trouble.

Mr. ELSTON. Well, I think in view of the interpretation of it already, if that follows through, you won't have any trouble with it.

Mr. LARKIN. I think so.

Mr. SMART. I had one more observation which I think this committee ought to interpret, when they provide that "the accused has requested in writing." Now it seems to me that the language there is pretty clear and means the accused. But I can tell you this case has arisen, which is now in the Judge Advocate General's Department of the Army: the attorney for the accused made the request for the enlisted men and insists that he made it at the request of the enlisted defendant.

Mr. ELSTON. Wouldn't it be all right to say "the accused or his counsel"?

Mr. SMART. I believe I would leave it "the accused" here. And I believe I would make the accused himself sign that application so he will never then be heard to say that he didn't want them.

Mr. DEGRAFFENRIED. Didn't authorize his counsel to do it.

Mr. SMART. That is right.

Mr. DURHAM. I don't see how you could put that interpretation on that—"accused has requested in writing that enlisted persons serve on it." This says "in writing."

Mr. SMART. That is true. Of course as a matter of form in your civil courts the attorney is authorized to do many things as the agent of his client. Perhaps that is the thought that is carried over here.

But I believe now that the committee should clearly express its intent that this means that the accused himself shall sign it and not delegate that authority to anyone else. But I would not want to prejudice the case which is already existing by the present interpretation of the committee.

Mr. BROOKS. Your idea is this, is it, that the right is so important in your mind that the accused should be required to sign the application to indicate that he is fully apprised of his right?

Mr. SMART. And that he personally makes that choice and does the signing personally and doesn't delegate it to anyone slse—counsel or otherwise.

Mr. ANDERSON. Mr. Chairman, I have a suggestion. Why not make it very clear by putting after the word "accused" "himself"?

Mr. DEGRAFFENRIED. "In person" or something of that kind.

Mr. LARKIN. "The accused has personally requested," I would think would make it nondelegable.

Mr. ANDERSON. Just anything that makes clear that that is the intent of the committee.

Mr. BROOKS. Do you make that as a motion?

Mr. ANDERSON. I make that as a motion.

Mr. BROOKS. An objection? If not, we will insert the word "personally."

Mr. ANDERSON. I would like it noted that that is the first suggestion I have made that has been adopted.

Mr. BROOKS. Mr. deGraffenried.

Mr DEGRAFFENRIED. Mr. Larkin and Mr. Smart——

Mr. SMART. Yes, sir.

Mr. DEGRAFFENRIED. Over on page 23 of the bill, on line 19, it says:

No person shall be eligible to sit as a member of a general or special courts martial when he is the accuser or a witness for the prosecution or has acted as an investigating officer as counsel in the same case.

Would it be worth while in your opinion to add to that "or who has a fixed opinion as to the guilt or innocence of the accused", or can you reach that in some other way?

Mr. LARKIN. I think you reach that in your challenge for cause.

Mr. DEGRAFFENRIED. All right, sir.

Mr. LARKIN. I think that is clearly taken care of under that.

Mr. DEGRAFFENRIED. All right, thank you.

Mr. BROOKS. Mr. Elston has another question.

Mr. LARKIN. Yes, sir.

Mr. ELSTON. Just to get the record clear, does the term "enlisted persons" include warrant officers?

Mr. LARKIN. No, sir; it does not.

Mr. ELSTON. So that when a man demands enlisted men on the court it means persons below the grade of warrant officer?

Mr. LARKIN. That is right.

Mr. BROOKS. I have a question, too. Now the accused must personally request in writing that enlisted persons serve on the court. Suppose you got several accused and one makes a request and one doesn't make a request, what is the situation?

Mr. LARKIN. I assume that severance would have to be granted as to the accused.

Mr. BROOKS. Even though both are charged with identically the same offense involving identically the same set of facts?

Mr. LARKIN. That is right. Because, you see, this is at the option of the accused himself and it is his right to exercise it. On the other hand, there is no authority for anybody to put enlisted men on his court without his request. I can see no solution other than a severance of the case.

Mr. ELSTON. Is it a matter of right that an accused person can demand a separate trial?

Mr. SMART. No. That is discretionary.

Mr. DEGRAFFENRIED. That is the point I asked you the other day, and you said there wasn't any other way.

Mr. SMART. He can as a matter of right request it, but it is discretionary whether or not it shall be granted.

Mr. ELSTON. It seems to me it would be reversible error if he were granted a trial with enlisted men because the enlisted men were given to his codefendant and the court refused his request for a separate trial before an all-officer court.

Mr. LARKIN. I should think so.

Mr. BROOKS. I want to hear from the Colonel on that.

Colonel DINSMORE. I agree with Mr. Elston.

If the committee will indulge me, I would like to address myself one step further on the appointment of enlisted men. The difficulty arises from the language in the act as we have drawn it: "But he

shall be appointed as a member only if prior to the trial the accused requests it." Therefore, you can't appoint your court until you get right up to the arraignment. Now if we could find some way of saying that he shall not be tried by a court which does not include enlisted men of the number at least one-third of its members if he requests it, then you could appoint a court in advance, you understand, with enlisted men on it and maybe you could appoint another one without enlisted men on it, so that when the man made up his mind you could try it by either court.

Mr. BROOKS. Colonel, if we don't put in some stipulation along that line, here is the result, isn't it: That every enlisted man can get a severance in every case, almost, where there are two or more defendants?

Colonel DINSMORE. I think that will necessarily follow.

Mr. BROOKS. Because the enlisted man can decide in advance 'we want to separate these cases and I will demand enlisted men and you just don't ask for it, and then we automatically have a severance."

Colonel DINSMORE. That seems to me to be inevitable, Mr. Chairman.

Mr. SMART. There is no way to get around that that I see, Mr. Brooks.

Mr. BROOKS. Unless we stipulate here by separate provision that in the event one defendant asked for enlisted men the court shall then be composed of one-third enlisted men.

Mr. LARKIN. I don't think it is necessary, frankly.

Mr. PHILBIN. You think you would rather go ahead and give them a severance in that situation?

Mr. LARKIN. Yes.

Mr. SMART. In any event a severance should be granted.

Mr. ELSTON. Mr. Chairman, I had another question. I believe someone who testified before us indicated that there is a loophole here in that enlisted persons could be excluded if it was considered impossible to obtain competent enlisted persons. Now, can you give us any case in which competent enlisted persons might not be available? There are always more enlisted persons around than there are officers.

Mr. LARKIN. Yes; that is right. That specific provision in subdivision (c) was, as I recall, objected to by Mr. Wolman. It is a difference and one which I wish to point out to the committee. It differs from the provisions of the Elston bill last year.

Last time it was provided, that is your committee provided, for the Army only that where an enlisted man requested enlisted men on his court, he could not be tried unless such enlisted men were on the court, although members of his own company were not competent to sit on that court.

Now, when we addressed ourselves to the problem of enlisted men and tried to make it apply to the Navy as well—and as designed by your committee problems of the Navy I am sure were not before you—it seemed to us that you would have a number of circumstances in the Navy where a man would request enlisted men on his court and by virtue of the fact that none of the men in his own ship's crew, in this so-called unit, were eligible to sit, you might be faced at sea particularly in special courts with the situation that no other eligible men were available.

The men of his own ship, of course, are not eligible and the problem of trying to transfer some enlisted men on the high seas from another ship is so great that unless you made provision for trying him without enlisted men even though he had requested them in those extraordinary circumstances, you couldn't try him at all perhaps for a lengthy period of time.

Now, we realized that to leave any discretion with the commander was bordering on a situation where there might be criticism that commander would not follow the spirit of this provision and the inten tof Congress that there be enlisted men where the enlisted men wanted them on generals and special courts.

So for that reason we attempted in providing for that isolated exception that in such event the convening authority, if he finds the circumstance is such that there are no eligible enlisted men available at sea, because the ship's crew are not eligible, shall make a detailed written statement to be appended to the record stating why he found it impossible to obtain eligible enlisted men at the time.

Mr. ELSTON. It doesn't say "eligible." It says "competent."

Mr. LARKIN. Well, it is the same notion, I think.

Mr. ELSTON. Well, "competent"—an officer might interpret that to mean a person who is incompetent by reason of lack of intelligence.

Mr. LARKIN. Of course, there is a provision covering that, but our idea as I am trying to reconstruct it would have the exception apply only when there are no eligible men, eligible in the sense or competent in the sense that there are no enlisted men outside of the unit.

Mr. ELSTON. Wouldn't "eligible" be a better word than "competent"?

Mr. BROOKS. I think so.

Mr. ELSTON. I don't know what the term "physical conditions" means, either.

Mr. LARKIN. I think "physical conditions" are the physical conditions that are encountered on the high seas where ships are separated physically. It is very dangerous and very difficult to transfer men from one ship to the other.

And "military exigency" I think has more to do with the isolated unit. In the commentary we set forth further our idea of how restricted the exception should be, where we say in the last paragraph of the commentary—

> The last sentence of the first paragraph of subdivision (c) was added to make it possible to proceed with the trial where competent enlisted persons can't be obtained. This is to avoid long delays in the administration of justice and the expensive process which might otherwise be necessary of transporting witnesses or court members great distances. Such delays and expenses would arise in connection with offenses committed on ships at sea or on isolated units ashore such as remote weather stations. The language of the subdivision makes it clear that mere inconvenience is no ground for proceeding with the trial without enlisted men on the court and the requirement of a detailed written statement of the ground insures that the purpose of the subdivision will be complied with.

Now we intended that that be part of the legislative history, as instructions to the commanders and the people that write the manual that it would only be in the most exceptional type of case that they would proceed and it would only be after the commander writes a statement of the conditions he has faced which made it impossible for him to obtain enlisted men and the statement is to go with the record.

So it will not just be arbitrary or capricious convenience of his which he could adopt in order to avoid using enlisted men in the event he was the type of commander who wasn't sympathetic with this provision.

Mr. ELSTON. It seems to me, though, the word "eligible" would be a better word than "competent."

Mr. LARKIN. That may be. I think we used the word "competent" because it occurs in the beginning of subdivision (c), in the third line under there, which is a word that we have borrowed from your language.

Your language read just that way, "competent"—and we continued it.

Mr. PHILBIN. Would you have any objection to the substitution of "eligible"?

Mr. LARKIN. I wouldn't think so.

Mr. BROOKS. Then if you do that, would you substitute that all the way through?

Mr. LARKIN. You would have to. I assume the word "competent" was used because of subdivision (d) (2), which is a continuation of the provision of last year's bill which leaves it in the discretion of the convening authority to appoint people of certain competency.

Mr. PHILBIN. Yes. Competency usually goes to mental quality or capacity.

Mr. LARKIN. That is right, and education, training, and so forth.

Mr. PHILBIN. That is right.

Mr. LARKIN. And since that is also a part of it, why it was used. But our notion as to when the exception would operate would be by virtue of there being no one competent in connection with the definition of the word "unit," that is the ship's crew rather than the other.

Mr. ELSTON. Well, with that explanation probably the word "competent" is all right.

Mr. BROOKS. Down in the last sentence of that section you use the word "eligible." You suddenly switch off.

Mr. ELSTON. I would suggest, Mr. Chairman, that Mr. Smart and Mr. Larkin go over this section and if they feel the word "eligible" is more appropriate than "competent," that it be substituted.

Mr. LARKIN. Let us do that.

Mr. BROOKS. That is an excellent suggestion. Unless there is no objection, we will refer it to them and take it up next time.

Mr. LARKIN. May I ask if it is the sense of the committee that the substance as provided in this article is acceptable?

Mr. ELSTON. I hadn't any idea of changing the substance at all.

Mr. LARKIN. I see.

Mr. BROOKS. The only thing that occurred to me is whether it would not be better to put a period earlier there, so that it would read "unless eligible or competent enlisted persons can't be obtained."

Mr. LARKIN. Well, that leaves it wide open.

Mr. BROOKS. I think the thing that really——

Mr. LARKIN. May I say we toyed with the idea "available," but it is a word of——

Mr. PHILBIN. Limitation.

Mr. BROOKS. The thing that ties that down is the succeeding sentence, though, which requires a detailed written statement, because

"military exigency" and "physical conditions" can cover just about anything.

Mr. LARKIN. Well, I think those phrases are valuable restrictions.

Mr. PHILBIN. The commentary covered it pretty well, I thought.

Mr. LARKIN. I think so.

Mr. BROOKS. Yes.

Mr. LARKIN. We tried to spell that out carefully so the intent was quite clear.

Mr. BROOKS. Any further discussion of it? If not, this article 25 will stand adopted, with the one reservation which we have agreed on.

Mr. LARKIN. Yes, sir.

Mr. BROOKS. Article 26.

Mr. SMART (reading):

ARTICLE 26. Law officer of a general court-martial.

(a) The authority convening a general court-martial shall appoint as law officer thereof an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States and who is certified to be qualified for such duty by The Judge Advocate General of the armed force of which he is a member. No person shall be eligible to act as law officer in a case when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(b) The law officer shall not consult with the members of the court, other than on the form of the findings as provided in article 39, except in the presence of the accused, trial counsel, and defense counsel, nor shall he vote with the members of the court.

References: A. W. 8; Proposed A. G. N., article 24 (b).

Commentary: This article is derived from A. W. 8 with modifications. The law officer is required to be a member of the bar whether or not he is a judge advocate or law specialist. The change in the position of the law officer is reflected in subdivision (b) which requires the accused and counsel to be present when the law officer consults with the court, other than on the form of the findings, and states that the law officer shall not be a voting member of the court. See article 51 as to rulings and duties of the law officer and article 39 as to when the law officer must be present.

Mr. BROOKS. I might ask you this: That includes members of the District bar?

Mr. LARKIN. That is right, Mr. Chairman. I can cite for the record title 28, United States Code, sections 41 and 88, which construe the District of Columbia court as a United States Federal court and clearly includes members admitted to the District Court Bar.

Mr. BROOKS. Mr. Elston, do you have some questions?

Mr. ELSTON. You recall there was a good deal of controversy about subsection (b). That is a departure from present law. I don't know that you stated your position on it, Mr. Larkin. Some of the witnesses who testified about this section objected to it. Others were for it. Now maybe you can enlighten us as to why the present law was changed.

Mr. LARKIN. Yes. I think we have touched upon this problem in a brief manner when we considered articles 39 and 51, which also have to do with the law member and his functions. This represents a change from both Army and Navy practice. The present Army practice provides, since 1920, that each general court have an official known as a law member who rules on interlocutory questions during the course of the trial in the same fashion as we have set out in another article here and provided for this law officer to do.

In the Army practice, however, this law member retired with the court after the conclusion of the case or the finishing of the evidence and consulted and deliberated with them, instructing them on the law of the case, and then voted with them on the findings and the sentence.

Now the Department of the Navy, on the other hand, has not and never has had such a legal arbiter on its courts. The courts themselves rule on all questions of evidence and when they retire they retire alone.

There is no person who is similar to the Army law member who, of course, for many purposes, is really a judge. In studying the whole problem of what kind of a legal arbiter there should be on general courts the committee was split on the ideal manner of providing the functions of this legal arbiter. There was no question in anybody's mind that there should be one in all general courts martial.

The question turned on what his functions would be. The ultimate decision in this case was made by Mr. Forrestal, that the legal arbiter should rule on questions of law on the trial in the same way the Army law member does at the present time, but that he should not retire with the court and continue to act as a judge insofar as he instructs the court in closed session and thereafter act in effect as a juror in that he votes on the findings and sentence.

The idea principally was to make the law officer more similar to the judge in a civilian court and to act as a pure judicial officer and further for the first time to put on the record in open court the instructions that he does give the court on the elements of the offense and on the presumptions of innocence, reasonable doubt, and various other principles which were put in the law last year by your committee.

It is a difficult problem. There's no question about it. The proponents of the present Army system feel that the law member is of great assistance when retiring with the court and instructing them in closed session. They feel it is a protection for the accused, as a matter of fact.

Inasmuch as no one knows what goes on, however, behind the closed doors and the elements of the crime and the law of the case are not preserved for the record, it is just impossible to tell whether erroneous law is given or not.

The opponents for this type of law officer felt that it was most valuable to have the instructions given to the court preserved on the record so that they could later be scrutinized and reviewed to determine whether or not the law was accurately given to the court so that you could be sure that its verdict was based on the accurate instruction of the elements of the offense and so forth.

The provision as written adopts the civilian idea more nearly than the law member in the present Army and Air Force system does. It is an extension of it.

Mr. BROOKS. Mr. deGraffenried.

Mr. DEGRAFFENRIED. There is nothing in here that prevents the lawyer who is not the law officer from serving on the courts, is there? You might have an officer there or some member of the court or even two or three members of the court who are lawyers themselves.

Mr. LARKIN. That is right.

Mr. DEGRAFFENRIED. Is that possible?

Mr. LARKIN. I think so.

Mr. DEGRAFFENRIED. Now suppose a law officer were to rule one way on a question of law and the members of the court who were lawyers themselves thought he was absolutely wrong about it, would his ruling be advisory to the court or would it be absolutely binding on them?

Mr. LARKIN. It is absolutely binding, except for the fact of course that any member of the court whether he is a lawyer or otherwise may for his own personal reason not follow them, which is a situation that obtains in any court in the land. The judge may rule on the questions of law and he may instruct the jury and charge them and as it happens the jury goes out and pays no attention to them whatever. But that is something over which no one has any control in any tribunal.

Mr. DEGRAFFENRIED. He acts as the judge on questions of law?

Mr. LARKIN. That is right. He acts as an outright judge on questions of law and his rulings are final and binding. Whether any individual person decides that he doesn't want to follow them or not of course is a different problem.

Mr. BROOKS. It is just binding in reference to interlocutory decisions, isn't it?

Mr. LARKIN. And it is binding on his instructions, before they retire, as to the elements of the offense and on the other law of the case, if necessary.

Mr. DURHAM. He would still have the right to rule on a mistrial, wouldn't he?

Mr. LARKIN. That is right; he has the right. On a motion for a dismissal or a motion for acquittal he has the right to rule, but in that case as in the case of insanity his ruling is subject to veto by the court.

Mr. ELSTON. Well, the theory of the whole thing was, then, to give the accused an additional safeguard?

Mr. LARKIN. That is right, having the instructions on the record and segregating further the judicial functions of the law member from the previous practice where he is a combination of both.

Mr. BROOKS. Is there further discussion on it? If not, and there is no objection to the article, it will stand adopted as read.

The next article, Mr. Smart.

Mr. SMART (reading):

ART. 27. Appointment of trial counsel and defense counsel.

(a) For each general and special court-martial the authority convening the court shall appoint a trial counsel and a defense counsel, together with such assistants as he deems necessary or appropriate. No person who has acted as investigating officer, law officer, or court member in any case shall act subsequently as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant defense counsel in the same case. No person who has acted for the prosecution shall act subsequently in the same case for the defense, nor shall any person who has acted for the defense act subsequently in the same case for the prosecution.

(b) Any person who is appointed as trial counsel or defense counsel in the case of a general court martial—

(1) shall be a judge advocate of the Army or the Air Force, or a law specialist of the Navy or Coast Guard, or a person who is a member of the bar of a Federal court or of the highest court of a State; and

(2) shall be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

(c) In the case of a special court-martial—

(1) if the trial counsel is certified as competent to act as counsel before a general court-martial by The Judge Advocate General of the armed force

of which he is a member, the defense counsel appointed by the convening authority shall be a person similarly certified; and

(2) if the trial counsel is a judge advocate, or a law specialist, or a member of the bar of a Federal court or the highest court of a State, the defense counsel appointed by the convening authority shall be one of the foregoing.

References: A. W. 11; proposed A. G. N., articles 18 (b), 24 (b).

Commentary: Subdivision (a) of this article incorporates the opening clause and the fourth and fifth provisos of A. W. 11. The trial judge advocate is renamed the trial counsel, and the right of the accused to have a person requested by him act as defense counsel is subject to the availability of that person. See article 38.

Paragraph (1) of subdivision (b) incorporates the first proviso of A. W. 11, but the requirement that counsel be qualified as set forth therein is no longer subject to the exception allowed where such qualified persons are not available. Paragraph (2) of this subdivision, the requirement that counsel be certified by the judge Advocate General, is drawn from article 24 (b) of the proposed A. G. N.

Subdivision (c) is based on the second proviso of A. W. 11. It is made applicable only to special courts martial, since the qualification requirements in subdivision (b) with respect to counsel for general courts martial are not subject to exception.

The third proviso of A. W. 11, which has to do with the right of the accused to counsel of his own selection, is covered in article 38, while the sixth proviso, which limits who may act as the staff judge advocate of the reviewing authority, is found in article 6.

Mr. BROOKS. That has reference to general courts martial.

Mr. LARKIN. And special.

Mr. SMART. General and special, Mr. Chairman.

Mr. ELSTON. Mr. Chairman, I would like to ask this question: There is nothing in this section that indicates that the Judge Advocate General shall be a lawyer?

Mr. LARKIN. That is right.

Mr. ELSTON. Well, don't you think that that provision should be written into the law?

Mr. LARKIN. I believe they all are. That is, all those presently serving now all are lawyers. I know they are. And they have been for some time. I believe that years in the past that hasn't always been true.

That question never did come up before us actually.

Mr. BROOKS. Doesn't that get back to the corps proposition?

Mr. LARKIN. No; it does not, necessarily.

Mr. SMART. No.

Mr. LARKIN. As a matter of fact, I don't think the corps provisions in Public Law 759 so stipulated, either.

Mr. SMART. I think that is true, Mr. Chairman. Public Law 759 did not say that judge advocates of the Army or Air Force had to be lawyers. However, you will notice on page 25, in subsection (1), where it goes on and specifies that others who are not members of the Judge Advocate Department or not designated as legal specialists, if they are members of a bar of a State or a Federal bar and certified as competent in addition by the Judge Advocate General, are competent to serve in these capacities.

So a legally qualified individual whether he is or is not a member of the Judge Advocate's Department or corps may be qualified to serve.

I think it is anticipated certainly that where you provide for others outside of the Department that they must be legally qualified it must be anticipated that members of the Judge Advocate's Corps or Department or a legal specialist must be similiarly qualified, even though the law does not so state, because it gives the Judge Advocate the authority to pass upon his competency and I think he will not approve him unless he is so qualified.

But I did want the record to show that situation and the intent of the committee in regard to it.

Mr. PHILBIN. It would be a rather anomalous situation if you had a judge advocate who was not a lawyer himself passing on the competence of lawyers for assignment to these boys.

Mr. SMART. Exactly, sir.

Mr. ELSTON. Don't you think we ought to spell it out in the law so there would be no question about it?

Mr. PHILBIN. How does the Army feel about that?

Colonel DINSMORE. I didn't hear that, Mr. Philbin.

Mr. PHILBIN. We are considering the question now of spelling out in the law a requirement that the judge advocate be an attorney.

Mr. LARKIN. The Judge Advocate General be an attorney.

Colonel DINSMORE. Well, the Elston bill so requires.

Mr. LARKIN. No, it doesn't——

Mr. PHILBIN. Is that a present requirement?

Mr. SMART. That the judge advocate must be a lawyer.

Colonel DINSMORE. Not the judge advocate, but the Judge Advocate General.

Mr. LARKIN. Mr. Elston was talking about the Judge Advocate General.

Mr. ELSTON. I mean judge advocates generally.

Mr. LARKIN. Generally?

Mr. ELSTON. Yes.

Mr. LARKIN. Oh. On that question, as I understand it, there may be in one or the other of the Judge Advocate Departments as they now exist or in the Office of the Judge Advocate in the Navy an officer or two who has been there for 15 or 16 years who never has been admitted to the bar.

But their current administrative practice is at the present time that no one becomes a judge advocate or a law specialist in the Navy unless he is a lawyer.

Mr. PHILBIN. Is that true of the Army?

Colonel DINSMORE. Our requirement, Mr. Philbin, is that they be graduates of a recognized law school. Uniformly they go on and take a bar examination and get admitted, but you see we send these officers to school—line officers if you please, who apply for it, such as lieutenants.

They go to Harvard, Yale, California, Michigan, and others, and when they graduate they are transferred to the Judge Advocate General's Department. And it is not a requirement that they be a member of any particular bar.

As I say, uniformly, they do go ahead and get admitted.

Mr. PHILBIN. Would the Army object to a requirement that the Judge Advocate General be a member of the bar?

Colonel DINSMORE. I don't think so, sir. I hesitate to go on record for the Army without consulting the proper officials.

Mr. PHILBIN. On its face, would you see any objection to such a provision?

Colonel DINSMORE. The Judge Advocate General be a member of the bar?

Mr. DE GRAFFENRIED. The judge advocate.

Colonel DINSMORE. Oh, any members of the Judge Advocate General's Department?

Mr. PHILBIN. Well, first the Judge Advocate General. It is the Judge Adovcate General who passes on the competency of these trial officers?

Colonel DINSMORE. Yes.

Mr. PHILBIN. Would you have any objection to that—that he be a member of the bar?

Colonel DINSMORE. If the committee will indulge me, I would like to reserve my answer on that.

Mr. BROOKS. We had better get answers, too, from the Navy, the Air Force, and the Coast Guard.

Mr. LARKIN. Well, may we state the question. Is it in two parts: One, that the Judge Advocate General himself be admitted to the bar, and then, two, that judge advocates or law specialists in the departments will be admitted to the bar?

Mr. BROOKS. That is right.

Mr. LARKIN. On the second one at least I should say if that is provided it probably should be provided prospectively rather than retroactively because the language of (b) (1) was written designedly in this fashion not to exclude a number—and I understand it is a very small number—of judge advocates who are and have been in these departments for some years and who are quite expert in court-martial and military law, but who did not take bar examinations. There are a very few of them, I understand.

Mr. PHILBIN. I had that very point in mind.

Mr. LARKIN. That is why we said (1), they either be a judge advocate or law specialist or if they are not in those categories then they must be admitted to a Federal bar—that is, other officers throughout the service—and (2), they all must be certified by the Judge Advocate General. So there are two requirements in either case.

And to go further, of course you will notice that this is a substantial step beyond what is in the present law in that for a general court the trial counsel and defense counsel must be a person qualified in both respects and no general court-martial case can be tried unless these counsel are so certified.

The words "if available" have been deleted and it is mandatory now that there be such qualified people acting as trial counsel and defense counsel. But it is in either of those categories and it has both those requirements.

We will find out——

Mr. PHILBIN. I did not have in mind that any such provision should be retroactive, but that we might have the opinions of the departments concerned relating to such a provision.

Mr. LARKIN. That is right.

Mr. BROOKS. If there is no objection, we will just refer that to the counsel.

Mr. ELSTON. We might get one other answer before that time. Can the services give us some idea of how many officers might be

required in each of the services to perform the duties that are required under this section?

Mr. LARKIN. We have some estimates already. But why don't we save them? I don't have the complete ones. May we save them until we bring back the answer on the first two?

Mr. ELSTON. Yes.

Mr. BROOKS. In that connection, the average number of general courts-martial cases per month in the service.

Mr. LARKIN. We will furnish that at the same time, Mr. Chairman.

Mr. BROOKS. Any further questions on it? If not and there is no further objection to article 27, with the reservation which we have made, it will stand approved.

Article 28: Would you read that, Mr. Smart.

Mr. SMART (reading):

ART. 28. Appointment of reporters and interpreters.

Under such regulations as the Secretary of the Department may prescribe, the convening authority of a court martial or military commission or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission. Under like regulations the convening authority of a court martial, military commission, or court of inquiry may appoint an interpreter who shall interpret for the court or commission.

References: A. W. 115; N. C. & B, section 361.

Commentary: This article is derived from A. W. 115. The power to appoint, however, has been shifted from the president of the court to the convening authority, since the latter will have control of the available personnel.

Mr. BROOKS. You have heard the reading of the article. Any discussion on it? If not and there is no objection, it will stand adopted as read.

Article 29.

Mr. SMART (reading):

ART. 29. Absent and additional members.

(a) No member of a general or special court martial shall be absent or excused after the accused has been arraigned except for physical disability or as a result of a challenge or by order of the convening authority for good cause.

(b) Whenever a general court martial is reduced below five members, the trial shall not proceed unless the convening authority appoints new members sufficient in number to provide not less than five members. When such new members have been sworn, the trial may proceed after the recorded testimony of each witness previously examined has been read to the court in the presence of the law officer the accused, and counsel

(c) Whenever a special court martial is reduced below three members, the trial shall not proceed unless the convening authority appoints new members sufficient in number to provide not less than three members. When such new members have been sworn, the trial shall proceed as if no evidence had previously been introduced, unless a verbatim record of the testimony of previously examined witnesses or a stipulation thereof is read to the court in the presence of the accused and counsel.

References: A. G. T., article 46; proposed A. G. N., article 27; M. C. M., paragraph 38; N. C. & B., section 375–8.

Commentary: This article is based on proposed A. G. N., article 27, and limits the reasons for excusing members of general and special courts martial.

Subdivisions (b) and (c) specify the procedure for replacing absent members of general and special courts martial. Where a complete transcript of the testimony is kept, only the record need be read to the new members. However, in special court-martial cases where a

complete record is not kept, only such previous evidence as is stipulated by the parties may be deemed to have been introduced.

New members are subject to challenge for cause and if the parties have not used their peremptory challenges, are subject to peremptory challenge.

Mr. BROOKS. How does that differ from basic law now?

Mr. SMART. Well, I think that that is substantially the same, Mr. Chairman. I believe that every effort is made to protect the rights of the accused. The record has to be read in the presence of the new members of course.

Now, of course, you will notice in subsection (c), that takes cognizance of the fact that you may not have a reporter in a special courts-martial case.

Mr. PHILBIN. Why didn't you provide for a stipulation in subsection (b)?

Mr. SMART. Well, the point there is that you may not have a reporter at a special court case, but the accused's counsel and the trial counsel and the accused may stipulate as to the testimony which had been adduced up to that point.

Mr. PHILBIN. You don't provide that in subsection (b), but you do in subsection (c) and I wonder——

Mr. LARKIN. There is always a reporter. Subsection (b) refers to general courts, Mr. Philbin.

Mr. PHILBIN. I understand that. Why shouldn't it be possible to have a stipulation between counsel for the accused and the trial counsel?

Mr. LARKIN. I think when you have the verbatim record it is preferable that the new member hear the questions and the answers.

Subsection (c) is only in the event you have no verbatim record, and it gives an out by stipulation if there is none. But of course if the accused does not desire to stipulate, they have to start anew.

Mr. PHILBIN. Well, I mean you don't permit them to stipulate in subsection (b), do you?

Mr. LARKIN. No; that is right. I think it is much more desirable that you require the reading of the verbatim record than stipulation.

I might add, Mr. Smart, that the content of this article is in accord with regulations in the services heretofore, but it has not specifically been statutory. We felt that it was important and desirable to make it statutory and it was provided in a fashion similar to this in the proposed Navy bill in the Eightieth Congress.

Mr. PHILBIN. I had in mind the situation where you might have cumulative testimony of several witnesses. Say you had five witnesses. The testimony of two has already been heard. Three are to come along the same lines. A stipulation might well expedite business.

Mr. LARKIN. Yes.

Mr. PHILBIN. Without harming any of the rights of the accused.

But I admit, of course, it is an additional safeguard for the accused and it is entirely desirable.

Mr. LARKIN. Yes.

Mr. SMART. And, of course, you have the comparable situation of a general court always being a court of record, whereas your special court may not necessarily be so.

Mr. PHILBIN. Yes.

Mr. SMART. So, you abide by the greater formality in the court of record.

Mr. PHILBIN. Yes.

Mr. BROOKS. Now, Colonel Oliver had some objections to this particular article. As I recall, they were objections to subsection (c).

Mr. LARKIN. I think his objections, Mr. Chairman, went to the fact that he would have preferred permitting a court to go on even though it were reduced below these minimum requirements. Perhaps I can find his objection very quickly here.

Mr. BROOKS. Was his objection based upon the thought of double jeopardy?

Mr. LARKIN. I think not. Well, he says and I will read from his formal statement—I have forgotten the questions and answers afterwards—

> As to article 29, subparagraph (a), we feel that this article should specifically state that the law member shall not be excused and in those cases where unable to attend by reason of physical disability or other cause that no proceedings may be had in his absence.

I don't think his objection is well taken because this article concerns members of the court—not law members. We provide in another section that the trial may not proceed in the absence of a law member, now called law officer, under any circumstances.

Mr. BROOKS. Is that his only objection?

Mr. LARKIN. There may be a confusion of terminology in his mind. It is the only comment I see in his formal statement, and, as I say, I do not recall what position he may have taken as elicited by questions from you.

Mr. PHILBIN. You didn't consider that these sections had any double-jeopardy features; did you?

Mr. LARKIN. The double-jeopardy provision operates in the normal fashion. There is no exception to it, certainly.

Mr. DEGRAFFENRIED. Mr. Larkin, when these new members are brought in as members of the court, is there any way to exercise any right to challenge them?

Mr. LARKIN. Yes, sir.

Mr. DEGRAFFENRIED. You have that in.

Mr. LARKIN. Yes. The challenge continues in exactly the same way. And, if you haven't used your peremptory challenge, why it is available against the new member. And we spell that out specifically in the commentary, the last paragraph of which says:

> New members are subject to challenge for cause, and if the parties have not used their peremptory challenges are subject to peremptory challenge.

But this is designed to ensure, if a court falls below the set minimums, a man will not be convicted with less than these minimums.

If a man is sick or dies—that is a court member—and if you can't replace him, a mistrial results.

Mr. BROOKS. Mr. Elston, do you have some questions?

Mr. ELSTON. No.

Mr. BROOKS. Any further questions? If not and there are no further suggestions, gentlemen, article 29 wlill stand adopted as read.

Now that completes part V which we passed and which will bring us back at the next session of this committee to the article——

Mr. SMART. Article 59, Mr. Chairman.

Mr. BROOKS. Fifty-nine.

I think it would be useless to start on anything new at this session of the committee. We will go over, then, at the next session to 59.

Now, there are several matters which we bypassed, and we haven't come back to them. It is such a late hour, I think it would be wise to pass these, too.

Mr. LARKIN. May I make this suggestion—I will do it any way you desire. We have been working on the half a dozen articles which you have instructed Mr. Smart and myself to furnish some clarifying language on.

We are in fairly good position to offer those to the committee, but I wondered if we might not hold them because there will be others I believe as we continue our reading.

Mr. BROOKS. Yes.

Mr. LARKIN. We might hold them to the last hour of your entire considerations, when Mr. Smart can offer them article by article, and you can quickly clean them up, I think, all at once.

Mr. BROOKS. I think that is all right. There is not enough there to engage the attention of the committee for any lengthy time.

Mr. LARKIN. I don't think so. We are, of course, attempting to draft them in accordance with your instructions, and your function will be to make sure that we have. That is about all.

Mr. BROOKS. We are very anxious to finish the bill, but not so anxious that we want to neglect any part of it. I would like to sit this afternoon, but we have the oleo bill coming up, and I suppose that some of us are in shape where they want to be present all the time on that oleo bill, and, therefore, if there is no objection, the committee will stand adjourned until 10 o'clock in the morning.

(Whereupon, at 11:55 a. m., the subcommittee adjourned to reconvene on Friday, April 1, 1949, at 10 a. m.)

UNIFORM CODE OF MILITARY JUSTICE

FRIDAY, APRIL 1, 1949

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The subcommittee met at 10 a. m., Hon. Overton Brooks (chairman) presiding.

Mr. BROOKS. The committee will please come to order.

Before we start on the next article, my colleague, Mr. Kilday, just mentioned to me the case of the American post-exchange worker from Germany who was recently apprehended over here and charged, as I understand it with black-market operations in Germany. He has been taken back to Germany for trial.

Now, in cases of that sort, are there any regulations regarding the removal of accused persons from one section of the country or one continent to another? There is no extradition procedure in the service; is there?

Mr. LARKIN. No. They are subject to the Articles of War by virtue of either being military personnel or civilians who come under the jurisdiction.

Mr. Brooks. Wherever the offense occurs, they can be tried?

Mr. LARKIN. That is right.

Mr. BROOKS. And they can be moved from one place in the world to another?

Mr. LARKIN. Yes, sir.

Mr. BROOKS. Without any extradition?

Mr. SMART. I think the facts in that case were, briefly, from what I gather from the newspaper, Mr. Chairman, that the civilian was serving as a manager of a PX in Germany by virtue of a contract with the Government and he misappropriated cigarettes or some other articles of merchandise and engaged in black-market activities.

Then he violated the terms of his contract and, in effect, went a. w. o. l. from his duty and got back to this country. He, at the time of the commission of the offense, was subject to the Articles of War. So, having gone a. w. o. l. and still being subject to being prosecuted, they merely came to this country, apprehended him and flew him back. And he is already back in Germany now.

Mr. BROOKS. But not for a. w. o. l.?

Mr. SMART. No, sir.

Mr. BROOKS. A civilian couldn't go a. w. o. l.

Mr. SMART. No. But the point is there he left Germany while subject to the Articles of War.

Mr. BROOKS. Yes.

Mr. SMART. He voluntarily left and without permission, or without termination of his contract with the Government.

Mr. BROOKS. Yes.

Mr. SMART. So they contend, and I don't say rightly or wrongly, they have a continuing jurisdiction.

Mr. BROOKS. Well, I don't think we should go into petty cases. The question that I thought was pertinent is the question of extradition there, and I knew of no provisions requiring extradition in service, regardless of where a man is.

Mr. LARKIN. Yes.

Mr. BROOKS. In civilian life, you would have extradition proceedings.

Mr. LARKIN. Yes, sir.

Mr. BROOKS. Now, when we adjourned yesterday, we were on what article, Mr. Smart?

Mr. SMART. We had concluded article 29, Mr. Chairman. You will recall that you had requested that certain statistics be furnished to the committee as to the number of legally qualified personnel now available in all of the services. That inquiry goes to article 27.

Admiral Russell is here and may wish to be heard on it. And the committee might wish to settle that particular point at this time.

Mr. BROOKS. That would be an excellent idea. If you have the statistics and ready to report on it; yes.

Mr. LARKIN. Maybe Mr. Larkin has some background to give to the committee before Admiral Russell goes on?

Mr. LARKIN. No. I think I have some of the statistics on the Army and Air Force, although the representatives may have more statistics than I have. But I don't have them for the Navy; and I think, if you would let Admiral Russell put them in the record, we could do that first and then follow with the others on the same subject.

Mr. BROOKS. Fine, sir. You have them, do you, Admiral?

Admiral RUSSELL. As I understood, there were four questions asked over here relating to naval statistics—some of it to numbers and some of it to qualifications of our law specialists.

Mr. SMART. That is right.

Admiral RUSSELL. I don't have any prepared statement to put in the record. I can just answer it, though.

Mr. BROOKS. All right, sir.

Admiral RUSSELL. We have at the moment 241 law specialists. We have 30 naval Reserve officers who have been retained on active duty.

Mr. BROOKS. Now, when you say "We," you mean the Navy?

Admiral RUSSELL. I mean the Navy; yes, sir.

Mr. BROOKS. Yes.

Admiral RUSSELL. In addition, there are, I believe, 48 unrestricted line officers with a law education and who are qualified for that duty; but, of that number, there are only six or seven who are now working at it.

Mr. RIVERS. When you say that number, you say only six or seven of that number, you mean with the basic background to qualify them to be lawyers?

Admiral RUSSELL. I mean the naval officers who went to law school.

Mr. RIVERS. I say the basic background, and who had some experience in it?

Admiral RUSSELL. Yes, sir.

Mr. BROOKS. You have 241 law specialists?

Admiral RUSSELL. That is correct, sir.

Mr. BROOKS. Now, how many of them are qualified to practice before the high State court or Federal court?

Admiral RUSSELL. I still don't have that figure. When we took them in, our requirements for eligibility were that they should be either graduates of an accredited law school or admitted to practice before the court of last resort in some jurisdiction.

So far as we know, nearly all of them are members of the bar somewhere. There may be some small number that for some reason or other did not get admitted. I will have those figures and put them in the record. I don't believe there are over 15 or 20 of them.

Mr. BROOKS. You mean 15 or 20 what?

Admiral RUSSELL. That are not members of a bar somewhere.

Mr. BROOKS. Yes. And they are graduates of some law school?

Admiral RUSSELL. Yes, sir.

I might say—I would like to put this off the record.

(Discussion off the record.)

Admiral RUSSELL. This can go on the record now.

All our law specialists are either members of a bar, admitted to practice before the court of last resort in some jurisdiction, or they are graduates of an accredited law school by—I can't think of the name of the association. I believe it is the Association of American Law Schools.

Mr. BROOKS. The other day when we were discussing it, it occurred to me that the rule might be fashioned so as to adapt itself to your situation, that is, a graduate of an accredited law school or a member of the highest State tribunal.

Mr. RIVERS. That is right.

Mr. BROOKS. I mean they are entitled to practice before the highest State court or the Federal courts.

Mr. SMART. On the basis of article 27, you will note that there is nothing in the article which makes any requirement that they be a graduate of an accredited law school.

Mr. BROOKS. No.

Mr. SMART. That is a matter of regulation within the Department. The statute only prescribes that he shall be admitted to practice before a State or Federal bar.

Admiral RUSSELL. That is the way we have regarded it. And that would represent no departure from our present practice.

Mr. BROOKS. Yes. But I mean in order to conform to the present practice, if we amended this article so as to cover graduates of an accredited law school, it seems to me that would be a pretty safe course to follow.

Admiral RUSSELL. Yes, sir; I would think so.

Mr. BROOKS. I don't know, though, why a man when he graduates from a law school won't immediately become a member of the bar. Of course, I can see where he might fail to qualify with the supreme court of the State or in New York the court of appeals which is the highest court there. And he might fail to go to the Federal court to qualify.

Mr. SMART. You have that very situation in the Army today, with a very capable general officer who graduated from an accredited law school but never was admitted to the bar.

Mr. BROOKS. Now would that catch everybody in the Navy today?

Admiral RUSSELL. Yes, sir.

Mr. BROOKS. What about the other branches of the service?

Admiral RUSSELL. I can't speak for them, sir.

Mr. BROOKS. Do you have any other figures you want to put in now, Admiral?

Admiral RUSSELL. There was one other question asked as to how many additional lawyers we estimate we will need under the terms of this bill.

Mr. BROOKS. Yes.

Admiral RUSSELL. Our computation shows that we need 287 more.

Mr. BROOKS. Two hundred and eighty-seven more.

Mr. RIVERS. Do you say, Admiral, that you have lawyers in your set-up who are not admitted to any jurisdiction?

Admiral RUSSELL. A very few; yes, sir.

Mr. RIVERS. How are you going to cure that? How are we going to cure that? There is no question about their abilities. They are doing the work every day.

Admiral RUSSELL. That is correct.

Mr. RIVERS. And from your own testimony, you have the finest system in the whole world?

Admiral RUSSELL. My predecessor was one of those.

Mr. RIVERS. Yes, sir.

Mr. BROOKS. Well, you would cure it, wouldn't you, by amending this so as to say that any graduate of an accredited law school might be used.

Mr. RIVERS. Or admitted.

Mr. BROOKS. Or admitted.

Admiral RUSSELL. That is correct. We put it in the alternative when we wrote our eligibility rules.

Mr. DEGRAFFENRIED. What does it mean to be an accredited law school?

Admiral RUSSELL. There is an Association of American Law Schools, as I understand it, which establishes certain standards and any school that meets those standards is accredited.

Mr. DEGRAFFENRIED. In some States if you graduate from the State university you are automatically to practice law without any examination.

Admiral RUSSELL. If I am not mistaken, there used to be a rule at one time that any citizen in good standing could be admitted to the bar in some States.

Mr. BROOKS. In my State, in Louisiana, they graduate from the best law schools and sometimes they fail the bar. But you are pretty safe in taking a graduate of an accredited law school.

Mr. RIVERS. That is right. Of course, there are two reasons for that. One of them was the States wanted to protect their own universities, and then the other reason they gave us was that they shouldn't admit a man to the bar unless he knew something about State statutes.

Admiral RUSSELL. I dare say that it is easier in some instances to get admitted to the bar than it is to get a degree from an accredited law school.

Mr. RIVERS. That is probably true. I know if I had my experience to go——

Mr. DEGRAFFENRIED. Harder or easier to get admitted to the bar?

Admiral RUSSELL. Easier.

Mr. DEGRAFFENRIED. Easier to get admitted to the bar.

Admiral RUSSELL. That isn't true in some places, but I think it is true——

Mr. RIVERS. Knowing what I did when I took that blooming thing, I wouldn't have taken it for a million dollars. It was just impossible to finish in my State.

Mr. DEGRAFFENRIED. In a great many States now you can't even get into a law school until you have had a certain amount of A. B. work or scholastic work in other schools—2 years or 3 years.

Mr. RIVERS. That is right.

Mr. BROOKS. Mr. Smart.

Mr. SMART. I think the additional point ought to be reiterated here which was made yesterday by Mr. Larkin, and that is that this provision here is something which is intended to apply in the future and not to apply retroactively. I know, within my own personal knowledge, instances of a number of officers, particularly Army and Air Force, who are not law-school graduates but are doing judge advocate work.

I doubt if they ever had any legal training. But because of their particular ability and intelligence and long experience in court-martial work they have become very, very competent—more so in many cases than a great many legally trained persons.

Mr. RIVERS. They had no legal training?

Mr. SMART. They have had no legal training, but by association with court-martial work and by personal intelligence——

Mr. DEGRAFFENRIED. And studying courts martial.

Mr. SMART. And studying it diligently and faithfully they have become very proficient in the trial of cases.

Mr. RIVERS. They should know something about evidence.

Mr. SMART. Well, they do know something about evidence. I think it would probably be unfortunate, I will say, if we took action here which would prevent the services from availing themselves of the services of such qualified people. I am sure that none of the judge advocates are going to certify as competent any of those people who they do not of their personal knowledge know are competent.

Mr. RIVERS. You mean, if that goes for the past it can go for the future. Now I can appreciate fully what you are talking about. You just can blanket them in. But it certainly can happen in the future. And you know, I have heard all kinds of things like you no doubt have heard—and this is off the record.

Mr. BROOKS. We want this off the record.

(Statement off the record.)

Mr. SMART. Let me ask, back on the record, again, Mr. Rivers, if you feel that the committee should amend article 27 to provide that law specialists and judge advocates shall be legally qualified in the future?

Mr. RIVERS. In the future?

Mr. SMART. In the future.

Mr. RIVERS. That is right.

Mr. SMART. And that he be a law graduate.

Mr. BROOKS. What type now are you referring to? Either a graduate of an accredited law school or entitled to practice before the highest State tribunal or the Federal court?

Mr. SMART. Yes, sir.

Mr. RIVERS. That is right.

Mr. SMART. And that closes the gate that you are talking about.

Mr. DEGRAFFENRIED. Because while those untrained men are getting the experience that makes them qualified a lot of cases are being tried in the meantime.

Mr. RIVERS. That is right. That is my point.

Mr. BROOKS. I would like to put in the record, too, as to this idea of permitting a graduate of an accredited law school to be eligible for appointment this thought: In my State, following the completion of your work in a law school you are required to take a bar examination before the supreme court and which is a very strict examination.

Sometimes as much as several months might elapse from the time you finish your course and the time you take the examination and it is possible that a graduate of a law school fully accredited might not have an opportunity of qualifying before the bar because of that fact.

Admiral RUSSELL. Well, our experience when we went into our procurement program here 3 years ago was that we didn't look out. We handcuffed ourselves by making the rules too rigid, and we would keep out some fellow that is really pretty good.

Mr. RIVERS. That is right.

Admiral RUSSELL. And we came up with this alternative eligibility requirement which has worked very well for us.

Mr. RIVERS. Of course, if you don't follow the procedure Mr. Brooks indicated by giving them an opportunity to get in there when they get out of school, they may be too old under the bill we passed a year or two ago about coming in under the wire as to age for being an officer.

Mr. BROOKS. Do you have anything, Mr. Elston, you want to say on that?

Mr. ELSTON. No. I think if you have the bill amended to except those already in the service and then confine it in the future to those who come in the service hereafter, graduates of accredited law schools or those who have been admitted to practice in the highest State court or in the Federal court, it will take care of it very well.

Mr. BROOKS. I think we are unanimous in that agreement and unless I hear objection I am going to suggest, Mr. Smart, if you will, to frame an amendment that we can work it in there at the very next meeting.

Mr. LARKIN. May I ask a question for guidance, Mr. Chairman. When you say that they in the future are eligible if they are either graduates of an accredited law school or admitted to the bar you are talking, I take it, of judge advocates or law specialists who are officer personnel and are officially a part of either a corps, a department, or the office of the Judge Advocate General.

Mr. BROOKS. That is right.

Mr. LARKIN. But as to other persons in the service who are qualified—and in wartime you have a lot of lawyers who come in and become officers and who are members of the bar—they be members of the bar in addition to being accredited by the Judge Advocate General or certified by him.

You see, there are two notions here that you should keep in mind, and that is that insofar as judge advocates or law specialists are concerned, I think it is entirely appropriate that they be graduates of an accredited school or members of the bar.

Now you may have a number of other lawyers in the service who you will have to use for the trial of cases, particularly in wartime, and who you should use and must use. It was the notion of Professor Morgan's committee as to those the requirement should be admission to the bar.

Mr. BROOKS. Why is there that difference?

Mr. LARKIN. Because they are not doing the court-martial work daily that the judge advocates or the law specialists are doing.

Mr. ELSTON. They are not specialists?

Mr. LARKIN. They are not specialists.

Mr. BROOKS. You mean——

Mr. LARKIN. But if they at least are admitted to the bar, which generally is the more severe test, a test that is generally more severe than graduating from an accredited law school, why the test should be a little more severe in that respect.

Mr. BROOKS. Is it to give them training? Is that your thought?

Mr. LARKIN. No, to give assurance of greater capability.

Mr. ELSTON. I think that is right, because today there are lots of men not able to pass the bar examination. Out in Ohio they flunked about 50 percent of them this year.

Mr. LARKIN. They do in New York, too, all the time.

Admiral RUSSELL. They do in the District of Columbia.

Mr. RIVERS. They do it just about everywhere.

Mr. ELSTON. There are some persons in the State of Ohio who have taken bar examinations a number of times and have never been able to make it. Now you don't want to get that type in the service.

Mr. LARKIN. And I don't think that type——

Mr. ELSTON. Yet what the admiral said is true, too, that it is sometimes easier to get through the bar examination than it is to get through law school because some States have a very simple requirement, such as only an oral examination. You go before a judge in some States and he asks you a few questions and you are admitted to the bar. That is all there is to it.

Mr. LARKIN. That is right.

Mr. BROOKS. Furthermore, in reference to those who failed before the bar, a great many of them that take the bar examination may not be graduates of any accredited law school and therefore your percentage of failures is very heavy on that account.

But I will fully agree with what you say.

Mr. LARKIN. Yes. I just wanted to point out the distinction.

Mr. BROOKS. Yes.

Mr. LARKIN. I think it is appropriate, certainly, that this double standard that Admiral Russell suggests and uses is an adequate protection for his law specialists or the judge advocates because he himself will watch them over a period of time as they work in his office and he can appraise their ability. But where you get to the point that you need lawyers for the trial of cases over and above that number—and you certainly will in wartime—why the requirement should probably be admission to the bar for those extra lawyers.

There, again, the Judge Advocate General will certify them, but his opportunity of learning their capabilities is not nearly as good as the opportunity he has for the people who work in his own office.

Mr. BROOKS. Mr. Smart, you understand the situation there. We want it limited to that group.

Mr. SMART. Yes. I think we are belaboring the statute, though, by trying to do this. Now I think you have to assume that the Judge Advocate General himself is going to have some pride in the people who are going to administer the military law under his direction.

You provided here, on page 25, in subsection (2), that in addition to these other requirements they shall be certified as competent to perform their duties by the Judge Advocate General. Now if the respective Judge Advocates General are the type of persons that I think they are and I hope the future ones will be, they are not just going to open up these doors and let everybody come in.

We must remember that during the past war there were some 25,000 lawyers who were members of the bar who came into Army service. Now the Army saw fit to only use about 2,000 of them in courts-martial work.

However, they were readily available. And in any wartime situation you are going to have all of the lawyers you want who are going to be members of the bar. I think we could very safely trust the judgment and the discretion of the Judge Advocates General as to that qualification.

Mr. RIVERS. I don't see how that is going to conflict.

Mr. GAVIN. Neither do I.

Mr. RIVERS. I don't see the conflict.

Mr. GAVIN. You are merely assuming we are going to have. If you write it into the law, we will know we have.

Mr. BROOKS. The trouble is in time of war they have had a surplus. Men with law degrees and who were competent lawyers were serving as privates in the ranks, which showed a surplus certainly of lawyers.

Mr. SMART. That, of course, goes to the philosophy that was followed during the last war wherein many commanders did not want lawyers in their courts because they said that they talked too much and made too many technicalities and this, that, and the other.

You have a surplusage of lawyers available, but you don't have a surplusage of them being used.

Mr. RIVERS. One of our most able young lawyers from South Carolina came to me. He had a very fine practice. The Navy gave him a billet over at St. Elizabeths. That is how they used them.

Mr. BROOKS. Well, let us get back to the case here.

Mr. GAVIN. Off the record.

(Statement off the record.)

Mr. BROOKS. Now coming back to this case, is there any objection to the suggestion as made? If Mr. Smart will prepare a suitable amendment, we will take it up the next time. If there is no objection, it is so ordered.

Mr. SMART. Do you care to receive, Mr. Chairman, any statistics Mr. Larkin has as to the Army and Air Force on this same point?

Mr. BROOKS. Sure, if he has them.

Mr. LARKIN. Well, I just have the comparable statistics to Admiral Russell's.

Mr. SMART. I would like to ask one more question of Admiral Russell, if I may.

Mr. BROOKS. Sure.

Mr. SMART. Where do you propose to get these 287 lawyers, and how long do you think it will take to get them?

Admiral RUSSELL. It took us 2½ years to recruit 240 lawyers that were acceptable to us the last time. We have since obtained authority under the Officer Personnel Act of 1947 to take in lawyers directly from civil life and commission them as lieutenants, junior grade.

We took in 10 of those this last October. One source of supply for the 287 lawyers is the law schools and some members of the Naval Reserve who might be interested.

Mr. RIVERS. That ought to be a good source—that Naval Reserve.

Mr. SMART. Let us ask you, Admiral, do you give a constructive credit to these men coming in as lieutenant; junior grade for their 3 years of law school

Admiral RUSSELL. We do. But the individuals who became law specialists before the Personnel Act of 1947 went into effect do not have it.

Now that the subject has been brought up, I would like to inform the committee that we have a measure which has not yet gone to the Bureau of the Budget which will cover this whole situation, namely the procurement of lawyers and the readjustments we have to make in our rank structure to fit them in where they belong.

Mr. BROOKS. What do you mean by that constructive credit that Mr. Smart referred to—for retirement purposes?

Admiral RUSSELL. The idea is this, Mr. Chairman. An individual who goes to a graduate school and from there into the service has spent his own time and his own money getting his education. He is credited with that period for constructive service. That is done in the case of doctors and it is done with others.

Mr. BROOKS. Well, is it for pay purposes that you give him that time?

Mr. GAVIN. For longevity?

Admiral RUSSELL. For longevity, yes, sir; for all purposes.

Mr. BROOKS. You give it to doctors?

Admiral RUSSELL. He comes in as a lieutenant, junior grade, instead of an ensign.

Mr. RIVERS. When you say constructive credit, he gets 4 years?

Admiral RUSSELL. Three years.

Mr. RIVERS. Three years.

Mr. BROOKS. What about graduates of Annapolis?

Admiral RUSSELL. They don't get it. They start out as ensigns.

Mr. RIVERS. Yes.

Mr. GAVIN. Their period of service at the Academy is accredited for longevity purposes, isn't it?

Admiral RUSSELL. No, sir.

Mr. RIVERS. No.

Mr. BROOKS. Subcommittee No. 2 has that question up now.

Mr. RIVERS. They have been trying to get that bill through for years.

Mr. SMART. I have one more question, Mr. Chairman.

Mr. BROOKS. All right, Mr. Smart.

Mr. SMART. Considerable discussion has been had here as to the interruption of a legal specialist's or a legal officer's career in the Navy by virtue of the fact that he is rotated from legal duty to sea duty.

I am wondering what the plan of the Navy is as to the usage of these approximately 500 officers who are now desirable. Does the Navy intend to rotate those men from perhaps a 3-year tour of duty ashore, wherein they perform as legal specialists, and then send them to sea as a line officer in the command of a ship or something, or does it anticipate that they shall continue to do legal duties while they are at sea or ashore?

Admiral RUSSELL. The law does not permit them to command anything. The present practice of rotation is from 4 to 5 years on shore duty and about a year and a half or 2 years on sea duty, but that sea duty is not the type of duty where they get much salt in their whiskers.

They continue to do legal work when they are in what we call sea billets and also outside of the continental United States. For example, we have a number of officers out at Guam. We have some working on the governor's staff and we have others that have been participating in war crimes trials. For purposes of rotation we consider that duty out there the same as we do sea duty.

Mr. RIVERS. Of course that rotation gives them a well rounded experience.

Admiral RUSSELL. Our theory is the more they know about the Navy the better Navy lawyers they will be. But they do not rotate from sea to shore in the same fashion as unrestricted line officers do.

Mr. SMART. The point I wanted to make there, Mr. Chairman, was that there are some unrestricted line officers. I think Admiral Russell here is one of them. His predecessor, Admiral Colclouth, is one of them. Captain Nunn, whom you all know and is now commanding a cruiser, the *Manchester*, is such an officer.

How many are there of those in the Navy as of now?

Admiral RUSSELL. We have a total of I think 45 or 48, but as I said previously there are only 6 or 7 of us who are working at law. That provides what we consider the leavening, if you will, of the legal knowledge we have in the service.

Mr. GAVIN. Getting back to that, what did you call it, constructive period——

Admiral RUSSELL. Constructive service.

Mr. GAVIN. Constructive service.

Well, now, supposing you take these young men in regardless of what rank you gave them and grant them this constructive service period for their record, how about the boys from the Naval Academy? Won't they feel quite concerned about that, in event that a similar constructive service isn't granted to them for their longevity record?

You are going to have a feeling in there because right away they are going to say "Wait, now, why this discrimination here."

Mr. RIVERS. Everybody uses that term now.

Mr. ELSTON. Well they hope to get that in this bill that is pending now.

Mr. GAVIN. They hope to get it, but they haven't it. If this bill goes through and you have written this in, then certainly it will be questioned.

Mr. BROOKS. Now——

Mr. RIVERS. We do this. We give every doctor or dentist in the Navy $100 more. You take the Chief of Dentistry. He gets a hundred dollars a month more than you get, I think.

Admiral RUSSELL. I doubt that.

Mr. RIVERS. Well, maybe you are an exception.

Mr. BROOKS. Now——

Admiral RUSSELL. But he would if I weren't in my present job.

Mr. RIVERS. Yes.

Mr. BROOKS. I would like to say this. I think it is all right to go into these things as carefully as we wish to, but I call the committee's attention to this fact: We have no authority to legislate on that particular matter since it is in the pay bill and it is being already considered by Mr. Kilday's subcommittee. I don't think we ought to go into the question of legislating on it.

Admiral RUSSELL. If the measure, Mr. Brooks, which I mentioned is referred to this subcommittee, which I hope it will be because it is intended to supplement this bill now before the committee, I would suggest that the time to talk about it.

Mr. LARKIN. That is right.

Mr. BROOKS. Yes.

Mr. ELSTON. I would like to ask the admiral a question.

Admiral RUSSELL. Yes, sir.

Mr. ELSTON. How many men do you have now in law schools?

Admiral RUSSELL. I think, 24, sir.

Mr. ELSTON. And how many in the Army and the Air Force?

Mr. LARKIN. In law schools now?

Mr. ELSTON. Yes. How many have you assigned to law schools?

Mr. LARKIN. Do you have that figure?

Colonel DINSMORE. I will get that, Mr. Elston.

Mr. ELSTON. All right, will you get it, Colonel, and put it in the record.

Colonel DINSMORE. Yes, sir.

Mr. RIVERS. Admiral, let me ask you, there wouldn't be any joker in this thing anywhere down the line if a line officer were subsequently put into this corps or in this new set-up by way of longevity, would there?

Admiral RUSSELL. No, sir.

Mr. RIVERS. I mean it couldn't work that way, could it?

Admiral RUSSELL. No, sir. We have a provision written in this proposed bill that would prevent that.

Mr. RIVERS. Because you could say he should be with his running mate or whatever it is and therefore he ought to have 3 years given to him on longevity because if he hadn't done this he would be this. Can you see what I am driving at?

Admiral RUSSELL. Yes, sir.

Mr. BROOKS. Mr. Larkin, you have figures on the Army and the Air Force. I am thinking of this: Perhaps you could just put those in the record. Do they need other explanation?

Mr. LARKIN. Fine.

Mr. BROOKS. We are running a little late here.

Mr. LARKIN. Yes, sir. I don't think there is any need for explanation.

Mr. BROOKS. If you will put them in the record the committee will be grateful to you.

Mr. LARKIN. Yes, sir.

(The information referred to is as follows:)

The Department of the Army now has on duty 793 officers who can qualify as law officers and trial counsel. They estimate that they would need a total number of 1,100 officers to satisfy the requirements of articles 26 and 27.

The Department of the Air Force now has on duty 274 officers who can qualify as law officers and trial counsel. They estimate that they will need a total of 750 officers so qualified to meet the requirements of articles 26 and 27.

Mr. BROOKS. Let us go back to the articles.

Mr. SMART. We are now ready for article 59, on page 49 of the bill.

Mr. BROOKS. All right.

Mr. SMART (reading):

ART. 59. Error of law; lesser included offense.

(a) A finding or sentence of a court martial shall not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

(b) Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense.

References: A. W. 37, 47 (f), 49 (a); proposed A. G. N., article 39 (d), (e); N. C. and B., section 472.

Commentary: Subdivision (a) is adapted from A. W. 37. In light of certain new procedural requirements in this code, such as the requirement that the law officer of a general court-martial instruct the court as to the elements of the offense, this subdivision is an extremely important one and should be given full force and effect. On the matter of technical errors N. C. and B., section 472 contains the following statement:

If there has been no miscarriage of justice, the finding of the court should not be set aside or a new trial granted because of technical errors or defects which do not affect the substantial rights of the accused.

Subdivision (b) is taken from A. W. 47 (f), 49 (a) and article 39 (d), (e) of the proposed A. G. N. MCM paragraph 78 (c) defines a lesser included offense as follows:

The test as to whether an offense found is necessarily included in that charged is that it is included only if it is necessary in proving the offense charged to prove all the elements of the offense found.

Mr. BROOKS. That subsection (b) means that if a man is tried for murder, and they find an error committed, the appellate court could still hold him or find him guilty of manslaughter?

Mr. LARKIN. That is right.

Mr. BROOKS. And in reference to that term "error materially prejudices," exactly haw far does that go?

Mr. LARKIN. Well, it is provided so that there will not be a setting aside of a finding of guilty for technical reasons or for minor errors of law which do not prejudice the rights of the accused.

Mr. RIVERS. Minor.

Mr. DEGRAFFENRIED. Is that sometimes spoken of as error without injury?

Mr. LARKIN. I should say that is just about the notion, yes.

Mr. PHILBIN. Are you speaking now about section (b)?

Mr. LARKIN. Section (a).

Mr. PHILBIN. Subsection (a). How about subsection (b), what is your reasoning on that?

Mr. LARKIN. Well, that is to give the reviewing authorities latitude in the review of a case where a man has been charged with let us say

murder and he has been found guilty of it but the reviewing authority finds that one element of the crime of murder has not been proved but without that element a lesser included offense has been proved.

And while we do not in our punitive articles have degrees of crime in the sense of grand larceny in the first or second degree as you find in civil courts, the idea is analagous. For instance, in a grand larceny in the first degree charge, assuming you had one where one of the elements was that property exceeding $500 in value was taken and the man is convicted of it and the reviewing authority feels they made an error in the value and it was only $250 and they would be perfectly satisfied he was guilty of grand larceny in the second degree and not in the first, they could reduce the finding to a lesser included offense, just as the court can itself when it tries the case and finds the man guilty of a lesser included offense than the one he is charged with.

This extends that authority to the reviewing authorities, because several of them have a review of the facts as we will see.

Mr. RIVERS. Up in (a) there, of course with regard to the fellow who appeals on the ground of an error of law, the burden of proof then is on him to prove that it has materially affected the rights of the accused.

Mr. LARKIN. That is right. I think that is a common rule in civil practice and it has been generally applied in courts martial. You can't try a case—the finest trial judge probably can't try a case—without making some technical error occasionally, but the error is so inconsequential that the substantial rights of the accused have not been prejudiced at all and there is no reason why the verdict should be set aside by virtue of minor or technical errors. If you have a substantial error or an error that prejudices his substantial rights, why then of course it should be set aside.

We have taken this from the statute and we have emphasized it because we have as you have noticed made the trial of a case and the review of a case more legal in that we have required lawyers and we have required instructions to the court on the record.

Now we feel it is progress to do that, but on the other hand we do not feel that anything is gained by making the system so technical that you can have reversals for minor technical errors. We feel strongly that you should not have reversals for errors of that character;

Mr. PHILBIN. Do you have in your commentary some illustration of an error that would be reversable under this section?

Mr. LARKIN. No, we have not.

Mr. SMART. You could revert to your case of murder, again, where the elements would all be the same except for malice aforethought.

Mr. PHILBIN. That disturbs me, too. That relates to section (b). I mean you could charge a man with murder and wind up convicting him of simple assault.

Mr. SMART. That is right.

Mr. LARKIN. Only if it is an included offense. But that is a standard practice in every jurisdiction.

Mr. PHILBIN. I mean is it an included offense?

Mr. LARKIN. Assault.

Mr. PHILBIN. I mean, would it have to be an included offense under this section? Take for example a case of where you find a man guilty of murder on charges of murder and only on charges of murder.

Mr. RIVERS. It couldn't be simple assault.

Mr. PHILBIN. Could the reviewing authority then find the man not guilty of murder but guilty of simple assault?

Mr. LARKIN. I think he might. But he couldn't find him guilty of larceny or he couldn't find him guilty of robbery.

Mr. PHILBIN. I understand that.

Mr. LARKIN. Assault is a lesser included offense of murder.

Mr. PHILBIN. I mean it would work the same way with larceny. He might be charged with grand larceny and found guilty of course and the reviewing authority might find him guilty of some petty larceny.

Mr. LARKIN. That is right.

Mr. PHILBIN. That is your interpretation of an included offense.

Mr. LARKIN. That is right.

Mr. ELSTON. Well, this section states the law exactly as it is in the civil courts.

Mr. LARKIN. That is right, Mr. Elston.

Mr. DEGRAFFENRIED. Mr. Larkin, as I see it, the only difference here is if they find him guilty of a lesser offense instead of sending it back for a new trial and having the whole thing to go over again they just save that time and expense and everything else by reducing it to the lesser offense and fixing the penalty.

Mr. LARKIN. That is right.

Mr. BROOKS. This is not changed from what the present statute is, is it?

Mr. LARKIN. That is right, nor is it changed from the civil practice.

Mr. BROOKS. Yes. Is there any objection to it? If not, it stands adopted.

Article 60.

Mr. SMART (reading):

ART. 60. Initial action on the record.

After every trial by court martial the record shall be forwarded to the convening authority, and action thereon may be taken by the officer who convened the court, and officer commanding for the time being, a successor in command, of by any officer exercising general court-martial jurisdiction.

References: A. W. 35, 47 (e); N. C. & B., section 479.

Commentary: This article is taken principally from A. W. 47 (e). There is no similar provision in the AGN, but NC&B, section 479 provides that the reviewing power vests in the office, not the person, of the authority so acting.

Mr. ELSTON. Why do you just say in the first line "every trial by court martial" and then in the last "an officer exercising general court-martial jurisdiction." Does the first line refer to all court-martial cases?

Mr. SMART. That is what that is intended to do, because in the case of summary and some special courts you see they will go no higher than the officer having general courts-martial jurisdiction. In others they necessarily must go all the way up. So this section restates, substantially, existing law.

Mr. ELSTON. It means every court-martial case?

Mr. SMART. That is right, but it does not mean that every court-martial record has the same type of review.

Mr. ELSTON. No; that is right.

Mr. BROOKS. Now, that means acquittals and everything?

Mr. SMART. Acquittals in the case of a general court, Mr. Chairman, are reviewed only for jurisdiction.

Mr. ELSTON. Well they can't reverse an acquittal.

Mr. SMART. No, sir.

Mr. BROOKS. An acquittal, though, for jurisdiction would go up and be subject to a reversal?

Mr. LARKIN. That is right. If there is an acquittal and on the review it appears that the court that tried him had no jurisdiction at all over him in the first instance——

Mr. ELSTON. Well that is obvious——

Mr. LARKIN. But for no other reason.

Mr. ELSTON. Jeopardy will only arise where a man has been tried in a court that has jurisdiction.

Mr. LARKIN. Exactly.

Mr. ELSTON. If there was no jurisdiction, then he can't claim jeopardy.

Mr. LARKIN. Exactly.

Mr. BROOKS. Any further discussion on the article? If not, it stands adopted.

Article 61.

Mr. SMART (reading):

ART. 61. Same—General court-martial records:

The convening authority shall refer the record of every general court martial to his staff judge advocate or legal officer, who shall submit his written opinion thereon to the convening authority. If the final action of the court has resulted in an acquittal of all charges and specifications, the opinion shall be limited to questions of jurisdiction and shall be forwarded with the record to The Judge Advocate General of the armed force of which the accused is a member.

References: A. W. 35, 47 (c)

Commentary: This article is drawn principally from A. W. 47 (c). The requirement that the convening authority refer the record to his staff judge advocate or legal officer is new for the Navy. The requirement that the staff judge advocate or legal officer write an opinion on the jurisdiction of the court in cases of acquittal conforms to present Army practice. See Article 65 with reference to opinions and records in cases where there is a finding of guilty.

Mr. BROOKS. That brings up that same question of jurisdiction.

Mr. LARKIN. That is right.

Mr. BROOKS. Any further discussion on 61? If not, it stands adopted.

Article 62.

Mr. SMART (reading):

ART. 62. Reconsideration and revision.

(a) If a case before a court martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action.

(b) Where there is an apparent error or omission in the record or where the record shows improper action by a court martial with respect to a finding or sentence which can be rectified without material prejudice to the substantial rights of the accused, the convening authority may return the record to the court for appropriate action. In no case, however, may the record be returned—

(1) for reconsideration of a finding of not guilty or a ruling which amounts to a finding of not guilty; or

(2) for increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory.

References: A. W. 40; proposed A. G. N., article 39 (i); M. C. M., pars. 64 (f), 83, 87 (b); N. C. & B., secs. 410, 458–468.

Commentary:

No provision similar to subdivision (a) is found in either the A. W. or the A. G. N. Under present Army, Navy and Air Force practice, however, the convening authority has the power setrut in this subdivision (see M. C. M., par. 64 (f) and N. C. & B., sec. 410.)

Subdivision (b) is based on A. W. 40. Under this subdivision the convening authority may return the record where the court has failed to prescribe a mandatory punishment or where it has found the accused guilty of a specification and not guilty of a charge and the specification sufficiently alleges a violation of some article. He may also return the record for correction of other errors, such as clerical errors.

Mr. BROOKS. In other words, under No. 2, where the court prescribed a sentence in violation of the Articles of this particular Code the correction might be made on an appeal even though it increases the amount of his sentence?

Mr. LARKIN. That is right. In other words, the first sentence would have been an illegal one in that the court did not follow the mandatory requirement of sentence. I think it occurs only in the two or three instances where the death penalty is mandatory.

If the first court did not give that mandatory sentence, then upon a rehearing the second court could give what amounts to a more severe sentence by following the mandatory provisions. Otherwise, no sentence can be increased even though it was less than is authorized.

Take the case where the maximum table of punishment says a punishment up to 20 years can be imposed. If the 20 years wasn't mandatory in the first instance and they gave 5, on the rehearing they could not give more than 5.

Mr. RIVERS. What about if they gave him manslaughter, could they increase it to murder?

Mr. SMART. No.

Mr. LARKIN. There you are talking not about the sentence but the charge itself.

Mr. BROOKS. I would like——

Mr. LARKIN. This has to do with the sentence.

Mr. PHILBIN. This relates only to the sentence?

Mr. LARKIN. That is right.

Mr. PHILBIN. How about section (a) there, what sort of a case would that be? Have they made a practice of dismissing some of these cases without prejudice so they may be revived?

Mr. LARKIN. Which section?

Mr. PHILBIN. Subsection (a) of article 62.

Mr. LARKIN. You see, there may be any number of motions throughout the course of the trial which result in a cessation of the trial.

Mr. PHILBIN. This says here "dismissed," where a case has been dismissed on motion.

Mr. LARKIN. Which motion does not go to the merits of the case and does not amount to an acquittal, for instance a motion addressed to the jurisdiction which may be sustained, or a motion invoking the statute of limitations.

Now it may well be that the law officer would grant such a motion and it turns out that he is in error, that the statute actually hasn't run. He has computed the time incorrectly. Well, now, such a motion was not to the merits of the case. It doesn't amount to——

Mr. PHILBIN. A jurisdictional question.

Mr. LARKIN. It doesn't amount to a finding of guilty.

Mr. RIVERS. Let me ask this. Under that whole article 62, if a man is charged with murder and convicted of manslaughter and it was clear that he should have been convicted of murder, there wouldn't be any instance where it could be sent back for a sentence for murder?

Mr. SMART. The only case where that could happen——

Mr. RIVERS. That couldn't happen under this article, could it?

Mr. SMART. If he were charged with murder and found guilty of murder and the court violated the mandatory punishment——

Mr. RIVERS. I see.

Mr. SMART. The sentence.

Mr. RIVERS. Yes.

Mr. SMART. Then in that case of course it could be sent back. But where he is charged with murder but the finding is guilty as to manslaughter then the punishment cannot exceed the maximum set out in the table of maximum punishments for manslaughter and the mandatory punishment for murder goes out the window when they reduce the finding from murder to manslaughter.

Mr. RIVERS. I see.

Mr. DEGRAFFENRIED. That goes to just changing the sentence which was mandatory.

Mr. SMART. Exactly.

Mr. DEGRAFFENRIED. The verdict still stands. I knew of a case once where a man was convicted and was supposed to have been sentenced to 2 years in the penitentiary. The judge thought he had sentenced him. He went over and served 2 years in the penitentiary.

The case was appealed and neither the lawyers nor the Supreme Court caught the fact in the record that the sentence had not been formally imposed. And yet after the case went back the man filed a petition for a writ of habeas corpus and the court held and the Supreme Court affirmed it that the judge could still go back down there and change the sentence and enter it nunc pro tunc and enter the sentence he should have entered in the beginning.

Now what this does is simply give them the right to give him the sentence which was mandatory. The verdict was correct.

Mr. LARKIN. That is correct.

Mr. DEGRAFFENRIED. But in imposing the sentence they didn't follow the mandatory provisions of the law.

Mr. LARKIN. That is right. But there are so few mandatory provisions that it would only work in the mandatory death case. Where the sentences are discretionary within a maximum, the first sentence imposed binds the rehearing as to the sentence.

As to your case, Mr. Rivers, where he is charged with murder and convicted of manslaugher, that amounts to a finding of not guilty of murder, so that can't go back.

Mr. RIVERS. That is right. I just wanted the record to show that.

Mr. LARKIN. Yes, sir.

Mr. BROOKS. Now this subsection (a) is a new section, isn't it?

Mr. LARKIN. It is new in the statute, but it is adopted from present regulations.

Mr. BROOKS. Do you think it requires any further explanation?

Mr. LARKIN. I don't think so, sir.

Mr. RIVERS. The present regulations of whom?

Mr. LARKIN. The Navy and Army. It comes from the Manual of Courts-Martial paragraph 64 (f), and from Naval Courts and Boards, section 410.

Mr. BROOKS. Any further discussion of the article? If not, it will stand approved.

Article 63.

Mr. SMART (reading):

ARTICLE 63. Rehearings.

(a) If the convening authority disapproves the findings and sentence of a court-martial he may, except where there is lack of sufficient evidence in the record to support the findings, order a rehearing, in which case he shall state the reasons for disapproval. If he does not order a rehearing, he shall dismiss the charges.

(b) Every rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be imposed unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings or unless the sentence prescribed for the offense is mandatory.

References: A. W. 52; N. C. & B., section 477.

Commentary: This article is adopted from A. W. 52. The Navy has no similar statutory provision. The Army term "rehearing" has been adopted to distinguish a proceeding under this Article from the new trial specified in article 73.

Subdivision (a) provides, in conformance with the usual concept of double jeopardy, that the convening authority shall not order a rehearing where the prosecution has failed to establish a prima facie case—has failed, as a matter of law, to introduce sufficient evidence to warrant the finding. The phrase "evidence in the record" is intended to authorize rehearings where the prosecution has made its case on evidence which was improperly admitted at the trial, evidence for which there may well have been an admissible substitute.

Subdivision (b) contains the limitations on the sentence which can be adjudged by a court on rehearing, with an exception for mandatory sentences. Without this exception the court on rehearing could impose no sentence at all where the original sentence was less than that made mandatory for the offenses. For a mandatory sentence see article 133.

A rehearing is a continuation of the former proceeding, and if the original court had no jurisdiction in the case, none of the restrictions of this article apply to a subsequent trial on the same charges.

Mr. BROOKS. That is all in favor of the defendant there and it also complies with the double jeopardy provisions, does it?

Mr. LARKIN. Well, as a matter of fact, (a) cuts down the standard notion of double jeopardy of the military as provided in the other section a little bit in that if the findings are disapproved because there is what amounts to a lack of a prima facie case in the first court then it can't be sent back for a rehearing. Otherwise it can.

But that is a limitation on the broader double jeopardy provision that is found in the military.

Mr. DEGRAFFENRIED. Mr. Larkin, let me ask you a question. Under that section (a) there, if the evidence was sufficient, in other words a prima facie case was made out, and it was submitted to the court and the verdict was rendered, could the convening authority under that section disturb that and call for a rehearing?

Mr. LARKIN. Well, if he found an error of law, yes; or he did not give the credibility to a witness that the court did.

Mr. DEGRAFFENRIED. Well, the convening authority—could that be just one man?

Mr. LARKIN. That is right. That is the man who convened the court.

Mr. DEGRAFFENRIED. He is the man who has called the court together.

Mr. LARKIN. That is right.

Mr. DEGRAFFENRIED. And he doesn't have to be a lawyer, does he?

Mr. LARKIN. No, he doesn't.

Mr. DEGRAFFENRIED. If he was in the chain of a command and he thought, although the evidence was sufficient—if he himself thought—an error had been committed by the court he could set the whole thing aside and call for a rehearing.

Mr. LARKIN. That is right. He could set it aside for no reason. He could dismiss it, if he wanted to.

Mr. ELSTON. Don't you think this last sentence is a little confusing: "If he does not order a rehearing, he shall dismiss the charges." That might be interpreted to mean that if he doesn't order a rehearing, there has to be a dismissal of the charges and there can't be any further appeal?

Mr. LARKIN. Well, that is all to the protection of the accused. If they are dismissed, why he has nothing to complain of.

Mr. ELSTON. I know, but it looks like he has to do one of two things: Either dismiss or order a rehearing.

Mr. LARKIN. That is in the event that he disapproved. If he approves the findings or sentence or so much of them as he believes are sustainable, why of course it then proceeds further to the board of review and so forth through the appellate system. But if he disapproves them——

Mr. ELSTON. Suppose he does disapprove them we will say in part and not entirely and he feels that the upper court ought to review it rather than send it back for a retrial, under this section he couldn't do that. He would have to send it back for a rehearing.

Mr. LARKIN. I think that is right.

Mr. DEGRAFFENRIED. But he couldn't disturb a finding by the court of not guilty, could he?

Mr. LARKIN. No.

Mr. DEGRAFFENRIED. Because it says "and sentence."

Mr. LARKIN. That is right.

Mr. DEGRAFFENRIED. And no sentence uses that word "sentence." He couldn't disturb the findings if there were no sentence, because it says "disapproves the findings and sentences" and there wouldn't be any sentence if he had been found not guilty.

Mr. LARKIN. That is right.

Mr. DEGRAFFENRIED. So he could not disturb the verdict of not guilty.

Mr. LARKIN. That is right, unless it turned out that the court had no jurisdiction in the first instance. That is the only circumstance.

Mr. BROOKS. What would you think of Mr. Elston's suggestion that we add something like the words "in such an event" before the word "if" at the beginning of the last sentence of subsection (a)?

Mr. LARKIN. Well, the notion would be, I take it, in such event if he does not order a rehearing he shall dismiss the charges or send it on for review? Is that your notion?

Mr. ELSTON. Yes. I could conceive of the case where he does disapprove of it, but he may feel that he is not a lawyer.

Mr. LARKIN. Of course he must consult, you understand, with the staff judge advocate.

Mr. ELSTON. Even so, he might figure that it is a case that ought to be reviewed by some higher authority than himself. It seems to me he should have the alternative of letting the higher court review the case or sending it back for a rehearing.

Why send it back for another hearing and a hearing that will involve additional time and go over the same evidence again when perchance the upper court may disagree with the convening authority?

Mr. LARKIN. Of course, he can send it up, if he is in doubt, by approving it.

Mr. ELSTON. Well, he may not approve it, though. He may approve it in part, but not entirely.

Mr. LARKIN. You mean approve one specification?

Mr. ELSTON. Yes. Or he may feel that one specification has been disproven. He may disagree with the court on one specification, but he may think that six others are all right. Now under this, wouldn't he have to send it back for a rehearing?

Mr. LARKIN. Or he just dismisses the one that he disapproves of and that is the end of that one. And the rest of them go up for review.

Mr. DEGRAFFENRIED. Mr. Larkin.

Mr. LARKIN. Yes, sir.

Mr. DEGRAFFENRIED. Suppose the court had brought in a verdict where they had a period of time there that they could find a man guilty and sentence him to either 5 years or 10 or 15 years. Now it doesn't distinguish here between law and evidence.

If he thought they had given him too small a sentence and that he should under the evidence of the case get 10 years instead of 5 or 15 years instead of 5, could he send it back for a rehearing under those circumstances?

Mr. LARKIN. No, sir; he could not.

Mr. DEGRAFFENRIED. He could not.

Mr. LARKIN. No.

Mr. BROOKS. Any further discussion? If not, the article will stand approved as read.

Article 64.

Mr. SMART (reading):

ART. 64. Approval by the convening authority.

In acting on the findings and sentence of a court martial, the convening authority shall approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and determines should be approved. Unless he indicates otherwise, approval of the sentence shall constitute approval of the findings and sentence.

References: A. W. 47 (c), (f); A. G. N., articles 33, 54, 64 (d); proposed A. G. N., article 39 (b).

Commentary: This article substantially conforms to present practice in all the armed forces. The convening authority can approve a finding only if he finds that it conforms to the weight of the evidence and that there has been no error of law which materially prejudices

the substantial rights of the accused. See article 59, commentary. He may approve only so much of a finding as involves a finding of guilty of a lesser included offense. See article 59. He may disapprove a finding or a sentence for any reason.

Mr. RIVERS. In other words, he has to note. Otherwise, it just goes by the board?

Mr. LARKIN. Well, by approving the sentence it includes an approval of the findings. He can't approve a sentence if he disapproved the findings. So approval of the sentence automatically means an approval of the findings.

Mr. BROOKS. Well, these articles here apply in cases where the command may use his influence in favor of the defendant in certain cases for the good of the service or for disciplinary reasons; is that right?

Mr. LARKIN. That is right. The principal one is to catch errors and to cut down the sentence. He can't increase the sentence. He can't send back not guilty findings and so forth.

Mr. BROOKS. Yes.

Mr. LARKIN. But it provides an immediate review right in the field. And this follows present practice in all services.

Mr. RIVERS. Now, does that mean that all he has to write on there is approved or disapproved?

Mr. LARKIN. That is right. He can approve all or so much of it as he wants to or disapprove some of it or all.

Mr. RIVERS. Just say approved or disapproved.

Mr. LARKIN. That is right.

Mr. ELSTON. Where is there anything in here that authorizes him to disapprove for example, a sentence and then impose a later sentence?

Mr. LARKIN. I think 64 that we just covered covers that. He shall "approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct."

Anything he finds incorrect——

Mr. ELSTON. Well, now, let us take the case where the court had the right to, we will say, give a sentence of 10 years, but that he in his judgment thought the sentence ought to be only 1 year. Now the court was correct in law in imposing a 10-year sentence.

He just disagrees with the court on the amount of the sentence. Now I don't see anything in this section that gives him a right to remit a part of the sentence.

Mr. LARKIN. Well, I think the language "and determines should be approved" is a determination that he can make for any reason.

Mr. ELSTON. I don't think that is what it says, though.

Mr. BROOKS. Well, would that come under the word "fact," there, because that reads "as he finds correct in law and fact."

Mr. ELSTON. Well, the point I am making, Mr. Chairman, is, it would be correct in law and it would be correct in fact. It is a matter of judgment.

Mr. LARKIN. That is right.

Mr. ELSTON. The court may have been correct in law and they may have been correct in fact, but it is a matter of judgment. They thought the man ought to have 10 years. The convening authority thinks he ought to only have 1 year. Now this sentence doesn't give him the right to remit a part of the sentence as I interpret it.

Mr. LARKIN. Well, that language "and determines should be approved" was intended to give him a free hand in doing anything he

wants for any reason in cutting down the sentence or in disapproving. "As he finds correct in law and fact" is a guide to him that he at least can't approve anything which he finds is not correct in law and fact. At least he is bound by that.

If he finds it incorrect in law or in fact, either the findings or the sentence, then he should disapprove it. He can only approve at least what he finds correct and only as much as he determines he wants to.

Mr. ELSTON. I think you are putting an interpretation on it that isn't written there.

Mr. DEGRAFFENRIED. Your interpretation is that he can reduce it if it is correct in law, but he can't increase it.

Mr. LARKIN. That is right.

Mr. DEGRAFFENRIED. Do you think it is clear in there, Mr. Larkin?

Mr. ELSTON. You make it clear in the previous section, that he can't increase it, but you don't make it clear here that he can decrease it.

Mr. LARKIN. Perhaps we can——

Mr. BROOKS. Furthermore, I think your commentary goes far beyond that article because in the last sentence of your commentary you say "he may disapprove a finding or a sentence for any reason."

Mr. LARKIN. That is right. That is the intention.

Mr. BROOKS. Which means that he can just disapprove it.

Mr. LARKIN. That is right.

Mr. BROOKS. He doesn't have to read the record or anything esle. He can just say disapproved and it is through.

Mr. LARKIN. That is right. In the normal course of the review of the case he looks to its legality and the establishment of the facts and the appropriateness of the sentence and he shouldn't approve anything that is wrong or illegal, but he can disapprove it if it is illegal, if it is wrong, and for any other reason.

Mr. BROOKS. Or for no reason at all?

Mr. LARKIN. Or for no reason at all.

Mr. RIVERS. That is right.

Mr. LARKIN. The classic case that I think General Eisenhower stated in his testimony before your subcommittee last year was that even though you might have a case where a man is convicted and it is a legal conviction and it is sustainable, that man may have such a unique value and may be of such importance in a certain circumstance in a war area that the commanding officer may say "Well he did it all right and they proved it all right, but I need him and I want him and I am just going to bust this case because I want to send him on this special mission."

He has the right to do that. It is that free rein—all of which operates to the advantage of the accused——

Mr. ELSTON. Doesn't this last sentence more or less refer to a case that is going on to the upper court, up to the board of review? In other words, when the board of review gets the case the board of review would understand that since he didn't express any disapproval of the sentence it is presumed that he approved of the sentence?

Mr. LARKIN. No. I think that because he has approved of the sentence it is presumed that he has approved of the finding of guilty.

Mr. ELSTON. Well, I think we ought to clearly indicate that he has a right to remit a part of the sentence.

Mr. BROOKS. Mr. Smart has something he wants to say in that respect.

Mr. SMART. Well, in old article of war 51 you have words to this effect:

The power of the President, the Secretary of the Department of the Army, and any reviewing authority to order the execution of a sentence of a courts martial shall include the power to mitigate, remit or suspend the whole or any part thereof, except that a death sentence may not be suspended.

Now this particular article here brings up a phase of command control that operates to the benefit of the accused.

I well remember General Collins' testimony before the committee 2 years ago when he talked about his authority, as of that time, to empty the whole guardhouse if he wanted to. He had a bunch of people out there who had been convicted. They were getting ready to go to combat and he wanted to give them a chance to work themselves out from under a serious conviction.

He suspended their sentences and let them all go back to combat. If they made good he remitted the entire sentence. Now this permits the convening authority to do the very same thing. That is the intent. As to the appropriateness of the language used, I am not in position to say one way or the other. But that is the intent of it and it works for the benefit of the accused.

Mr. ELSTON. Yes. Certainly the language you read is clear. There is no doubt about that language.

Mr. BROOKS. Well, is it possible to make a change in that article so as to make it very clear?

Mr. LARKIN. I think so. I think Mr. Smart and I can work out something where after the words "law and fact" we could say in addition—

the convening authority may for any or for no reason disapprove a finding or reduce a sentence in whole or in part—

Or something like that.

Mr. ELSTON. Yes.

Mr. LARKIN. It is the same idea. If we can express it more clearly and make it sure, there is no reason why we should not. Let us try.

Mr. BROOKS. Is it all right, then, to authorize Mr. Smart and Mr. Larkin to fashion that wording and bring it in in the morning?

Mr. LARKIN. We will bring it back when we have these eight or nine other things to discuss.

Mr. BROOKS. If there is no further discussion, then, on article 64, we will approve it with the reservation we have made.

Article 65.

Mr. SMART (reading):

ART. 65. Disposition of records after review by the convening authority.

(a) When the convening authority has taken final action in a general court-martial case, he shall forward the entire record, including his action thereon and the opinion or opinions of the staff judge advocate or legal officer, to the appropriate Judge Advocate General.

(b) Where the sentence of a special court martial as approved by the convening authority includes a bad conduct discharge, whether or not suspended, the record shall be forwarded to the officer exercising general court-martial jurisdiction over the command to be reviewed in the same manner as a record of trial by general court martial or directly to the appropriate Judge Advocate General to be reviewed by a board of review. If the sentence as approved by an officer exercising general court-martial jurisdiction includes a bad conduct discharge, whether or not suspended, the record shall be forwarded to the appropriate Judge Advocate General to be reviewed by a board of review.

(c) All other special and summary court-martial records shall be reviewed by a judge advocate of the Army or Air Force, a law specialist of the Navy, or a law specialist or lawyer of the Coast Guard or Treasury Department, and shall be transmitted and disposed of as the Secretary of the Department may prescribe by regulations.

References: A. W. 35, 36; proposed A. G. N., articles 21, 39 (d), 39 (e).

Commentary: Subdivision (a) incorporates present Army practice. Navy practice is similar except that no opinion by the legal officer is required.

Subdivision (b) is derived from A. W. 36 except that the record may be sent directly to the Judge Advocate General. This alternative is permitted in order to provide for situations where no judge advocate or law specialist is assigned to the staff of the officer exercising general court-martial jurisdiction or where direct transmittal to the Judge Advocate General or a branch office would be more expeditious. Proposed A. G. N., article 39 (d) is similar to A. W. 36.

Subdivision (c) permits the review of other special and summary courts martial to be prescribed by regulations, subject to the requirement that all such records shall be reviewed by a law specialist or judge advocate, or lawyer in a Coast Guard case. The reason for this provision is that the volume of cases, the availability of law specialists and judge advocates, and the feasibility of reviewing records in the field may differ in the various armed forces.

The disposal of special and summary court-martial records is also left to regulation, because of the varying needs of the armed forces. It is intended, however, that such records shall be retained until no longer of use either to the armed force concerned or to the accused.

Mr. BROOKS. Any discussion on article 65?

Mr. RIVERS. That means that any lawyer in the Treasury Department, whether he be a tax man or not, could O. K. or review it?

Mr. SMART. Technically speaking, I guess you would be right, but that certainly is not the intent of it, Mr. Rivers. The general counsel, I am sure, is the individual intended.

Mr. RIVERS. It says any lawyer.

Mr. BROOKS. Well, of course, that review is all in favor of the defendant.

Mr. LARKIN. Well, that section (c) has to do with special courts martial in which there is no B. C. D. imposed.

Mr. RIVERS. I see.

Mr. LARKIN. Or the next lower court—the summary courts martial.

Mr. RIVERS. Yes.

Mr. LARKIN. And it is left, of course, to the Secretary of the Treasury in peacetime as far as the Coast Guard is concerned to designate the appropriate lawyer and I am quite sure that you can be confident that he will designate the chief counsel.

Mr. BROOKS. Any further discussion? Any objection to the article? If not, we will approve it.

Article 66.

Mr. SMART (reading):

ART. 66. Review by the board of review.

(a) The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal court or of the highest court of a State of the United States.

(b) The Judge Advocate General shall refer to a board of review the record in every case of trial by court martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for more than 1 year.

(c) In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the board of review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. Otherwise it shall order that the charges be dismissed.

(e) Within 10 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.

(f) Otherwise, the Judge Advocate General shall, unless there is to be further action by the President or the Secretary of the Department or the Judicial Council, instruct the convening authority to take action in accordance with the decision of the board of review. If the board of review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(g) The Judge Advocates General of the armed forces shall prescribe uniform rules of procedure for proceedings in and before boards of review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the Offices of the Judge Advocates General and by the boards of review.

References: A. W. 50 (a), (d), (e), (g); 51, 52; proposed A. G. N., article 39 (e), (f).

Commentary: This article adopts the Army system of review by a formally constituted board. Required qualifications of the members are new, however, and a provision permitting civilian members has been added for the Coast Guard. (See subdiv. (a).)

Review of all the cases specified in subdivision (b) is automatic, whether or not the sentence is suspended. The types of cases receiving automatic review by the board are substantially the same as those under the present Articles of War except that for sentences involving penitentiary confinement there have been substituted sentences involving confinement for more than 1 year. This conforms to changes in the system of confinement in article 58. For review of other cases by a board of review see article 69.

The board of review shall affirm a finding of guilty of an offense or a lesser included offense (see art. 59) if it determines that the finding conforms to the weight of the evidence and that there has been no error of law which materially prejudices the substantial rights of the accused. (See art. 59, Commentary.) The board may set aside, on the basis of the record, any part of a sentence, either because it is illegal or because it is inappropriate. It is contemplated that this power will be exercised to establish uniformity of sentences throughout the armed forces. (See art. 67 (g).)

Subdivision (d) deals with the power to order a rehearing. (See article 63).

Mr. Brooks. Any discussion on this article? I notice in my records here that subsection (b) was the one as to which Colonel Melvin Maas recommended some sort of saving clause. Mr. Smart, do you remember just what he had in mind there?

Mr. LARKIN. I thought, Mr. Chairman, in that connection he objected or some witness objected to the mandatory review for general or flag officers.

Mr. BROOKS. I think his idea, if I recall it, was that you singled out general or flag officers.

Mr. LARKIN. Yes.

Mr. BROOKS. While it didn't cover others.

Mr. LARKIN. That is right, but it doesn't apply here because in the article providing for the Judicial Council there is an automatic review of the case of a general or flag officer where there is not of these other types.

Since they all are automatically and mandatorily reviewed here, why I don't think the criticism applies if it is a good criticism in any case. But I don't think it applies here. I don't know what criticism you are referring to in the absence of that.

Mr. SMART. I think that that is correct, Mr. Larkin. He was referring to: Why didn't you specifically mention other officers, other than flag rank or general officers?

Mr. LARKIN. Yes.

Mr. SMART. And why didn't you talk about enlisted men, too?

Mr. LARKIN. Yes.

Mr. SMART. That was his complaint.

Mr. BROOKS. Well, what is your answer to that?

Mr. LARKIN. Well, this provides an automatic review before the board of review of the character spelled out here, as to facts and law, for general or flag officers no matter what offense they are convicted of and no matter how minor and for everyone else, including general or flag officers, in the event that the finding is death, dismissal, dishonorable discharge, bad conduct discharge, or confinement for over a year.

The only thing in addition that this does for a general or flag officer is that it gives a mandatory review of the case even though the sentence is not death, dismissal, or confinement.

Mr. RIVERS. That air officer who is under investigation now over in Britain I think—General Bissell—would be one under this article. Of course, he is under preinvestigation now.

Mr. LARKIN. That is right.

Mr. RIVERS. Now, what is he being charged under, the Elston bill?

Mr. LARKIN. I don't know. I don't know that the charge has been formulated as yet, Mr. Rivers.

Mr. RIVERS. He is being investigated under something.

Mr. SMART. It apparently is a charge under the ninety-sixth article of war.

Mr. DEGRAFFENRIED. Conduct unbecoming an officer and a gentleman, or something of that kind.

Mr. LARKIN. I don't know.. I haven't heard.

Mr. BROOKS. Now, for instance, in the event of a case paralleling that of a man with the same rank, his case would first go through the trial court, of course, and then the convening officer.

Mr. LARKIN. Yes, sir.

Mr. BROOKS. And then would come here to this review.

Mr. LARKIN. As would every other case that includes a sentence of death, dismissal, dishonorable discharge, bad-conduct discharge, or confinement for more than a year.

Mr. BROOKS. But now if that were an enlisted man, it would not follow that same procedure, would it?

Mr. LARKIN. Yes, sir; if the sentence on the enlisted man was either death, dishonorable discharge, and so on.

Mr. BROOKS. Say the sentence was lesser than that.

Mr. LARKIN. That is right, then it would not.

Mr. BROOKS. It would not.

Mr. LARKIN. That is right.

Mr. BROOKS. You heard the explanation, gentlemen. Any objection?

Mr. ELSTON. I would like to ask a question on some other parts of this article.

Mr. BROOKS. Go ahead.

Mr. ELSTON. This is the first time you have permitted civilians to serve on boards of review, isn't it?

Mr. LARKIN. That is right.

Mr. ELSTON. Now, why were they included?

Mr. LARKIN. Well, they were included initially at the request of the Coast Guard—not that it be worded this specific way but the Coast Guard does have civilian lawyers working in their court-martial procedures during peacetime, and they feel they are very competent.

They don't have an unusually large number of officers in their review, and they wanted to be free if they desired to appoint a civilian lawyer working for the Coast Guard to a board of review. This was the easiest way to make that provision. Of course, it is not mandatory that civilians sit on a board of review.

It is up to the Judge Advocate General because he appoints the members of the board of review and they would sit on them only in the event he desired it.

Now the Navy said that they might find that useful. They have in the past had several civilian lawyers who were working in their office for a number of years and who were extremely competent.

The Navy does not of course now have a statutory board of review of this character. This is patterned after the board of review in the Army review system. But of course, as written here, it applies to the Navy and will require them to have one.

Mr. ELSTON. Now I notice in article 62 permission is granted the convening authority to remand the case for the correction of an apparent error in the record or omission in the record. But that same authority is not granted here. Was there any reason for omitting it?

Mr. LARKIN. Well, it was felt I think that if the board of review found such a record after it had been screened by the convening authority, since they are an appellate tribunal, it is not necessary to give it to them and all they would have to do is send it back to the convening authority and ask him to have it corrected.

Mr. ELSTON. I notice that you have provided here that the sentences of more than a year are to be reviewed. Why is that not a year or more? That is subsection (b).

Mr. LARKIN. I see it.

Mr. BROOKS. May I offer this thought——

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Mr. LARKIN. I don't know that there is any reason. Colonel Dinsmore suggested that felony is construed in many jurisdictions as a year and a day, but I don't think it is uniform by any means.

I am frank to say I don't know that there is any reason why it couldn't be a year or more.

Mr. ELSTON. It seems to me it ought to be because a great many sentences are for a year.

Mr. LARKIN. Yes.

Mr. ELSTON. There is not much difference between a year and a year and a day. The reason for the year and a day in the Federal courts is because I believe the law is that you can't confine a man in a penitentiary unless he is sentenced for more than a year.

Mr. LARKIN. Yes.

Mr. ELSTON. That is why judges make it a year and a day.

Mr. LARKIN. In some States, however, I know—New York particularly—a year's sentence makes it a felony if not otherwise stated.

Mr. ELSTON. Yes.

Mr. LARKIN. And it doesn't have to be a year and a day.

Mr. ELSTON. It is in a great many States.

Mr. LARKIN. Yes.

Mr. DEGRAFFENRIED. In some jurisdictions, though, you can give a man 12 months' hard labor and it would be under a misdemeanor or statute, whereas if it prescribes a year in a penitentiary it is a felony.

Mr. LARKIN. Yes.

Mr. BROOKS. Isn't that the old common law, that where you want to make it a felony you prescribe a year and a day?

Mr. LARKIN. I think so.

Mr. BROOKS. And that takes you to the penitentiary instead of the jail.

Mr. LARKIN. Yes.

Mr. ELSTON. Well the rule with respect to what is a felony as I understand it is that the place to which he is sentenced determines it. He may be sentenced to a penitentiary or a reformatory if it is a felony. Anything less than that is a misdemeanor.

Mr. BROOKS. Mr. Smart, do you have an idea on that?

Mr. SMART. I think the most important thing to keep in mind here is the fact that your subordinate court is limited to a 6-month penalty, so that your special court is in no event able to confine for more than 6 months. So any sentence of 1 year is in every instance given by a general court martial.

I don't think we should cling too closely to the civil interpretation as to what constitutes a felony as against a misdemeanor. I think we should better consider the jurisdictions of the court here. I strongly feel that general courts are not giving sentences of a year and a day. They cling to perhaps an even number of months. And I have the personal feeling that this should say 1 year or more.

Mr. ELSTON. I move, Mr Chairman, that we make that change.

Mr. PHILBIN. That is right.

Mr. BROOKS. You heard the motion—change. Will you state your motion, again?

Mr. ELSTON. The motion is to amend subsection (b) on line 8, by striking out the words "more than one" and making it read "for a year or more."

Mr. BROOKS. You heard the motion. Any objection to it? If not, it is adopted.

Mr. ELSTON. Now, Mr. Chairman, there is one other question that I think was raised by some of the witnesses who testified before us and that was with respect to subsection (e), where the Judge Advocate General is given authority to refer a case for reconsideration to the same or another board of review. The argument was made that there wasn't any finality about it.

If the Judge Advocate General wasn't satisfied with the decision of the board of review he could just send it to another board and it would give him too much authority. There ought to be something final about the action of a board of review. As long as he is not satisfied he sends it to another board.

So actually he is the one who is practically dictating what ought to be done by the board of review.

Mr. LARKIN. I recall that criticism, Mr. Elston. The idea here substantially was this: The board of review's judgment is not necessarily final, for two reasons. The first is that the judge advocate can if he is dissatisfied with its decision send it to the Judicial Council—and not on petition—as a matter of right for future review or the accused himself may petition the Judicial Council for further review on questions of law.

Now, the board of reviews as provided—and there probably will be several, perhaps more than that because the Army I believe at the present time has four and during the war they had a larger number—continues jurisdiction as provided in your bill over facts as well as law.

Now, there may be a case or there may be cases in which the board of review will reverse not on a question of law but on a construction of the facts or on their idea of the credibility of a witness that is different from the credibility that the court gave that witness.

On that basis the Judge Advocate General who might disagree could not send that question to the Judicial Council since it is a question of fact, and it may be a case of such importance that he would like another group, say another group of his own, to review the facts.

If, of course, he were to send a case to the board of review because he disagreed with their findings on the law and you got a different decision from another board of review, I should say that is a perfect case on the law for the Judicial Council. If two boards of review differ on the law, why it certainly needs settling some place.

But if they disagree or he disagrees with a board of review on the facts, why there is no other place for it to go except another board, and it may well be such an extremely important case that he would like to have another opinion as to the construction of the facts, the credibility of the witnesses, or the settling of controverted questions of fact. Now, it was on that basis, rather than on another——

Mr. ELSTON. Well, I am not objecting to it at all. I think it perhaps gives the accused the same opportunity for review that the prosecution would have. It is just perhaps another safeguard for the accused. It might give him another hearing.

Mr. LARKIN. Yes.

Mr. ELSTON. But the question was raised and there was objection by some witnesses so I thought we ought to at least consider it.

Mr. LARKIN. I understand.

Mr. BROOKS. Colonel, do you want to say something?

Colonel DINSMORE. Mr. Chairman, I am glad Mr. Elston raised that point. He stated that correctly. I think the criticism was raised on the assumption that this was a disadvantage to the accused, whereas often enough it is decidedly to his advantage.

In a recent case the board of review held that the story of the defense which the accused presented was incredible. The Judge Advocate General wasn't satisfied. He did not send the case to another board of review. He sent it to the Judicial Council because it is the kind of case he could send to the council.

The council held the same way. The Judge Advocate General still was not satisfied and referred the case to two of his more experienced assistants. Of course that was not a statutory reference. It was for his own personal advice. They took a different view from the board and the council.

So I merely want to point out that it works at least both ways and often enough in favor of the accused.

Mr. DEGRAFFENRIED. But in that particular case there were two men that were working right there in his office who decided that the board of review was wrong and the Judicial Council was wrong and they really decide the thing?

Colonel DINSMORE. Well, they didn't, Mr. deGraffenried, because the case, of course, had to go to the Secretary. But the Judge Advocate General had the benefit of their advice, just like I might come to you and say "What do you think?" It wouldn't have any official standing.

Mr. DEGRAFFENRIED. They really didn't decide it.

Colonel DINSMORE. No.

Mr. DEGRAFFENRIED. They just made suggestions.

Colonel DINSMORE. Yes.

Mr. BROOKS. Colonel, this won't apply in the case where the first board of review finds that an error had been committed and the man was not guilty. In that instance there would be no second board of review, would there?

Colonel DINSMORE. I disagree, Mr. Chairman. I think you could send it.

Mr. BROOKS. How would that be to the advantage of the accused?

Colonel DINSMORE. That would not. I don't say it is always to the advantage of the accused. I merely want to point out it works out both ways.

Mr. BROOKS. It can be either to the advantage or the disadvantage?

Colonel DINSMORE. That is correct.

Mr. LARKIN. The Government should have an advantage sometimes, too. I mean it should be an equal basis, with both having the advantage.

Mr. ELSTON. Especially after you get into the higher courts of appeal.

Mr. LARKIN. Exactly.

Mr. SMART. It has been my understanding—and I stand to be corrected by the Judge Advocate General of the Navy, Admiral Russell—I have discussed this particular article with him and his particular feeling is that it would result in a benefit to the accused.

Where the board of review had affirmed a sentence which he felt was entirely too much, in the interest of the accused he felt he ought

to be able to refer it to another board of review and let them see if they wouldn't knock that sentence down in some degree.

Now, of course as you have pointed out, let us assume that the board of review would not agree with the findings and sentence and might very well reverse them. In that event he could take that case under the present wording of this section (e) and refer it to another board of review.

Mr. BROOKS. Well, what occurs to my mind is this: Suppose they would hold that actually there was no basis for conviction and the man was innocent. Now, does that then amount to a double jeopardy when you turn that over to another board?

Mr. SMART. It is not jeopardy, sir, because this is not trial procedure. This is appellate procedure.

Mr. LARKIN. Well, under the jeopardy provision, you recall, jeopardy does not attach until the finding of guilty is final.

Mr. BROOKS. It seems to me it is very close to double jeopardy, when one tribunal finds a man to be innocent and then turn him over to another one for hearing.

Mr. DEGRAFFENRIED. Suppose the board of review would say the evidence was insufficient to sustain a verdict of guilty and order him discharged, that would be tantamount to a verdict of not guilty. Sometimes they send it back for a new trial if there are errors of law.

Mr. Larkin. That is right.

Mr. DEGRAFFENRIED. But sometimes the appellate court holds from the record that the evidence is not sufficient, and they don't order it back for a retrial.

Mr. LARKIN. But the Judge Advocate General has the right in that case to send it forward to the Judicial Council to determine the question finally and once and for all.

Mr. ELSTON. Well, isn't it true, too, in the civil courts that if you get into the court of appeals and the court of appeals decides in favor of the accused and orders a retrial of the case?

Mr. LARKIN. Yes.

Mr. ELSTON. Or even orders the dismissal of the accused?

Mr. LARKIN. Yes.

Mr. ELSTON. The State can appeal.

Mr. LARKIN. That is right.

Mr. ELSTON. From a decision of the court of appeals.

Mr. LARKIN. Exactly so.

Mr. ELSTON. The Supreme Court may reverse the court of appeals.

Mr. LARKIN. That is right.

Mr. DEGRAFFENRIED. But it is still in a court, Mr. Larkin, isn't it?

Mr. LARKIN. Sir?

Mr. DEGRAFFENRIED. In the civil court, if you were to appeal from a decision of the United States circuit court of appeals it would go to the United States Supreme Court.

Mr. LARKIN. Yes.

Mr. DEGRAFFENRIED. It would still be in a court.

Mr. LARKIN. That is right.

Mr. DEGRAFFENRIED. Under this method here, the way they have it worked out here, it doesn't go to another tribunal. It goes to the judge advocate or goes to the Secretary. Was that what I understood?

Mr. LARKIN. No. It may thereafter upon request of the judge advocate or upon petition of the accused go to the Judicial Council, as we will see in the next article.

Mr. deGraffenried. I see.

Mr. Elston. Of course, it is susceptible of abuse. There is no doubt about that. But on the other hand, it can work to the advantage of the accused.

Mr. Larkin. That is right. And as I say, if you had two boards of review that differed on questions of law, why there is a perfect petition to your Judicial Council.

Mr. Brooks. If you have a case, though, where a board of review should find a man not guilty and want to release him, and the command steps in and says, "We will send it to another board of review," and they find the same thing, he can send it to another one and keep on until he gets a conviction.

Mr. Larkin. Yes. But on that basis, unless it was only on questions of fact, the accused still has the right to petition the final tribunal, which is the Judicial Council.

Mr. Brooks. He has the right to petition, but he doesn't have the right to appeal in all cases.

Mr. Larkin. Unless they entertain it.

Mr. Brooks. Does he?

Mr. Larkin. No; that is right.

Mr. Brooks. Therefore, this is the final appeal for some of these cases. And a commanding officer, if he wants to get a conviction, can sit by and keep on until he does get one.

Mr. Larkin. Well, you are talking about the judge advocate and not the commanding officer?

Mr. Brooks. Well, he is the commanding officer in this instance, though, isn't he?

Mr. Larkin. That is right.

Mr. Brooks. The judge advocate.

Mr. Larkin. He is——

Mr. Brooks. He can go on until he does get a conviction, or by the same token an acquittal. Whenever he decides what he wants, he is going to get it.

Mr. Larkin. If it was on the facts that is possibly true, but on the law it still goes to the Judicial Council.

Mr. Elston. Mr. Chairman, wouldn't it be well to put in a slight amendment to prevent more than one reconsideration by adding the word "one" so that the Judge Advocate General may refer the case for one reconsideration, which reference may be to the same or to another board of review, so that you couldn't have just one review after another.

Mr. Larkin. Well, that might do it.

Mr. Elston. I offer that amendment, Mr. Chairman.

Colonel Dinsmore. Mr. Chairman, I would like to make my position clear.

Mr. Brooks. All right, Colonel.

Colonel Dinsmore. I was merely pointing out the effect of this language. I don't want to be understood as taking any position as to what the committee ought to do about this one way or the other.

Mr. Brooks. Well, thank you very much, Colonel.

I feel since they are passing also on the facts that you may run into this: Here is a board of review that hasn't seen the witnesses and will find as to those facts one way and you keep on until you do get a

finding on the facts just like you want the board of review to find. It is a weakness, it seems to me, in this appellate set-up.

You have heard the amendment offered by Mr. Elston. All in favor say, "Aye." All opposed, "No." The "Ayes" seem to have it. The amendment is adopted, to add the word "one" in——

Mr. ELSTON. Line 2, on page 54, after the word "for".

Mr. BROOKS. Any further discussion? If not——

Commander WEBB. Mr. Chairman, the Treasury Department would like to emphasize the point that Mr. Larkin made. It was at the instigation of the Department that the exception was made for the Coast Guard to have civilians sit on the board of review.

But we would like to make it very clear that the Treasury Department is in no way advocating civilians for any other armed force except the Coast Guard and the request was made in the nature of an exception for the service because of existing practice.

Mr. BROOKS. Fine. We thank you very much.

Any further discussion? If not, the article is adopted.

Article 67.

Mr. SMART. Mr. Chairman, this is a difficult section. There are a great many charts and things over here which should be displayed. I don't know whether the committee wants to launch itself into 67 in view of the fact that we will have to recess in 10 minutes. What is your pleasure?

Mr. BROOKS. Is it possible to bypass that and take up 68 and then go back to 67?

Mr. SMART. Yes; I think that 68 and 69 and these other articles are all relatively easy to consider.

Mr. BROOKS. If there is no objection, we will bypass 67 until tomorrow morning and take up 68.

Mr. SMART (reading):

ART. 68. Branch offices.

(a) Whenever the President deems such action necessary, he may direct The Judge Advocate General to establish a branch office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office one or more boards of review. Such Assistant Judge Advocate General and any such board of review shall be empowered to perform for that command, under the general supervision of The Judge Advocate General, the duties which The Judge Advocate General and a board of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval by the President.

(b) In time of emergency, the President may direct that one or more temporary Judicial Councils be established for the period of the emergency, each of which shall be under the general supervision of the Judicial Council.

References: A. W. 50 (c).

Commentary: Subdivision (a) incorporates A. W. 50 (c) with modifications to conform to the review under this code. The AGN contains no similar provision, but the Navy feels that it would be useful in times of emergency.

Subdivision (b) provides for expansion of the Judicial Council in time of emergency. Such temporary Judicial Councils are placed under the supervision of the permanent Judicial Council for the purpose of uniformity.

Mr. BROOKS. You have heard that article. Any discussion on it? If not, it stands adopted.

Article 69.

Mr. SMART (reading):

ART. 69. Review in the office of The Judge Advocate General.

Every record of trial by general court martial, in which there has been a finding of guilty and a sentence, the appellate review of which is not otherwise provided for by Article 66, shall be examined in the Office of the Judge Advocate General. If any part of the findings or sentence is found unsupported in law, or if The Judge Advocate General so directs, the record shall be reviewed by a Board of Review in accordance with Article 66, but in such event there will be no further review by the Judicial Council.

References: A. W. 50 (f); proposed A. G. N., article 39 (e).

Commentary: This article conforms to A. W. 50 (f). Since these cases involve minor sentences, no review by the Judicial Council is felt to be appropriate.

Mr. BROOKS. You have heard the reading of that article. Any discussion on it? Any objection?

Mr. ELSTON. Hold it just a second.

Mr. BROOKS. Yes.

Mr. SMART. I think perhaps it would be well to just give an example or two for the record to show what types of cases are anticipated under that article.

Mr. BROOKS. All right, sir.

Mr. SMART. Will you offer that, Mr. Larkin?

Mr. LARKIN. Well, this contemplates the review for general courts in which there is not imposed as part of the sentence either a dishonorable discharge, a bad-conduct discharge, or there is a sentence of less than a year.

Mr. ELSTON. In other words, they can bring within the purview of article 66 cases which are not specifically referred to there.

Mr. LARKIN. That is right.

Mr. ELSTON. If the Judge Advocate General after examination of the record feels that they ought to be given review by the board of review?

Mr. LARKIN. That is right, Mr. Elston. But it is not provided that there is a mandatory review by the board of review in these lesser sentences.

Mr. BROOKS. If there is no objection to the article, we will pass on to 70.

Mr. SMART (reading):

ART. 70. Appellate Counsel.

(a) The Judge Advocate General shall appoint in his office one or more officers as Appellate Government Counsel, and one or more officers as Appellate Defense Counsel.

(b) It shall be the duty of Appellate Government counsel to represent the United States before the board of review or the Judicial Council when directed to do so by the Judge Advocate General.

(c) It shall be the duty of Appellate Defense counsel to represent the accused before the Board of Review or the Judicial Council—

(1) when he is requested to do so by the accused; or

(2) when the United States is represented by counsel; or

(3) when The Judge Advocate General has requested the reconsideration of a case before the board of review or has transmitted it to the Judicial Council.

(d) The accused shall have the right to be represented before the Judicial Council or the Board of Review by civilian counsel if provided by him.

(e) The Appellate Counsel shall also perform such other functions in connection with the review of court-martial cases as The Judge Advocate General shall direct.

References: None.

Commentary: This article is new and is included in the code in order that the accused may be represented on review. Such representation will assure that the accused's case will be thoroughly considered. Appellate counsel should have the qualifications of counsel before a general court martial. See article 27 (b).

I make only one point insofar as this article is concerned, Mr. Chairman, and that is that there are no qualifications prescribed for appellate counsel.

Mr. BROOKS. Anyone that is appointed can appear, is that it?

Mr. LARKIN. That is right, Mr. Chairman. We spelled out in our commentary, though, that they should have the qualifications, we thought they should have the qualifications, that are provided for trial counsel in the general courts under article 27 (b).

Mr. ELSTON. Why wouldn't it be well to say having the qualifications prescribed in section——

Mr. SMART. In article 27.

Mr. LARKIN. I think that would certainly make it clear.

Mr. PHILBIN. Yes.

Mr. LARKIN. This whole article is new. But in setting up this appellate system we felt it worth while and advisable that in appropriate cases there be representation and argument, rather than just a generalized reading of records, so that issues and contentions can be argued before these appellate tribunals.

Mr. ELSTON. Well, I would move, Mr. Chairman, that we amend the section by providing that counsel referred to in this section shall have the qualifications required in section——

Mr. SMART. Article 27 (b) (1).

Mr. ELSTON. Allowing Mr. Smart to draft the amendment and put it in the appropriate place.

Mr. SMART. You will recall, Mr. Chairman, that it was agreed when the committee concluded with the remaining sections Mr. Larkin and I would prepare an amendment for 27 (b) (1).

Mr. LARKIN. That is right.

Mr. SMART. Once that is done, this will refer back to that and will close that loophole.

Mr. BROOKS. Yes.

What would you think of this, under subsection (d), which reads "the accused shall have the right to be represented by Judicial Council or the board of review by civilian counsel if provided by him"—shouldn't we add the word "also" in there or begin by saying "in addition the accused shall have the right"?

Mr. LARKIN. I think it is clear this way, Mr. Chairman.

Mr. BROOKS. But you have stated above that the Judge Advocate General may appoint someone to represent the accused.

Mr. LARKIN. That is right. That follows the notion that you have in the trial where the convening authority appoints someone to represent the accused.

Mr. BROOKS. Then in (d) you say "the accused shall have the right."

Mr. LARKIN. That follows the same pattern. When a man goes to trial the convening authority appoints a counsel for him or he appoints a military counsel that he requests if he is available or the accused may have his own civilian counsel.

Mr. BROOKS. So that that——

Mr. LARKIN. This follows the same pattern here. Here he may have his own counsel if he desires.

Mr. BROOKS. Do you really read into subsection (d) the word "also"?

Mr. LARKIN. I think so, yes.

Mr. BROOKS. All right.

You have heard article 70 as read. Is there any further discussion or objection? If not, it stands approved.

Article 71.

Mr. SMART. [reading]:

ART. 71. Execution of sentence; suspension of sentence.

(a) No court-martial sentence extending to death or involving a general or flag officer shall be executed until approved by the President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence, as approved by him, except a death sentence.

(b) No sentence extending to the dismissal of an officer, cadet, or midshipman shall be executed until approved by the Secretary of the Department, or such Under Secretary or Assistant Secretary as may be designated by him. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of any part of the sentence as approved by him. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person who is so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

(c) No sentence which includes, unsuspended, a dishonorable, or bad conduct discharge, or confinement for more than one year shall be executed until affirmed by a board of review and, in cases reviewed by it, the Judicial Council.

(d) All other court-martial sentences, unless suspended, may be ordered executed by the convening authority when approved by him. The convening authority may suspend the execution of any sentence, except a death sentence.

References: A. W. 44, 47 (d), 48 (a), 48 (c), 49, 50 (e); proposed A. G. N., Article 39 (a), 39 (c).

Commentary: Subdivision (a) is derived from A. W. 48 (a). Proposed A. G. N., Article 39 (a) is similar except that sentence involving a flag officer are treated in the same manner as sentences involving other officers. The words "as he sees fit" are intended to give the President absolute discretion in determining the amount of the sentence to be approved by him.

Subdivision (b) is derived from A. W. 48 (c) and A. W. 44. Proposed A. G. N., article 39 (a) requires a dismissal to be confirmed by the President, or by the Secretary when empowered by the President. It is felt appropriate, however, to place this power initially in the Secretary of the Department and to allow delegation of this power in order to provide for periods of expansion of the armed forces. It was felt more appropriate to place the power to change a dismissal to reduction to ranks in the Secretary rather than in a court martial as provided in A. W. 44.

Subdivision (c) is derived from A. W. 48 (c) and A. W. 50 (e). Sentences required to be affirmed by a board of review may not be ordered executed until such review and any further review by the Judicial Council under article 67 is completed. Thus, such sentences may be ordered executed 30 days after the accused has been notified of the decision of the board of review if he has not petitioned the Judicial Council for review within that period.

Subdivision (d) is derived from A. W. 47 (d). The proposed AGN would require execution of sentences not extending to punishments specified in subdivisions (a), (b), and (c) to be executed upon announcement by the court. It is felt appropriate, however, to require review by the convening authority before ordering execution of any sentence. The convening authority is given power to suspend sentences other than death sentences. See article 74 as to the power of other officers to suspend sentences.

Mr. ELSTON. Why do they provide that they can't suspend a death sentence?

Mr. LARKIN. Well, I think it would be cruel and unusual, wouldn't it, to suspend a death sentence, have a man continue under a death sentence the execution of which is suspended.

Mr. ELSTON. Well, they might suspend it for 30 days. They do it in civil courts, until the governor has a chance to review the case. It might be that the President would want to review the case a little longer and suspend it for 30 or 60 days until he has an opportunity to thoroughly investigate all the facts.

Mr. LARKIN. Oh, I think he has that opportunity clearly because it can't be executed until he approves it. So rather than having him go through the formality of suspending the execution of it, it is in effect suspended from the very beginning until he in his own good time does approve it. I think it is the same thing.

Mr. ELSTON. Then, he does have power to suspend the execution of the sentence for a short period of time?

Mr. LARKIN. To be specifically technical, rather than to suspend it, why it is in a state of suspense until he does approve it, you see.

Mr. ELSTON. What I mean is this: When a death sentence is given in the Army who fixes the date of the execution?

Colonel DINSMORE. The commanding general in the area, Mr. Elston.

Mr. ELSTON. Well, suppose the date of the execution of the sentence is just a day or so after the case gets to the President and he wants more time.

Colonel DINSMORE. Oh, no; he can't do that, sir. He can't fix the date cf sentence. Let me remind you, a case has to go all the way through the judicial process and to the President. Now going back for a moment to your first question, all the President has to do is to defer action until he makes up his mind what he wants to do. The execution date can't be fixed until after the President has acted.

Mr. ELSTON. Oh. That is what I wasn't clear about.

Colonel DINSMORE. Then that mandate goes back and some convenient time is fixed.

Mr. ELSTON. That answers my question.

Colonel DINSMORE. The President doesn't undertake to say when they will have to do it because that is matter of local conditions.

Mr. LARKIN. And there is no date set before he gets it.

Mr. BROOKS. Any further discussion on article 71?

Mr. ELSTON. Yes, Mr. Chairman, I think there is another question.

Mr. BROOKS. All right.

Mr. ELSTON. I think we will have to change——

Mr. SMART. Subsection (c), page 60?

Mr. ELSTON. Subsection (c) to conform to the change we already made to say "for a year or more" instead of "more than 1 year."

Mr. SMART. That is on page 60, line 3, delete the words "more than 1 year" and substitute "a year or more."

Mr. BROOKS. You have heard the amendment. Any opposition to it? If not, it stands adopted.

Any further discussion? If there is no further discussion and if there is no objection, then, to article 71 as amended it is adopted.

Mr. SMART. Article 72, vacation of suspension——

Mr. DEGRAFFENRIED. It is 12 o'clock and the House is in session.

Mr. BROOKS. Do you want to take up this one and quit on that?

Mr. SMART. These are all relatively easy.

Mr. BROOKS. Well, it has been suggested the House is in session.

Mr. SMART. Off the record.

(Discussion off the record.)

Mr. BROOKS. We better, then, meet at 10 o'clock in the morning if it is all right with the members of the committee. We will stand adjourned until 10 a. m.

(Whereupon, at 12 o'clock, the subcommittee adjourned to reconvene on Saturday, April 2, 1949, at 10 a. m.)

UNIFORM CODE OF MILITARY JUSTICE

SATURDAY, APRIL 2, 1949

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The subcommittee met at 10 a. m., Hon. Overton Brooks (chairman) presiding.

Mr. BROOKS. The committee will please come to order. Mr. Elston, I thought, if the committee had no objection, we could return to the article that we approved yesterday with an amendment regarding the review boards.

Mr. ELSTON. That is subsection (e) of article 66.

Mr. BROOKS. Subsection (e). Since the committee's adjournment of yesterday, I have talked to some members who were anxious that we return to that particular article and consider again subsection (e). If there is no objection, I should like to present it again to the committee.

We amended subsection (e) by referring to the fact that the case might be given reconsideration by another review board. I personally feel that is one part of the bill that we cannot properly defend on the floor of the House. I have thought a good deal about it.

The accused at the present time under the draft that we are considering has a right to a trial initially. Then his case goes to the commanding officer, who has a right to any findings which he may care to make providing they do not increase the penalty. Then it goes to a reviewing board for a review, a restudy. Then that reviewing board is appointed by the Judge Advocate General and if the Judge Advocate General does not like the findings of the reviewing board, he can send it to another reviewing board. Then, as I see it, the Judge Advocate General, if he still does not like the findings, has the authority to send it on to the Judicial Council.

It seems to me that is one part of the bill that is going to be difficult to defend on the floor of the House and I should like to hear from some of the other members of the committee on it. What do you think about it, Mr. Elston?

Mr. ELSTON. Mr. Chairman, I offered the amendment yesterday to provide for one consideration, more or less in the nature of a compromise, but I said at the time that I thought the section was susceptible of abuse. The thing that disturbed me was the fact that a board of review might say that an accused was innocent. The commanding officer would not be satisfied with that decision and would refer it to the next board of review which would affirm a sentence of conviction. That does not seem to be exactly right, since it operates to the ad-

vantage of the prosecution in this: that the prosecution can take the case to the Judicial Council as a matter of right, if they are not satisfied with the decision of the board of review, whereas the defendant cannot go to the Judicial Council unless he can show that there is some error of law that has been committed.

So I agree with the chairman that it is a dangerous provision and I think we will have trouble with it on the floor. Whether we have trouble with it or not, it does not seem to me to be right. I talked to Mr. deGraffenried about it yesterday, we discussed it, and I think he has some feeling about it, too.

Mr. DEGRAFFENRIED. I feel that way. If one board of review passes on it, if it goes further than that, it should go to the Judicial Council.

Colonel DINSMORE. Mr. Chairman, if I gave the impression yesterday that there is any such practice maintained in the Army, I want to correct it. I, too, have talked to my associates; that is, after the meeting yesterday. I am sure that the Judge Advocate General has never sent a case from one board of review to another, that it is not his practice to do so, and that he does not feel it is the proper thing to do.

The case that I cited, you will recall, was not one in which he sent it to another board, but he called in some private advisers to help make up his own mind. That he probably will continue to do as occasion requires.

But I should like to say that the Army has no objection to the amendment, which as I understand is now suggested, prohibiting the case from going from one board of review to another.

Mr. BROOKS. There has not been an amendment yet offered, but that is what we are considering. I wondered how the Navy would feel in reference to that.

Mr. LARKIN. I think the Navy would like to have this provision. They do not at the present time in their appellate system have statutory courts of review. The Judge Advocate General has appointed a board of review for his own purposes, to aid and assist him, and it is advisory only.

He has, I think as a matter of practice under the present system, sent a number of cases to this advisory board of review for close scrutiny over and above the normal review that it gets in his office, and when he gets their recommendation he wants to make assurance doubly sure and, in a manner similar to the practice in the Army, I think will ask the Assistant Judge Advocate, or some other high officer in his office, to go over it again, just to get the maximum amount of best advice.

It was with that thought in mind. If it is the sense of the committee that that might be subject to too much abuse as written here, I wonder if you might consider rewording it in such a way that he might send back for reconsideration a case once to the same board of review that reviewed it in the first instance rather than cutting out the whole section.

Mr. BROOKS. Mr. Larkin, I think your thoughts are well-timed; but the captain is standing right behind you and I wonder if he would not like to add something.

Mr. LARKIN. I wish he would.

Captain WOODS. Yes, sir. Our present experience indicates that in some cases we have a great deal of difference of opinion. Our present practice is to have a panel of three officers go through a court-martial case, pass upon it, and then it comes to the chief of the division, through me and, in substantially all cases, it goes to the board or review. Sometimes we find strong differences.

We fear, in setting up this new system, giving the final word to your first board of review—we have had a small experience under the statute—that will have the last and final say as to questions of fact and action on the sentence, that there may be some miscarriages.

Mr. BROOKS. Let me ask you this. The Judge Advocate General may have several boards of review.

Captain WOODS. That is correct, sir.

Mr. BROOKS. And he has the authority to choose his board of review?

Captain WOODS. That is perfectly true.

Mr. BROOKS. He has not only authority to set up the board of review, but he has authority to choose the one he wants to consider this particular case and I think personally that that is giving him a tremendous latitude of discretion as to the type of judgment he wants to obtain in the board.

Mr. DEGRAFFENRIED. Do you not think at the present time that if he were to send it back to the same board of review for reconsideration, that that would give the impression that he was dissatisfied with the result of their first review and wanted them to reconsider it?

Captain WOODS. I think there is no question about that. They would have the benefit of his views to consider. I do not think our people would be coerced by his views a particle. We envisage a situation in which we would get an action by a board of review, and then a very powerful dissent. Then you have the final action on the evaluation of the evidence and the determination of the sentence resting on the opinion of the majority of the board of review, but which——

Mr. BROOKS. You feel that the mere fact that there is a dissent would be a compelling reason why——

Captain WOODS. It would indicate such a close margin in that particular board as to raise some question as to the correctness of the finding. Of course, it is majority rule. We would have to concede that. But if the Judge Advocate General, with the advice of his staff people, felt that it was not correct, it would be well to send it back to that board or to another board.

Mr. ELSTON. What would be the situation, Captain, where two boards had passed on the matter, after you get to the Judicial Council? The action of the board of review is a part of the record. Now, is the Judicial Council going to consider the finding of the first board or of the second board, or of both of them?

Captain WOODS. It would all be part of the record. I would presume that they would consider the opinion of both boards on the question of law. Bit if we had a reference to a second board of review, on a finding of facts or on the measure of the sentence, I take it that the second board's finding would be conclusive.

Mr. ELSTON. Since the board of review is the final authority on questions of fact which board's decision is final, the first board's or the second board's?

Captain WOODS. I take it that the second board's would be under the wording of this provision as now written.

Mr. ELSTON. This does not say so. It simply says that he may refer it to another board, but one board has just as much authority in law as the other. And it is assumed that each board gave the same amount of time and consideration. So why should the second board be considered any more an authority in its decision, any more final, than the first one?

Captain WOODS. Of course, if your permit this, you would set up a further step in the appellate system and they would have the last step.

Mr. ELSTON. I do not think there is any precedent for it. You would not have a situation like that in the civil courts. You always go one step higher in the civil courts. You never move from one court of the same jurisdiction to another one of the same jurisdiction.

What is the situation of the defendant in this kind of case, where he has had a board of review completely exonerating him? Then it goes to another board of review, because the referring authority does not like the dceision. Or the Judge Advocate General does not like the decision. The second board renders a decision diametrically opposed to the decision of the first board, and that becomes final.

Captain WOODS. I think his position has certainly suffered.

Mr. ELSTON. I think you are putting the matter too much into the hands of the Judge Advocate General rather than your board of review.

Captain WOODS. You could consider it the other way, Mr. Elston. The second board's decision may be favorable.

Mr. ELSTON. Sometimes that would happen, there is no doubt about that. I am not worried about those cases. If that is all we were concerned about, then all right. But I am concerned about a case where a board says that a man is not guilty, the facts in the case do not establish his guilt beyond a reasonable doubt and they feel that the case should be dimissed. Then the Judge Advocate General refers it to another board. They have exactly the same authority and they have exactly the same record in front of them and have exactly the same power. And yet you say their decision should be taken as final rather than the decision of the first board. Where is there any precedent for that?

Captain WOODS. I have no precedent in the civil practice. Nevertheless we feel rather strongly that the public at large looks to the Judge Advocate General for the administration of justice. In these particular cases he would have nothing whatever to say.

Mr. ELSTON. If he has got the proper kind of board of review, that is made up of—is it three persons?

Captain WOODS. That is correct.

Mr. ELSTON. If they are competent men, if he selects competent men to serve as members of that board, why should not the decision of the board in the first instance be final?

Captain WOODS. I think that might well be true after we have had experience with boards established, and he has confidence in the personnel of those boards.

Mr. ELSTON. Suppose the Judge Advocate General is not satisfied with the decision of the board, a miscarriage of justice is not going to take place necessarily, because he can still refer it to the Judicial Council.

Captain WOODS. Not on questions of fact or on sentence.

Mr. ELSTON. On questions of law. There has been many a case in the civil courts where the appellate court has erred, and a guilty person has been permitted to go scot free. Of course, the theory of the law is that it is better that 99 guilty persons escape than that 1 innocent person be convicted.

Captain WOODS. I understand that.

Mr. DEGRAFFENRIED. He would have the same choice in selecting the first board of review as he would have in selecting the second board of review, would he not?

Captain WOODS. I do not think so as a practical matter, Mr. deGraffenried. Administratively these records will doubtless come to the boards of review without any preliminary survey by the Judge Advocate General. He cannot be expected to go through each case.

Mr. DEGRAFFENRIED. You do not think he would be more careful in the selection of the second board than in the selection of the first board?

Captain WOODS. I think they would be on a parity. I think all the boards would be composed of excellent men, to the extent of our capacity.

Mr. BROOKS. Captain, this is the way it impresses me. I think it is very commendable that in the absence of statutory authority he is interested in obtaining what he feels is a correct solution, a correct decision.

Captain WOODS. That is correct.

Mr. BROOKS. Now, when we set this up, in effect, as a court, with statutory authority, the situation takes on a different light. He should have competent boards set up. Each case goes to a board which he feels is competent. An erroneous opinion comes back. Is not his remedy the replacement of the whole board and the nomination of a competent board?

Captain WOODS. That is the action he would necessarily have to take after error had been demonstrated. Those cases would suffer.

Mr. BROOKS. Of course, it is regrettable, but there are cases of innocence where the defendant is found guilty. That is human error. But, on the other hand, it seems to me that what you are doing here is getting one review board and saying, in effect, that if that is not satisfactory, he will have another review board who would be found to decide the other way.

Captain WOODS. That is not what we seek. We merely seek to have the opinion of the first board, if there is any doubt, fortified by the opinion of the second board.

Mr. BROOKS. Would you not get that by an appeal to the Judicial Council?

Captain WOODS. Except on the law, we cannot appeal to the Judicial Council. The Judge Advocate General to date has had no experience in evaluation of sentences. That has all been done by the Bureau of Personnel and the Commandant of the Marine Corps.

Mr. BROOKS. It seems to me, that what you are getting to is this: If one board decides one way and another one decides the other way, you are going to weaken your whole system of justice. It is not a case where you have a divided court, 2 to 1, but here you have two separate tribunals rendering a decision on the same case, and the decisions may

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be diametrically opposed to each other. I think that hurts the whole system.

Captain WOODS. The second one would necessarily have the finality in the matter, sir.

Mr. BROOKS. Still they have the same authority, and there is the same number of persons, and it is assumed of the same competency, and one decision is one way and the other decision is the other way.

Captain WOODS. With the benefit of the record, of all that had gone before; the opinion of the first board plus the reference opinion of the Judge Advocate General.

Mr. BROOKS. Mr. Smart, do you have something to say on this?

Mr. SMART. I think the committee ought to bear two things in mind about this situation. One is that the board of review itself, if it finds insufficiency in the facts, may return that case for rehearing. Secondly I think you ought to go two steps above the Judge Advocate General. Assume that a case has arrived, that the board of review has sustained both the facts and the law in a case which carries a severe penalty of confinement and the Judge Advocate General thinks it is an unconscionable sentence, but he cannot do anything about it.

We must remember that the respective Secretaries have unlimited power of clemency. I cannot conceive of a situation where the Judge Advocate General would point out to his Secretary that a given sentence was unconscionable, and that the Secretary would refuse to take appropriate clemency action.

So that in a case where it is to the best interests of the accused to have the sentence reduced, I say that it will ultimately be reduced by the Secretary. As to other errors that might have been made in behalf of the accused, I think it is commonly held that the accused is entitled to the benefit of that error or doubt.

So I see nothing to be lost by deleting the section.

Mr. BROOKS. What does the Air Force think about it?

Major ALYEA. General Harmon stated that even with statutory authority he doubted whether he would ever use it; so, so far as the Air Force is concerned, I do not think we would object either way, whether we had it or it were deleted.

Mr. BROOKS. What does the Coast Guard say about it?

Mr. WEBB. The Coast Guard follows the position of the Navy, sir.

Mr. DEGRAFFENRIED. I make the motion, Mr. Chairman, that we strike out subsection (e) of article 66, and also strike out the word "otherwise" in subsection (f), right at the start of the section.

Colonel DINSMORE. May I inquire, Mr. Chairman, whether that would preclude the suggestion made by Mr. Larkin, that the Judge Advocate General may refer the case back to the same board?

I might sat that the Army has no objection to that and I might point out that it is humanly possible that a board of review, with the best intentions and the best ability, may overlook some factor which the Judge Advocate General thinks ought to be considered.

Mr. ELSTON. Colonel, the section that Mr. deGraffenried referred to says to the same or another board.

Colonel DINSMORE. Yes, sir.

Mr. ELSTON. So it would not be rereferred to any board; that is, after the one board had passed on it, it could not be referred again, if that language were stricken out.

Colonel DINSMORE. That is what I thought.

Mr. BROOKS. I am not recommending even this, but it seems to me that it would be preferable if you are going to make any change: In a case where the Judge Advocate General feels that error has been committed, to permit an appeal to the Judicial Council both on the law and the facts, rather than to send it back to the same board for another decision and a review of what it has already considered and on which it has made its finding.

Gentlemen, you have heard the motion. Is there any further discussion?

If there is no objection, subsection (e), and the word "otherwise" in subsection (f) shall be stricken out.

Mr. SMART. May I offer a further corrective amendment? That you reletter subsections (f) and (g) to (e) and (f), respectively.

Mr. LARKIN. May I also offer a further amendment? I assume that the motion carried.

Mr. BROOKS. Yes.

Mr. LARKIN. For the sake of conformity, I would request that you consider deleting in article 70, which has already been adopted by the committee, the words on page 58, line 22, at the end of the line, "has requested the reconsideration of a case before the board of review or".

That is just to make it conform. There is no reason for that language, since you have deleted (e).

Mr. ELSTON. I so move, Mr. Chairman.

Mr. BROOKS. Is there objection? If not, the correction will be adopted.

Let us pass on to the next article, Mr. Smart, article 72.

Mr. SMART (reading):

ART. 72. Vacation of suspension.

(a) Prior to the vacation of the suspension of a special court-martial sentence which as approved includes a bad-conduct discharge, or of any general court-martial sentence, the officer having special court-martial jurisdiction over the probationer shall hold a hearing on the alleged violation of probation. The probationer shall be represented at such hearing by counsel if he so desires.

(b) The record of the hearing and the recommendations of the officer having special court-martial jurisdiction shall be forwarded for action to the officer exercising general court-martial jurisdiction over the probationer. If he vacates the suspension, the vacation shall be effective, subject to applicable restrictions in article 71 (c), to execute any unexecuted portion of the sentence except a dismissal. The vacation of the suspension of a dismissal shall not be effective until approved by the Secretary of the Department.

(c) The suspension of any other sentence may be vacated by any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence.

References: A. W. 51 (b); M. C. M., paragraph 94; N. C. and B., section 476; Keeffe report, pages 313–318.

Commentary: This article is new. It applies where a sentence has been suspended pending good behavior of the accused, that is, where the accused is a probationer. Under present Navy practice, the commanding officer of a probationer has authority to vacate probation whenever he deems the conduct of the probationer unsatisfactory. Under Army practice, an officer who has the power to convene a court of the kind which adjudged the sentence may similarly vacate probation.

This article requires that where the vacating of the supension of a serious sentence is contemplated, a record of the facts justifying the

vacating action will be made and these facts will be given consideration by two officers.

Where the original sentence includes a bad-conduct or dishonorable discharge, or confinement in excess of 1 year, such vacation will not be effective to execute the sentence until the review provided in articles 66 and 67 has been completed. Where the suspended sentence includes a dismissal, the Secretary of the Department must act before the dismissal may be executed, whether or not he has previously approved it.

Mr. BROOKS. Mr. Smart, where is that word "probationer" used there?

Mr. SMART. That is a new word, so far as military law is concerned, Mr. Chairman. Mr. Larkin can give you some information on that point.

Mr. LARKIN. It is used because I think it most clearly describes the position of the person contemplated in this article. This article, I might say, Mr. Chairman, is substantially new and it is designed to set up the following procedure.

There are a number of instances where after the accused has been sentenced and confined he is sent to a retraining command or a retraining center and subsequently is restored to duty. The services are anxious to do that to the maximum extent and, as you heard Captain McGinnis and Colonel Garrison, they have such programs.

Frequently an accused who is returned to active duty has not completed his sentence by a considerable portion and he is returned to duty in effect on probation. The unexecuted part of the sentence may still hang over him but pending his good behavior, upon his return to duty, over a certain period of what is most accurately called probation, he may be able to work his way out of, or to have the unexecuted portion of his sentence and even the dishonorable discharge or the bad conduct discharge set aside, and ultimately get an honorable discharge.

Now, when he is back on duty on probation, there are a number of instances where such persons commit additional offenses or in some way by their conduct violate the standard of good behavior. In the same fashion as in civilian courts, upon such violations, they may be returned to serve out the unexpired portion of their sentence or the dishonorable discharge or bad conduct discharge which has been suspended may be revoked.

To assure that when a man who has been returned to duty and is charged with violation of this state of probation, that the suspended sentence that he has received or the suspension of the balance of the execution is not capriciously revoked or arbitrarily revoked, and that the dishonorable discharge will not be capriciously executed and have him discharged from the Service, we have provided this type of hearing so that the elements of the offense or the facts of the conduct which is charged amounts to a violation on his part, are clearly set forth.

We have provided this procedure which, as I say, is substantially new. It is a protection for the accused.

It is perfectly true that there are any number of instances where a man who is given this other chance just does not make good at all and in a large number of those cases he should have a vacation of the suspension; that is, a vacation of the suspension is entirely appropriate and he should be sent back to serve out the unexecuted portion of his

sentence, or it is perfectly appropriate that the dishonorable discharge be executed. All that this provides is that it will be done after this protective procedure.

You will notice that in no case can a dishonorable discharge or bad-conduct discharge be executed on such a vacation unless at one time or another either before or after this, it has been reviewed by the board of review.

Mr. DEGRAFFENRIED. That follows the same system they have in the Federal courts now?

Mr. LARKIN. That is right, and I think in most State courts.

Mr. DEGRAFFENRIED. Yes.

Mr. LARKIN. I know that in a good many State courts, at any rate, there must be a hearing before a suspended sentence can be vacated. This follows that practice, Mr. deGraffenried.

Mr. ELSTON. I do not see where you have a hearing as to general court martial. Article 72, section (a), provides there shall be a hearing on a special court martial. I do not see where there is anything said as to a general court martial.

Mr. LARKIN. I think if you read on, Mr. Elston, you will see it.

Mr. SMART. It is in line 13, Mr. Elston, where it says, "or of any general court-martial sentence."

Mr. ELSTON. Yes, but then it goes on to say that "the officer having special court-martial jurisdiction over the probationer shall hold a hearing on the alleged violation of probation."

Mr. LARKIN. That is right. He is the officer designated to hold the hearing.

Mr. ELSTON. Even though it is a general court martial?

Mr. LARKIN. Because he happens to be the local commanding officer under whom the man is serving and in all likelihood the man to whose attention the alleged violation is brought in the first instance.

Mr. ELSTON. That is the point that I was trying to understand. You have a person exercising special court-martial jurisdiction conducting a hearing as to a general court-martial conviction.

Mr. LARKIN. That is right. He is the logical man to hold the hearing. The record of the hearing goes up for review in a general court-martial case to the commander having general court-martial authority, in (b).

Mr. ELSTON. I see that, but I could not understand why you go down one step and have an officer exercising special court-martial jurisdiction reviewing a suspended sentence in a general court martial case.

Mr. LARKIN. It was just for the purpose of convenience in holding the hearing. His decision does not become final in a general court-martial case until it is approved by the general court martial.

Mr. BROOKS. Does the record in all cases go up to the general court-martial officer having jurisdiction?

Mr. SMART. I think subsection (b) clearly prescribes that. You see, it does not state that it is limited to special or general. It says the record of the hearing. That record may involve a special court martial, bad conduct discharge, or it may be clearly a general court martial case. In either instance, it would go up to the officer having general court-martial jurisdiction.

Mr. BROOKS. It does not go through the local commanding officer. It goes straight to the officer having general court-martial jurisdiction.

Mr. SMART. I think it would be true in practically every case that the officer exercising special court-martial jurisdiction would be the officer in command of the probationer.

Mr. BROOKS. Gentlemen, is there any further discussion on this article? If not, and if there is no objection, we shall consider it as adopted.

Will you proceed to article 73, Mr. Smart.

Mr. SMART (reading):

ART. 73. Petition for a new trial.

At any time within one year after approval by the convening authority of a court-martial sentence which extends to death, dismissal, dishonorable or bad conduct discharge, or confinement for more than one year, the accused may petition The Judge Advocate General for a new trial on grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before the Board of Review or before the Judicial Council, The Judge Advocate General shall refer the petition to the Board or Council, respectively, for action. Otherwise The Judge Advocate General shall act upon the petition.

References: A. W. 53; proposed A. G. N., article 39 (g).

Commentary: This article provides for a petition for a new trial as provided in A. W. 53 and in proposed A. G. N., article 39 (g). Action on the petition is to be taken by a board of review or the Judicial Council if the case is being reviewed or is to be reviewed by such tribunal. Otherwise the Judge Advocate General shall either deny or grant the new trial. See article 75 as to restoration of rights privileges, and property after a new trial.

Mr. BROOKS. I would like to ask you this. This is limited to a period of 1 year. For the purpose of the record will you explain why it is limited that way?

Mr. LARKIN. That is in an effort, of course, to obtain finality at some point and, in addition, it was adopted from article of war 53 as it was amended by Public Law 759 last year. That one feature was adopted.

Mr. ELSTON. Do you not think we should change this to conform to the changes we have heretofore made, and make it a year or more?

Mr. LARKIN. Yes.

Mr. SMART. That is in line 11, page 61.

Mr. BROOKS. What do you have to say with reference to extending this to death?

Mr. SMART. Do you have the feeling there that perhaps a death sentence could not be executed before the expiration of one year, in view of this article?

Mr. BROOKS. That is the thought I had in mind.

Mr. SMART. Justice McGuire has raised that same point, Mr. Chairman, the question as to whether or not a death sentence could be executed before the expiration of 1 year, in view of this provision.

Mr. LARKIN. We had no such intention of limiting the imposition of a death penalty when it is finally approved by the President, after the complete review for this purpose.

As you notice—and this, which I want to bring to your attention, has been commented on by witnesses—we have made this petition depend on the grounds of newly discovered evidence or fraud on the court. In your amendment to article of war 53, last year, the standard was for good cause shown. The reason for the difference was that we felt that the appellate system as devised here is a tight, comprehensive and efficient appellate system, that it is wholly capable of reviewing

all matters on the record; that the review of cases should properly be as complete as possible in the appellate system. I think that is a principle that is followed pretty closely in civilian courts.

There are two circumstances which may arise which may not have been on the record and which it may not have been possible for the appellate system to review. They are newly discovered evidence which, of course, was not available at the time and did not appear at the trial; and fraud on the court which might have been such a fraud that it could not appear on the record. That might have been the fraud itself. So that those two are really the only remaining good causes left after your appellate review on the record. This is not written in such a way that no case can become final, pending the lapse of a year, and on the possibility which may be very remote that there is going to be newly discovered evidence or there has now been discovered that fraud was practiced on the court. If, of course, they do arise that permits the remedy; but it is not intended that there is no finality until the year elapses.

Mr. DEGRAFFENRIED. Is that a new section, that is not present in existing law?

Mr. LARKIN. It is present in existing Army and Air Force law, except that the petition may be granted by the JAG for good cause shown within a year as distinguished from the two grounds we set out.

Mr. DEGRAFFENRIED. I just wondered how you got that 1 year in there.

Mr. LARKIN. We took that 1 year from the present law, article of war 53.

Mr. DEGRAFFENRIED. This is really much broader than in most civil courts, is it not?

Mr. LARKIN. I do not think so. There have been a number of cases; as far back as the Mooney case in California, where a writ of habeas corpus does not lie but there is the contention that some fraud was practiced on the court before or during the trial, a fraud which amounted to concealment of some evidence or a concealment of the conduct of some official of the court. It has been the practice of some civil courts, some State courts, after the conviction is firmed where habeas corpus will not lie, that the court will permit a so-called writ of error coram nobis, which is an old English writ, which has been revived for just this particular kind of circumstance. What we did was to combine what amounts to a writ of error coram nobis with the motion for a new trial on newly discovered evidence. We have provided for both of them and to our minds they are the only additional circumstances over and above the appeal that need a remedy. But as to the time limit, it was the idea of Mr. Elston's committee last time.

Mr. DEGRAFFENRIED. I like the newly discovered evidence, and the fraud feature, rather than for good cause shown. I think that is too broad. We have a statute in our State which gives you the right to file a motion for a new trial on newly discovered evidence.

Mr. LARKIN. So do we.

Mr. DEGRAFFENRIED. But we don't have any length of time in it. The only question in my mind is the year. As a matter of fact, after a trial people begin to talk who know something; that is, when they think they are not going to be used as witnesses they will disclose something, and you get newly discovered evidence.

Mr. LARKIN. I think the newly discovered evidence will be surrounded by the practices and procedures in the Federal court that govern that motion such as—oh, that the newly discovered evidence is not cumulative; that if it had been presented to the jury it at least would have changed its mind; and various other rules that circumscribe the use of that type of motion.

Mr. ELSTON. I still think we will have the question about the death sentence.

Mr. DEGRAFFENRIED. So do I.

Mr. ELSTON. You are bound to give to a person sentenced to death less of an opportunity to petition for a new trial than other offenders, because if he is executed within a year he is considerably handicapped in filing petition for a new trial thereafter.

Mr. LARKIN. If you think that is not complete, I should say we should make it clear. I think it would be very bad, and there is no intention, to construe this as preventing the execution of the death sentence until after this 1 year period. These remedies are available in civil courts, and they are not construed as a stay of any death sentence at all, and they should not be.

Mr. ELSTON. I think you would have to state it or it would be construed that he was not to be executed in less than a year.

Mr. LARKIN. Either the explanation that it is not intended to and the adoption by the committee on that explanation is sufficient, or we can write in something.

Mr. BROOKS. Would it be better to consider the thought of reducing the time for everyone? Had you given that any thought?

Mr. LARKIN. We just adopted the year provided by your committee last year. I would say this. I do not think it is an unreasonable time. I know very well that a motion for a new trial, because of fraud on the court, is the type of motion in New York State that can be brought any time. There is no time limit. I think the jurisdiction of New York is quite unhappy about that, because it just means that there is practically no finality. As against that no time limit a year, I think, is perfectly all right.

Mr. ELSTON. I think the time is all right, because fraud is not usually discovered immediately.

Mr. LARKIN. There are not many cases where there ever is fraud. I think in courts martial the percentage is very much lower than it would be in a civil court.

Mr. ELSTON. May I ask here what the normal amount of time would be between trial and final review by the Judicial Council? What time do you anticipate it will take to go through all the steps?

Mr. LARKIN. I should certainly expect it would be completed within a year. But I just cannot give any estimate at this time. I think experience is going to indicate that. I might ask the representatives of the services as to their guess as to the time it takes to complete review now.

Mr. ELSTON. Regardless of the time, a person sentenced to death does not necessaruly go through the Judicial Council. There may not be any error of law that his counsel claims and he may go through only the board of review. So his case would be completely reviewed and could be completely reviewed in a very short space of time.

Mr. LARKIN. Well, we have not reached that. We skipped the Judicial Council provision, Mr. Elston. When we come to it, you

will find we have made a review by the Judicial Council mandatory in death sentences, so that the review in a death case will follow the course of convening the authority, board of review, Judicial Council, and final approval by the President. They are all mandatory; there is no exception in that case.

Mr. ELSTON. That would take considerable time, then?

Mr. LARKIN. That is right; it would.

Mr. ELSTON. So that would make the year all the more reasonable

Mr. LARKIN. I think so.

Mr. BROOKS. Could not we get in the record some estimate of the services of what they think will be a reasonable time to complete the average case? I think that would be of general interest to the Congress.

Mr. LARKIN. Colonel Dinsmore, do you have a guess as to how long it takes to complete the review of a death sentence now?

Colonel DINSMORE. It varies, depending on the difficulty of the questions involved, but I would say a matter of only a few months.

Mr. BROOKS. All of those major violations normally should be reviewed in a matter of a few months; is that correct?

Colonel DINSMORE. That is right.

Mr. BROOKS. And the case completed, say, within 3 or 4 months?

Colonel DINSMORE. Yes, sir. When we had the great accumulation of cases during the war and all of those records came in from the various overseas jurisdictions and theaters, we had a tremendous backlog, and at that time it took longer than it normally does in time of peace. So that it would be an extremely unusual case, Mr. Chairman, that would take a year.

Mr. BROOKS. Are there any further questions?

Mr. LARKIN. One thing that has been brought to my attention is that the Federal court, the district court, has construed a similar provision of this kind in the Federal courts to give the right of petition as not amounting to a stay of execution if all other review is completed. That was certainly our intention here.

Mr. ELSTON. I notice you have left out a provision that we had in H. R. 2575 last year about reviewing cases which originated during World War II. Can you tell us why that was omitted?

Mr. LARKIN. I think it was omitted only because in our opinion the provision continues and remains. I say that because under section 12 of the bill, which is on page 98 and is enacted into law, although not as a part of the uniform code itself, but enacted into Federal law, that provides that any rights and liabilities existing under such section or parts thereof prior to the effective date of this act shall not be affected by this appeal and this act shall not be effective to authorize trial or punishment for any conviction if such trial or punishment is barred by the provisions of existing law. So that that right which was granted by article 53, that all World War II cases have the right to petition the Judge Advocate in 1 year after the termination of the war, still remains by virtue of the fact such rights are not lost to anybody, or such rights as they had under the previous law are retained.

Mr. SMART. I would point out, of course, Mr. Elston, that existing law is applicable only to Army and Air Force personnel. So this will perpetuate the difference which exists today, that is, naval and Coast Guard and Marine Corps personnel, when prosecuted by the Navy, offenders of World War II in those services, would not be

accorded the same right as is preserved for the Army and Air Force personnel.

Mr. LARKIN. That is right. That is the difference.

Mr. ELSTON. I think it probably ought to be restated, so that there will be no question about it and so that it will apply to all services. We thought last year that was a rather good provision because of the many cases that had arisen during World War II in which there were claims they had not had a fair trial or there had been some miscarriage of justice. I do not know how many cases came in by reason of that section.

Mr. LARKIN. There has only been experience since February 1, you see

Mr. ELSTON. That is true, that it has only been since February 1, but there might be a number of them who waited until they could file their petitions for review.

For the sake of the record, have there been any or very many?

Mr. LARKIN. The Air Force has none, apparently, so far.

Major SOLF. It is my impression about 2 weeks ago we had eight petitions. There may be more right now.

Mr. ELSTON. It would not hurt to have that section rewritten so that it would apply to all services?

Mr. LARKIN. That petition, of course, was for good cause shown. The way we worded this is as I have indicated. If we redraft this at the committee's request or add this additional provision to this for my guidance do you want "for good cause shown" in that connection? It ought to be consistent, whatever it is.

Mr. ELSTON. I do not know. There is a difference between the two types of cases. The cases that come up after this code is adopted are largely cases that arose after the war. During the war, there was a tremendous volume of cases. There were trials conducted not in the same leisurely manner they could now be conducted, and it might be there is no fraud involved, there is no newly discovered evidence, but it is a case that the appeal should be reviewed. We have heard of a number of them—cases where the claim is made that there was a miscarriage of justice.

My own notion is the services did a magnificent job in going over all of the cases and trying to equalize the sentences. I think they did a tremendous job and dia it well. At the same time, there might be some cases that have not been adequately reviewed, and I do not believe we ought to close the door. If there is some good cause shown, without newly discovered evidence and without fraud, it seems to me they ought to be reviewed.

Mr. BROOKS. Is it your idea to apply that suggestion to cases already disposed of where they ask for a review?

Mr. ELSTON. Yes; in cases that arose during World War II. We wrote that into the law last year and gave every person in the service an opportunity to have his case reheard, and it was of great benefit to Members of Congress, I will say, because I do not suppose there was a Member of Congress who did not have somebody appeal to him about his case—that he did not get justice and the like—and in those instances we were able to reply that the door was still open and they could still have a rehearing of their cases if they could give good reason.

Mr. LARKIN. May I suggest, then, in this connection, that in adding this provision that World War II cases have this right of petition, we

have a cut-off somewhere, because the war is not over yet. Cases currently tried are construed to come within the additional time limit you have in that proviso, and I do not know but what there should be a distinction between the 1 year petition for fraud and newly discovered evidence, starting with cases that are tried under this new code whenever it becomes effective and the petition as to all of the cases that are still within the war period, the war not having terminated and the cases being tried today coming under that provision.

Mr. ELSTON. I think that is right. They are amply safeguarded under this code.

Mr. LARKIN. Yes.

Mr. ELSTON. But as to the ones who did not have an opportunity to come under this code, they would have a right to have their cases reviewed.

Mr. LARKIN. I think we can draft something.

Mr. BROOKS Will you do that?

Mr. SMART. I would suggest that we put a time limit on it of 1 year. You cannot leave this thing open interminably in the future, because, the longer it is open, the more difficult it is to obtain evidence, witnesses, and what not, and it unduly weakens the prosecution.

Mr. ELSTON. I so move you, Mr. Chairman, that we have Mr. Smart draft the amendment.

Mr. BROOKS. Before we do that, let us hear from Captain Woods.

Captain WOODS. The only suggestion I have to make is I want to invite your attention to section 301 of the Servicemen's Readjustment Act of 1944, where arrangement for a readjustment is made, which provides for a review of discharges and dismissals, and section 207 of the Reorganization Act which provides for authority to correct records.

Mr. SMART. I would like to point out to the committee just how difficult it is if the man is dishonorably discharged to ever get his case before the 207 board for correction of military records. Ordinarily, if it is purely an administrative, technical change in the record, those applications will go directly to the board. I do not know what the policy is in the Navy, but certainly in the Army any record involving the correction of a dishonorable discharge must first be approved by the Secretary before it ever goes before that board. So far as I know, there may be one case involving dishonorable discharge that has received favorable action by the board for correction of military records, but I do not believe it is accomplishing the purpose Congress hoped it would when they wrote that into the law, and that was the feeling last year when the committee wrote this provision into the law, to accord a right for a new trial as a matter of law and not for it to hinge upon a policy over in the Department of the Army.

I cannot speak as to how the act has operated in the Navy.

Captain WOODS. I think it has operated far more extensively in the Navy. I think it was not necessary to rely upon those two provisions, but it would seem to me there is a great deal of administrative burden involved; and, in the case where the man has gone to one of those two boards and the sentence has been altered in his favor, there should be no further rehearing in his case possible for the purpose of altering a conviction, but the convictions in those hearings should stand. The action has been addressed solely to the sentence and correction of the records to alter the form of discharge.

Mr. BROOKS. Could not the provision be so drafted that the applicant for rehearing on that basis should be limited to a request before one tribunal or the other?

Mr. SMART. I believe, as a matter of form, the particular person who may pass upon this application will take that into consideration when he is considering "for good cause shown." If he finds the man has already received some administrative relief, I think he would be thoroughly justified in considering that along with the other elements of "good cause shown."

Mr. BROOKS. You think that is a type of judicial notice?

Mr. SMART. I am not certain.

Captain WOODS. I would not think so, because it is directed to the fact of conviction. I would feel the Judge Advocate General, in good cause shown, would have to order a rehearing, even though the sentence and discharge had previously been altered by one of those boards merely to cure the conviction.

Mr. SMART. I would say in that case, if the Judge Advocate General felt, in spite of any administrative relief this man may have had, that he is entitled to additonal relief by way of a rehearing of his case, then why preclude him?

Captain WOODS. I might mention very large numbers of some courts-martial actions have been reviewed by the board of discharges and dismissals, because we had the bad-conduct discharge.

Mr. BROOKS. Let me make the suggestion, then, Mr. Elston, that Mr. Larkin and Mr. Smart get together and try to work something out and do so in collaboration with the Navy.

Mr. SMART. I think it might be very well if we might write into this particular section a proviso that would limit it to cases involving dishonorable discharge, bad-conduct discharge, or confinement in cases of 1 year or more. The thing I think the Congress is trying to get at is to insure a review of the serious cases that really affect the man seriously in his civilian life.

Mr. BROOKS. I think you can get together and we can take that up Monday; and, if you have trouble, the committee can discuss it further.

Mr. ELSTON. Our section last year on this subject included summary courts-martial cases?

Mr. SMART. It was without specification as to the type of court.

Mr. LARKIN. It provided for dismissals, dishonorable discharge, or bad-conduct discharge. Inasmuch as the Army special courts did not have authority at that time to impose a bad-conduct discharge, I doubt that it covers them. The Navy's comparable court has had the authority to impose bad-conduct discharges for a number of years.

Mr. BROOKS. If there is no further suggestion on that point, what about the last sentence in article 73, reading "otherwise the Judge Advocate General shall act upon the petition"? How much authority does that give the Judge Advocate General?

Mr. LARKIN. I think it gives him complete authority to order a rehearing. It was our idea that, not knowing when the petition might be made and since it might be made during the course of the appellate review, the petition is made while the case is before the board of review or the Judicial Council, it is entirely appropriate to send that petition to them. Otherwise, you would have the incongruous situation of the board of review or the Judicial Council reviewing a case

on the record on appeal while the Judge Advocate General at the same time is reviewing the petition on grounds of fraud or newly discovered evidence. So it was our idea, if this petition is made during the course of the appeal, it should be addressed to the tribunal that is considering the appeal. In the event, however, that the appeal is concluded, then we would have the Judge Advocate General do it, just as you provided he should do it last year in article of war 53.

Mr. BROOKS. The defendant could elect the time when he chose to present the petition?

Mr. LARKIN. It is entitely up to him. He will be the only one, presumably, who will discover either of those grounds, and it is up to him to come forward whenever he does, as long as it is within a year.

Mr. BROOKS. Is there any further discussion?

Mr. ELSTON. Just one other question. There is no provision for the Judge Advocate General to vacate sentence or restore rights or grant an administrative discharge in lieu of a dishonorable discharge or bad-conduct discharge, is there?

Mr. LARKIN. No; that is right; not the Judge Advocate General. The Secretary of the Department, in a later article, has that complete power.

Mr. DEGRAFFENRIED. The Judge Advocate General, under those circumstances, could do one of two things: just deny the petition or order a new trial?

Mr. LARKIN. That is right.

Mr. BROOKS. Is there any further discussion of article 73? If not, it will stand adopted subject to the reservation of the amendment we discussed.

Now take up article 74.

Mr. SMART (reading):

ART. 74. Remission and suspension.

(a) The Secretary of the Department and any Under Secretary, Assistant Secretary, or commanding officer designated by the Secretary may remit or suspend any part or amount of the unexecuted portion of any sentence, including all uncollected forfeitures, other than a sentence approved by the President.

(b) The Secretary of the Department may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court martial.

References: A. W. 51 (b); proposed A. G. N., article 39 (h).

Commentary: Under this article the Secretary of a Department may review the sentence of any court martial, which will give him clemency and parole powers as well as ultimate control of sentence uniformity. Action hereunder may be taken without regard to whether the person acting has previously approved the sentence.

Mr. ELSTON. Under that section, the Secretary could designate the Judge Advocate General for the purposes of remitting or suspending any part of the sentence?

Mr. LARKIN. That is right; but it centralizes responsibility in him.

Mr. BROOKS. On subsection (b), explain the reason for making a change there from a judicial finding for discharge or dismissal and that of an administrative finding.

Mr. LARKIN. Well, a discharge or dismissal—that is, a dishonorable discharge or a bad-conduct discharge—can be imposed only by a court martial, and the Secretary, by way of clemency, can substitute for any dishonorable discharge or any bad-conduct discharge or any sentence

of dismissal of an officer what, in his own discretion, by way of clemency, is a form of administrative discharge. This authority enables him to extend clemency.

Mr. BROOKS. Are there any further questions on article 74? If not and there is no objection, it will stand approved.

The next is Article 75, Restoration.

Mr. SMART (reading):

ART. 75. Restoration.

(a) Under such regulations as the President may prescribe, all rights, privileges, and property affected by an executed portion of a court-martial sentence which has been set aside or disapproved, except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered and such executed portion is included in a sentence imposed upon the new trial or rehearing.

(b) Where a previously executed sentence of dishonorable or bad-conduct discharge is not sustained on a new trial, the Secretary of the Department shall substitute therefor a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of his enlistment.

(c) Where a previously executed sentence of dismissal is not sustained on a new trial, the Secretary of the Department shall substitute therefor a form of discharge authorized for administrative issuance, and the officer dismissed by such sentence may be reappointed by the President alone to such commissioned rank and precedence as in the opinion of the President such former officer would have attained had he not been dismissed. The reappointment of such former officer shall be without regard to position vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and such reappointment shall be considered as actual service for all purposes, including the right to receive pay and allowances.

References: A. W. 53.

Commentary: This article is new in that restoration of rights, privileges, and property is mandatory and in that restitution of forfeitures previously collected is authorized. If a new trial or rehearing is ordered, restoration is to be made in regard to such part of the original sentence as is not adjudged upon the new trial or rehearing.

Under subdivision (b), the Secretary of the Department shall order an administrative discharge substituted for a bad-conduct or dishonorable discharge which has not been sustained on a new trial unless the accused is to be restored to duty.

Subdivision (c) requires an administrative discharge to be substituted for a dismissal which is not sustained on a new trial. In addition, the President is given authority to reappoint the accused to such rank and precedence as he believes will correct the injustice of the dismissal.

This article applies not only to new trials but also to all cases where an executed or partly executed sentence is set aside or disapproved under the provisions of this code.

Mr. BROOKS. Does that last mean pay for the actual time he did not serve; in other words, is that retroactive pay?

Mr. LARKIN. That covers the time between the first and second trials.

Mr. BROOKS. In the case of a man that is reopened under subsection (c), he is supposed to be put back and made whole insofar as possible; but the last sentence refers to the fact that he shall be considered as actual service for all purposes, including the right to receive pay and allowances. Does that mean retroactive pay?

Mr. LARKIN. I think it is retroactive pay to the extent he has not received anything from the time he was dismissed until the time he is reappointed. When he is reappointed, it is retroactive for that period.

Mr. BROOKS. For the period during which he was out of the service?

Mr. LARKIN. That is right.

Mr. BROOKS. Also, it would mean longevity would operate during his absence from service under those conditions?

Mr. LARKIN. That is right.

Mr. ELSTON. I would like to ask about section (b), where it is provided—

> Where a previously executed sentence of dishonorable or bad-conduct discharge is not sustained on a new trial, the Secretary of the Department shall substitute therefor a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of his enlistment.

That makes it mandatory that he shall substitute another form of discharge. Suppose they just wanted to completely dismiss the charges against him; suppose they have not been sustained and no discharge is warranted, no form of discharge is warranted; and suppose his enlistment had expired by that time?

Mr. LARKIN. In that case he would have to substitute an administrative discharge in the event the term of enlistment has expired, and if they desire——

Mr. ELSTON. Could not he get an honorable discharge?

Mr. LARKIN. We would get one by this provision.

Mr. ELSTON. Is that what is meant by "administrative discharge"?

Mr. LARKIN. It could be one of three kinds; it could be honorable, under honorable conditions, and the third would be "undesirable." You recall we discussed the same type of possibility under article 4.

Mr. ELSTON. Are those all included under this expression, "a form of discharge authorized for administrative issuance"?

Mr. LARKIN. That is right. There are only three that are authorized for administrative issuance.

Mr. ELSTON. What is the present policy of the services relating to the restoration to an enlisted person of his rights, where he has received a dishonorable or a bad-conduct discharge and that is suspended as a part of his sentence? What is the present policy?

Mr. SMART. I think, Mr. Elston, the two witnesses who appeared the other day before the committee, the Navy captain and the Army colonel, who gave testimony regarding the incarceration of prisoners in Federal penal institutions, touched the point you now raise. I think your inquiry is directed to the policy of the respective departments in permitting various and sundry convening authorities or review authorities to suspend sentence when, at the same time, they know, by virtue of the policy which is not known to everyone, that they are going subsequently to execute that dismissal and the man is not going to be given any opportunity to reenlist.

I do not know what the Navy's procedure is on it, but it has previously been pointed out that stealing in the services is an extremely bad thing, is very difficult to cope with, and ruins morale. That is a particular type of offense, but I think it may generally be stated to be true that in the Army, at least, all felony types of crimes which result in conviction of an enlisted person, even though he may receive a dishonorable discharge that is suspended, that that is just so much double talk, because, as a matter of policy, that discharge will be executed when he has served an appropriate amount of his sentence. He then gets his dishonorable discharge, and is spite of the fact they say he may subsequently apply for reenlistment and try to serve

another enlistment and work his way out with an honorable discharge, nevertheless they are just not taking that kind of man back.

So that I say it leads to a great deal of false hopes on the part of parents and others when a boy of theirs gets a suspended dishonorable discharge. They think he has a chance to work it out, and I want this record to show here that is not true. I think it is a shame that they go ahead and perpetuate that policy in any of the departments. I will say again I cannot say what is happening in the Navy on that, but I know that is happening in the Army, and somebody ought to do something about it.

Colonel DINSMORE. In answer to Mr. Elston's question, if a dishonorable discharge has been suspended and it is determined later to put the man back on duty, he simply is restored to duty to complete the unexpired term of his enlistment. If the dishonorable discharge has been carried into effect, the Secretary has statutory authority to authorize his reenlistment notwithstanding his dishonorable discharge, and that, of course, is a new enlistment completely.

Mr. ELSTON. What is the general policy where they do reenlist with dishonorable discharges hanging over their heads? Do they, as a rule, set that aside if he makes a good record?

Colonel DINSMORE. No, sir; that is a historical fact, and that discharge that is on record can never be wiped out. If he completes his new enlistment honorably, he gets an honorable discharge at the end of that enlistment.

Mr. ELSTON. Then he has both?

Colonel DINSMORE. Yes. But he has a white paper, in a way, and nobody asks him about anything except his last discharge.

Mr. ELSTON. Is that the case when they go in for reenlistment?

Colonel DINSMORE. I doubt if it is.

Mr. SMART. It would be illuminating for this committee to know how many Army enlisted men, who have been convicted since January 1946, of offenses which are considered to be felonious, have been permitted to reenlist. I'll bet you could count them on one hand.

Mr BROOKS. Why could not we get those figures? Would not they be available, Colonel?

Colonel DINSMORE. Yes; they would be vailable.

Mr. BROOKS. I wonder if they would be available in the Navy. Do you think you could get them?

Captain WOODS. I do not think we have quite the same situation in the Navy. I think our probations are granted in good faith, and if a man completes his probation period, he gets his honorable discharge, providing the rest of his service entitles him to it.

Mr. SMART. Is that regardless of the type of offense?

Captain WOODS. It varies.

Mr. SMART. I subscribe to that. That is what I think is the proper policy.

Mr. DEGRAFFENRIED. Do your remarks this morning "when they have been permitted to reenlist" refer to the ones who have been tried under existing law pertaining to the armed services or those who have been tried to civil courts, too?

Mr. SMART. Under military law, once a man has been released to the civil authorities and subsequently convicted, I think inevitably the military will drop from the rolls of the service the man who is in a civilian penal institution.

Mr. DEGRAFFENRIED. But after he gets out, are they more lenient about taking him back into the service or letting him reenlist than if he were convicted under military law?

Mr. SMART. I just could not answer that but I doubt it.

Colonel DINSMORE. I am not sure I understand the question.

Mr. DEGRAFFENRIED. Are they more willing to let a man reenlist in the Army who has been tried and convicted in a civil court, say for grand larceny, than they would be if he had been convicted in a military court?

Colonel DINSMORE. I think there would be no difference.

Mr. Chairman, if I followed Mr. Smart correctly, his remarks were addressed to the question as to whether or not a dishonorable discharge ought to be suspended in a felony case. I am sure Mr. Smart would not suggest that the Army ought to be forced to enlist felons. We would not take them in the first instance, and we certainly would not enlist them after they had been convicted by a military court.

Mr. SMART. I do not subscribe to the theory that every man who is convicted of a felony is hopelessly lost. I do not think it is true. While I will concede as to the great majority of them, that you are correct, Colonel, and you do not want them back in the service, but to make that a matter of ironclad policy, without exception, I think is carrying it too far.

Mr. LARKIN. Did I understand the captain to say that the Navy does take them back?

Captain WOODS. That is correct.

Colonel CURRY. This is a memorandum which was sent to Mr. Larkin under date of March 2 in answer to a questionnaire which I understood originated after discussion with Mr. Smart, who asked what the service's policy was about restoration, and after you wrote it I checked with Captain McGinnis' civilian assistant, and he says this is essentially correct:

> Each case is decided on its own merits, after a man has been observed in confinement. A period of probation prior to this time is a serious error, as the prisoner does not have to strive to make good.

I might interject, that means if he goes to prison knowing he is going to be restored, he just does enough to get by. It does not mean that he cannot be put on probation immediately without confinement if the convening authority thinks that is proper.

> There is no statutory or general policy which would prevent reenlistment—

that is, if he has been discharged—

> or restoration on probation or even discharge. A waiver can be granted if a man meets the currently prescribed standards for enlistment, physically, morally, etc. Those who would be excluded are for the most part subversives.

I might say it means where we have convineing evidence that a man is seriously of that character, that he has declared himself and intends it to be taken seriously and is not just idle talk.

"A hopeless recidivist," that is to say a man who has repeated the offense so often that we are just forced to give him up; "a psychopath", that means a man who we are told by the doctors, on a medical survey, is a psychopath; "and without psychosis"—if he is insane, he is a candidate for medical survey—"a homosexual," and when I say that, I again mean a man who is definitely established as such; maybe he was tried for something else, such as robbery, and it was

thrown out, then we do not want to keep him if we know he is a homosexual, just because the robbery conviction would not stand up. Now, as I say, if he is a mental case, the fact that he is a homosexual does not deprive him of a medical survey based on the ground that he is not responsible for his action.

Mr. BROOKS. Thank you very much. I think that is clear.

Is there any further discussion on this article? I think we have covered it fairly thoroughly. If there is no further discussion, then the article will stand approved.

Next is article 76.

Mr. SMART (reading):

ART. 76. Finality of court-martial judgments.

The appellate review of records of trials provided by this code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this code, and all dismissals and discharges carried into execution pursuant to sentences by courts-martial following approval, review, or affirmation as required by this code, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73 and to action by the Secretary of a Department as provided in article 74.

References: A. W. 50 (h).

Commentary: This article is derived from A. W. 50 (h) and is modified to conform to terminology used in this code.

Mr. BROOKS. What about "subject to Executive clemency"?

Mr. LARKIN. That is article 74, I think. We have specifically made it not final in the sense that it would bind a Secretary and prevent him from exercising further clemency.

Mr. BROOKS. What about the President?

Mr. LARKIN. I think probably the President has the power under the Constitution and the only provision, the only type of case that goes to the President automatically for approval is the death sentence in the case of a general or flag officer. In that case, it cannot be approved until he himself acts. Other than that, this applies.

Mr. BROOKS. There is nothing we can do to take away any constitutional authority from the President?

Mr. LARKIN. No, sir.

Mr. ELSTON. Do you think it is clear enough to include the authority of the President that he now has under the law?

Mr. LARKIN. Yes; I do.

Mr. ELSTON. Exclusive of his constitutional authority? You see, the section does not refer to the President; it only refers to the Secretary of the Department as provided in article 74.

Mr. LARKIN. I think it is sufficient. He has to take approving action under specific proceedings that are set up, and this says "all action taken pursuant to such proceedings." This stems from article of war 50, subparagraph (h), which does not mention the President and, as a matter of fact, did not except the clemency power of the Secretary as we have.

I believe there might be some question now under article of war 50 (h) whether the penalty prescribed there, as here, may be binding on the Secretary. We have put it in to make sure that his clemency power is not so restricted by this provision for finality.

Mr. ELSTON. Remember we use the words here "subject only to action upon a petition for a new trial as provided in article 73 and to

action by the Secretary of a Department as provided in article 74." Now, those are the only exceptions.

Mr. DEGRAFFENRIED. Would it hurt anything if we add the words "or by the President"?

Mr. LARKIN. It would reaffirm whatever constitutional powers he has. Normally, I do not believe the President, after he approves a case, thereafter continues to exercise clemency. To put it another way, in all of these cases which become final without his approval, I do not believe that he normally steps in and exercises any further clemency, but it is left to the Department Secretary.

Mr. BROOKS. Would it not do a little more than that; would it not reaffirm the statutory authority of the President?

Mr. LARKIN. I see no harm in putting in the President, as to any further clemency power he may have.

Mr. BROOKS. How would you frame that? Would you just say "action by the Secretary of a Department as approved in article 74 and the authority of the President"?

Mr. LARKIN. I believe that would do it. I would like to check it.

Mr. BROOKS. I make that as a motion, subject to check which Mr. Larkin will make. Is there any objection to the amendment? If not, the amendment is adopted.

Is there any further discussion of article 76? If not, then article 76 stands approved.

Mr. SMART. Mr. Chairman, may I point out we have now completed the reading of articles 1 through 76, except article 67, the Judicial Council, and, of course, the punitive articles of war which are 77 to 134, inclusive.

Mr. BROOKS. I would suggest this, if the committee agrees with me, that we take up part X as a whole for such comments as Mr. Larkin and you have to make on the whole part. Then, if the committee wants to go to any one article in part X, we can discuss that.

These definitions, as I understand, are based on statutory definitions and have been worked out, and unless the committee wants to go over each one of them individually, it would seem to me that would be proper.

Mr. SMART. I think that would be entirely appropriate, Mr. Chairman, first including in the record the text of the article plus the comments on the article, as is shown in the book which you have, and then let the committee probe on any individual punitive article they may wish.

Mr. BROOKS. If there is no objection to that suggestion, the text of the article, together with the comments, as set forth in the annotation which the committee has been using will be spread on the record of the hearing.

(The matter above referred to is as follows:)

PART X.—PUNITIVE ARTICLES

"ART. 77. Principals.

"Any person punishable under this code who—

"(1) commits an offense punishable by this code, or aids, abets, counsels, commands, or procures its commission; or

"(2) causes an act to be done, which if directly performed by him would be punishable by this code;

shall be punished with the punishment provided for the commission of the offense."

References.—Title 18, U. S. C., section 2 (1948); M. C. M., paragraph 27; N. C. & B., section 41.

Commentary.—At present the subject matter of this provision is prescribed by regulations or provided for in individual offenses.

"ART. 78. Accessory after the fact.

"Any person subject to this code who, knowing that an offense punishable by this code has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial or punishment shall be punished as a court-martial may direct."

References.—A. G. N., article 8 (17); title 18, U. S. C., section 3 (1948); N. C. & B., section 41.

Commentary.—The language of this article is derived from title 18, U. S. C., section 3, and conforms to present Army and Navy practice.

"ART. 79. Conviction of lesser included offense.

"An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein."

References.—Proposed A. G. N., article 28 (a) (2); Federal Rules of Criminal Procedure, rule 31 (c).

Commentary.—At present this provision is prescribed by regulations. The language of the proposed text is derived from the Federal Rules of Criminal Procedure.

"ART. 80. Attempts.

"(a) An act, done with specific intent to commit an offense under this code, amounting to more than mere preparation and tending but failing to effect its commission, is an attempt to commit that offense.

"(b) Any person subject to this code who attempts to commit any offense punishable by this code shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

"(c) Any person subject to this code may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated."

References.—A. W. 96; proposed A. G. N., article 9 (62); N. C. & B., section 42, 43.

Commentary.—An attempt to commit an offense is now punished under the general articles in cases where it is not specifically set forth.

Subdivision (c) is applicable only to a trial where the charge alleges an attempt to commit an offense, and not to a trial upon a charge for the offense itself.

"ART. 81. Conspiracy.

"Any person subject to this code who conspires with any other person or persons to commit an offense under this code shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct."

References.—Proposed A. G. N., article 9 (62); title 18, U. S. C. section 371 (1948); N. C. & B., section 112.

Commentary.—This article is derived from title 18, U. S. C. section 371.

"ART. 82. Solicitation.

"(a) Any person subject to this code who solicits or advises another or others to desert in violation of article 85 or mutiny in violation of article 94 shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct.

"(b) Any person subject to this code who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of article 99 or sedition in violation of article 94 shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct."

References.—Proposed A. G. N., article 9 (62).

Commentary.—Subdivision (a) makes it clear that one who solicits or advises another to violate the articles specified shall be guilty of an offense under this code. However, where the solicitation or advice results in the offense being consummated or attempted, the solicitor shall be punished as a principal, and the death penalty may be imposed.

In subdivision (b) where the solicitation or advice does not result in the consummated offense, the death penalty is not authorized.

"ART. 83. Fraudulent enlistment, appointment, or separation.

"Any person who—

(1) procures his own enlistment or appointment in the armed forces by means of knowingly false representations or deliberate concealment as to his qualifications for such enlistment or appointment and receives pay or allowances thereunder; or

"(2) procures his own separation from the armed forces by means of knowingly false representations or deliberate concealment as to his eligibility for such separation;

shall be punished as a court-martial may direct."

References.—A. W. 54; A. G. N., article 22 (b); proposed A. G. N., article 9 (34).

Commentary.—Paragraph (1) is in substance the same as A. W. 54, with the addition of one who procures his own "appointment" by fraudulent means, thus making it applicable to officers as well as enlisted persons.

Paragraph (2) incorporates proposed A. G. N. 9 (34) which relates to one who procures his own "separation" by fraudulent means.

"ART. 84. Unlawful enlistment, appointment, or separation.

"Any person subject to this code who effects an enlistment or appointment in or a separation from the armed forces of any person who is known to him to be ineligible for such enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct."

References.—A. W. 55; A. G. N., article 195; proposed A. G. N., article 9 (38).

Commentary.—This article is derived from A. W. 55. The scope of the article has been enlarged to include all persons subject to the code, instead of being limited to officers. Unlawful appointments or separations have been added to conform to article 83.

"ART. 85. Desertion.

"(a) Any member of the armed forces of the United States who—

"(1) without proper authority goes or remains absent from his place of service, organization, or place of duty with intent to remain away therefrom permanently; or

"(2) quits his unit or organization or place of duty with intent to avoid hazardous duty or to shirk important service; or

"(3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact he has not been so regularly separated, or enters any foreign armed service except when authorized by the United States;

is guilty of desertion.

"(b) Any officer of the armed forces who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to remain away therefrom permanently is guilty of desertion.

"(c) Any person found guilty of desertion or attempted desertion shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the desertion or attempted desertion occurs at any other time, by such punishment, other than death, as a court-martial may direct."

References.—A. W. 28, 58; A. G. N., articles 10, 4 (6), 8 (21); proposed A. G. N., articles 8 (3), 9 (31), 10 (b).

Commentary.—This article consolidates all provisions relating to desertion. Paragraph (1) of subdivision (a) sets forth the elements of desertion, in order to clearly distinguish desertion from a.w.o.l. Paragraphs (2) and (3) of subdivision (a), and subdivision (b) are derived from A. W. 28.

A. W. 59 (advising or aiding another to desert) and A. W. 60 (entertaining a deserter) have been deleted, as they are now covered by article 77 (principals) and 78 (accessory after the fact), respectively.

"ART. 86. Absence without leave.

"Any person subject to this code who, without proper authority—

"(1) fails to go to his appointed place of duty at the time prescribed; or

"(2) goes from that place; or

"(3) absents himself or remains absent from his unit, organization, or other place of duty at which he is required to be at the time prescribed;

shall be punished as a court-martial may direct."

References.—A. W. 61; A. G. N., articles 8 (19), 8 (46), 4 (9); proposed A. G. N., article 9 (29).

Commentary.—This article is based on A. W. 61. The words "fails to go" have been substituted for the words "fails to repair", in conformity with the policy of avoiding technical terms wherever possible.

"ART. 87. Missing movement.

"Any person subject to this code who through neglect or design misses the movement of a ship, aircraft, or unit with which he is required in the course of duty to move shall be punished as a court-martial may direct."

References.—A. W. 61; proposed A. G. N., article 9 (57).

Commentary.—This article is taken from propsed A. G. N., article 9 (57) and is, in effect, an aggravated form of absence without leave as set forth in A. W. 61.

"ART. 88. Disrespect towards officials.

"Any officer who uses contemptuous or disrespectful words against the President, Vice President, Congress, Secretary of Defense, or a Secretary of a Department, a governor or a legislature of any State, Territory, or other possession of the United States in which he is on duty or present shall be punished as a court-martial may direct."

References.—A. W. 62; proposed A. G. N., article 9 (47).

Commentary.—This article is derived from A. W. 62. The scope has been enlarged to include the Secretary of Defense and the Secretaries of the Departments. The phrase "shall be dismissed from service" has been deleted as the same punishment can be adjudged under the phrase "shall be punished as a court-martial may direct." This article applies to officers only.

"ART. 89. Disrespect towards superior officer.

"Any person subject to this code who behaves with disrespect towards his superior officer shall be punished as a court-martial may direct."

References.—A. W. 63; A. G. N., article 8 (6); proposed A. G. N., article 9 (16).

Commentary.—This article is derived from A. W. 63. Superior officer shall be given the meaning set forth in article 1.

"ART. 90. Assaulting or willfully disobeying officer.

"Any person subject to this code who—

"(1) strikes his superior officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

"(2) willfully disobeys a lawful command of his superior officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct."

References.—A. W. 64; A. G. N., articles 4 (2), 4 (3), 4 (15); proposed A. G. N., articles 9 (13), 9 (50), 8 (10).

Commentary.—This article is derived from A. W. 64. The punishment has been modified so that the death penalty can be imposed only when the offense is committed in time of war.

"ART. 91. Insubordinate conduct towards noncommissioned officer.

"Any warrant officer or enlisted person who—

"(1) strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while such officer is in the execution of his office; or

"(2) willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer; or

"(3) treats with contempt or is disrespectful in language or deportment towards a warrant officer, noncommissioned officer, or petty officer while such officer is in the execution of his office;

shall be punished as a court-martial may direct."

References.—A. W. 65; A. G. N., Article 4 (2); proposed A. G. N., articles 9 (13), 9 (50).

Commentary.—This article is derived from A. W. 65. The scope of the provision has been enlarged to include warrant officers. The attempt provision has been deleted as it is now covered by article 80. "Petty officer" has been added to take care of Navy terminology.

"ART. 92. Failure to obey order or regulation.

"Any person subject to this code who—

"(1) violates or fails to obey any lawful general order or regulation; or

"(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the same; or

"(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct."

References.—A. W. 96; proposed A. G. N., article 9 (30), 9 (19).

Commentary.—This article is derived from proposed A. G. N. 9 (30) and 9 (19). Under present Army practice a violation of this provision would be charged under A. W. 96.

"ART. 93. Cruelty and maltreatment.

"Any person subject to this Code who is guilty of cruelty toward, or oppression or maltreatment of any person subject to his orders shall be punished as a court-martial may direct."

References.—Proposed A. G. N., article 9 (12).

Commentary.—This article is derived from proposed A. G. N. 9 (12). The present Army practice is to handle an offense of this nature under A. W. 96.

"ART. 94. Mutiny or sedition.

"(a) Any person subject to this code—

"(1) who with intent to usurp or override lawful military authority refuses, in concert with any other person or persons, to obey orders or otherwise do his duty or creates any violence or disturbance is guilty of mutiny;

"(2) who with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person or persons, revolt, violence, or other disturbance against such authority is guilty of sedition;

"(3) who fails to do his utmost to prevent and suppress an offense of mutiny or sedition being committed in his presence, or fails to take all reasonable means to inform his superior or commanding officer of an offense of mutiny or sedition which he knows or has reason to believe is taking place, is guilty of a failure to suppress or report a mutiny or sedition.

"(b) A person who is found guilty of attempted mutiny, mutiny, sedition or failure to suppress or report a mutiny or sedition shall be punished by death or such other punishment as a court-martial may direct."

References.—A. W. 66, 67; A. G. N., articles 4 (1), 8 (8); proposed A. G. N., articles 8 (1), 9 (18).

Commentary.—This article consolidates A. W. 66 and 67, and sets forth the elements required to constitute the offense of mutiny or sedition.

The death penalty has been removed for the offense of attempted sedition. The words "excites, causes, or joins" have been omitted as unnecessary because such persons are principals under article 77.

"ART. 95. Arrest and confinement.

"Any person subject to this code who resists apprehension or breaks arrest or who escapes from custody or confinement shall be punished as a court-martial may direct."

References.—A. W. 69; proposed A. G. N., article 9 (50).

Commentary.—This article covers the punitive aspect of A. W. 69. That part omitted is now covered by article 10.

The distinction between officers, cadets and enlisted persons has been removed. The article now applies to all persons, and the punishment shall be as a court-martial may direct.

"ART. 96. Releasing prisoner without proper authority.

"Any person subject to this code who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any such prisoner to escape, shall be punished as a court-martial may direct."

References.—A. W. 73; proposed A. G. N., article 9 (28).

Commentary.—This article is derived from A. W. 73, and is in accord with the comparable Navy provision.

"ART. 97. Unlawful detention of another.

"Any person subject to this code who, except as provided by law, apprehends, arrests or confines any person shall be punished as a court-martial may direct."

References.—Proposed A. G. N., article 9 (51).

Commentary.—This article should be read in conjunction with articles 7 and 9, wherein those persons authorized to apprehend, arrest or confine are set forth.

"ART. 98. Noncompliance with procedural rules.

"Any person subject to this code who—

"(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this code; or

"(2) knowingly and intentionally fails to enforce or comply with any provision of this code regulating the proceedings before, during, or after trial of an accused;

shall be punished as a court-martial may direct."

References.—A. W. 70.

Commentary.—Paragraph (1) of this article embodies the substance of A. W. 70. The scope of A. W. 70 is enlarged to include persons other than officers.

Paragraph (2) is new, and is intended to enforce procedural provisions of this code, for example, article 37 (unlawfully influencing action of court) and article 31 (compulsory self-incrimination).

"ART. 99. Misbehavior before the enemy.

"Any member of the armed forces who before or in the presence of the enemy—

"(1) runs away; or

"(2) shamefully abandons, surrenders or delivers up any command, unit, place or military property which it is his duty to defend; or

"(3) through disobedience, neglect or intentional misconduct endangers the safety of any such command, unit, place, or military property; or

"(4) casts away his arms or ammunition; or

"(5) is guilty of cowardly conduct; or

"(6) quits his place of duty to plunder or pillage; or

"(7) causes false alarms in any command, unit, or place under control of the armed forces; or

"(8) willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture or destroy; or

"(9) does not afford all practicable relief and assistance to any troops, combatants, vessels or aircraft of the armed forces belonging to the United States or their allies when engaged in battle;

shall be punished by death or such other punishment as a court-martial may direct."

References.—A. W. 75; A. G. N., article 4 (12-20); proposed A. G. N., article 8 (7-15).

Commentary.—This article incorporates comparable Army and Navy provisions. The phrase "or speaks words inducing others" has been deleted from A. W. 75 as unnecessary in view of article 77 and 82.

"ART. 100. Subordinate compelling surrender.

"Any person subject to this code who compels or attempts to compel a commander of any place, vessel, aircraft, or other military property, or of any body of members of the armed forces to give it up to an enemy or to abandon it, or who strikes the colors or flag to an enemy without proper authority, shall be punished by death or such other punishment as a court-martial may direct."

References.—A. W. 76; A. G. N., article 4 (12); proposed A. G. N., article 8 (7).

Commentary.—This article consolidates A. W. 76 and proposed A. G. N., article 8 (7).

"ART. 101. Improper use of countersign.

"Any person subject to this code who in time of war discloses the parole or countersign to any person not entitled to receive it or who gives to another who is entitled to receive and use the parole or countersign a different parole or countersign from that which, to his knowledge, he was authorized and required to give, shall be punished by death or such other punishment as a court-martial may direct."

References.—A. W. 77; proposed A. G. N., article 9 (48).

Commentary.—This article is derived from A. W. 77. The words "to his knowledge" have been added, to cover the situation where a person misunderstands the countersign or parole given to him.

"ART. 102. Forcing a safeguard.

"Any person subject to this code who forces a safeguard shall suffer death or such other punishment as a court-martial may direct."

References.—A. W. 78.

Commentary.—This article is derived from A. W. 78. The words "in time of war" have been deleted to cover the situation where it is necessary to impose a safeguard, as in circumstances amounting to a state of belligerency, but where a formal state of war does not exist.

"ART. 103. Captured or abandoned property.

"(a) All persons subject to this code shall secure all public property taken from the enemy for the service of the United States, and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody or control.

"(b) Any person subject to this code who—

"(1) fails to carry out the duties prescribed in subdivision (a) of this article; or

"(2) buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or another directly or indirectly connected with himself; or

"(3) engages in looting or pillaging;

shall be punished as a court-martial may direct."

References.—A. W. 79, 80; proposed A. G. N., article 9 (37); A. G. N., article 8 (16).

Commentary.—This article consolidates A. W. 79 and 80. Paragraph (3) of subdivision (b) is added as it was felt that conduct of this nature should be specifically covered.

"ART. 104. Aiding the enemy.

"Any person who—

"(1) aids, or attempts to aid the enemy with arms, ammunition, supplies, money or other thing; or

"(2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with, or holds any intercourse with the enemy, either directly or indirectly;

shall suffer death or such other punishment as a court-martial or military commission may direct."

References.—A. W. 81; A. G. N., article 4 (5), 4 (4); proposed A. G. N., article 8 (2).

Commentary.—This article is derived from A. W. 81. Paragraph (2) enlarges A. W. 81 by the addition of the phrase "holds any intercourse with the enemy."

"ART. 105. Misconduct as prisoner.

"Any person subject to this code who, while in the hands of the enemy in time of war—

"(1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or

"(2) while in a position of authority over such persons maltreats them without justifiable cause;

shall be punished as a court-martial may direct."

References.—None.

Commentary.—This article is new, and stems from abuses of this nature arising out of World War II.

"ART. 106. Spies.

"Any person who in time of war is found lurking or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces of the United States, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death."

References.—A. W. 82; A. G. N., article 5; proposed A. G. N., article 8 (16).

Commentary.—This article is derived from A. W. 82. The scope of the article has been enlarged in view of the importance of industrial plants, and other manufacturing units engaged in the war effort.

"ART. 107. False official statements.

"Any person subject to this code who, with intent to deceive, signs any false record, return, regulation, order or other official document, knowing the same to

be false, or makes any other false official statement knowing the same to be false, shall be punished as a court-martial may direct."

References.—A. W. 56, 57; A. G. N., article 8 (14); proposed A. G. N., article 9 (24).

Commentary.—This article consolidates A. W. 56 and 57. It is broader in scope in that it is not limited to particular types of documents, and its application includes all persons subject to this code.

The article extends to oral statements, and the mandatory dismissal for officers has been deleted.

"ART. 108. Military property of United States—Loss, damage, destruction, or wrongful disposition.

"Any person subject to this code who, without proper authority—

"(1) sells or otherwise disposes of; or

"(2) willfully or through neglect damages, destroys, or loses; or

"(3) willfully or through neglect suffers to be lost, damaged, destroyed, sold, or wrongfully disposed of;

any military property of the United States, shall be punished as a court-martial may direct."

References.—A. W. 83, 84; A. G. N., article 8 (15); proposed A. G. N., article 9 (20), 9 (21), 9 (25).

Commentary.—This article consolidates A. W. 83 and 84. It removes the distinction between issued and nonissued military property, and applies to all persons subject to the code.

"ART. 109. Property other than military property of United States—Waste, spoil, or destruction.

"Any person subject to this Code who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States shall be punished as a court-martial may direct."

References.—A. W. 89.

Commentary.—This article is derived from A. W. 89. The provisions relating to behavior, reparation, and riot have been deleted.

The reparation aspect is now handled by article 139 and the riots by article 116

"ART. 110. Improper hazarding of vessel.

"(a) Any person subject to this code who willfully and wrongfully hazards or suffers to be hazarded any vessel of the armed forces shall suffer death or such other punishment as a court-martial may direct.

"(b) Any person subject to this code who negligently hazards or suffers to be hazarded any vessel of the armed forces shall be punished as a court-martial may direct."

References.—A. G. N., articles 4 (10), 8 (11); proposed A. G. N., articles 8 (6), 9 (21).

Commentary.—This article is derived from proposed A. G. N., articles 8 (6) and 9 (21).

"ART. 111. Drunken or reckless driving.

"Any person subject to this code who operates any vehicle while drunk, or in a reckless or wanton manner, shall be punished as a court-martial may direct."

References.—Proposed A. G. N., articles 9 (53), 9 (54).

Commentary.—It is intended that the word "drunk" as used in this article, and in articles 112 and 113, shall have the same meaning as set forth in the M. C. M., paragraph 173, to wit: "Whether the drunkenness was caused by liquor or drugs is immaterial; and any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of this article."

"ART. 112. Drunk on duty.

"Any person subject to this code, other than a sentinel or look-out, who is found drunk on duty, shall be punished as a court-martial may direct."

References.—A. W. 85; A. G. N., article 8 (1); proposed A. G. N., articles 9 (53), 9 (55).

Commentary.—This article is derived from A. W. 85. The phrase "other than a sentinel or look-out" has been added, as a sentinel or look-out found drunk on duty is guilty of a separate and distinct offense under article 113.

"ART. 113. Misbehavior of sentinel.

"Any sentinel or look-out who is found drunk or sleeping upon his post, or leaves it before he is regularly relieved shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the offense is committed at any other time, by such punishment other than death as a court-martial may direct."

References.—A. W. 86; A. G. N., articles 4 (8), 4 (9); proposed A. G. N., articles 8 (5), 8 (9), 9 (29).

Commentary.—The language used in this article is substantially that of A. W. 86. The word "look-out" has been added to cover Navy terminology.

"ART. 114. Dueling.

"Any person subject to this Code who fights or promotes, or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall be punished as a court-martial may direct."

References.—A. W. 91; A. G. N., article 8 (5); proposed A. G. N., article 9 (15).

Commentary.—The provision regarding dismissal of officers found guilty of the offense of dueling has been deleted as superfluous.

"ART. 115. Malingering.

"Any person subject to this code who for the purpose of avoiding work, duty, or service—

"(1) feigns illness, physical disablement, mental lapse, or derangement; or

"(2) intentionally inflicts self-injuty;

shall be punished as a court-martial may direct."

References.—Proposed A. G. N., articles 9 (55), 9 (56); N. C. and B., section 104.

Commentary.—This article consolidates proposed A. G. N., articles 9 (55) and 9 (56).

"ART. 116. Riot or breach of peace.

"Any person subject to this code who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct."

References.—A. W. 89; A. G. N., article 22 (a); N. C. and B., section 92.

Commentary.—The language of this article is new. It is derived from A. W. 89, and is set forth specifically as it is not within the purview of article 109.

"ART. 117. Provoking speeches or gestures.

"Any person subject to this code who uses provoking or reproachful words or gestures towards any other person subject to this code shall be punished as a court-martial may direct."

References.—A. W. 90; proposed A. G. N., article 9 (13).

Commentary.—This article is derived from A. W. 90 and proposed A. G. N., article 9 (13).

"ART. 118. Murder.

"Any person subject to this code who, without justification or excuse, kills a human being, when he—

"(1) has a premeditated design to kill; or

"(2) intends to kill or inflict great bodily harm; or

"(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or

"(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson, though he has no intent to kill;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under paragraph (1) of this article, he shall suffer death or imprisonment for life as a court-martial may direct."

References.—A. W. 92; A. G. N., article 6.

Commentary.—Under paragraph (1) there must be not only an intent to kill, but there must also be a premeditated design to kill.

Under paragraph (2) intent to inflict great bodily harm has been held to satisfy the "malice aforethought" requirement.

Paragraph (3) is a codification of the well-settled common-law rule that, even in the absence of a specific intent to kill or inflict serious bodily harm, the homicide is murder if the offender's conduct was imminently dangerous to others and evinced a wanton disregard of human life. It is intended to cover those cases where the acts resulting in death are calculated to put human lives in jeopardy, without being aimed at any one in particular.

Paragraph (4) adopts a restricted view of the felony-murder doctrine. Its application is limited to the more serious and dangerous offenses.

It is intended that the common-law "year and a day" rule shall not be applicable. In early times, when the rule originated, it was difficult to ascertain the true cause of death if a substantial period of time intervened. With modern developments in medical science the only justification for this rule no longer exists.

The territorial limitation in peacetime has been removed, thus allowing the armed forces to try murder and rape cases in all places, and at all times.

"ART. 119. Manslaughter.

"Any person subject to this code who, without a design to effect death, kills a human being—

"(1) in the heat of sudden passion; or

"(2) by culpable negligence; or

"(3) while perpetrating or attempting to perpetrate an offense, other than those specified in paragraph (4) of article 118, directly affecting the person;

is guilty of manslaughter and shall be punished as a court-martial may direct."

References.—A. W. 93; N. C. and B., section 119.

Commentary.—Paragraph (1) conforms to the offense which is usually labelled voluntary manslaughter. Paragraph (2) covers that type of involuntary manslaughter where the homicide results from criminal negligence. Paragraph (3) obviates the necessity of distinguishing offenses malum in se and malum prohibitum. The phrase "directly affecting the person" is intended to apply to those offenses affecting some particular person as distinguished from an offense affecting society in general, such as general safety regulations.

"ART. 120. Rape.

"(a) Any person subject to this code who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape. Penetration, however slight, is sufficient to complete the offense.

"(b) Any person found guilty of rape shall be punished by death or such other punishment as a court-martial may direct."

References.—A. W. 92; A. G. N., article 22 (a).

Commentary.—The geographical limitation in time of peace contained in A. W. 92 has been deleted.

"ART. 121. Larceny.

"Any person subject to this code who, with intent to deprive or defraud another of the use and benefit of property or to appropriate the same to his own use or the use of any person other than the true owner, wrongfully takes, obtains, or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, or article of value of any kind, steals such property and is guilty of larceny, and shall be punished as a court-martial may direct."

References.—A. W. 93; proposed A. G. N., articles 9 (43), 9 (41).

Commentary.—This article is intended to combine the offenses of larceny by asportation, larceny by trick and device, obtaining property by false pretenses, and embezzlement. It is desirable to eliminate the technical distinctions which have heretofore differentiated one type of theft from another and is in keeping with modern civil trends.

"ART. 122. Robbery.

"Any person subject to this code who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or the person or property of a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct."

References.—A. W. 93; N. C. and B., section 123.

Commentary.—This article conforms basically to the common-law definition of "robbery." The phrase "anything of value" was preferred to "property," in order to obviate the difficulties of the common-law interpretations. The class of persons menaced has been enlarged.

"ART. 123. Forgery.

"Any person subject to this code who, with intent to defraud—

"(1) falsely makes or alters any signature to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; or

"(2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered;

is guilty of forgery and shall be punished as a court-martial may direct."

References.—A. W. 93; proposed A. G. N., article 9 (39).

Commentary.—This article combines forgery and uttering a forged instrument. The basic common-law elements have been incorporated.

"ART. 124. Maiming.

"Any person subject to this code who with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which—

"(1) seriously disfigures his person by any mutilation thereof; or

"(2) destroys or disables any member or organ of his body; or

"(3) seriously diminishes his physical vigor by the injury of any member or organ;

is guilty of maiming and shall be punished as a court-martial may direct."

References.—A. W. 93; N. C. & B., section 122.

Commentary.—This article is broader in scope than common-law mayhem. It includes injuries which would not have the effect of making a person less able to fight.

"ART. 125. Sodomy.

"(a) Any person subject to this code who engages in unnatural carnal copulation with another of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

"(*b*) Any person found guilty of sodomy shall be punished as a court-martial may direct."

References.—A. W. 93; proposed A. G. N., article 9 (39); N. C. & B., section 108.

Commentary.—This article covers the same elements as the Army and Navy definition of this offense.

"ART. 126. Arson.

"(a) Any person subject to this code who willfully and maliciously burns or sets on fire a dwelling in which there is at the time a human being, or any other structure, water craft, or movable, wherein to the knowledge of the offender there is at the time a human being is guilty of aggravated arson and shall be punished as a court-martial may direct.

"(b) Any person subject to this code who willfully and maliciously burns or sets fire to the property of another, except as provided in subdivision (a) of this article, is guilty of simple arson and shall be punished as a court-martial may direct."

References.—A. W. 93; N. C. & B., section 124.

Commentary.—This article divides arson into two categories. Subdivision (a) is essentially common-law arson, but is enlarged to cover structures other than dwellings, in view of the fact that the essence of the offense is danger to human life. In subdivision (b) the offense is essentially one against the property of someone other than the offender.

"ART. 127. Extortion.

"Any person subject to this code who communicates threats to another with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity of any description is guilty of extortion and shall be punished as a court-martial may direct."

References.—A. W. 96; proposed A. G. N., article 9 (42); N. C. and B., section 93.

Commentary.—This article combines extortion and blackmail.

"ART. 128. Assault.

"(a) Any person subject to this code who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

"(b) Any person subject to this code who—

"(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

"(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

is guilty of aggravated assault and shall be punished as a court-martial may direct."

References.—A. W. 93; N. C. and B., section 48.

Commentary.—This article is divided into two categories. Subdivision (a) defines a simple assault. Subdivision (b) sets forth the elements of aggravated assault.

This article differs from present service practice in that assaults with intent to commit specific crimes have been eliminated. Such assaults could be punished under article 80 (attempts), or, if the intent is doubtful, under this article.

"ART. 129. Burglary.

"Any person subject to this code who, with intent to commit an offense punishable under articles 118 through 128, inclusive, breaks and enters, in the nighttime, the dwelling house of another, is guilty of burglary and shall be punished as a court-martial may direct."

References.—A. W. 93; proposed A. G. N., article 9 (39).

Commentary.—This article includes all the elements of common law burglary. The intent to commit a felony has been limited to those offenses specified.

"ART. 130. Housebreaking.

"Any person subject to this code who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct."

References.—A. W. 93; proposed A. G. N., article 9 (39); M. C. M., paragraph 179 (e).

Commentary.—This article is adopted from M. C. M., paragraph 179 (e). The scope has been enlarged by the inclusion of the words "or structure of another."

"ART. 131. Perjury.

"Any person subject to this code who in a judicial proceeding or course of justice, willfully and corruptly gives, upon a lawful oath or in any form allowed by law to be substituted for an oath, any false testimony material to the issue or matter of inquiry is guilty of perjury and shall be punished as a court-martial may direct."

References.—A. W. 93; M. C. M., paragraph 180 (h); N. C. and B., section 115.

Commentary.—This article is derived from M. C. M., paragraph 180 (h), and is in substantial conformity with the Navy definition.

"ART. 132. Frauds against the Government.

"Any person subject to this code—

"(1) who, knowing it to be false or fraudulent—

"(A) makes any claim against the United States or any officer thereof; or

"(B) presents to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof; or

"(2) who, for the purpose of obtaining the approval, allowance, or payment of any claim against the United States or any officer thereof—

"(A) makes or uses any writing or other paper knowing the same to contain any false or fraudulent statements; or

"(B) makes any oath to any fact or to any writing or other paper knowing such oath to be false; or

"(C) forges or counterfeits any signature upon any writing or other paper, or uses any such signature knowing the same to be forged or counterfeited; or

"(3) who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the armed forces thereof, knowingly delivers to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

"(4) who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, makes or delivers to any person such writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States;

shall, upon conviction, be punished as a court-martial may direct."

References.—A. W. 94; A. G. N., articles 14 (1–10); proposed A. G. N., articles 9 (1–10).

Commentary.—This article has revised and rearranged the comparable Army and Navy provisions to eliminate repetitious and superfluous material.

Reference to persons "causing, procuring, or advising" have been deleted in view of article 77 (principals). The conspiracy clause has been omitted as that offense is now covered by article 81. It is to be noted that an overt act to effect the object of the conspiracy is now required.

The provisions relating to embezzlement, stealing, misappropriation, and pledges have been omitted as the said offenses are now covered by article 121 (larceny) or article 108 (wrongful disposition of military property).

The continuing jurisdiction clause has been deleted, since a member of the armed forces who commits a fraud against the government, and who is thereafter discharged, is subject to prosecution in the Federal courts under general criminal statutes. See title 18 U. S. C., sections 1001 et seq. (1948).

"ART. 133. Conduct unbecoming an officer and gentleman.

"Any officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the armed forces."

References.—A. W. 95.

Commentary.—This article is derived from A. W. 95. The word "midshipman" has been added to cover the Navy designation.

"ART. 134. General article.

"Though not specifically mentioned in this code, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this code may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

References.—A. W. 96.

Commentary.—This article is derived from A. W. 96 and corresponds to A. G. N. article 22 (a).

PART XI—MISCELLANEOUS PROVISIONS

"ART. 135. Courts of inquiry.

"(a) Courts of inquiry to investigate any matter may be convened by any person authorized to convene a general court-martial or by any other person designated by the Secretary of a Department for that purpose whether or not the persons involved have requested such an inquiry.

"(b) A court of inquiry shall consist of three or more officers. For each court of inquiry the convening authority shall also appoint counsel for the court.

"(c) Any person subject to this code whose conduct is subject to inquiry shall be designated as a party. Any person subject to this code or employed by the National Military Establishment who has a direct interest in the subject of inquiry shall have the right to be designated as a party upon request to the court. Any person designated as a party shall be given due notice and shall have the right to be present, to be represented by counsel, to cross-examine witnesses, and to introduce evidence.

"(d) Members of a court of inquiry may be challenged by a party, but only for cause stated to the court.

"(e) The members, counsel, the reporter, and interpreters of courts of inquiry shall take an oath or affirmation to faithfully perform their duties.

"(f) Witnesses may be summoned to appear and testify and be examined before courts of inquiry as provided for courts-martial.

"(g) Courts of inquiry shall make findings of fac tbut shall not express opinions or make recommendations unless required to do so by the convening authority.

"(h) Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signatures of the president and counsel for the court and forwarded to the convening authority. In case the record can not be authenticated by the president it shall be signed by a member in lieu of the president and in case the record can not be authenticated by the counsel for the court it shall be signed by a member in lieu of the counsel."

References.—A. W. 97–103; proposed A. G. N., articles 42, 43, 44.

Commentary.—This article is a combination of Army and Navy provisions as to courts of inquiry. Army courts of inquiry, at present, may only be convened at the request of the person whose conduct is to be investigated. Naval courts of inquiry, however, may be convened for any formal investigation. Subdivision (a) grants this broader power.

Subdivision (b) does not change the number of members of courts of inquiry in either service, but does provide for a counsel whose duties are to assist the court in matters of law, presentation of evidence, and in the keeping of the record.

Subdivision (e) adopts the substance of Proposed A. G. N., article 42. The provision in regard to employees of the National Military Establishment is included in order to allow employees whose conduct may be involved in the inquiry to intervene in order to protect their rights or reputations.

Subdivisions (d) and (e) conform to present Army and Navy practice.

Subdivision (f) is derived from A. W. 101. Under Navy practice witnesses may be but are not required to be sworn.

Subdivisions (g) and (h) conform to Army and Navy practice.

"ART. 136. Authority to administer oaths and to act as notary.

"(a) The following persons on active duty in the armed forces shall have authority to administer oaths for the purposes of military administration, including military justice, and shall have the general powers of a notary public and of a consul of the United States, in the performance of all notarial acts to be executed by members of any of the armed forces, wherever they may be, and by other persons subject to this code outside the continental limits of the United States:

"(1) All judge advocates of the Army and Air Force;

"(2) All law specialists;

"(3) All summary courts-martial;

"(4) All adjutants, assistant adjutants, acting adjutants and personnel adjutants.

"(5) All commanding officers of the Navy and Coast Guard;

"(6) All staff judge advocates and legal officers, and acting or assistant staff judge advocates and legal officers; and

"(7) All other persons designated by regulations of the armed forces or by statute.

"(b) The following persons on active duty in the armed forces shall have authority to administer oaths necessary in the performance of their duties:

"(1) The president, law officer, trial counsel, and assistant trial counsel of all general and special courts-martial;

"(2) The president and the counsel for the court of any court of inquiry;

"(3) All officers designated to take a deposition;

"(4) All persons detailed to conduct an investigation;

"(5) All recruiting officers; and

"(6) All other persons designated by regulations of the armed forces or by statute.

"(c) No fee of any character shall be paid to or received by any person for the performance of any notarial act herein authorized.

"(d) The signature without seal of any such person acting as notary, together with the title of his office, shall be prima facie evidence of his authority."

References.—A. W. 114; A. G. N., article 69; proposed A. G. N., article 47 (a).

Commentary.—This article is a combination and modification of A. W. 114 and A. G. N., article 69. Only certain persons specified are given notarial powers, as it is believed in appropriate that persons having temporary powers to administer oaths should notarize legal instruments which may have drastic legal consequences if incorrectly drawn. The persons specified in subdivision (a) are believed to have legal experience or experience in personnel matters. Commanding officers of the Navy and Coast Guard are included in subdivision (a) as Navy and Coast Guard commands do not have adjutants and personnel adjutants.

"ART. 137. Articles to be explained.

"Articles 2, 3, 7 through 15, 25, 27, 31, 37, 38, 55, 77 through 134, and 137 through 139 of this code shall be carefully explained to every enlisted person at the time of his entrance on active duty in any of the armed forces of the United States, or within six days thereafter. They shall be explained again after he has completed six months of active duty, and again at the time he reenlists. A complete text of the Uniform Code of Military Justice and of the regulations prescribed by the President thereunder shall be made available to any person on active duty in the armed forces of the United States, upon his request, for his personal examination."

References.—A. W. 110; A. G. N., article 20 (tenth).

Commentary.—This article is derived from A. W. 110, but requires the articles to be carefully explained instead of being read, as it is felt that a careful explanation is of more value than a mere reading. The language would also permit training films to be used to explain the code. The requirement that the code be read every six months is omitted as it is felt that a thorough indoctrination is more beneficial than a required reading every six months.

'ART. 138. Complaints of wrongs.

"Any member of the armed forces who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to any superior officer who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. That officer shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department concerned a true statement of such complaint, with the proceedings had thereon."

References.—A. W. 121; United States Navy Regulations, article 99.

Commentary.—This article is adopted from A. W. 121. The Navy has provided a similar procedure by regulation.

"ART. 139. Redress of injuries to property.

"(a) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that his property has been wrongfully taken by members of the armed forces he may, subject to such regulations as the Secretary of the Department may prescribe, convene a board to investigate the complaint. The board shall consist of from one to three officers and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The order of such commanding officer directing charges herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the damages assessed and approved.

"(b) Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in such proportion as may be deemed just upon the individual members thereof who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board."

References.—A. W. 105.

Commentary.—This article is a redraft of A. W. 105 with changes to permit the Secretary of the Department to prescribe the situations and procedures for redress. It is not intended to affect the provisions of 40 Stat. 705 (1918) as amended by 41 Stat. 132 (1919), 34 U. S. C., section 600 (1946), (claims for damages not occasioned by vessels) or the provisions of 28 U. S. C., section 2671 et seq. (1948), (tort claims) or similar enactments.

"ART. 140. Delegation by President.

"The President is authorized to delegate any authority vested in him under this code, and to provide for the subdelegation of any such authority."

References.—Public Law 759, Eightieth Congress, second session, section 10 (c) (June 24, 1948).

Commentary.—This article incorporates the language of the reference.

Mr. BROOKS. Mr. Larkin, would you give us your idea on part X—your general comment?

Mr. LARKIN. Part X includes from article 77 through article 134, the punitive articles. It sets out and defines the different offenses over which the uniform code has jurisdiction.

When we were studying the punitive articles as spelled out in the Articles of War and in the Articles for the Government of the Navy, we noticed some different offenses in one statute that were not in the other. We observed that the Articles of War, in the main, define the so-called military offenses. They did not define all of them but the most of them. The Articles for the Government of the Navy defined most of the military offenses but not all. There were some crimes that were peculiar to one service which were not provided for in another.

Going further, we noticed that most of the civil crimes or the civil types of crimes were not defined, and, in checking the definitions as

spelled out in the respective manuals, we found some differences between them—not very many but a few.

The civil crimes in the Articles of War, as defined by the manuals, were generally the definitions in the common law, actually the common law of Maryland which, as a matter of fact, is very close to the Federal law definitions but is not identical.

The civil crimes in the Articles for the Government of the Navy were not defined, except that Naval courts and boards generally followed the Federal statutory definition; but to the extent that they provided some common law crimes which had never been made statutory, they followed the common law definition. There was enough variance, however, to lead us to the conclusion that since we were trying to draft punitive articles for the three services, we ought to define all of the offenses, and the civil crimes, as I have said, not having been defined in the statute before.

So we started from scratch and we examined each offense and tried to stick as closely as we could to the definition that was commonly used by both services and also to adopt whatever ideas we felt were worth-while from some of the more modern State codes. We considered adopting the Federal definition as defined in the Federal code, but, unfortunately, we found there were some offenses that were not defined there, either.

So we looked to all of these sources and relied on most of them and tried to select what we thought was the clearest definition for each of those offenses, sticking as closely as we could to what was commonly used as a definition by both of the services now or what was the latest definition in some of the more modern day penal laws.

In addition to that, we set out in the punitive articles in the beginning some general definitions which had heretofore not been statutory but which are set out in most of the modern penal codes. For instance, we drafted one definition for principals, for accessories after the fact, and for a provision of lesser included offense, for attempts and for conspiracy.

Mr. DEGRAFFENRIED. You really, in effect, have done away with the distinction between principals and accessories before the fact, have you not?

Mr. LARKIN. That is right; we have—and also a definition of solicitation. We have spelled those out in the code where heretofore they have not been in the Articles of War or Articles for the Government of the Navy and then have gone on with each of these crimes, keeping the major crimes that we found in each of the services and adding a few—I think just two—additional offenses which were not found before.

That was the general scheme which we followed.

If you care to address yourself to any individual definition of any offense, I will try to point out the source of it or point out the previous definition as used in either the Articles of War or the Articles for the Government of the Navy or both.

Mr. BROOKS. I would like to ask you this: suppose an offense is not defined under these punitive articles, is there any redress by court martial?

Mr. LARKIN. We have retained a general article, Article No. 134, which is similar to Article of War No. 96, and the Article for the Government of the Navy No. 22, so that offenses of—

disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces—

is retained as it was provided in the Articles of War and in the Articles for the Government of the Navy. We have in a few instances made specific offenses out of conduct which heretofore was treated only by this general order, but otherwise it is the same.

We also have retained Article of War No. 95 and made it Article No. 133. That is conduct unbecoming an officer and a gentlemen.

Mr. ELSTON. What do you mean in section 134 when you say "and crimes and offenses not capital, of which persons subject to this code may be guilty"? I will go back a little further and start from the beginning.

Though not specifically mentioned in this code, all disorders and neglects to the prejudice of good order and discipline in the Armed Forces, or conduct of a nature to bring discredit upon the Armed Forces, and crimes and offenses not capital, of which persons subject to this code may be guilty * * *.

To what crimes and offenses are you referring there—the ones defined in this code or other crimes and offenses?

Mr. LARKIN. It has been construed to be the offenses which are not spelled out but which are offenses under the Federal law. It is the same provision as is now found in article 96. Also, as Colonel Dinsmore reminds me, it may be an offense under a State law where the accused commits such an offense in that State.

Mr. ELSTON. So, as I understand it, any person in the military service who commits an act which is defined as a crime by a Federal or State law is subject to trial and punishment in the military courts for the commission of that offense?

Mr. LARKIN. That is right.

Mr. BROOKS. Going further, if a soldier, for instance, is out here in Washington and speeds, the military has full authority to punish him for speeding?

Mr. LARKIN. If it is an offense; yes.

Mr. BROOKS. Well, speeding is an offense in Washington.

Mr. LARKIN. I do not know. Sometimes it is a violation of an ordinance; it is not classified as an offense. But that would depend——

Mr. BROOKS. This would not be construed, then, to cover a violation of a city ordinance?

Mr. LARKIN. I do not believe so.

Colonel DINSMORE. I do not think so, Mr. Chairman.

Mr. BROOKS. But only a statutory offense; is that it?

Mr. LARKIN. The construction as to State laws should be clarified to this extent: I believe a violation of a State law would be punishable under the code to the extent it is construed as conduct to the prejudice of good order and discipline but not to the extent of the specific State law itself. We purposely want to avoid trying personnel who happen to commit an offense under State law, by virtue of the tremendous variations between State laws and by virtue of the necessity that would fall upon the court of trying them according to the procedural practices and perhaps even the substantive provisions of one State as against another. But, if the act is to the prejudice of good order and discipline, the fact that it also incidentally is a State law violation as well would bring it under this jurisdiction but not triable as the State would try it.

Mr. ELSTON. It would necessarily include all cases involving moral turpitude.

Mr. LARKIN. I should say so; yes.

Mr. ELSTON. I am wondering where you got your definition of principals and the manner in which they should be punished.

Mr. LARKIN. That came I believe from title 18 of the United States Code, section 2. The only variation from that definition there is that in title 18, section 2, after these words, there are the additional words "is a principal." And by virtue of the fact that we were trying to word this as we did in the first sentence to include spies, for instance, who are not subject ordinarily to the code, we revised it a little and it was criticized I think by some witness—I believe Mr. L'Heuseux. Where it says "any person punishable under this code who commits an offense punishable," that seems to be redundant. But we consciously did it that way rather than saying "any person subject to this code who commits an offense punishable," because spies are not otherwise subject to this code. But, to answer your question specifically, it comes from the Federal Code.

Mr. ELSTON. The words "shall be punished with the punishment provided for the commission of the offense," does that come from the Federal Code?

Mr. LARKIN. The Federal Code says "as a principal," which means the same same thing.

Mr. ELSTON. I do not know whether it does or not. You limit the punishment of a principal or an accessory before the fact to the punishment provided for the commission of the offense that he aided another to commit.

Mr. LARKIN. That is right.

Mr. ELSTON. The law goes further than that. Suppose he aided someone to commit the crime of robbery and in the perpetration of the robbery a murder is committed; he not only should be punished for the offense that he aided the other to commit, but for any offense which might reasonably be expected to flow from the commission of the act intended.

Mr. LARKIN. He aids in the commission of a robbery, and murder flows from it. The person who committed, or who was the active agent in the robbery I assume becomes the one who commits the murder, and the accomplice is the principal for all purposes in the act of the active participant and, as such, he is a principal in the murder.

Mr. ELSTON. You do not say that, though. You say "shall be punished with the punishment provided for the commission of the offense."

Mr. LARKIN. Which in that case is murder.

Mr. ELSTON. But read up above. You say:

> Any person punishable under this code who—
>
> (1) commits an offense punishable by this code, or aids, abets, counsels, commands, or procures its commission;

It seems to me you have got to go a little further than that or you are going to limit an aider or abetter to the offense committed, the offense that he aided another to commit, where he did not intend to commit the crime of murder, and intended only to commit the crime of robbery. He may have been a mile away from the scene of the crime; he may have furnished the weapon that was to be used in the commission of the robbery, but murder was committed, something

that he did not intend. He may have advised against it but still, under the law, he would be guilty, because murder is something that might reasonably be expected to flow from the commission of the act that he thought was going to be committed.

Mr. LARKIN. Is that not true of the active principal who starts out with no intention of committing a murder but with the intention of committing a robbery and without intention to commit a murder, but, during the commission of the robbery, does so commit the murder?

Mr. ELSTON. That is understandable as to him; but the person who aided and abetted is limited, as your language seems to limit it, and might be punished only for the offense that he conspired to commit.

Mr. LARKIN. Of course, a conspirator is bound by all the acts of his coconspirators; is he not?

Mr. ELSTON. That is the theory of the law, but is it expressed here anywhere?

Mr. DEGRAFFENRIED. Mr. Larkin, is it true generally, under Federal law, that if a man were to plan, for example, with his confederates to break into a filling station at night and steal money from the cash register, but did not go with them to do it; but that when the crime was committed the night watchman, or somebody else, happened to come up and was killed by one of the people present, is it true under Federal law that that man, who is not on the scene of the crime, would be guilty of murder?

Mr. LARKIN. If you can prove he is part and parcel of the conspiracy, I think so. Is it not analogous to the case that where a principal or his instigator of a crime, or a procurer of a crime, hires a paid gunman, let us say, to go out and commit robbery, and he is not near the scene at all?

Mr. BROOKS. Gentlemen, I do not believe we can finish this before lunch. I am therefore going to suggest that we recess until 2 o'clock. Mr. Smart, for instance, has about 8 or 10 inquiries about these articles that should be covered.

Mr. LARKIN. Let us reserve judgment on that, Mr. Elston, and look up some of those cases. We shall try to do it very quickly. And, if it is not clear, I agree that we ought to correct it.

Mr. ELSTON. It is a very simple definition. Whoever aids, abets, procures another to commit an offense shall be charged and tried as a principal offender.

You have got them all, then.

Mr. BROOKS. If there is no objection, we shall recess until 2 o'clock.

(Whereupon the subcommittee took a recess until 2 p. m.)

AFTERNOON SESSION

The subcommittee reconvened at 2 p. m., Hon. Overton Brooks (chairman) presiding.

Mr. BROOKS. The committee will please come to order.

Mr. Larkin, since we recessed, have you and Mr. Smart gotten together on some suggestions of changes or interpretations of the articles?

Mr. LARKIN. Well, the one we were discussing, Mr. Chairman—namely, 77—I think would be cured or at least would meet the idea Mr. Elston had if we added the words, in line 80, page 65, "is a principal" and strike out the rest of the language on lines 8 and 9.

But I think, since Mr. Elston raised the point, perhaps we ought to reserve the suggestions until he returns; and, if it meets with his approval, why I think——

Mr. BROOKS. We might wait a little bit. Suppose we do this: Take up the other articles and then come back to his suggestion before we adjourn.

Mr. LARKIN. Fine.

Mr. BROOKS. I think Mr. Elston told me he would be a little late.

Mr. LARKIN. All right.

Mr. BROOKS. But I think he will be right back.

Mr. SMART. Mr. Chairman, in view of the previous decision of the committee to more or less consider these punitive articles en bloc, I have no further questions up to article 106, which I think needs clarifying as to the meaning of the word "lurking" on page 77, line 3.

I find that the intent was that the word "lurking" would mean "lurking as a spy." So, I would suggest an amendment on line 3, page 77, after the word "lurking," insert "as a spy."

Mr. BROOKS. So it will read: "Any person who in time of war is found lurking as a spy"?

Mr. SMART. Yes, sir.

Mr. LARKIN. "or"—

Mr. BROOKS. "or acting as a spy"?

Mr. SMART. That is right. There is some doubt as to the advisability of striking out the word "lurking," because it has historical significance and has been in the military law for many, many years.

This would definitely clarify the meaning of the word "lurking."

Mr. BROOKS. Is there any objection to that? I do not believe there is.

Mr. DEGRAFFENRIED. No.

Mr. BROOKS. If there is no objection, then we will adopt that suggested amendment.

Now, is there any other comment on 106? Are there any comments on any of these other articles covering punitive provisions of the code?

Mr. DEGRAFFENRIED. There is just one question I would like to ask as a matter of information.

Mr. Larkin, do you have anything in military law at all that provides in any kind of serious case that an accused cannot be convicted on the uncorroborated testimony of an accomplice?

Mr. LARKIN. There is nothing in the statute that I know of.

Mr. DEGRAFFENRIED. We talk about these accessories and all, and I just wondered in a lot of jurisdictions that protection is thrown around the accused.

Mr. LARKIN. Captain Woods points out in the Navy they have heretofore provided that the uncorroborated testimony of an accomplice, for instance, is not sufficient. I would anticipate that that same rule will be preserved and continued in the uniform manual.

I believe it is the Federal rule and we tried to adhere as nearly as possible to that rule.

Colonel DINSMORE. Mr. Chairman, my recollection, and I speak subject to correction, is that our rule is that he may be convicted on the uncorroborated testimony of an accomplice but that such testimony will be received with great caution.

Mr. DEGRAFFENRIED. That is all.

Mr. BROOKS. Any further questions?

Now, someone was telling me the other day, perhaps it was you Mr. Larkin, about a case arising in New York in which it was found, I think on a habeas corpus, that the service had no law to cover some very serious crime.

Do you recall that?

Mr. SMART. I think that is a Navy situation. I think that was a case which arose on one of the overseas islands where several sailors committed a murder.

In that situation, they were not attached to a ship and were not subject to capital punishment.

Captain WOODS. Is that the Saipan case?

Mr. SMART. Yes.

Captain WOODS. Yes. The point there was that our code provided that jurisdiction over murder pertained to outside the continental United States when attached to the ship.

These people were ashore and therefore we could not try them for murder.

So we had to retry them for manslaughter.

Mr. BROOKS. Now, is there anything in this code that takes care of that situation?

Captain WOODS. That takes care of it?

Mr. BROOKS. Under what article is that? That might be asked us on the floor.

Mr. SMART. That is article 118, "Murder." It does not restrict it as far as the territorial applicability of the code is concerned.

The code provides that it will be applicable in all places, so that covers ships, islands, continents, or whatever you have.

Mr. BROOKS. Mr. Elston has come in. We might turn back to that one particular matter that we were discussing, Mr. Larkin, and take that up and see whether or not your suggestion fits the situation now.

Mr. LARKIN. Well, as I pointed out, Mr. Chairman, I think this article if amended as follows——

Mr. BROOKS. What article is that, now?

Mr. LARKIN. Article 77, on page 65 will include the idea expressed by Mr. Elston. That is, on line 8, strike out all the words on that line and also on line 9 and substitute the words, "is a principal."

Mr. ELSTON. I do not quite get that. Where is that?

Mr. LARKIN. Page 65, Mr. Elston.

Mr. ELSTON. I have that.

Mr. LARKIN. Line 8.

Mr. ELSTON. Yes, strike everything on lines 8 and 9.

Mr. LARKIN. Yes, everything on lines 8 and 9?

Mr. ELSTON. Yes. So that starting with (2), it will say "causes an act to be done which if directly performed by him would be punishable by this code" and then drop to the next line, "is a principal."

So that in all those cases above he is a principal.

Mr. BROOKS. You do away with accessories completely?

Mr. LARKIN. No, sir. We just add to the end of that, "is a principal," which includes accessories before the fact.

Mr. BROOKS. Sure. I see what you mean there.

Mr. LARKIN. I think that cures the situation you had in mind, Mr. Elston.

Mr. ELSTON. That is all right: "or shall be punished as a principal offender"; either one.

Mr. LARKIN. Well, I think this one does it, do you not think so?

Mr. ELSTON. "Is a principal" reaches it.

Mr. BROOKS. Let me ask you, then: It take in all cases of accessories before the fact?

Mr. ELSTON. That is right.

Mr. BROOKS. And 78 merely covers those after the fact?

Mr. ELSTON. That is right. We have obliterated the distinction between the accessories before the fact and the accomplice on the scene.

Mr. BROOKS. Any further comment on that particular article?

Is there not a new article on larceny or are there some changes in the old article on larceny?

Mr. SMART. That is article 121, Mr. Chairman.

Mr. BROOKS. Have you any comments you want to make on that?

Mr. LARKIN. Well, it has been observed, I believe, that it is not clear whether larceny under the provision of article 121 applies only if the intent to defraud or deprive a person of his property is a permanent deprivation.

I think that is perfectly true. It does not have to be a permanent one. It could be a temporary one as distinguished from permanent.

Mr. BROOKS. Would you say it takes in the case of embezzlement?

Mr. LARKIN. It does. The reason for this draft is to obliterate the distinction between larceny by trespass and trick and device and embezzlement and false pretenses.

Now, last year, in Public Law 759, this committee in its amendment to article of war 93, did erase the distinction between larceny and embezzlement. They did not go further and provide for false pretenses. This is an attempt to obliterate the technical distinction between not only larceny of both kinds, that is, trespass and trick and device, but embezzlement and false pretenses as well.

Since such a comprehensive article had not been defined in the statute of either the articles of war or the articles for the government of the Navy, nor was it defined by your committee last time we were of course forced to adopt a definition which we thought would do that.

Mr. BROOKS. But you have nothing here which indicates a crime of grand larceny?

Mr. LARKIN. No, sir.

Mr. BROOKS. As contrasted to petty larceny?

Mr. LARKIN. That is right. The military law has not had degrees of larceny in the fashion of civil courts where you have grand larceny in the first or second or third degree, depending upon the amounts.

Mr. BROOKS. Any questions, Mr. Elston?

Mr. ELSTON. Of course, you leave it to the court martial to affix such punishment as the court matrial may direct?

Mr. LARKIN. Exactly.

Mr. SMART. That is further limited, Mr. Elston, by your table of maximum punishments which prescribes that for property taken in such and such a value you will have a given maximum punishment. So it very closely follows, I think, the civilian concept of petite larceny and grand larceny.

Mr. DEGRAFFENRIED. Mr. Larkin, under the construction placed by the military authorities on false pretense, is that construed that

there must be a statement of an existing fact that is false that causes a person to be deprived of his property or can a mere promise to do something which he fails to do support false pretense?

Mr. LARKIN. I would have to look that up. I know in civil law it usually always is an existing fact rather than a promise.

Mr. ELSTON. Past or an existing fact.

Mr. LARKIN. Past or existing. That is right.

Mr. DEGRAFFENRIED. Well, that is not important enough to cause you any delay here.

Mr. LARKIN. I will look it up. But I am sure the past or existing fact rule applies.

Mr. ELSTON. Are you through, Mr. deGraffenried?

Mr. DEGRAFFENRIED. Yes, Mr. Elston.

Mr. ELSTON. Of course, you eliminated one of the elements of embezzlement, which is agency.

Mr. LARKIN. The fact that a clerk or an employee has lawful custody and then thereafter appropriates to his own use wrongfully with the intent to deprive is the same, I should say, under this, as it is under embezzlement.

Mr. ELSTON. Well, of course, in order to convict of embezzlement there has to be not only agency but the property must have come in to his possession by virtue of his agency.

The mere fact that he is employed by the Government or the fact that some property came into his possession would not make him guilty of embezzlement unless it came into his possession by virtue of his agency.

To illustrate what I mean: Say a man is a cashier. If property came into his possession as cashier and he appropriated to his own use he would be guilty of embezzlement.

But if he went across the aisle and appropriated money from some other cashier's cage he would not be guilty of embeezzlement but larceny.

Mr. LARKIN. That is right. But the question of agency hinges on the fact, does it not, that the custody he has over it is a lawful one? Whether it is a full-blown agent or whether it is an agent for purposes of custody is immaterial. It is the lawful custody.

Mr. ELSTON. Well, of course you can put any definition in that you want.

Mr. LARKIN. That is right.

Mr. ELSTON. But you are including three offenses in one: Larceny, embezzlement and obtaining property by false pretenses?

Mr. LARKIN. That is right.

Mr. ELSTON. And perhaps conversion also?

Mr. LARKIN. Yes.

Mr. SMART. This includes joy riding.

Mr. LARKIN. Yes, under this section a person who would drive the automobile of another, and not intend to steal it at all but just drive it, without consent of the owner, would be guilty under article 121.

Mr. LARKIN. That is right.

Mr. SMART. In that particular instance, Mr. Elston, the punishment will be limited in the table of maximum punishments, in the case of joy riding.

Mr. ELSTON. Well, I appreciate in military offenses you do not have to be as specific as you do in the civil courts because the statute in each case defines the penalty.

Mr. LARKIN. That is right.

Mr. ELSTON. Here you have a table of punishment which is to be construed in connection with the statute and I suppose you can put anything in the statute you want.

Mr. LARKIN. May I point out the present table of maximum punishments in connection with larceny provides that if it is concerned with property of the value of $20 or less the maximum punishment is 6 months.

In the event that it is concerned with property of a value of $50 or less and more than $20 the maximum is a year. And if it is concerned with property of the value of more than $50 the maximum is 5 years.

Mr. BROOKS. Did we put those tables of punishment in the record?

Mr. LARKIN. Well, you could. But they are to be drawn and provided as is the whole manual, by article——

Mr. BROOKS. Why would it not serve a good and useful purpose to put the tables in? They are not very long, are they?

Mr. LARKIN. Well, they are.

Mr. BROOKS. Well, never mind.

Mr. SMART. There are several pages, Mr. Chairman.

Mr. LARKIN. There are more than that.

They are to be provided, as you will recall, under the article where the President prescribes.

Mr. BROOKS. Sure.

Any further questions?

Any further comments from either you, Mr. Larkin, or you, Mr. Smart, on these articles?

Mr. LARKIN. No, sir.

Mr. ELSTON. Mr. Chairman, I would like to go back to article 119 which defines manslaughter. It says:

> Any person subject to this code who, without a design to effect death, kills a human being in the heat of sudden passion or by culpable negligence or while perpetrating or attempting to perpetrate an offense, other than specified in paragraph (4) of article 118, directly affecting the person, is guilty of manslaughter and shall be punished as a court martial may direct.

Now, what about an intentional killing while the slayer is in the heat of passion? Here you say "without a design to effect death."

You have some types of manslaughter where it is with an intent to kill.

Mr. DEGRAFFENRIED. But where there is an absence of premeditation, deliberation, and malice.

Mr. BROOKS. And in the heat of passion.

Mr. LARKIN. Well, there are variations among the statutes on that point. It probably can be divided into two schools of thought. The first is where you have a design to kill and it is preceded by premeditation and deliberation, which classically is common-law murder in the first degree.

Then you have the kind where you have the design to effect death and it is not preceded by premeditation and deliberation, which is usually murder in the second degree.

Mr. DEGRAFFENRIED. If malice is present.

Mr. LARKIN. You have murder, then, confined to those in which there is the intent to kill, that is, the design to effect death. Then you come to the next lower degree, if you will, and in this one school of thought, the heat of passion is such that it overcomes the intent to kill or negatives it so much that there cannot be said to be a design to consciously and intentionally effect death because of the disturbed state of mind in the heat of passion.

Mr. ELSTON. Well——

Mr. LARKIN. Then you have a so-called voluntary type in the heat of passion and involuntary type by negligence and so forth.

Then there is of course the other grouping where you have the conscious intent and design to kill, whether premeditated or otherwise, falling into murder in the first or second degree, or going forward (with the intent to kill in the manslaughter but the intent is so beclouded by the heat of passion that it is hard to say, even though you said it is an intent, the heat of passion has not removed entirely that intent because if you can clearly prove the intent to kill in an excited state but not in such a heat of blood or passion that it eradicated your intent, why, you would have been guilty of murder in the second degree rather than manslaughter in the first.

It is perfectly true that the different State jurisdictions have those "one or the other" styles. As a matter of proof, I think, it ultimately comes down to exactly the same thing.

Mr. ELSTON. I do not know that it does. My understanding is that if you kill in the heat of passion or upon sudden or great provocation and do it intentionally it negatives malice.

Mr. DEGRAFFENRIED. That is right.

Mr. ELSTON. But still the intent to kill is there. Now, this definition confines it to an unintentional killing at all times. If there is an intentional killing it is not manslaughter. And there are plenty of cases of manslaughter where the killing is intentional.

Mr. LARKIN. But there is not a design to effect death.

Mr. ELSTON. What is the difference between a design to effect death and intent to kill?

Mr. BROOKS. The design is where you get your premeditation?

Mr. LARKIN. Not necessarily.

Mr. ELSTON. No.

Mr. LARKIN. You may have a design to effect death which is preceded by premeditation and deliberation, or not. It might be on the spur of the moment, a conscious, specific design to effect the death without previous premeditation.

The heat of passion, as I understand it, to reduce below murder in the second degree must preclude the design to effect death. Otherwise, it is murder in the second degree.

Mr. DEGRAFFENRIED. What do you think about this, Mr. Larkin: Murder in the first degree is the killing of a human being with premeditation, deliberation, and malice; murder in the second degree is the killing of a human being with malice but without premeditation and deliberation; manslaughter in the first degree is the intentional, unlawful killing of a human being but without malice and without premeditation or deliberation.

Mr. LARKIN. Well, when you delete the malice from the intention, what have you done?

Mr. DEGRAFFENRIED. Well, the intent. You have the intent there.

Mr. LARKIN. You are intending an act mala in se and you say it is without malice?

Mr. DEGRAFFENRIED. Yes. The passion that you exist under at the time does away with the malice. You still have the intent to kill. But the heat of passion does away with the idea of malice and premeditation and deliberation.

Mr. LARKIN. Well, I cannot see the distinction.

Mr. ELSTON. I see the distinction. There are two grades of manslaughter, voluntary and involuntary, and your definition has completely ignored voluntary manslaughter where there is an intentional killing but there is no malice such as the killing of another in the heat of passion or upon sudden or great provocation.

Now, he intends to kill. There is not any question of an intent to kill. But he does not entertain malice. If he entertains malice, then it is second-degree murder and not manslaughter.

Mr. LARKIN. Well, it becomes a question of the proof, does it not?

Mr. ELSTON. Yes——

Mr. DEGRAFFENRIED. A jury——

Mr. ELSTON. But you have to find the crime, too, and if you want to include voluntary manslaughter, which is made punishable in every State of the Union, I think you would have to change your definition.

Mr. LARKIN. Well, it is not made punishable in New York, specifically, as such. That distinction that I pointed out first, of a design to kill, distinguishes murder in the first and second degree from manslaughter in the first and second degree which is without a design but in the heat of passion.

Mr. BROOKS. Well, I might say in my State we do not have such a crime as murder in the second degree. The crime is murder or manslaughter. And if the jury brings in a verdict of murder it can bring in recommendations for clemency, which is as close as we come to murder in the second degree.

Mr. LARKIN. Yes. Well, you certainly have your choice there.

Mr. ELSTON. Well, it would seem to me that the proper definition of manslaughter would be:

> Any person subject to this code who intentionally kills another in the heat of passion or upon sudden passion and without malice or unintentionally kills another by culpable negligence or while perpetrating or attempting to perpetrate an offense, other than those specified in paragraph (4) of article 118.

Of course, you ought to say "unintentionally." And you ought to say he unlawfully kills. It has to be an unlawful killing.

Mr. DEGRAFFENRIED. That is right.

Mr. ELSTON. You would not say that it was manslaughter to kill another unintentionally unless the slayer was violating the law.

Mr. LARKIN. Or by negligence.

Mr. ELSTON. Or by culpable negligence.

Mr. LARKIN. That is right.

Mr. ELSTON. He has to be violating the law. Suppose he is only violating a city ordinance? You cannot predicate it ordinarily on the violation of a city ordinance unless it is in those States where they recognize culpable negligence as being the basis for manslaughter?

Mr. LARKIN. Yes; where you have those automobile homicides.

Mr. ELSTON. Yes.

Mr. DEGRAFFENRIED. Some States hold that the doing of a lawful act—I do not know exactly how they define it.

Mr. LARKIN. I think a lawful act in an unlawful manner.

Mr. ELSTON. Or by unlawful means.

Mr. DEGRAFFENRIED. Yes.

Mr. BROOKS. What about that subsection (3), there, where a person intends to perpetrate a crime such as robbery but it results in unlawful killing?

Mr. LARKIN. That would be murder.

Mr. BROOKS. That would be murder?

Mr. LARKIN. That is right. Well, that is provided by (c): Robbery and the few other felonies we mention in article 118——

Mr. BROOKS. Oh, yes.

Mr. LARKIN. Would make it murder, whereas other——

Mr. BROOKS. You take it out of that group mentioned in subsection (4) and then it will be automatically manslaughter.

Mr. SMART. Yes.

Mr. ELSTON. I think you omitted one very essential element in manslaughter, too, in that his unlawful act must have been the proximate cause of his death.

Mr. SMART. I think that is a necessary ingredient.

Mr. ELSTON. It is probably not necessary in the definition?

Mr. SMART. That is right.

Mr. ELSTON. But I mention it since you do undertake to define the thing rather fully.

Mr. SMART. Yes.

Mr. ELSTON. I question your definition of murder too. You make it possible for a person to be guilty of murder in the first degree without even an intention to kill. You say [reading].

> Any person subject to this code who without justification or excuse kills a human being when he is * * * engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson, though he has no intent to kill.

Mr. SMART. That is a felony murder.

Mr. ELSTON. I never knew you could be guilty of murder in the first degree without an intent to kill.

Mr. SMART. Well, it is a statutory crime.

Mr. ELSTON. Out in Ohio it is not. You have to have an intent to kill to be guilty of murder in the first degree. You have to have an intent to kill and you have to have malice. And you have to have premediation except in those cases where it is your intention to kill while perpetrating or attempting to perpetrate rape, arson, or burglary.

Mr. LARKIN. Well, it is a felony murder. That is the typical felony murder in certain other States. I do not know about Ohio, Mr. Elston.

Mr. ELSTON. Well, do you want to send a person to his death where he unintentionally kills?

Mr. SMART. During the course of a robbery.

Mr. BROOKS. Intent is presumed in that case, is it not?

Mr. ELSTON. You may presume an intention from the manner in which he commits his act, but you cannot presume it from the mere commission of the act.

Mr. SMART. You have to prove the intent to commit the underlying felony and during the course of the commission of that underlying felony death results.

Mr. ELSTON. Murder results if he intentionally causes the death or if his act is of such nature that an intent can be inferred.

And a person is presumed to intend the natural, reasonable and probable consequences of his voluntary act?

Mr. SMART. That is right.

Mr. ELSTON. But you cannot assume that he intended to kill unless the circumstances indicate that the execution of his crime might produce death.

Well, just take, for example, a man burns down an old cow shed. He does not anticipate that anybody is in the shed and it happens that a tramp is sleeping there.

Now, he is not guilty of murder in the first degree, as he would be if he burned a dwelling house or a place where people are accustomed to congregate?

Mr. LARKIN. I think that would follow here, would it not?

Well, we have to go to our definition of arson to determine that, but that covers a dwelling house in which people are likely to be and not a structure in which they are not likely to be.

Mr. ELSTON. Well, you just s[illegible]" Arson is the unlawful burning of a building

Mr. LARKIN. "Aggravated arson" we say, and we have a definition for aggravated arson.

You see, in 126 we provide that—

> Any person subject to this code who willfully and maliciously burns and sets on fire a dwelling in which there is at the time a human being, or any other structure, water craft, or movable, wherein, to the knowledge of the offender, there is at the time a human being, is guilty of aggravated arson.

Now, that is the type of arson that is in the felony murder which would sustain a murder charge—not any other kind of arson.

Mr. ELSTON. Of course, you do not differentiate it with murder in the second degree here at all?

Mr. LARKIN. That is right.

Mr. ELSTON. Under this statute a person could be guilty of killing another without malice, without premeditation, and even without perpetrating or attempting to perpetrate rape, arson, robbery or burglary?

Mr. LARKIN. That is right. You see, the death penalty is not provided. The death penalty is provided only in subdivision (1), and then it is not mandatory.

Mr. ELSTON. Well, you do provide for imprisonment for life, though?

Mr. LARKIN. Subject to the maximum table. Well, one is the premeditated type of murder where it can either be the death penalty or imprisonment for life.

Mr. ELSTON. After reading it, you simply say that in section 1 he shall suffer death or imprisonment for life, as a court martial may direct.

In the others he is guilty of murder and shall suffer such punishment as a court martial may direct.

Now, does that not mean they could sentence him to death?

Mr. SMART. No.

Mr. LARKIN. They can sentence him to death only where it is specifically provided in the statute.

Mr. ELSTON. What is the court limited to, then? You say such punishment as the court martial may direct. What is the maximum?

Mr. LARKIN. What is set forth in the table of maximum punishments.

Mr. ELSTON. Well, what is that?

Mr. SMART. The maximum would be life.

Mr. LARKIN. Well, they would have to spell out what they are. I do not know that they have these separate subdivisions at the present time in the law.

Mr. ELSTON. Then under this definition you could not impose the death sentence if a person killed another while perpetrating or attempting to perpetrate rape, arson, robbery, or burglary?

Mr. LARKIN. That is right. It would be a felony murder. But you could not impose the death sentence.

Mr. ELSTON. Even though he intentionally killed?

Mr. LARKIN. Well——

Mr. SMART. Then you would revert to No. 1, I believe. You would revert to your premeditation.

Mr. ELSTON. You could have an intention to kill without a premeditated design to kill.

Mr. LARKIN. Then it would be under 2, would it not?

Mr. ELSTON. Yes; but under 2 you cannot impose the death penalty.

Mr. LARKIN. That is right.

Mr. ELSTON. You cannot impose it under 3 or under 4?

Mr. LARKIN. That is right.

Mr. ELSTON. You may have the most aggravated rape case in the world. A fellow may rape a 9-year old child and kill the child in the perpetration of his act and even do it intentionally, and if he did not do it with premeditation and deliberation which must exist for some period of time before the killing takes place, he could not be sentenced to death.

Mr. LARKIN. That is right. And he could not in a civil jurisdiction. It would be murder in the second degree.

Mr. ELSTON. Oh, no. In a civil jurisdiction if you have intent to kill plus the element of having killed while perpetrating any one of those felonies it would be a crime guilty of murder of the first degree?

Mr. LARKIN. That is right, but that would be on the theory of the felony murder, would it not?

Mr. ELSTON. Well, if he intentially kills while perpetrating or attempting to perpetrate rape or arson, robbery or burglary without premeditation and deliberation, he is guilty of murder in the first degree and may be sentenced to death?

Mr. LARKIN. That is right.

Mr. BROOKS. Now, in most civil jurisdictions, anyway, where you have the crime of rape you have the death penalty.

Mr. SMART. You have in this code, in article 120.

Mr. DEGRAFFENRIED. And even for armed robbery you have a capital offense.

Mr. ELSTON. Suppose it is an attempted rape on a 9-year-old child and it is not consummated. The attempt can be just as bad almost as the rape itself.

Mr. LARKIN. That is certainly true, except that I think the standard application of punishments in attempts is less than in the consummated crime.

Mr. DEGRAFFENRIED. Well, under your military law, how long does premeditation or deliberation have to exist? In our jurisdiction it only has to exist for an instant.

Mr. LARKIN. I think that is the typical standard.

Mr. DEGRAFFENRIED. And it becomes a jury question as to whether that deliberation or premeditation did exist. On a 9-year-old child he could not claim he was acting in self-defense. And, if it became a question of fact as to whether he was or not, they would in all probability decide that he was acting with premeditation and deliberation, would they not?

Mr. LARKIN. I think the courts have pretty generally held that to be not much more than a fleeting instant. But it has to be some instant.

Mr. BROOKS. Any further discussion?

If there is no further discussion——

Mr. ELSTON. Well, it seems to me, Mr. Chairman, your murder statute is a little mixed up. Is this the way it is in the law now?

Mr. LARKIN. No. (1) and (2) are the law; (3) is not; and (4) is held to be applicable, although (4) is a statutory type of murder, and I do not know the extent to which it has been used.

I do not think it has been used much at all.

Mr. BROOKS. We might do this: If this is the only article that we have in question, we could pass this over until Monday and let everybody study it and think about it.

Mr. DEGRAFFENRIED. I think that is a good idea.

Mr. ELSTON. That may be a good idea. The point I am making is this: I do not know of any State in which you punish a person for murder unless he intentionally kills, and yet you say here he may commit murder without intending to kill. Now, I grant you the intent may be inferred, but in your definition you have an intent to kill, and you have ignored one type of manslaughter which is certainly prevalent in virtually every jurisdiction in the United States.

You have not defined the two types of manslaughter. I do not know why the death penalty should not be invoked in cases where the person is committing an aggravated felony and intends to kill although there is no premeditation and deliberation. Suppose a man sets fire to a barracks in which there are a lot of soldiers quartered and did not intend to kill anybody in there, did not even know there was anybody in there; the intent is inferred there, of course, but the court would have to tell the jury that the intent would either have to be present by inference or directly.

Suppose he accidentally set fire to it; he would not be guilty of murder.

Mr. BROOKS. Well, suppose we do this: Pass 118 and also 119 over until Monday, and we can think about those two statutes over the week end.

I do not follow everything that has been said here, because in my State we do not have a distinction between the two, nor do we in manslaughter. We have a very simple manslaughter definition. We do not read in two types of manslaughter. It is either manslaughter or it is not manslaughter.

And our punishment for manslaughter varies from 1 day to 20 years, at the option of the judge.

But, at any rate, if there is no objection we will pass it over until Monday.

That will be one thing we can take up. Now, is there any other article or articles under this section of the code that is subject——

Mr. ELSTON. What about your definition of rape?

Any person subject to this code who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape.

Suppose it is a child, say a child of 15, who does consent but in law lacks the intelligence to give consent. The way your definition is drawn here she could be 6 years old; if she consented there would be no crime of rape.

Mr. LARKIN. I think not. I think that would be a constructive lack of consent.

Mr. ELSTON. I do not think that would be constructive lack of consent. Statutes all fix an age limit. In some States it varies.

Mr. LARKIN. That is right.

Mr. ELSTON. In some it is 16; and in some, 15. In some States they have even gone so far as to make it 18.

Mr. DEGRAFFENRIED. In some States it is a capital offense where the child is under 12 years, and where the child is over 12 and under 16 you have it a felony but provide for a sentence of, say, not less than 2 nor more than 10 years.

Mr. SMART. The age of consent.

Mr. DEGRAFFENRIED. Yes. And they have held this—I have a brief on it which I think I mentioned the other day—you can indict a man for rape.

Of course, they call that other offense sometimes statutory rape, though we call it carnal knowledge.

Carnal knowledge of a child under 12 is a capital offense. Carnal knowledge of a child over 12 but under 16 is a felony with 2 years minimum and 10 years maximum.

But, when you speak of rape ordinarily, you carry with it the idea of force. In the other you do not. They have held that, where a man is indicted for rape and the child is over 12 and under 16 or under 16 and the evidence shows that she consented to it, the element of force being absent, the jury might acquit him.

But you could still turn around and indict him for carnal knowledge of a child under 16, which does not involve the element of force, and try him for that offense, and it would not be a form of jeopardy. I do not know how you define it in military law. You may define rape as rape or constructive rape. And the rape may include all of that. But usually when you speak of rape the thought you have is the idea of force.

Mr. ELSTON. How is it defined now?

Mr. LARKIN. Rape?

Mr. ELSTON. In the military.

Mr. LARKIN. Well, there is no statutory rape in the first place—I mean no age of consent or lack of consent.

Mr. ELSTON. Well, since you are trying to set up a statute, do you not think you ought to include rape with consent?

Mr. LARKIN. Or to enumerate the age of consent?

Mr. ELSTON. Yes.

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Mr. deGraffenried. Yes. Suppose it is some little child 10 years old——

Mr. Larkin. The way the practice has been so far, apparently, carnal knowledge, with her consent, of a female under the age of consent, commonly called statutory rape, is not an offense under this article but may be an offense under article 96. That is the general article which is here now as 136, I think.

Mr. Smart. And for which the death penalty may not be imposed.

Mr. Larkin. The definition in the manual at the present time is—

Rape is the unlawful carnal knowledge of a woman by force and without her consent and may be committed on a female of any age. Force and want of consent are indispensable in rape, but the force involved in the act of penetration is alone sufficient if there is no consent.

Mr. deGraffenried. Do you think you can prosecute under the general section where you have undertaken to define an offense? For instance, in article 120 you have attempted to define the offense of rape. Now, if you have a rape-with-consent case and you undertake to prosecute under the general section that you referred to, might not the question be raised that, since you have undertaken to define rape, you cannot prosecute for any other type of rape?

Mr. Larkin. For a lesser included offense, you mean, such as carnal knowledge?

Mr. deGraffenried. Well, that is not an included offense. I mean rape with consent is not an included offense to rape without consent.

An included offense is one that has to be committed in order to commit the ultimate crime. Rape with consent is only applicable where the child is under a certain age and there is consent. You cannot have consent and lack of consent both.

Mr. Larkin. That is right.

Mr. deGraffenried. What is the number of that general statute, Mr. Larkin? You said 136?

Mr. Smart. Article 134 is the general statute.

Mr. Larkin. Yes.

Mr. Smart. You will notice that life imprisonment is the maximum penalty which can be assessed for any offense under this article.

Mr. Brooks. I think that is a serious question. When we were over there in Europe during the course of the war, I recall that they had more trouble with that situation than any other. I went to the Judge Advocate General's office in Paris, and he had 150 capital cases on his desk at that time, and he was very much disturbed about it.

Mr. Larkin. Well, as I say, this definition was not in the statute. It was the one applied by virtue of the regulations, and if there was consent or the age of consent—and I take it they applied the local age of consent in the community, whether it was 16 or 14 or 18—if there was consent and the person was under that age limit, then, as I say, they tried it under 96—not calling it rape, but calling it carnal knowledge—setting out the specifications of the acts alleged.

Mr. Brooks. But that is not a capital offense; and it does not seem to me to make sense to say that if they are above the age of consent it will be a capital offense, but if it is a little child under the age of consent there will be no capital offense. If anything, it seems to me the latter would be more aggravating.

Mr. Larkin. Well, you have, I suppose, any number of girls just under the age of consent who freely consent and have no qualms or

misgivings about it. You say that is more aggravated than the type where there is no consent?

Mr. ELSTON. Usually a great deal of latitude is allowed, so that if you do have a case—a girl of 15 might look like she is 20——

Mr. LARKIN. That is right

Mr. ELSTON. The accused would not be given a very severe penalty?

Mr. LARKIN. That is right.

Mr. ELSTON. On the other hand, you may have a very young child who obviously is incapable of consent and it may be the most atrocious case in the world.

Mr. LARKIN. Yes.

Mr. ELSTON. Now, it seems to me if you had article 134 which is a general article and you had not defined rape at all it would include rape of all kinds and descriptions.

But when you undertake to define a crime, it seems to me you ought to define all elements of the crime and define it clearly, because you say in the general article, "Though not specifically mentioned in this code" all other offenses may be prosecuted.

Now, you do specifically menton rape

Mr. LARKIN. Yes; with this element: Without her consent.

Mr. ELSTON. Well, that is not a very clear way to do it. If you are going to define rape, let us define it the way it ought to be defined.

Leave this off the record for a moment.

(Discussion off the record.)

Mr. BROOKS. On the record.

Mr. LARKIN. I do not know why they never stated an age in the past. I suppose it is because soldiers are in so many jurisdictions in which there are so many different ages and to select one which is materially different from the local jurisdiction one way or the other inflames the local people.

In other words, if we set 16 or 14 and the local State is very much distressed that he has taken advantage of sombody who is 17 because they think that she ought to be protected until she is 18.

I assume that is one of the problems, or has been.

Mr. ELSTON. You could say the statutory age applicable to the jurisdiction in which the offense is committed, or something like that.

Then you would have fixed an age.

Mr. LARKIN. You probably could do that, which puts the burden, I suppose, on the soldier finding out just what the age is in every State, jurisdiction, and country he is in.

Maybe you should. I am not saying that that is a reason, but it is not very informative.

Mr. ELSTON. Of course, ignorance of the law is no excuse.

Mr. LARKIN. I know.

Mr. BROOKS. Just off the record, Mr. Reporter.

(Statement off the record.)

Mr. BROOKS. But could not we do this, work out some arrangement where a statutory offense of that sort might carry with it the penalty of death? Now, it seems to me—I read in the press fairly recently that the services had decided to abolish rape as a capital offense crime.

Is that right?

Mr. LARKIN. I think so.

Mr. SMART. It does not make the death penalty mandatory as has heretofore been the case. It prescribes death or such other punishment as a court martial may direct.

Colonel DINSMORE. You see, Mr. Chairman, that was thought out carefully in the Elston bill.

Prior to that time the death penalty was mandatory on conviction for rape. It is recognized that there are all degrees of culpability from a very serious situation down to a borderline case. So the law was changed at that time to provide a lesser penalty than death. But the death penalty is still permissive.

Mr. BROOKS. What did they do during the war, because in every case the death penalty was not imposed? Was it by the use of pardon power? I am asking the Colonel if he knows.

Colonel DINSMORE. It would have to be commuted, Mr. Chairman, by the President at the time.

Mr. BROOKS. Was it not done by the field commanders?

Colonel DINSMORE. Yes, sir; they had that authority, too. A theater commander——

Mr. BROOKS. Under special act of Congress?

Colonel DINSMORE. Yes, sir. It was in the Articles of War at that time.

Mr. ELSTON. Colonel, when we wrote that law last year we proceeded a little bit differently than we are proceeding now. For example, in article 93 we provided—

Any person subject to military code who commits manslaughter, mayhem, arson, burglary, or robbery—

we enumerate a great number of crimes—

may be punished as a court martial may direct.

Colonel DINSMORE. That is correct, sir.

Mr. ELSTON. Now, by that simple statement you go back to your definitions of the crime. And you had a clear definition of the crime and you did not have any trouble about it. As I see it, the trouble arises now by reason of the fact that you are undertaking to specifically set forth the elements of a crime but leaving out some of the elements. You might get in some trouble there because somebody is going to raise the question, "You have defined rape and I am not guilty of rape because the woman consented even though she was 12 years old," and I am not sure that he would not prevail.

Mr. SMART. I would like to point out in that connection that you have to take into account the fact that our troops are in many different countries in a wartime situation and even today in a peacetime situation and whereas in the ordinary and usual jurisdiction in this country the age of consent we will say is 16 years it is a fact that the age of consent is 12 in other countries, so that it would be, I think, too stringent to write out in this code that our troops would be subject to a charge of statutory rape involving a girl 15 years old when as a matter of fact in some countries she can give her consent at the age of 12.

Mr. ELSTON. Now, Mr. Smart, I agree with you. But the way we had the bill written last year you would not have any trouble, because we say any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court martial may direct.

Then you could always go back and see what rape was in that particular locality. But once you try to spell it out and set forth the elements of the crime and leave some of the elements out it leaves it

open. I do not see how you are going to prosecute a person for rape if you do not prove all the elements that you have set forth in the definition.

Mr. SMART. Well, on this proposition of statutory rape, of course the way the Army has handled that is to follow the District of Columbia procedure of wrongful carnal knowledge with a female under the age of 16.

The table of maximum punishments prescribes a maximum punishment of 15 years.

Mr. BROOKS. Would it be better to insert a separate article there and refer to it as carnal knowledge and giving latitude so that in any jurisdiction that fails to punish statutory rape there would be no crime or offense and in those jurisdictions that make the punishment the penalty shall be death or such other punishment as the court-martial might prescribe?

Mr. LARKIN. Well, you could spell out a carnal knowledge offense which is less than this and that would cover the suggestion, would it not, Mr. Elston?

Mr. ELSTON. Well, you could either spell it out or leave it like it was last year. If you had it the way it was last year you would not have any trouble.

Mr. LARKIN. Except that the way it was written you refer for the definition to some place else—some manual.

Now, we have two manuals. We are going to have to write in the manual one single definition for everybody. You face the same problem ultimately. There are variations in the manuals, you see, as to just what the definition is, and the elements of each of these crimes.

Last year you were dealing with one service only. Now, in this one specifically I do not think there is any major difference. The naval courts and boards use the Federal definition as contained in 18 U. S. Code 457 and 458, which I do not have before me, but which is further spelled out and it says—

It is the having of unlawful carnal knowledge by a man of a woman forcibly where she does not consent"—

which is, I think, substantially the same as the Army in different words.

It says "of a woman," however. Presumably it could be his wife, under this. But you see, there is that difference in the first place. Then it goes on to say, if the female is under the age of 16, and they adopt 16 as being the Federal age, I believe—

unlawful carnal knowledge of her completes the offense set out and her consent is immaterial.

So you do have a problem of resolving the differences in the Army and Navy and in the case of punitive articles it can only be done by definition.

I think for that specific problem, though, a spelling out of carnal knowledge would help.

To complete the record or correct it, it goes on to say further—

Carnal knowledge will be unlawful in such a case unless the female is the wife of the man.

Mr. BROOKS. It seems to me the best thing to do would be to put in a subsection (c) there.

Mr. ELSTON. I think you almost have to do it. If you are going to undertake to define a crime you better define it all the way.

Mr. BROOKS. Unless there is objection, then, why not ask Mr. Smart and Mr. Larkin to work up a definition for carnal knowledge that we can take up Monday?

Mr. LARKIN. Well, we will, Mr. Chairman.

Mr. BROOKS. Now, is there any further discussion?

Mr. LARKIN. There are two new articles that I think should be brought to your attention. The first is 87.

Mr. ELSTON. What number?

Mr. LARKIN. Eighty-seven.

Mr. BROOKS. Would you want to read that one?

Mr. SMART. Eighty-seven. Missing movement. (Reading:)

Any person subject to this code who through neglect or design misses the movement of a ship, aircraft, or unit with which he is required in the course of duty to move shall be punished as a court-martial may direct.

References: AW 61; Proposed AGN, Art. 9 (57).

Commentary: This article is taken from proposed AGN, Article 9 (57) and is, in effect, an aggravated form of absence without leave as set forth in AW 61.

Mr. LARKIN. Now, I say that is new, Mr. Chairman. It really is an aggravated form of absence without leave, but the type of absence without leave which is specifically connected with the circumstance of missing a ship or a unit when it is about to move.

Now, the experience of World War II was such that in a large number of cases persons who were either legitimately on leave or those who were not or who left without authority, did so just about the time that their ship was to sail or their unit was to move.

It is considerably more serious for a man to be absent at that time than to be absent under other circumstances.

It was felt that it is desirable and necessary to spell out those circumstances and facts in a specific article.

I would expect that the maximum sentence for this type of absence without leave would be heavier than an absence without leave that takes place in different circumstances.

Mr. BROOKS. Do you think that article ought to include other things besides ships and aircraft—for instance, vehicles?

Mr. LARKIN. Well, or unit.

Mr. BROOKS. You could strike out "ships and aircraft" and put "unit" and leave it alone, but if you start to denominate the types of vessels, had you not better cover all of them?

Mr. LARKIN. Well, I think if he missed the movement of a truck it would not make any difference unless his whole unit was moving up front or overseas or wherever else they were going.

So I think that would not cause the trouble you expect.

Mr. BROOKS. It did not in the last war, but you might have a case where you do not have to go overseas.

Mr. LARKIN. Well——

Mr. BROOKS. I just put that out to you.

Mr. LARKIN. Yes.

Mr. BROOKS. It seems to me that you are just doing the same thing you did in the other article and that is leaving it incomplete.

Mr. LARKIN. I think that is as complete as it can be.

Mr. SMART. What is your other article?

Mr. LARKIN. The other article is 105.

Mr. SMART (reading):

ART. 105. Misconduct as a prisoner.

Any person subject to this code, who, while in the hands of the enemy in time of war—

(1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or

(2) while in a position of authority over such persons maltreats them without justifiable cause;

shall be punished as a court martial may direct.

References: None.

Commentary: This article is new, and stems from abuses of this nature arising out of World War II.

Mr. LARKIN. This article, Mr. Chairman, I think is self-explanatory. It provides for those circumstances which were found in the Hirschberg case, for instance.

And there were other cases of that character. Heretofore, they have been tried, I believe, under the general article.

There apparently was enough of this kind of conduct to warrant that it be specifically made an offense and not just left to the general article.

They are the only two I wanted to bring to your attention.

Mr. BROOKS. We have held open the article covering murder, manslaughter, and we have indicated the necessity, perhaps, of an additional subdivision under the rape article.

Article 77 was amended and the committee has approved the amendment.

Now, if there are no further comments on these punitive articles we will just adopt them as they are read, with those reservations which I have indicated.

Now, what is the pleasure of the committee? Shall we proceed with the discussion on to the end of the bill?

Mr. SMART. I would, if I may, Mr. Chairman, point out that the remaining articles from 135 to 140, inclusive, are a restatement of existing law, substantially speaking, except in the case of article 139, which is redress of injuries to property. This article has been cut down from the present article of war in view of the definitions of larceny and forgery now contained in the code.

I think there is no question about those articles, except on article 140: The authority for the President to delegate authority vested in him under this code.

The general criticism was made that that was much too broad. I think the general intent is that he would be authorized to delegate administrative authorities granted under the code but not judicial authority.

If that is the feeling of the committee it could be very easily rectified by inserting the word "administrative" in there. I would like to hear from the departments, however, as to their reaction.

Mr. BROOKS. What do you think, Colonel?

Mr. LARKIN. Well, may I explain the origin of this article? We had not thought of it ourselves. We included it in the code at the request of the Bureau of the Budget, and they recommended that we adopt this article verbatim from the Public Law 759, title I. Title I, as you

will recall, had to do with selective service and this provision is contained therein in exactly these words.

So we provided this article at their request.

Now, I think despite this authorization the President cannot delegate judicial acts, perhaps even legislative acts. So it is effective only to the extent that it is an administrative act.

I think they have to be studied on a case-by-case basis as they come up.

But it was the desire of the Bureau of the Budget to provide an appropriate flexibility in the future if it appears that it is desirable for the President to delegate some of his duties under the code.

Now, that is the source of it.

Mr. SMART. I think that the particular criticism goes to the subdelegation. My understanding now as to the Army is that he may delegate one time but no more.

Now, this provides that he may delegate and subdelegate.

Mr. LARKIN. I see no reason why he should not, if it is a nonjudicial act. In other words, he might want to in the first instance delegate it to the Secretary of Defense just because the Secretary of Defense is the chief official in the whole National Military Establishment, but the Secretary of Defense's chief function is a policy one and not an operating one and while the President might desire to look to him and hold him responsible he may not desire to have him operate as well and might be perfectly willing to have him subdelegate it to a departmental secretary, holding the Secretary of Defense is responsible.

I do not know that from purely an administrative point of view that is objectionable.

Mr. BROOKS. I personally think that the President ought to be allowed to delegate all of the authority which he feels like should be delegated.

Mr. LARKIN. I think so. If there is any authority that is judicial and that is nondelegable that is a question for the Attorney General, I should say you have to scrutinize any and every attempt to delegate based on what you are trying to delegate.

As I say, again, if it is judicial or even legislative, I should think he would request and be guided by the opinion of the Attorney General in that case.

Mr. BROOKS. Any objection to that article?

If not, we will approve it as read.

Mr. SMART. That completes all of section 1 except article 67, review by the Judicial Council.

Mr. ELSTON. Then, of course, we have reserved for discussion the matter of a separate corps.

Mr. LARKIN. Oh, yes.

Mr. SMART. That is the last item of business, I hope.

Mr. BROOKS. Are there any other reservations that we could take up? What about article 3? Are we prepared to dispose of that? Can we do that now and leave the Judicial Council and the command influence until Monday, together with those three articles that we have bypassed?

Mr. SMART. Well, I would direct your attention, Mr. Chairman, to page 4 of the bill, article 2, subdivision (3) and (4). Now, the committee has passed action on both of those and I have some language here which is suggested as a substitute for the language in subdivision (3).

Strike out lines 24 and 25 on page 4 and substitute—

Reserve personnel, while they are on inactive duty training——

Mr. BROOKS. Just a moment. Is it long?

Mr. SMART. Well, it is about five lines.

Mr. BROOKS. Can you go a little slower so we can write it down?

Mr. SMART. I doubt if you can write it all on there, Mr. Chairman. You may be able to:

Reserve personnel, while they are on inactive duty training authorized by written orders which are volunatrily accepted by them, which orders specify that they are subject to this code.

Now, Mr. Chairman, this makes it clear that Reserve personnel who are merely wearing the uniform, taking correspondence courses and things of that character are not subject and it very clearly points out that they will only be subject when they are on duty as a result of written orders which they voluntarily accept and which orders plainly tell them that they are subject to the code.

I think that that is ample protection for any reserve.

Mr. BROOKS. I think that will meet the objection made heretofore in these hearings.

What do you think, Mr. Elston?

Mr. ELSTON. It would seem to.

Mr. BROOKS. Then, if there is no objection, we will adopt that language.

Mr. SMART. Now, I would call your attention to the top of page 5, subdivision (4). This is not a matter of amending the wording used. It is a question as to whether or not, as a matter of policy, you think that retired personnel of a Regular component who are entitled to receive pay should continue to be subject to the code.

They are now. The question is, will they continue to be or not?

Mr. BROOKS. Your recommendation, Mr. Smart, is that they should be retained as subject to the code?

Mr. SMART. I am reluctant to say, Mr. Chairman, what my recommendation would be.

I would point this one thing out to you: It seems a little inconsistent to me that retired personnel of a Regular component are subject when as a matter of fact you have non-Regular personnel in the Navy who are on the same retired list and entitled to the same rights and benefits as the regular.

The Navy apparently here has waived their right to their jurisdiction, so that the retired non-Regular Navy officer, even though he is on the retired list of the Navy will not be any more subject to the code than the non-Regular Army officer who is drawing retirement pay from the Veterans' Administration.

It is treating reserves alike, I will admit, but it is treating two classes of people on the same retired list differently too.

Mr. BROOKS. The Congress put this retirement under the Veterans' Administration so as to get it away from the active service.

Mr. SMART. That was by virtue of an Executive order, sir, of the President. When the retirement law was passed—the act of April 3, 1939—it pertained to Reserve officers of the Army and the Air Force.

It was silent as to who would administer the benefits. The Army had fought the bill all the way through. So on the 27th of April, after the passage of the act on April 3, 1939, the War Department prevailed

upon the President to issue his Executive order, I think No. 8077, which transferred that responsibility to the Veterans' Administration.

The following August of 1940, an almost identical act was passed covering Reserve personnel of the Navy and providing for the retirement for disabilities incurred in service of more than 30 days' duration.

That act was likewise silent as to who would administer the benefits.

The Navy undertook to administer it themselves.

As a consequence, the Reserves of the Navy are on the same retired list as the Regulars and paid from naval appropriations.

Mr. BROOKS. Now, last year in the retirement bill which we passed we failed to act on that, did we?

Mr. SMART. That is correct, sir. You have not disturbed it, sir.

Mr. BROOKS. We discussed it at length, I recall that.

Mr. SMART. That is correct. It could be altered in the next 15 minutes by the President either by issuing an additional Executive order transferring all those Reserves from the Army or the Air Force who are at the Veterans' Administration back to the Army or by taking the Navy Reserves away from the retired list of the Navy and transferring them over to the Veterans' Administration too.

Mr. BROOKS. Well, if there is no motion and no suggestion to the contrary, as a part of the suggested bill here—they are being paid as Reserves and furthermore, it is a part of the present law, is it not, and has worked all right, has it not?

Mr. SMART. I——

Mr. BROOKS. Then, if there is no objection, we would like to include that.

Mr. SMART. I would next like to direct your attention to article 3 (a), which came in for a lot of criticism. I think the ultimate opinion of the committee was that Reserves should continue to be subject to trial, for offenses committed while they were on active duty, even after they had returned to an inactive status if the offense were a serious offense and if the civil courts of this country, either State or Federal, had no jurisdiction to try the case.

With that understanding there is some proposed language to accomplish that. May I read it, sir?

Mr. BROOKS. Will you read it?

Mr. SMART (reading):

> Subject to the provisions of article 43—

this will be too long to write down, Mr. Chairman—

> any person charged with having committed an offense against this code punishable by confinement for 5 years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia while in a status in which he was subject to this code, shall not be relieved from amenability to trial by court-martial by reason of the termination of such status.

Now, that will get the Hirschberg case where he reenlisted. It would get Hirschberg even though he had not reenlisted.

Mr. BROOKS. That will close up that loophole?

Mr. SMART. In my opinion it will, sir.

Mr. BROOKS. What is your opinion?

Mr. ELSTON. I am inclined to feel it would.

Mr. BROOKS. All right, if there is no objection, then, we will adopt that language.

Will you make, Mr. Smart, copies of that amendment so we could place it in our manuscript and have it available?

Mr. SMART. Yes, sir.

Mr. BROOKS. Make enough copies so the other members can have it, too.

Mr. SMART. Yes, sir.

I would like to call your attention next to article 15, for some better language than that adopted there.

On page 14, subdivisions (E) and (F), we have tentatively decided to use the words "When assigned to or aboard ship."

There is a little better language, which is as follows:

if imposed upon a person attached to or embarked in a vessel.

Mr. BROOKS. That is under what subdivision?

Mr. SMART. On page 14, line 15, subdivision (E).

Mr. BROOKS. Read that again.

Mr. SMART (reading):

if imposed upon a person attached to or embarked in a vessel.

And those same words would be repeated in subsection (F), at the beginning of the section in either case.

Mr. BROOKS. In both cases it will be at the beginning of the section?

Mr. SMART. Yes, sir; in section (E) immediately before the word "confine," and in section (F) immediately before the word "confine."

Mr. BROOKS. That seems all right.

Is there any objection to that?

If not, that verbiage will be adopted.

Mr. SMART. On page 22, article 25, there was some discussion by the committee as to the choice of words. It involves whether or not we would continue to use the word "competent" in line 6, line 10, line 16, and line 25. It has been concluded that it would be perhaps clearer if we would substitute the word "eligible" for the word "competent" in each of those cases.

I think that will meet the objection which was raised by the committee.

Mr. BROOKS. What page is that?

Mr. SMART. On page 22, in article 25. It occurs in four places: first on line 6, line 10, line 16, and line 25.

Mr. BROOKS. That ought to meet with your approval, Mr. Elston.

Mr. ELSTON. Yes.

Mr. BROOKS. If there is no objection, then, those four changes will be made in article 25.

Mr. SMART. The next suggestion, sir; is in article 27, on page 25, in subsection (b) (1). There was some discussion as to the qualifications of counsel.

I would suggest this wording which I think will meet your objections: On page 25, line 5, delete the words "a person who is" and following the word "guard" in line 5, insert "who is a graduate of an accredited law school."

Mr. BROOKS. So that will read this way—let us see if we have it straight—subsection (1):

shall be a judge advocate of the Army or the Air Force or a law specialist of the Navy or Coast Guard who is a graduate of an accredited law school or is a member of a bar of a Federal court or of the highest court of a State.

Mr. SMART. That is correct.

Mr. BROOKS. "; and."

Mr. SMART. Now, in line 6 strike the word "and" and insert "or shall be a person who is a member of the bar of a Federal court or of the highest court of a State and";

Mr. BROOKS. Any further suggested changes in that article?

If not, and there is no objection to those suggested changes, we will adopt those.

Mr. SMART. The next article is article 30, on page 27. It involves the wording in subsection (b) beginning on line 15. The particular suggestion was that we notify the accused forthwith. You will probably recall the practical difficulty we get into there since the accused may not be in custody and it is impossible to notify him forthwith.

Now, if he is in custody you can. It is my feeling that if this committee will clearly endorse the opinion that it is intended by these words that if the accused is in custody he will be forthwith informed of the charges against him and that if he is not in custody he will be so informed as soon as practicable after he is returned to custody, I think no additional words are necessary—if you will endorse that which I have just said and if that is your intention.

Mr. BROOKS. I think that is the feeling of the committee. You would do it by references to the hearings?

Mr. SMART. Yes, sir. It is very cumbersome, Mr. Chairman, to insert other words in there without belaboring the intent of this particular article.

Mr. BROOKS. Any objection to that?

Mr. ELSTON. No.

Mr. BROOKS. If there is no objection to handling it that way, we will then endorse the interpretation which Mr. Smart has just placed on the meaning of the latter part of that article.

Mr. SMART. The next suggestion, sir, occurs in article 31, on page 28, subsection (c). We passed that due to the objection of Mr. Elston, who thought that it was too broad. May I suggest that beginning on line 12 and continuing on line 13, you delete the words "or for use before," which will clearly limit the use, in this case, to trials before a military tribunal.

I think that was the point that you wanted.

Mr. BROOKS. Is that all right with you?

Mr. ELSTON. Yes.

Mr. BROOKS. If there is no objection, we will adopt that suggestion.

Mr. SMART. The next one is in article 43: The statute of limitations, on page 36, subsections (b) and (c).

You will recall that I raised an objection to the particular wording here because I felt that it was a nebulous place to hook on the statute of limitations by having charges and specifications received by an officer having summary court-martial jurisdiction over the command.

I doubt that I had as complete an understanding of the situation at that time as I now have. I find that in the event of, we will say a Navy enlisted person, if he is A. W. O. L. in excess of 10 days he goes into a straggler status and if he continues to be A. W. O. L. for as much as 30 days he then goes into desertion and his file goes to the Chief of the Bureau of Personnel.

Is that correct, Captain Woods?

Captain WOODS. Yes.

Mr. SMART. Now, in the case of Army and Air Force personnel the thing that we were concerned about was, I think, deactivated units—who was going to operate in those cases—and I now find that in the event a unit is deactivated they must process the records of every man and if they have certain men who are absent in desertion or are A. W. O. L. they transfer them as an administrative process to another unit then in existence so that the language here, I think, would be broad enough to cover it and I hope will keep it from being a desk-drawer operation.

It is a very difficult situation. I do not think it is very practical, in that I do not think it is going to be used very much.

So whether you adopt this or not I do not think you have hurt or helped much in any event.

So to leave it as it is I believe would be generally acceptable.

Mr. BROOKS. If there is no objection, we will approve that suggestion.

Mr. SMART. My next inquiry goes to article 50, on page 42. There again I think the point was raised by both the chairman and by Mr. Elston.

Beginning on line 16 on page 42, after the word "admissible" the committee had already approved the insertion of these words: "under the rules of evidence," so that it must have been admissible under the rules of evidence.

Now, the next point that you raised was that it must be confined to the issues which were raised at the court of inquiry. Now, in order to accomplish that I would suggest that on line 19 after the word "inquiry" insert "and if the same issue was involved."

Mr. BROOKS. Would that be "were" or "was"?

Mr. SMART. "And if the same issue was involved."

Mr. BROOKS. "Was" involved?

Mr. SMART. Or if you want to make it in the plural: "issues were involved. '

Mr. BROOKS. I think that covers the matter we were discussing at that time. If there is no objection, then, we will adopt that wording.

Mr. SMART. The next inquiry, sir, goes to article 57 on page 47, in subdivision (a). The question was discussed as to whether or not some latitude should be given which would make it possible for the dependents of a convicted enlisted person to continue to draw allowances. The Navy had indicated previously to the committee that they do that now as an administrative matter. This to me is purely a matter of policy. I do not feel that it is an appropriate provision for statutory law.

I do not know how you are going to define as a matter of law a meritorious case.

Now, as of this moment the Secretary of the Army and the Secretary of the Air Force can follow present Navy procedure, which we assume is legal.

They are doing it by virtue of policy within the Navy Department but it does not go to the forfeiture, however, in the Navy. What they do is to remit enough of the forfeiture of pay so that the enlisted man will have $22 left and thereby he can match the Federal contribution so that his wife can get $50.

I am strongly of the feeling that this involves too many issues of human relations and everything else for the committee to go into as a statutory proposition.

However, I naturally abide by your wish. I would leave it as it is, Mr. Chairman.

Mr. BROOKS. Have you any suggestions, Mr. Elston?

Mr. ELSTON. No.

Mr. BROOKS. Why could not a sentence be added to that subsection which would say that nothing herein shall be construed to prevent the remission by the Department of that pay of an enlisted man necessary to permit the payment to meet the Federal contribution for the payment of dependency allowances?

Mr. SMART. Well, I would think there are two points to your question, sir. One is that they appear to have that authority as of this moment and even if you wrote it into law you would not affect the policy that the respective departments might want to adopt.

They can do it right this minute if they so desire as a matter of policy.

Mr. BROOKS. You would not be changing the policy but you would be indicating the attitude of Congress, which will be fairly strong in reference to indicating some sort of a policy of that sort.

I feel very strongly that the service injures itself considerably in the failure to adopt that policy.

I have a great many complaints from families in destitute circumstances who feel that the service has taken away their means of support, whether properly or improperly.

Mr. SMART. Yes.

Mr. BROOKS. Or whether rightfully or wrongfully it is still the case.

Mr. SMART. I would make this suggestion for your consideration, that in view of the difficulty of engaging in a statutory enactment to cover this matter of policy you, Mr. Brooks, present this very problem to the full committee and if it is the sense of the full committee that they want the Secretary of the Army and Secretary of the Air Force to know that they would like for them to exercise that authority and so advise them by letter or resolution or whatever means you think may be appropriate.

Mr. BROOKS. I think that is a good suggestion. If there is no objection, then, we will take that one matter up Monday and see what the sense of the subcommittee is at that time.

Mr. SMART. Yes, sir.

Now, article 64, on page 51. The point there was that the committee wanted to be sure that the convening authority had the right to remit any part of the sentence he wanted to, that is, to do anything he desired with that sentence, so far as abating it was concerned.

So I would suggest on page 51, at line 17, immediately before the word "determines" at the end of line 17, insert "as he in his discretion," so that he is not then limited to the findings or sentence or anything else but his discretion.

It becomes a discretionary matter with the convening authority as to what he shall do with any sentence which comes before him for review.

Mr. BROOKS. Any objection to that verbiage? If not, we will adopt that.

Mr. SMART. Mr. Chairman, it seems to me that that brings us down to today's activities.

I think on article 70 it was agreed that appellate counsel would be qualified in the same manner as prescribed in article 27 (b) (1) and now you have prescribed those qualifications in article 27 (b) (1), so that is taken care of.

Mr. BROOKS. Fine.

Mr. SMART. I think that that is all of the articles which we have passed except the punitive articles which you have discussed this afternoon.

Mr. BROOKS. And the two major questions which we are holding over anyway.

Mr. SMART. Yes, sir.

Mr. LARKIN. Yes, sir.

Mr. BROOKS. Well, if there is no further comment and no further business to take up this afternoon, we will stand adjourned, gentlemen, until 10 o'clock Monday.

(Whereupon, at 4:08 p. m., the committee adjourned, to reconvene at 10 a. m., Monday, April 4, 1949.)

UNIFORM CODE OF MILITARY JUSTICE

MONDAY, APRIL 4, 1949

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE NO. 1,
Washington, D. C.

The subcommittee reconvened at 10 a. m., the Honorable Overton Brooks (chairman) presiding.

Mr. BROOKS. The committee will please come to order.

Now, Saturday, gentlemen of the committee, we finished the bill. We went over all of the matters which had been reserved for special consideration, excepting about three major questions. We took up all of these minor matters. A great many of them have been instances where Mr. Elston felt that the phraseology might be changed some, or maybe Mr. Rivers or some of the others. They felt like some minor changes might be made. And we settled all of those.

That will leave us, first, the matter of the Judicial Council, and, second, the matter of the separate Judge Advocate General. That is about all.

What else is there, Mr. Smart?

Mr. SMART. You have articles 118, 119, and 120.

Mr. BROOKS. Yes.

Mr. SMART. Which are murder, manslaughter, and rape.

Mr. BROOKS. Yes.

Mr. SMART. And whether or not you are going to have a new article to cover carnal knowledge.

Mr. BROOKS. Well, now, suppose we take up the Judicial Council first.

Mr. SMART. Shall I read article 67, sir?

Mr. BROOKS. Yes.

Mr. SMART (reading).

ART. 67. Review by the Judicial Council.

There is hereby established in the National Military Establishment a Judicial Council. The Judicial Council shall be composed of not less than three members. Each member of the Judicial Council shall be appointed by the President from civilian life and shall be a member of the bar admitted to practice before the Supreme Court of the United States, and each member shall receive compensation and allowances equal to those paid to a judge of a United States court of appeals.

(b) Under rules of procedure which it shall prescribe, the Judicial Council shall review the record in the following cases:

(1) All cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death;

(2) All cases reviewed by a board of review which The Judge Advocate General orders forwarded to the Judicial Council for review; and

(3) All cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Judicial Council has granted a review.

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(c) The accused shall have 30 days from the time he is notified of the decision of a board of review to petition the Judicial Council for a grant of review. The Judicial Council shall act upon such a petition within 15 days of the receipt thereof.

(d) In any case reviewed by it, the Judicial Council shall act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the board of review. In a case which The Judge Advocate General orders forwarded to the Judicial Council, such action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, such action need be taken only with respect to issues specified in the grant of review. The Judicial Council shall take action only with respect to matters of law.

(e) If the Judicial Council sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. Otherwise it shall order that the charges be dismissed.

(f) After it has acted on a case, the Judicial Council may direct The Judge Advocate General to return the record to the board of review for further review in accordance with the decision of the Judicial Council. Otherwise, unless there is to be further action by the President, or the Secretary of the Department, The Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the Judicial Council has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(g) The Judicial Council and The Judge Advocate General of the armed forces shall meet annually to make a comprehensive survey of the operation of this code and report to the Secretary of Defense and the Secretaries of the Department any recommendations relating to uniformity of sentence policies, amendments to this code, and any other matters deemed appropriate.

References: A. W. 48, 49, 50 (a), (c), (g); 51, 52; proposed A. G. N. article 39 (g).

Commentary: This article is new, although the concept of a final appellate tribunal is not. Proposed A. G. N. article 39 (g) provides for a board of appeals while A. W. 50 (a) provides for a Judicial Council. Both of these tribunals, however, are within the Department. The Judicial Council provided for in this article is established in the National Military Establishment and is to review cases from all the armed forces. The members are to highly qualified civilians, and the compensation has been set to attract such persons.

Automatic review before the Judicial Council is provided for all cases which must be approved by the President. See A. W. 71. The Judge Advocate General may direct that a case be reviewed by the Council, and an accused may request review and will receive it where the Council finds good cause.

The time limits specified in subdivision (c) are necessary to eliminate undue delay in the execution of sentences.

The Judicial Council takes action only with respect to matters of law. In this, it differs from the final appellate tribunals now set up in or proposed for the Departments. It may act only with respect to the findings and sentence as approved by the convening authority. If the board of review has set aside a finding as against the weight of the evidence this decision cannot be reconsidered by the Council. If, on the other hand, the board has set a case aside because of the improper introduction of evidence or because of other prejudicial error, the Judicial Council may reverse if it finds there has been no such error.

The Council shall affirm the findings and the sentence if it determines that, with respect to the matters which it considers, there has been no error of law which materially prejudices the substantial rights

of the accused. (See article 59, Commentary.) It may affirm so much of a finding of guilty as involves a finding of guilty of a lesser included offense. (See Article 59.) The only action which the Council may take with respect to the sentence is to determine whether or not it is within legal limits.

As to the power to order a rehearing covered in subdivision (e), see article 63.

Subdivision (g) assures an annual review of sentence policies of the armed forces. This is provided to assure uniformity.

Mr. RIVERS. May I ask one question?

Mr. BROOKS. You have heard the article read. Mr. Rivers, do you have a question?

Mr. RIVERS. What is the tenure of office, Mr. Smart?

Mr. SMART. There is no tenure prescribed here. It has been left open, I think, intentionally, as a matter to be determined by this committee.

Mr. RIVERS. Well, now, what about on good behavior?

Mr. SMART. It has been pointed out, of course, by Justice McGuire, that this is not a constitutional court. I am not out of order, I think, in saying that it was originally planned to have each of the Secretaries appoint one-third of the members of the Council. There were subsequently some disagreements on that. Then it was felt to be advisable to leave the appointments to the President. Now, they did not go further and make it a constitutional court, that is appointed by the President, by and with the advice and consent of the Senate for life, subject only to good behavior.

Mr. RIVERS. I think the tenure, if it should be decided for any term of years, should be staggered so as to always have a man on Judicial Council who knows about the make-up of the court.

Mr. BROOKS. I feel that way, too. I feel very strongly that the success or the failure of the whole thing is going to lie in the Judicial Council, and it seems to me you ought to have a strong court, whether you call it a Judicial Council or otherwise makes no difference. But it has been going through my mind that we ought to write in there some tenure. My thought was to put in "during good behavior," and that they ought to be confirmed by the Senate. Of course, whether we put it in there or not, I am satisfied that the Senate is going to write it in there.

Mr. RIVERS. Don't let us put it in, then. Let us have some reason for going to conference.

Mr. BROOKS. Well, that might be a good reason. But it ought to be a strong court, because it is going to have control of the whole system and is going to make recommendations to the Congress from time to time; and, unless it is a strong court, your system is not going to be responsive to the recommendations.

Mr. RIVERS. I feel, though, that this Judicial Council shouldn't be closed up. Of course, good behavior takes them away from any political aspect or any pressure. That is always a laudable suggestion, as a theory underlying our courts of last resort and our courts of inferior jurisdiction to the Supreme Court.

Mr. LARKIN. Well, if you want a precedent, Mr. Rivers, in the Federal Court, why, it is during good behavior, which means life.

Mr. RIVERS. Yes.

Mr. LARKIN. Or it means mandatory retirement at 70, I believe.

Mr. BROOKS. Mr. Larkin, what would be the objection to writing in something like that, making the tenure during good behavior?

Mr. RIVERS. Just say it shall be good behavior and shall be appointed by the President by and with the advice and consent of the Senate. I am sure that would meet the approval of the other body.

Mr. LARKIN. I am sure it would.

Mr. RIVERS. I know that.

Mr. BROOKS. Do you have any suggestion, Mr. Elston, on that?

Mr. ELSTON. No. That conforms to my view about it, which is that it ought to be the same as Federal courts, I mean for life during good behavior. I think there should also be a provision that the members should not all be of the same political party.

Mr. RIVERS. That is right. Like the Commissions. The Federal Communications Commission, and so on.

Mr. ELSTON. Yes.

Mr. BROOKS. You might write in there something about bipartisanship. I don't know whether men should be selected, though, because of their affiliation with a political party. I don't think that ought to be the test, but, rather, the ability to do the job.

Mr. ELSTON. I am sure they could find men of ability in both parties.

Mr. RIVERS. Yes; we have ample precedent for that.

Mr. ELSTON. Yes.

Mr. LARKIN. I don't think there is a limitation on the Federal court, but I don't recall. I know it doesn't apply to the Court of Claims, anyhow.

Mr. ELSTON. But it is a requirement with respect to a number of boards, such as the Federal Trade Commission——

Mr. LARKIN. That is right.

Mr. RIVERS. The Federal Communications Commission.

Mr. ELSTON. The Maritime Commission, the Federal Communications Commission——

Mr. LARKIN. I know the Federal Trade Commission, specifically, has such a requirement.

Mr. ELSTON. Yes, and I think some of the others.

Mr. HARDY. I wonder if that is a good idea with respect to judicial people. I wouldn't think that in normal practice it would happen, but I wonder if it is a good thing to require.

Mr. RIVERS. It won't hurt.

Mr. BROOKS. Well, I don't know. What concerns me is, when you say there must be a bipartisan board, whether or not the political qualification should be considered in appointment.

Mr. ANDERSON. Mr. Chairman, is it required by any Federal courts?

Mr. BROOKS. No Federal courts.

Mr. RIVERS. I don't think so.

Mr. BROOKS. As a matter of fact, however, it has happened in a great many cases with the Supreme Court. I can recall——

Mr. RIVERS. Harold Burton.

Mr. BROOKS. I can recall the last justice we had from Louisiana was appointed by a Republican President. He was made the Chief Justice subsequently.

Mr. RIVERS. Couldn't we put something in the commentary or the record to say that it is the sense of this group that the judicial qualifi-

cation must predominate and where possible a bipartisan selection shall be encouraged?

Mr. BROOKS. Yes.

Mr. RIVERS. Just say in the same manner in which the President takes cognizance of this in his selection of the members of the Supreme Court.

Mr. HARDY. For myself, I will subscribe to that statement in the record here as being the sense of my angle on this committee.

Mr. DEGRAFFENRIED. I will, too.

Mr. RIVERS. Don't say "bipartisan" because there may be another strong party in the next election.

Mr. DEGRAFFENRIED. Certainly, the National Military Establishment or any court within it wants to and endeavors continually to stay out of politics. We don't regard it as a political branch of the Government, and I don't think Congress does, either.

Mr. ELSTON. No, and that is the reason for my suggestion.

Mr. DEGRAFFENRIED. Yes.

Mr. ELSTON. Because I don't want it to be political. But appointments are made that are political, and certainly there have been many where, in Federal courts, you get an unbalanced court. Take the Supreme Court of the United States today. I don't want to make any comment on it because everybody knows about it, but there have been times when Republicans appointed Democrats, as was pointed out. President Taft appointed Chief Justice White from Louisiana, wasn't it?

Mr. BROOKS. Yes.

Mr. RIVERS. That is right.

Mr. ELSTON. And they have followed a policy of trying to keep the courts nonpartisan and nonpolitical. But it can be abused. For my part, I feel like we ought to say we want it that way.

Mr. RIVERS. Yes.

Mr. HARDY. Let us do it in the record, Mr. Elston, and not in the law.

Mr. ELSTON. Well, that might be the solution of it, although I don't want to just foreclose myself from probably bringing it up again. I just want it certain that this court which is going to be an exceedingly important court is not filled by political appointments.

Mr. BROOKS. Let me suggest this thought: don't you think when we make it confirmable by the Senate that you are reaching at the same idea that you have in mind?

Mr. ELSTON. I don't think that quite reaches it.

Mr. ANDERSON. I suggest, Mr. Chairman, that Mr. Smart be authorized to place in the record the views of this committee as expressed by the gentlemen here, that the court be nonpolitical and bipartisan.

Mr. BROOKS. Well——

Mr. ANDERSON. That we not put it in the law at the present time——

Mr. BROOKS. The question is nonpartisan instead of bipartisan.

Mr. ANDERSON. Either way, which is the best legal term, and that we let Mr. Elston reserve the right to raise the issue later on if he so desires. That is just a suggestion.

And I would like to ask one more question, if I may. I note it says "The Judicial Council shall be composed of not less than three members." Should there not be also a "not more" in there some

place, so there wouldn't be more than five or more than seven? Shouldn't there be some limitation? You might get another packed court.

Mr. SMART. I think you must keep in mind, gentlemen, that again we are operating on a peacetime basis, but who knows when war is coming and certainly when it does come I think we should anticipate whether or not it will be possible to make temporary appointments to the Judicial Council or whatever you want to call it. I think the committee should receive a little more testimony here as to who is going to help administer this court. Are commissioners anticipated? What is the probable case load? I think the committee ought to receive some figures here.

Mr. BROOKS. Yes. I think we ought to have some figures, too.

Mr. ANDERSON. I think that is a good idea.

Mr. SMART. We don't even know whether this Council can do the job.

Mr. BROOKS. If we make the tenure in good behavior, you can't have temporary appointments.

Mr. SMART. I understand that. But I don't believe you want to leave it so you have the situation where in war time you may get a nine-man Judicial Council and during the ensuing peace you have the top-heavy structure of a nine-man council which you don't need.

Mr. ELSTON. Wouldn't the better way be to pick a definite number and if there is an emergency let Congress take care of the emergency function? In fact, the other day we passed a law to fix it for a temporary period. I believe it was in Georgia.

Mr. DEGRAFFENRIED. I know it was in Georgia, where a judge had gone blind and they needed another judge to help with the work.

Mr. ELSTON. So Congress can make emergency provision to take care of an unusual work load. I think we have such a provision in 68 (b), where we say:

In time of emergency, the President may direct that one or more temporary judicial councils be established for the period of the emergency, each of which shall be under the general supervision of the Judicial Council.

Mr. SMART. That is right.

Mr. LARKIN. We left 67 as not less than three, which leaves it with an open end on the top, because we just cannot accurately judge whether three will be sufficient for normal times We anticipate it will, but it may be that three would be the necessity even in normal times of adding one or two more In the event tht you come upon an emergency, however, or you are in war and the case load increases tremendously, why we already have a provision for these temporary wartime——

Mr. ANDERSON. As long as you have that, why shouldn't there be a limitation?

Mr. LARKIN. Because as I say, we cannot at this minute guarantee, if you will, that the three-man court will be able to carry the work load in normal times We anticipate they will, but it is a little difficult, based on the court-martial figures that we have, to say with assurance that there will be no trouble in the three handling it Now you could say "no less than three nor more than five"

Mr. RIVERS. That is right.

Mr. LARKIN. And then for the time of the emergency, keep this other provision for wartime.

Mr. RIVERS. That is right.

Mr. LARKIN. Where you might have to have, in other words, what amounts to branch offices or subsidiary panels, if you will—something the way the Tax Court works.

Mr. RIVERS. Let us fix it where you can get rid of these people at such and such an age because some of these old boys—this is off the record.

(Statement off the record.)

Mr. BROOKS. You have a provision for retirement.

Mr. RIVERS. They wait until the very last minute and it might be too long. Is that 70 years?

Mr. LARKIN. That is right, 70.

Mr. RIVERS. Now, do we want this to be 70?

Mr. LARKIN. You have the precedent of 70. I should think that would be all right.

Mr. ELSTON. Well, I think we could say that they shall have the same qualification as judges of the United States Circuit Courts of Appeal, the same retirement provision and so forth.

Mr. LARKIN. We can. We said, "Each member shall receive compensation allowance equal to those paid to a judge of the United States." We could say, "compensation and other perquisites," if you will.

Mr. RIVERS. Let us write it out.

Mr. BROOKS. Would be subject to the same retirement laws.

Mr. RIVERS. That is right.

Mr. LARKIN. All right.

Mr. RIVERS. What about this? We also want to consider this, about whether or not you want any retired Government official holding on. Now some people might not like the retired Judge Advocate General, with all deference to the one present. But somebody may object to that.

Mr. LARKIN. Well, I think the way the provision is incorporated in the article now, it is all right. It says, "from civilian life," which would exclude officers of the Regular components and retired Regulars. A retired Regular, I should say, would be eligible if he resigned. If he just retired, he wouldn't be.

Mr. RIVERS. I don't know why you should exclude him.

Mr. LARKIN. Well, the notion specifically was to make this as civilian as possible, otherwise perhaps the court would consist of nothing but Regular officers who have resigned for the purpose of taking the job and in effect you would have it more military than civilian.

Mr. RIVERS. Of course it could work the other way, too. You could appoint a Reserve who would have animus toward the Regular.

Mr. LARKIN. Yes. That is the way it was designed: from civilian life, but not as it is designed under the National Security Act, which provides that the Secretaries, or the Secretary of Defense, for instance, cannot have served within the previous 10 years in a Regular component. It is not as strict as that and I don't think it should be.

Mr. RIVERS. What about that, Charlie?

Mr. ELSTON. Well, you probably would have to have some such provision if you were going to keep it strictly civilian.

Mr. LARKIN. I think the way it is provided just carries out what I point out: from civilian life, which means a civilian as distinguished

from a military officer who is either on Regular service now or is a retired Regular who is still, of course, an officer of the United States. But it would not exclude a Reserve on inactive duty, or would not exclude anybody who has military service, of course.

Mr. RIVERS. Where do you get that distinction?

Mr. LARKIN. I think that has been defined time and again insofar as retired officers of Regular components and officers of Regular components who are actively serving.

Mr. BROOKS. Well, a retired officer is still a part of the Regular Establishment, isn't he?

Mr. LARKIN. That is right.

Mr. BROOKS. Therefore——

Mr. LARKIN. He is not from civilian life.

Mr. BROOKS. Therefore, he would be automatically excluded from the meaning of that term.

Mr. LARKIN. That is right.

Mr. RIVERS. You could conceive of a situation where there would be a marked feeling between Reserves and Regulars. It happened in many quarters after this war, as testimony before this committee will demonstrate and prove. And we sure don't want to get anybody on this court who has any feeling toward any segment of our active or inactive force. That is what we ought to try to guard against.

Mr. BROOKS. I think, after all, if you are going to have them confirmed by the Senate, you are fairly safe in getting men without strong predjudice. There is a screening there. And the Executive shouldn't want to appoint men of that character.

Mr. LARKIN. I should say the National Military Establishment might have a number of people who it would recommend to the President in the first place.

Mr. RIVERS. Surely.

Mr. LARKIN. He would screen them. Then the Senate screens them. So I don't think you are running any more danger here than you are in any other appointment.

Mr. BROOKS. What do you think of the name there: Judicial Council?

Mr. LARKIN. Well, we have no pride of authorship at all. Actually, we adopted it because it was a name that was adopted for the top court in the Army system, as provided last year by your committee. We just picked it up and carried it along. There is no fixed idea about it at all. If you have a different name, why——

Mr. BROOKS. Do you have any idea on that, Mr. Smart? Any fixed idea?

Mr. SMART. Well, of course, I don't think that the committee should adopt the term "Judicial Council" purely because we had it in H. R. 2575. In that case it applied to only one service, and also the members of the Judicial Council were to be general officers unless they were serving for temporary periods of 60 days or less, in which event they could be of lesser grade than general officers. Now here you are creating a court equally applicable, for purpose of review, to all of the services. They are civilians, not officers. I think you should adopt some judicial terminology and get away from this "Council," which suggests to me one of the usual basement operations here in Washington.

Mr. ELSTON. How about "Supreme Court of Military Appeals," or "Court of Military Appeals"?

Mr. RIVERS. That is right.

Mr. LARKIN. I think so.

Mr. RIVERS. Then, too, this act does not repeal the Eleston Act?

Mr. LARKIN. It does.

Mr. RIVERS. You see, and those terms still maintain in that act.

Mr. LARKIN. No.

Mr. SMART. This will supersede the Judicial Council as presently constituted in the Department of the Army.

Mr. RIVERS. I see.

Mr. BROOKS. Now, "The Court of Military Appeals"—how would that impress the Navy?

Mr. LARKIN. We define military and have used it—we have called this a uniform code of military justice—to include the naval service.

Mr. ELSTON. The reason I suggested "Supreme Court of Military Appeals" rather than "Court of Military Appeals" is this: In some States, your court of appeals is your highest court.

Mr. RIVERS. That is right.

Mr. ELSTON. In other States, your supreme court is your highest court.

Mr. LARKIN. That is right.

Mr. ELSTON. Now, in New York, your supreme court is inferior to your court of appeals. In our State, the court of appeals is inferior to the supreme court. I don't like to get names too long. In other words, on the other hand, the "United States Circuit Court of Appeals" is longer than the "Supreme Court of Military Appeals." But we ought to have something that would be different than "Judicial Council." That sounds too much like a city council.

Mr. LARKIN. It sounds like a round table, instead of a court.

Mr. ANDERSON. Why don't you move it?

Mr. BROOKS. It seems to me it would give strength to the whole idea there.

Mr. ANDERSON. I think so, too.

Mr. BROOKS. Admiral Russell is here. I am wondering, would you make a suggestion, or do you have one, sir?

Admiral RUSSELL. "The Court of Military Appeals" seems all right to me.

Mr. ANDERSON. You mean leave out the "Supreme"?

Admiral RUSSELL. I wouldn't think you need that. You are not comparing it with any other appellate courts. The only appellate court there is is in the service.

Mr. BROOKS. I think perhaps that thought is good, too, because, after all, while this is supposed to be the supreme body, there is a way to go higher than that, and that is to the President; is there not?

Mr. LARKIN. Of course. And there is still a way to go to the Supreme Court of the United States, actually, and that is by habeas corpus.

Mr. ELSTON. I think the shorter name is preferable. The only reason I suggested "Supreme" is because someone said if you say "Court of Appeals," it might imply that there is a supreme court above that.

Mr. LARKIN. Yes.

Mr. ELSTON. And, of course, there isn't.

Mr. LARKIN. We would accept the "Military Court of Appeals."

Mr. BROOKS. Make a suggestion to leave off the word "Supreme."

Mr. ELSTON. I would suggest, Mr. Chairman, to bring the issue to a vote, that we make it "The Court of Military Appeals."

Mr. RIVERS. Seconded.

Mr. BROOKS. You heard the suggestion made as a motion. Is there any objection to it? If not, then it stands adopted.

Now, suggestions have been made regarding two or three other matters and we haven't passed judgment on them.

Mr. ANDERSON. Mr. Chairman, I would like to bring that limitation to a head by offering a motion, if I may.

On page 54, line 20, after the word "three"—

Mr. BROOKS. What article?

Mr. LARKIN. 67 (a).

Mr. ANDERSON. Article 67, page 54.

Mr. BROOKS. Yes.

Mr. ANDERSON. Line 20, after the word "three," insert "nor more than five." I think with the provision in 68 (b) for the appointment of additional members of the Judicial Council in the event of an emergency, that that gives us a desirable limitation in time of peace.

Mr. RIVERS. After the word "member," put "no more than five".

Mr. BROOKS. After "three"——

Mr. ANDERSON. It will read, then, "The Judicial Council shall be composed of not less than three, nor more than five members." I would like to have the service comment on that before we proceed.

Mr. BROOKS. Let us see what the comments are. Would it be better to have seven or five there? How would that work in reference to two panels?

Admiral RUSSELL. Are you asking me, sir?

Mr. BROOKS. Well, I was really speaking to Mr. Larkin, but we would be very happy, Admiral, to have your ideas on it.

Mr. RIVERS. We could have two panels if we had seven.

Admiral RUSSELL. I haven't thought this through, Mr. Chairman, but, as I was sitting here, I was thinking we frequently have court martials appointed with the provision that any five are empowered to act. I don't know whether that would have any application here or not.

Mr. ELSTON. I don't think so. It is a separate creation.

Mr. BROOKS. If you have three and not more than five, you are going to have three constituting a court and then you will have two left. Now, how that two actually will help a great deal I don't know.

Mr. ELSTON. The thought that occurs to me, Mr. Chairman, is this: If the appointments are made they are going to be for life. Now if you have a period of emergency and you appoint five, and they are for life, they are going to stay on the court until they die or retire, whereas if you have a definite number plus this provision that allows emergency appointments, the emergency appointees would remain only until the close of the emergency and the President would then have the right to remove them. Suppose you said "less than three nor more than five" and the law went into effect immediately. There would probably be enough cases to justify five at the present time. Now that means five from hereon in.

Mr. LARKIN. That is right.

Mr. RIVERS. Until two of them die or retire. I am wondering whether it would be better to have a definite number, say three, plus the temporary appointments that the President might make. What do you think? I would like to ask Mr. Anderson, the one who offered the motion, what he thinks.

Mr. ANDERSON. You mean you would amend that so that it would be not less than three nor more than three?

Mr. ELSTON. The thought just occurred——

Mr. ANDERSON. Or just say three members?

Mr. ELSTON. We should make it a definite number, who will be lifetime appointees. When if their work load gets too heavy, the President can add one, two, three, five, or any number he sees fit.

Mr. LARKIN. Perhaps you could do it this way, Mr. Elston. If you desire to limit it to three as the permanent ones, then in 68 (b) you could modify it so that in time of emergency the President could appoint one or more courts of three——

Mr. BROOKS. Panels.

Mr. LARKIN. Panels, really, what it amounts to, or one or more temporary judges.

Mr. DEGRAFFENRIED. Mr. Larkin——

Mr. LARKIN. Otherwise, if you provide for three permanent judges and then find the work load is heavy for six months and you want another, you could only appoint him permanently. Perhaps you ought to have the right to appoint another in peacetime temporarily, and then in wartime appoint temporarily a whole subsidiary panel or two panels, if needed.

Mr. DEGRAFFENRIED. Mr. Larkin, if he just appointed one, though, so that you had four there for a while and two went one way and two went the other, there wouldn't be any decision.

Mr. LARKIN. That is right.

Mr. DEGRAFFENRIED. It seems to me you have to keep an odd number there.

Mr. LARKIN. Well, you would have a decision, in that I suppose the tie vote would act as an affirmance.

Mr. BROOKS. What we would have to do, as things are now, we are going to have to change over here in article 68 the usage of the term "Judicial Council".

Mr. LARKIN. Oh, yes.

Mr. BROOKS. And if we follow that thought, we are going to have to go further and place there "one or more temporary panels be set up," instead of referring to "Judicial Council additionally set up." Then we are going to have to specify that they shall be subservient to the court.

Mr. LARKIN. I think if you make it three in 67 (a), we can carry through the idea by adding to 68 (b) the provision for the temporary appointment of one or two judges in the President's discretion and in time of emergency or hostilities the temporary appointment of one or two panels.

Mr. BROOKS. Operating in cooperation with the Supreme Court?

Mr. LARKIN. Yes. I think that would work.

Mr. SMART. What is an emergency?

Mr. LARKIN. Perhaps we'd better say, "in time of war or emergency."

Mr. ANDERSON. I thoroughly agree with the idea expressed by Mr. Elston that we limit it to three members and make that line read, "The Judicial Council shall be composed of three members, period."

Mr. BROOKS. Mr. Anderson withdraws his motion and now moves that the court be limited to three members; is that right?

Mr. ANDERSON. Yes. Strike out the words "not less than."

Mr. BROOKS. Strike out the words "not less than." Is there any objection to that thought? If not, then the motion is agreed to.

Mr. SMART. Mr. Chairman, does the committee desire to refer to these appointees as members or judges?

Mr. HARDY. I think in that case it would be members there; that is, members of the court.

Mr. ANDERSON. It is going to be called "The Court of Military Appeals." Wouldn't they have to be judges?

Mr. SMART. Of course, once they are on, they become a judge. I just wanted to point out that little difference in there. You may wish to consider it or leave it as it is. I have no particular feeling. The statute as to Federal courts says "judges" specifically.

Mr. BROOKS. Now, how far do we want to go toward making this a Federal court?

Mr. SMART. Well, it becomes a specialized Federal court.

Mr. BROOKS. What is the pleasure of the committee? It seems to me it makes very little difference there.

Mr. ELSTON. You do say members of a court.

Mr. BROOKS. And Members of Congress, too.

Mr. ELSTON. And Members of Congress. So you would be saying members of the Court of Military Appeals.

Mr. BROOKS. I think, too, to refer to them as members is more in harmony with what you have in your court-martial procedures all the way through. It refers to members of a court. Is that right? All of them are called members.

Mr. ELSTON. Members of the court, yes. I notice as to the Court of Appeals of the United States it says "there shall be in each circuit a circuit court of appeals"—they have changed the name since to Court of Appeals—"which shall consist of three judges." They use the word "judges."

Mr. BROOKS. Well, if there is no motion to offer it, let us pass on to something else.

Mr. ELSTON. Mr. Chairman, wouldn't we now have to amend subsection (b) of article 69?

Mr. BROOKS. Yes.

Mr. ELSTON. To provide that in time of emergency the President may direct that one or more temporary courts be established for the period of the emergency, each of which shall be under the general supervision of the Judicial Council.

In other words, if the work load gets heavy he would have to appoint an entire court of three members.

Mr. SMART. Well, the idea was that if the work load gets heavy by virtue of a state of war or state of emergency——

Mr. ELSTON. Say in time of emergency.

Mr. SMART. That is right.

Mr. ELSTON. In other words, there would be no advantage in appointing one member because three members have to make a decision.

Mr. SMART. That is right.

Mr. ELSTON. And there would be no advantage in appointing two members. You would have to take a member away from the other court.

Mr. PHILBIN. This section permits them to set up the number of councils required by the emergency, doesn't it?

Mr. ELSTON. Yes; it would permit the President to appoint emergency courts. But the thought now is should he be permitted to appoint one member of if he makes any appointment he has to appoint three.

Mr. PHILBIN. He would have to appoint three under this language.

Mr. ELSTON. It seems to me the only way you could handle the matter would be to appoint three.

Mr. PHILBIN. Wouldn't they have to be constituted as a unit?

Mr. ELSTON. Yes, that is it, what the amendment says—

The President may direct that one or more temporary judicial councils be established.

It doesn't indicate members. It just says "three or more temporary judicial councils."

Mr. BROOKS. Why not let it read this way:

In time of emergency the President may direct that one or more panels of three members be established for the period of the emergency, each of which shall be under the general jurisdiction of the permanent court.

Mr. PHILBIN. Don't you think that language is clear enough—"one or more temporary judicial council?" That language certainly implies that the appointment shall be made as three members and a separate judicial council shall be set up.

Mr. BROOKS. Off the record.

(Discussion off the record.)

Mr. BROOKS. Back on the record.

You have to have every temporary panel in some respects under the direction of the permanent court.

Mr. ELSTON. And yet you don't want the permanent court able to overrule them, do you, on a decision, in a particular case? If you are going to do that, there is no use in having the separate court.

Mr. BROOKS. Of course, the way the Federal court does in so many cases where they set up a temporary panel, say the Court of Appeals, is they will assign a certain number of permanent judges to the temporary panel. The Court of Appeals does that often and in that way tries to harmonize the jurisprudence.

Mr. ELSTON. Of course, they have a different situation, because they have a large number of judges and they have the power to assign them to various jurisdictions to help a particular court catch up with its docket.

Mr. BROOKS. Coming back, then, to Mr. Anderson's suggestion, would it be better to have a permanent court of, say, seven members that can sit in separate panels and in the event of an emergency, temporary panels be brought in?

Mr. ELSTON. Well, I would think, Mr. Chairman, that if you are going to do that, you are going to create perhaps more lifetime jobs than are necessary. You would create seven lifetime judgeships and after a few years, with the war over, there might be not enough work

for seven. Then you have a little clumsy situation there. You would have three in one court and four in another.

Mr. BROOKS. Well, I merely suggest seven, but you might come back to five.

Mr. ELSTON. It seems to me——

Mr. BROOKS. I am not urging that. I am just pointing it out to you. I wasn't entirely unfriendly to the suggestion originally made by Mr. Anderson.

Mr. PHILBIN. Don't you think that is somewhat unwieldy, to have a body of five or seven? This more closely resembles the circuit court of appeals, rather than an individual district court.

Mr. BROOKS. What is the average circuit court of appeals number?

Mr. DEGRAFFENRIED. Three.

Mr. PHILBIN. Three.

Mr. LARKIN. How about this possibility, of having three permanent judges and then a provision for appointing additional ones either in groups of three or otherwise and then having of the total permanent and temporary judges any three authorized to sit as a court, on the theory that during heavy peak load you would have one of the permanent judges sitting with several of the temporary ones, and then give each three who sit as a court and who constitute a quorum of the court power to finally decide whatever cases is before them, leaving the three permanent judges with the function of this yearly review?

Mr. ELSTON. I would see no objection at all to that. In fact, I think that is the way it should be.

Mr. LARKIN. Yes.

Mr. BROOKS. Of course, if you do that, then you are going to have to provide here that one judge shall be nominated presiding judge, with authority to make those assignments.

Mr. LARKIN. Well——

Mr. ELSTON. Well, that is detail that can be worked out.

Mr. LARKIN. That is right. I don't think there is any great problem to that. I think we can work that out right in here. I think that is the most flexible. You would make a provision that at least one permanent judge and two others are a quorum of the court at any time and then when the emergency is over, you drop your temporary judges.

Mr. ELSTON. Yes. If you didn't have some such provision, one of the members of the permanent panel court might become incapacitated and they couldn't reach out and bring in some other judge to serve in his place.

Mr. LARKIN. That is right.

Mr. BROOKS. If there is no objection, then, I will suggest that Mr. Smart and Mr. Larkin be authorized to draft appropriate language which we can pass on later on.

Mr. ANDERSON. Mr. Chairman, may I ask one more question in connection with subsection (b) of article 68?

Mr. BROOKS. Yes.

Mr. ANDERSON. In time of emergency, just what constitutes an emergency? When it is declared by the President or the Congress to exist or do you mean in the event—well, say that the present emergency and the war are eventually declared terminated?

Mr. LARKIN. Yes.

Mr. ANDERSON. But there is still a work load that constitutes an emergency as far as review of cases is concerned?

Mr. LARKIN. No; we didn't contemplate that kind of an emergency.

Mr. ANDERSON. That is what I wanted to know.

Mr. LARKIN. We mean a national emergency. The state of emergency was the idea here. The fact that there is a local emergency in the court was not contemplated.

Mr. BROOKS. Suppose your work load does get too heavy, why shouldn't it be interpreted to mean any emergency which throws the court far behind in its work?

Mr. LARKIN. Then, I would take out the word "emergency" and say "the President, in his discretion."

Mr. ELSTON. Why wouldn't it be better to say "in time of emergency declared by the President or by Congress to exist"?

Mr. ANDERSON. I was afraid that limited it too much.

Mr. LARKIN. That is what we intended it to be.

Mr. ANDERSON. My thought, Charlie, is it might not be a national emergency declared by the President or the Congress to exist but simply an emergency because there are so many cases to be reviewed when there is no national emergency.

Mr. LARKIN. I think I should say there, if the court falls behind during the course of its work for a year, Heaven knows the Federal courts and many State courts are behind for years and years. It is not desirable at all, but it wouldn't last so long that we couldn't come back to Congress and point it out and get an authorization for an additional number.

Mr. PHILBIN. That is right. You could always come back for authority to appoint an additional number.

Mr. BROOKS. But there is this about it. One of the great criticisms I hear now about military justice is the delay. And I have heard this group here refer to the fact that in many cases a man serves out his sentence before he has a hearing on his appeal. Now, if we are going to sit back and let this court get as far behind as some of these Federal courts are in the handling of the cases, then, these men are going to serve their sentence long before they are disposed of here by the Appellate Court.

Mr. LARKIN. That is very undesirable, I agree.

Mr. BROOKS. These are all criminal cases. Now, a civil case may rock along for years without a serious injustice being done. But not so with a criminal case. It ought to be disposed of promptly.

Mr. LARKIN. Well, as I understood it and as Colonel Dinsmore, at least, testified before the committee, as far as the appellate end of processing cases is concerned, it has not been and is not now long. His guess was that it was completed within 2 or 3 months. I think there has occasionally been some complaints about delay in bringing men to trial. Of course, there have been complaints about bringing them to trial too quickly. So it is an individual case problem pretty much. During the war, of course, I dare say there was considerable delay in the processing of appeals, and that would be the time at least where you could come forward with these emergency extra members. But I have no strong feeling on it one way or the other, frankly.

Mr. BROOKS. Do you think this council will be able to keep down to date with their cases?

Mr. LARKIN. I think so.

Mr. BROOKS. As written now?

Mr. LARKIN. I think so.

Mr. BROOKS. And there is no reason for giving any emergency power during time of peace to the President to increase the panel?

Mr. LARKIN. Well, it would be safer that way.

Mr. HARDY. Well, Mr. Chairman, since these are going to be temporary appointments anyway, I don't see any serious objection to granting wider discretionary powers to the President. If you have a heavy work load, it may be necessary to appoint an additional number of members for a very short period of time to clean the thing up. It seems to me we ought to make provision for it in here and broaden this word "emergency" by some other phrase. I don't see where it could hurt anything since these are going to be purely temporary appointments.

Mr. PHILBIN. Roughly, how many general courts martial are you having per month in the Armed Service?

Mr. LARKIN. Sir?

Mr. PHILBIN. Do you have any information as to how many general courts martial you are now having per month?

Mr. LARKIN. Yes, I do.

Mr. PHILBIN. Would you give that to us roughly?

Mr. LARKIN. Well, the Army is running about 575 a month.

Mr. PHILBIN. These are general courts martial?

Mr. LARKIN. General courts martial. The Air Force is averaging 150. I will have to calculate the Navy's, unless Admiral Russell knows offhand.

Admiral RUSSELL. About 460 a month.

Mr. ANDERSON. What does that total?

Mr. PHILBIN. Around 1,185 per month.

Mr. LARKIN. That is trials.

Mr. ANDERSON. How many might go up to the Judicial Council?

Mr. LARKIN. That is it. I don't know what percentage have pleas of guilty, which probably would——

Mr. PHILBIN. These are actual trials?

Mr. LARKIN. That is right, which would create no legal problems.

Mr. PHILBIN. These don't refer to pleas. I mean you are talking about trials.

Mr. LARKIN. That is right.

Colonel DINSMORE. Mr. Chairman, I made some figures for the Army and offer them for the record at this time.

Mr. BROOKS. Without objection, it is so ordered.

(The matter referred to is as follows:)

ARMY ESTIMATE OF NUMBER OF CASES WHICH THE COURT OF MILITARY APPEALS WOULD HAVE AUTHORITY TO REVIEW UNDER THE PROVISIONS OF H. R. 2498, EIGHTY-FIRST CONGRESS

In estimating the volume of work of the court of military appeals under the uniform military code, it is assumed that the court will receive applications in all cases which it is empowered to review. Any other assumption would amount to mere speculation. It is not to be supposed that a person convicted by a court martial will be content with an unfavorable decision by any but the highest authority. Although the court of military appeals may refuse any such application, it can do so intelligently only after a careful examination of the contentions presented.

During the World War II fiscal years 1943-46, inclusive, the approximate number of general court-martial cases tried by the Army (including Air Force

cases, which were then tried by the Army and which it is impracticable to segregate) averaged slightly more than 24,800 per year. The best available information indicates that approximately 15 percent of these cases resulted in acquittals or sentences which did not include dismissal or dishonorable discharge.

During the same period the approximate number of cases tried by Army special courts-martial (including Air Forces cases) averaged 102,000 per year. During this period Army courts did not have authority to adjudge bad conduct discharges. It is estimated, however, that had such power existed at least 6 percent of these cases would have resulted in sentences which included bad conduct discharges.

Latest available figures indicate a peacetime average of Army general court-martial trials per year of approximately 6,600. Deducting an estimated 15 percent for cases resulting in acquittals or sentences not including dismissal or dishonorable discharge leaves a balance of approximately 5,600 Army general court martial cases per year.

Based on latest available information the approximate number of cases tried by special courts-martial by the Army in peacetime will average 37,000 per year, at least 6 percent of which, or approximately 2,200, and probably more, may be expected to result in sentences which include a bad-conduct discharge.

Recapitulating the foregoing estimates on the basis of World War II experience gives a total in wartime of approximately 21,000 Army and Air Force general court-martial cases (24,800 less 15 percent) and 6,000 Army and Air Force special court-martial cases (6 percent of 102,000), or a combined total of about 27,000 cases per year, or more than 2,200 per month, which the Court of Military Appeals will be empowered to review.

In peacetime the approximate figures are 5,600 Army general court-martial cases (6,600 less 15 percent) and 2,200 Army special court-martial cases (6 percent of 37,000), or a combined total of about 7,800 Army cases per year, or 650 cases per month, which the court of military appeals will be empowered to review.

Colonel DINSMORE. I made a spot check for 1 year which I thought was fairly typical, to determine the number of cases which did not result in dishonorable discharges or, in other words, the kind of case that would not go to the Judicial Council, which are acquittals and cases not involving dishonorable discharges, roughly.

Mr. BROOKS. Yes.

Colonel DINSMORE. And the exact percentage was 14.8. So I took 15 percent. So you could take 15 percent out as cases which would not be eligible for consideration by the Judicial Council.

Mr. BROOKS. You mean out of 575 you would take 15 percent out?

Colonel DINSMORE. Yes, sir.

Mr. BROOKS. And those would be the cases that would not go to the highest tribunal?

Colonel DINSMORE. The 15 percent could not go and the balance could go.

Mr. BROOKS. The balance could go; 85 percent could go?

Colonel DINSMORE. That is right. I don't know about the Navy.

Mr. DEGRAFFENRIED. Do you have a judgment as to what percentage actually do go, Colonel?

Colonel DINSMORE. Of course, we don't know, Mr. deGraffenried, because this is new. I would say, and the Army feels, that the only safe assumption to make is that everybody who has the right to appeal to the Council will do so, on the theory that nobody is satisfied with a decision which involves serious consequences without a decision by the highest tribunal. Now, that doesn't mean the Council is going to take the case, you understand.

Mr. LARKIN. That is the point, you see. The Council will take the case only if good cause is shown by the petition. You must figure further the number of absence cases that are tried. The percentage

varies in the service, but it runs anywhere from 50 to 75 percent, 50 to 75 percent of the cases are absence cases, which usually do not have a serious question of law in them. Sometimes they are very simple cases. Unless the man can make out a good question of law in his petition, the Judicial Council won't entertain those cases. So it is very difficult to judge how many it will be. We will just have to have experience. It is speculative. But it certainly couldn't or will not be the full number of trials because some of them are pleas of guilty and a large number of them are absence cases which give rise usually to no question of law.

Mr. PHILBIN. The colonel estimates that about 85 percent of them may go to the Judicial Council.

Mr. LARKIN. Yes; but he can't and I can't say how many of that 85 percent won't have a question of law, since a large proportion of them are absence cases.

Mr. PHILBIN. That is right.

Mr. LARKIN. We just can't tell.

Colonel DINSMORE. That is true.

Mr. BROOKS. I would like to hear from the admiral——

Colonel DINSMORE. May I say one more thing? Will you excuse me, sir?

Admiral RUSSELL. Surely.

Colonel DINSMORE. We would like to point out that although the Council is not going to consider all the cases that are sent to it by petition, those petitions have to be examined.

Mr. PHILBIN. That is right.

Mr. DEGRAFFENRIED. How many do you think the Judicial Council or the court or whatever we call it should consist of?

Colonel DINSMORE. I haven't thought that out, sir.

Mr. BROOKS. Admiral.

Admiral RUSSELL. I think we could give you a fairly good estimate. Based on the present strength of the Navy, we get about 460 cases a month. Of that number, the type of case which comes to me because the people in the office are in disagreement is very small, I would say probably less than 5 percent. That would represent probably about what I would feel should be referred to the Judicial Council.

Mr. PHILBIN. In other words, about 25 or 30 cases a month?

Admiral RUSSELL. Not over that.

Mr. PHILBIN. That would be true of the Army, Colonel? Do you think that percentage would be higher in the Army?

Colonel DINSMORE. Our estimate would be very much higher.

Mr. PHILBIN. Why should there be such a disparity between the Army and the Navy with regard to those figures?

Admiral RUSSELL. Well, as I understand, the Colonel estimated the number that could go there. Surely, I agree that 85 percent of these people that are convicted and appeal would be subject to that action.

Mr. PHILBIN. But you feel actually that you will only have 5 percent who may go, and he says 85 percent may go. There is a wide disparity there.

Admiral RUSSELL. We are talking about two different things.

Mr. BROOKS. If all of the services have even your figure, that would be almost a hundred cases a month?

Admiral RUSSELL. That is right.

Mr. BROOKS. Would your figure include the Navy, Marine Corps, and the Coast Guard?

Admiral RUSSELL. No, sir, just the Marine Corps and the Navy.

Mr. BROOKS. But not the Coast Guard?

Admiral RUSSELL. They don't come to us now. In time of war, of course, they would.

Mr. BROOKS. Yes.

Admiral RUSSELL. But I am not so sure. Of course, the total number gives you some kind of an index, but one case if it is close and if it involved and required a lot of research, might take up more time than 25 cases that go up on appeal.

Mr. BROOKS. And, of course, I can conceive this, too, that initially this military court of appeals might have a much heavier work load than it would subsequently. There are many points that must be ironed out initially.

Mr. LARKIN. That is right.

Mr. BROOKS. And after that, it might be your work load would drop off and that is the reason it occurred to me all along that perhaps it would not be too far out of order to permit the appointment of additional panels of the court even during time of peace.

Admiral RUSSELL. Yes, sir. I might say that this is one matter that I wanted to discuss. We talked about it just before the hearing. The more we can get shipshape before it goes to the Judicial Council, the less work there will be for that body.

Mr. PHILBIN. I desire to pursue the inquiry regarding the work load, as suggested by the gentleman from California, because I think we should determine here as closely as we could just what burden there would be upon the Council and provide for it, so that if it was a heavy burden they might come back here and seek additional legislation to create additional councils if required.

Admiral RUSSELL. There is one other comment I would like to make, namely, with the increased power of the special court martial, I look for a goodly reduction in the number of general courts. That is one of the supporting reasons for it.

Mr. LARKIN. Yes.

Mr. BROOKS. Thank you very much, Admiral.

Mr. PHILBIN. Do you think, Mr. Larkin, it would be safe or reasonable for us to go along with the proposal as now contained here in subsection (b), I believe it is, and then sort of test out for a certain period the number of cases coming before the Council and see what the work load is, and then if it is obvious that we ought to have additional councils we can provide for that?

Mr. LARKIN. I think that is the best way. It will be a little more flexible if you said, "The President, in his discretion," rather than limiting him to a term of emergency, but——

Mr. BROOKS. Why couldn't you be more strict than that and say "in time of national emergency" or "in time of judicial emergency"?

Mr. ELSTON. Well, Mr. Chairman, isn't it true that the work load would come on the court after the emergency is over? The cases really don't pile up until about the conclusion of the war.

Mr. PHILBIN. I hope we are not going to keep these boys in custody, when they are ready for an adjudication of their case. That is the purpose of creating additional councils, I take it.

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Admiral RUSSELL. We found after the last 2 wars that the work load lag is about 18 months.

Mr. BROOKS. Which is too long.

Admiral RUSSELL. However, I would like to invite the attention of the committee to this: The emergency—and I have forgotten whether it was a resolution or not before the Congress—was declared over for some purposes, but not for other purposes. I assume that this would be one of the things that would be considered.

Mr. BROOKS. Of course, if you permitted a dual construction in reference to that phrase, either a national emergency or an emergency in the court requiring additional panels, you would cover that.

Mr. LARKIN. Yes. That is——

Mr. ELSTON. Mr. Chairman, I am wondering whether some language something like this wouldn't be sufficient, then. Say in time of national emergency or otherwise, whether the court of military appeals is unable to expeditiously dispose of pending cases, the President may direct that one or more temporary courts of military justice of three members each be established for the period of such emergency or until pending cases may be disposed of, each of which shall be under the general supervision of the Judicial Council.

Mr. PHILBIN. Does the gentleman offer that as an amendment?

Mr. LARKIN. Or work out that quorum notion.

Mr. BROOKS. Would you rather think about that a little bit or dispose of it right now?

Mr. ELSTON. I just offered that right now without giving it too much thought, more for the purpose of discussion than anything else.

Mr. PHILBIN. That would take care of the work load, apart from a national emergency.

Mr. BROOKS. Mr. Smart.

Mr. SMART. Mr. Chairman, I think the thinking of the committee is apparent. May I suggest that you pass this matter temporarily? It is apparent that the committee will not be able to dispose of this and the question of a corps which you agreed to take up this morning.

Mr. BROOKS. Yes.

Mr. SMART. I would like to say that Mr. Zuckert, Assistant Secretary of Air, is here now and the hour is 11:20.

Mr. BROOKS. Mr. Larkin and you, Mr. Smart, sense the situation here in the committee. Would you get together and sort of frame language patterned along the line that Mr. Elston suggested?

Mr. LARKIN. Surely

Mr. SMART. We can frame some alternative propositions for the committee's consideration.

Mr. ELSTON. I have to leave, Mr. Chairman, in about 15 minutes to go over to the Supreme Court to move the admission of some important people.

Mr. HARDY. Mr. Chairman.

Mr. BROOKS. Mr. Hardy.

Mr. HARDY. There is just one point in connection with 67 (a) that we discussed a moment ago but which we didn't finish. I think we can dispose of it right quick. That is at the end of the paragraph affecting retirement.

Mr. BROOKS. Yes.

Mr. HARDY. I don't know whether this is appropriate, but to see if we can wind it up, I suggest the addition of a sentence: "Retirement

laws relating to members of the United States court of appeals shall apply also to the permanent members of the Court of Military Appeals."

Mr. LARKIN. Yes. We will provide for that.

Mr. ELSTON. And is it clear that they must be confirmed by the Senate?

Mr. LARKIN. Oh, yes.

Mr. BROOKS. Is there any objection to that motion there made by Mr. Hardy?. If not, why, it will stand adopted.

In going over this now, if any of the language we have adopted here in these amendments needs polishing up at all, why, I suggest that you take care of that.

Mr. LARKIN. We intend to do so and then bring it to your attention.

Mr. BROOKS. All right.

Mr. PHILBIN. May I inquire, in article 67, on line 23 of page 54, whether you would change the qualification for membership on the Council?

Mr. LARKIN. Now, you haven't as yet.

Mr. PHILBIN. You confine it to the Supreme Court. I wonder, has it been brought to the attention of the committee?

Mr. LARKIN. No, sir. It has been commented upon by witnesses. The committee indicated that they thought it was a poor standard. I think we could go back to the standards we used——

Mr. BROOKS. How about the United States court of appeals?

Mr. PHILBIN. I think the language you used heretofore in the bill would probably be better language than this language.

Mr. LARKIN. Yes.

Mr. SMART. A member of a State bar or a member of the Federal bar.

Mr. LARKIN. Yes.

Mr. ELSTON. I take it we still can go back over this whole thing.

Mr. LARKIN. Yes.

Mr. BROOKS. Let us go on. Since we have witnesses who were asked to come at this particular hour and if there is no objection, let us hear from them. Just come up, sir. We are happy to have you here.

Mr. ZUCKERT. Thank you, Mr. Brooks.

Mr. BROOKS. The committee has been looking forward to your appearance.

Mr. ZUCKERT. Thank you, sir. It is a pleasure to appear here on behalf of the Secretary of the Air Force and the Chief of Staff to tell you our views on this question of a corps in the Air Force.

I have here a short, rather informal statement which I might read and then I will be prepared to discuss it with you as you wish.

STATEMENT OF EUGENE M. ZUCKERT, ASSISTANT SECRETARY OF THE DEPARTMENT OF THE AIR FORCE

Mr. ZUCKERT. We appreciate this opportunity of presenting the Air Force views and we want to tell you this morning how we intend to operate under this new code if we do not have a corps. We feel that the bill as written provides the essential protection for all concerned and we trust that this committee will not feel that any organizational changes are needed within the Air Force. I am not going to

dwell on the differences between the military and civilian justice requirements because Under Secretary of the Navy Kennedy, I think, covered that subject in excellent fashion. We, in the Air Force, feel that under our present plan of operation plus the basic protections in this bill, justice will result to our people. I don't need to go through the safeguards that are in the bill, the requirement for a thorough, impartial investigation, the requirement for a complete record, and the requirements for legal training. But all those cumulative requirements we feel constitute a basically sound system. One of the requirements that is not original in the bill that we feel is a real protection is the requirement that there shall be no censure or coercion by any military authority upon the members of the court in respect to any case tried before them. In making that a military offense, we feel that has a strong moral effect.

The Air Force is in a unique position, starting out fresh as we are. We have been told many times by members of the Congress and people in the Government how fortunate we are to have the opportunity to start with a clean slate organizationally. We have no corps. We rely for the furnishing of our technical service on the Army. At the present time we have Air Force people. They are all Air Force people. We have no legislatively imposed attachments on our organizational structure as it is at present. We consider this problem of organization, the proper organization of the Air Force, one of the most important we have. And there is at this time in my office, as the Assistant Secretary for Management, a study of the basic legislation that we are considering which will describe the organization that the Air Force should have. It will take into account not only the way we should organize our legal officers, but all across the board: Chaplain, medical, and so forth. We feel, in view of the fact that this bill does have so many basic protections in it and in view of the fact that no system of organization by itself can cure anything, that from the point of view of the Congress and the efficient operation of the Air Force, it would be much more preferable to look to our organization as a whole rather than this little segment in respect to one aspect of our operations. The Judge Advocate General obviously is seriously concerned with military justice, but beyond that he is also the chief legal adviser to the Chief of Staff of the Air Force. He is the counsel for the Chief of Staff. There are many legal problems in the Air Force that have nothing to do with military justice. We use our lawyers in the procurement field. We use them in regard to all the real-estate law. We feel that by setting aside or by setting apart lawyers just in the military justice field as opposed to lawyers in the procurement field, and lawyers in the matter of real-estate law may, and we feel will, be creating an artificial subdivision that is not necessary and does create a certain amount of insulation. It does not permit you to administer your whole operation, we feel, as efficiently as if these officers, all lawyers, in the Air Force, were treated in the same manner. I might say that I am a lawyer myself and I feel that we can, through proper administrative action under the control of the Secretary of the Air Force, give proper recognition to the professional standing and professional requirements of the lawyers.

I lost my place here, but I think I have covered most of the points. We do have an Air Force Judge Advocate General whose position was established by Public Law 775 in the Eightieth Congress. His depart-

ment within the Air Force has already been established by administrative action. He has developed the regulation for the procurement of judge advocates, for the size of his departments and for the duties of his department. He has the responsibility for selecting legal officers to be judge advocates and for passing on the qualification of law members, trial counsel, and so forth. In practice, in actual practice, under good administration, his recommendations will determine the assignments to command. And the staff judge advocates will determine assignments within the command. Briefly, we feel that under the present system and operating as it does, the Judge Advocate General does have full control over all legal personnel engaged in the conduct of military justice. It has been argued, and of the best arguments, I think, is in connection with this matter of efficiency ratings: How can you have command people rating lawyers on the performance of legal duties? Well, as I pointed out, the Judge Advocate General is, in fact, the attorney of the Chief of Staff on many other matters except military justice. It is right that he should be evaluated for his ability to get along with people and for his ability to do the job effectively by the military commander. There is a strong argument—and we are studying the problem in the Air Force—an the possibility of having dual ratings, one by the military commander on the general effectiveness of the officer within the administration and the second a technical rating by the legal superior of the particular legal officer.

Well, that is about all I have to say. That covers my points and I would be glad to answer any questions that you may have.

Mr. BROOKS. May I ask you this question, sir. Is there a shortage of lawyers in the air establishment?

Mr. ZUCKERT. Yes, sir.

Mr. BROOKS. About how many do you need there?

Mr. ZUCKERT. I haven't those figures. Major Alyea, have you the figures on our requirements?

Major ALYEA. We have about 274 and we want to build it up to 750.

Mr. BROOKS. Are you having difficulty in getting them?

Mr. ZUCKERT. We are having difficulty; yes, sir.

We are having difficulty getting any type of specialist whether it is engineers of whom we use a lot or the other specialists. All the varied specialists whom we require in a complicated operation like the Air Force are difficult to get under present conditions. We have the same problem of procurement at Wright Field, for example, where we need the experienced technical people that we have in respect of the legal profession.

Mr. ELSTON. What is the situation with respect to the number of pending cases? Are you disposing of them rather expeditiously or not?

Mr. ZUCKERT. Well, I don't remember the exact date we took over our courts martial jurisdiction, Mr. Elston, but we haven't had the problem of our own courts martial jurisdiction very long. How long was that, Major Alyea?

Major ALYEA. Since June 25, 1948.

Mr. ELSTON. You have quite a load of cases on hand, haven't you?

Mr. ZUCKERT. We have a big load of cases.

Mr. PHILBIN. How many cases are you getting per month?

Mr. ZUCKERT. I don't recall the figures.

Mr. PHILBIN. Does the colonel have that?

Mr. LARKIN. I was furnished with the figures. Perhaps I can help there. The average in the Air Force at the present time, I understand, is about 150 per month. That is general courts.

Mr. PHILBIN. They have had jurisdiction only since June?

Mr. ZUCKERT. Nine months; yes, sir.

Mr. BROOKS. At least, you are not more than 9 months behind on any case, are you?

Mr. ZUCKERT. That is right.

Mr. ELSTON. How many cases do you have on hand undisposed of?

Mr. ZUCKERT. I don't know, Mr. Elston.

Mr. ELSTON. Can you get those figures for us?

Mr. ZUCKERT. Yes, sir; we can furnish you those figures.

Mr. ELSTON. Would you say it is a rather large number?

Mr. ZUCKERT. I don't believe so; no, sir. There hasn't been time for the cases that have come up through the appellate system to get up there to any great extent, seeing that we have only been in business 9 months.

Mr. ELSTON. You mean cases that originated before you were set up as a separate entity are being disposed of by the Army?

Mr. ZUCKERT. No. We have taken over all courts martial jurisdiction, sir. I just don't have the figures, sir. I can supply them for you.

Mr. PHILBIN. Do you have an acute need of lawyers in your courts martial branch in the sections where you are dealing with appeals for courts martial decisions?

Mr. ZUCKERT. The Judge Advocate General has filled up his complement of lawyers within the Judge Advocate General's system. We need a greater quantity of lawyers throughout the Air Force. We have had to make inducements. For example, there has been a provision raising the age limit for lawyers at which they could come in and get regular commissions.

Mr. ELSTON. You have a separate Medical Corps, haven't you?

Mr. ZUCKERT. Not in the Air Force; no, sir.

Mr. ELSTON. You do in the Army.

Mr. ZUCKERT. Our medical officers come to us from the Army.

Mr. ELSTON. Well, the Army has a separate Medical Corps.

Mr. ZUCKERT. That is right, Mr. Elston.

Mr. ELSTON. Now, could you give any particular reason why you couldn't have a separate legal corps?

Mr. ZUCKERT. You could, sir.

Mr. ELSTON. If you have a separate Medical Corps?

Mr. ZUCKERT. You could, sir.

Mr. ELSTON. Is there any reason for one and not for the other?

Mr. ZUCKERT. Yes, sir. And that is my principal reliance before this committee. Your medical people are limited to taking care of the health of your personnel. They don't go across the board administratively. They are not in your procurement field, for example. They are not concerned with real estate. They are not concerned with the great number of other things. Well, what I mean is the lawyers we have do go across the board. The doctors are merely concerned with this single problem of health. They are not concerned with anything that has to do with general administration.

Mr. ELSTON. Well, would it not be possible for your legal corps to handle all legal problems, that is, military trials and all matters pertaining to military justice, contracts, and every other legal question?

Mr. ZUCKERT. Yes, sir; it would be possible. But we feel it would be seriously undesirable because then you have created this insulated group that has such a strong effect upon the administration of your entire operation. They are off by themselves. They are an entity. They are a service organization which it is very difficult to touch and control in respect to your administrative problems.

Mr. BROOKS. Let me see if I get your idea. Your idea there is that the lawyer is needed in practically every phase of the air work.

Mr. ZUCKERT. That is right, sir.

Mr. BROOKS. And if they were insulated in a separate corps, they would not be available as readily certainly as they now are, without a corps; is that the thought?

Mr. ZUCKERT. That is right, sir, and as we develop we should be able to use lawyers in administrative jobs, too, just the way many of our lawyers in civilian life are in top administrative jobs in the Government. We want to be able to use the lawyer in the Air Force for his ability.

Mr. BROOKS. Let me ask you this, then, sir. If you had a corps, would that result in reducing the number of lawyers you use or increase the number?

Mr. ZUCKERT. If we had a corps——

Mr. BROOKS. Corps; yes.

Mr. ZUCKERT. It would reduce the availability of those officers for general assignment.

Mr. BROOKS. What about the numbers, though, needed?

Mr. ZUCKERT. You mean if we had a corps, a Judge Advocate General Corps——

Mr. BROOKS. Yes.

Mr. ZUCKERT. Would we need more lawyers in the Air Force than under the present circumstances?

Mr. BROOKS. Yes, sir.

Mr. ZUCKERT. Well, the tendency would be, Mr. Brooks, if I know anything about government, to get more and more of your lawyers into administrative jobs within the corps because there is the separate administration of the corps. Administrative jobs have an attraction and you would be denuding your lawyers by putting them into those jobs in connection with the administration of the corps.

Mr. HARDY. What you are saying is if you set up a separate corps, you would run into difficulties within the Air Force similar to the difficulties of unification that faces the Secretary of Defense at the moment?

Mr. ZUCKERT. Sir, that question is pretty broad in its scope.

Mr. HARDY. It is broad in its scope, and the problem you are raising is broad in its scope. I can't follow you. I don't know why you can't control them if you have them set up in a corps.

Mr. ZUCKERT. You can't control them if they are a separate administrative group with their own promotion list and running their own show apart from commend.

Mr. HARDY. But that doesn't have anything to do with the operation of the corps, even if they have a separate administrative group.

You have a separate administrative group in the Air Force and you have one in the Navy and you have one in the Army. It is the job of the Secretary of Defense to make them work together. And what is the reason why the Secretary of the Air Force can't make the corps work with all of the other activities of the Air Force? You are admitting a weakness, aren't you?

Mr. ZUCKERT. I am admitting an organizational weakness in the corps system, yes, sir.

Mr. HARDY. Aren't you admitting an administrative weakness, also?

Mr. ZUCKERT. I don't believe so, sir. I think the way organizations tend to function, when you set up a separate compartment with, so to speak, the right to hire and fire, you lose your control over those individuals within that compartment. I don't think that is an administrative weakness. I think that is just the way organizations work, sir.

Mr. HARDY. Of course, I can appreciate the fact that the Air Force has worked out their plan of organization and they think they have a good one, and there is always price in creation and perhaps a justifiable price. It may be that the Air Force have worked this thing out in a way that will produce efficiency. But how can the Congress determine that in the future a loosely held proposition of that kind will operate in the interest of promoting justice to these people that are coming up for courts martial?

Mr. ZUCKERT. Well, Mr. Hardy, you have the same problem, if I may say so, in connection with the spending of money. You have the problem of the review by the Congress of the efficiency of everything that the Secretary of the Air Force does. We don't have any pride in our organization plan which we are developing for the Air Force. But from the standpoint of starting off with something clean, without these artificial barriers inside an organization entity, we feel that it will promote efficiency within the Air Force, if we are allowed to start out on that premise. You are going to have the Secretary of the Air Force watching that problem. You are going to have the Judicial Council, composed of civilians, who are going to have a good perspective on this judicial system. They can tell you soon enough.

Mr. BROOKS. We have changed the name of that to the "Court of Military Appeals."

Mr. ZUCKERT. All right, sir, the Court of Military Appeals. I got here late.

Mr. HARDY. I am beginning to wonder if the Air Force is going to need different treatment all the way along the line from the other branches of the service——

Mr. ZUCKERT. We are not asking——

Mr. HARDY. I think, if we give consideration to this proposal not to require the Air Force to have a separate Judge Advocate General Corps, maybe it is wrong for the Army to have it. Maybe we ought to abolish it in the Army and get them all on the same footing. What do you think about that?

Mr. ZUCKERT. Sir, I can't speak for the Army.

Mr. HARDY. Well, if it is wrong for one, it would be wrong for the other, wouldn't it, from an administrative standpoint?

Mr. ZUCKERT. The Army is used to having corps. The Army has corps today.

Mr. HARDY. Well, does that make them right?

Mr. ZUCKERT. That doesn't make them right; no, sir. It becomes a question of the tail wagging the dog after a while.

Mr. HARDY. You think that maybe that is the case in the Army now, that the tail is wagging the dog?

Mr. ZUCKERT. No.

Mr. HARDY. Either in the Judge Advocate General Corps or some other corps?

Mr. ZUCKERT. No. It would do one of two things. If it is an error——

Mr. HARDY. Maybe that was the case when the Air Corps was a part of the Army.

Mr. Chairman, that is all I have.

Mr. DEGRAFFENRIED. Mr. Chairman.

Mr. BROOKS. Mr. deGraffenried.

Mr. DEGRAFFENRIED. Mr. Secretary, without any Judge Advocate General Corps there, you do follow the policy, don't you, of having the lawyers there who are better in courts-martial work to pursue that rather than let them handle all these various things that you are talking about—real estate and the various other things?

Mr. ZUCKERT. That is right.

Mr. DEGRAFFENRIED. You don't let one try to handle various things. In other words, a man tends to become good in some special line of work that he is suited for and for which he studied, and you do find out what their tendencies are and what they like best and what they are best suited for, and use them in those categories?

Mr. ZUCKERT. Yes; we do. And that is a matter of personnel administration within the Air Force, which is the responsibility of General Edwards in respect to lawyers as it is in respect to everybody else.

Mr. BROOKS. Mr. Norblad.

Mr. NORBLAD. Well, after the war there were a number of boards and committees set up to study the court-martial problem.

Mr. ZUCKERT. Yes, sir.

Mr. NORBLAD. I don't know how many there were—probably half a dozen. In New York, the bar association had a group and the veterans' association had a group. It is my recollection that every one of those boards universally and uniformly recommended that there should be a separate Judge Advocate General Corps in the three services; is that correct; everybody that studied it?

Mr. ZUCKERT. I think, in general, when the problem has been studied by outsiders, they have agreed there should be a separate corps.

Mr. NORBLAD. And I think I can say without fear of contradiction that 99 percent of the men who had experience with the courts-martial system in the war, particularly with the Air Force, are very much in favor of a separate corps.

Mr. ZUCKERT. I can't deny that, Mr. Norblad. All I know is, looking at the problem as one of the people in the office of the Secretary of the Air Force, you realize, as I do, that there are definite problems in connection with corps administration.

Mr. NORBLAD. I think most people who did deal with the problem during the war feel that the prime way of getting away from the abuse is by setting up a separate corps; that is, the command abuse that occurred in the courts-martial system.

Mr. ZUCKERT. And if I may say so, the case on the otherwise, which is our case, is that this statute hereby setting up these guaranties under this system, we feel, is the way to do it, rather than by an artificial administrative unit.

Mr. NORBLAD. Yes; I realize that.

Mr. ZUCKERT. Those are the two points of view.

Mr. BROOKS. I would like to ask you one or two more questions. In approaching this from a new viewpoint, the Hoover Commission recommended unification. How does the establishment of corps affect, or does it affect, unification generally?

Mr. ZUCKERT. The establishment of a corps in the Air Force and its effect upon unification?

Mr. BROOKS. Yes; on the establishment of a corps in the Navy or any other service. How would it affect unification?

Mr. ZUCKERT. Well, if you made it uniform for all three, if it could be done practically, I suppose that would be the ideal way. As it is, the Navy is at one extreme and the Army is at the other, and I am beginning to think that we are in the middle in this proposition.

Mr. BROOKS. Yes.

Mr. ZUCKERT. We feel, though, that if you set it up, if you set up the corps which has these definite disadvantages, you are creating something which is going to be very difficult to get rid of. And if it is only done for the Air Force, it leaves the Air Force and the Army on the one side and the Navy in a more favorable position to do their entire administrative job.

Mr. BROOKS. Well, thank you very kindly.

Are there any more questions?

Mr. NORBLAD. Mr. Chairman——

Mr. BROOKS. If not, sir——

Mr. BROOKS. Mr. Norblad.

Mr. NORBLAD. With reference to the statute, itself, specifically providing that the command influence shall not be used, as the statute does, I would like to know whether you think for a practical purpose that if the command does use influence that anybody within the command is thereafter going to go in and file charges of violating the Articles of War against a man who is superior to him in command? In other words, if the general abuses his command influence over a lieutenant who is doing judge advocate work, is the lieutenant then going in because the statute says so and file charges against his general commanding him?

Mr. ZUCKERT. Well, sir; I will answer you this way——

Mr. NORBLAD. It is good in the law, but it still needs further protection.

Mr. ZUCKERT. I think it needs something else, too, and that is that there is the strong deterrent of it being a crime, so to speak, for the general to do it. To have it written out clearly in the statute that it is in violation of the Articles of War will deter a lot of hasty action by commanding officers in attempting to exert improper control.

Mr. NORBLAD. I think that is right. You also have the situtation where he doesn't necessarily have to call down the court-martial board for their action. He can go into the officers' club, for instance, and pass out a few remarks to members of the board, some board that is going to try a case, and say, "I certainly hope that boy gets a stiff sentence," or "We ought to convict that man because he is not a good

officer" or "enlisted man" as the case may be. In any event, he can exert his influence very indirectly.

Mr. ZUCKERT. I will agree with you. But I don't think you can beat human nature by setting up this enclosure.

Mr. NORBLAD. I think it will help.

Mr. DEGRAFFENRIED. Mr. Secretary, this bill starts out by saying, "A uniform code of military justice."

Mr. ZUCKERT. Yes.

Mr. DEGRAFFENRIED. That is the name of it.

Mr. ZUCKERT. Yes.

Mr. DEGRAFFENRIED. Now, if we had a separate Judge Advocate General Department for the Army and some other branches and not for the Air Corps, is there any way we could really justify that? Uniform means applied to all the services alike. In order to make it uniform, don't we either have to have one or not have one applicable to all the services?

Mr. ZUCKERT. We don't feel you do, Mr. deGraffenried, because this uniform code sets up the procedural guarantees: The way of carrying it on, what is a crime, and what is there that must happen in order to fully protect the rights of the accused. We feel that that is enough of a hold that you don't in addition have to prescribe the method of administration of the lawyers who are handling the cases in addition to prescribing this hold that this code does set up. I believe Professor Morgan testified here that we felt when we designed the code that the problem of organization, military organization, was outside the present concept of the code.

Mr. BROOKS. Any further questions?

Mr. HARDY. Mr. Chairman, just a comment. I am a strong supporter of the Air Force, but I declare it does look to me as though they are trying to get an awful lot of preferential treatment and be left with an awful lot of discretion.

Mr. BROOKS. Thank you very much, Mr. Secretary.

Unless you want to answer the observation there.

Mr. ZUCKERT. I feel I have to, Mr. Chairman.

Mr. BROOKS. All right, sir.

Mr. ZUCKERT. Mr. Hardy, if it were a problem of the Navy having a corps and the Army having a corps and we were trying to evade it, I would think there would be some considerable merit in your contention as focused in this case.

Mr. HARDY. I noticed the Navy representative was shaking his head a moment ago when you were making the observation that the Army was on one extreme and the Navy was on the other extreme, and you were in the middle.

Mr. BROOKS. Mr. Secretary, we appreciate your coming here very much.

Mr. ZUCKERT. Thank you.

Mr. HARDY. And I think perhaps they would like to speak on that, Mr. Chairman.

Mr. BROOKS. Admiral, will you come forward here and represent the Navy?

Do you have a prepared statement, or would you just care to make an observation?

Admiral RUSSELL. I would like to make observations from a statement which I have written and offer the statement for the record.

(The statement referred to is as follows:)

STATEMENT OF REAR ADM. GEORGE L. RUSSELL REGARDING THE PROPOSED FORMATION OF A LEGAL CORPS IN THE NAVY

The Navy now has an integrated group of 239 professionally trained law specialists. These offcers are line officers who have been assigned to special duty only in the field of law pursuant to section 401 of the Officer Personnel Act of 1947, Public Law 381, Eightieth Congress. They are additional numbers in grade and compete only among themselves for promotion and for assignment to authorized law billets. They perform sea or shore duty appropriate to their special qualifications as lawyers. They cannot succeed to command at sea, but they can succeed to command ashore if authorized to do so by the Secretary of the Navy. Although these officers are designated for special duty in the field of law, they are still line officers and are able to perform other line duties should the situation demand. This feature of their status is of extreme value in the case of law specialist officers assigned to small fleet units. Although a command may be sufficiently large to warrant the assignment of a law specialist officer, the volume of legal work may reach alternate peaks and depressions. The ability of the law specialist officer to perform line duties makes it possible for the Navy to use his full time to best advantage. He is not compelled to sit idle in the midst of the continuous activity of the ship when his law work is at low ebb, but can be assigned other duties and can pull his weight with the rest of the ship's complement.

Allied with the officers assigned to special duty only in the field of law, there are professionally trained officers-lawyers in two other categories. Twenty-nine lawyers who are also officers in the United States Naval Reserve are now on active duty in law billets; and six general-service line officers of the regular Navy, who have had professional law training, are assigned to primary duty in law. The general-service line officers who have had legal training constitute an important element in the Navy law group. There are at present 47 such officers who have received LL. B. degrees under the supervision of the Judge Advocate General; and there are 24 more who are now studying law and who will be available for assignment either to law billets or line billets within the next 2 years. The group of general service line officers with legal training are of great value to the Navy in two ways:

(1) They provide within the law group a leavening of generalized naval experience which is essential in the handling of legal matters closely related to the general administration and operation of the Navy; and

(2) When dispersed in general line billets throughout the fleet and in the shore establishment, they constitute a widespread sources of legally trained personnel available in particular instances arising locally and requiring the attention of a professional lawyer.

There are a number of cogent reasons why the status of the principal group of Navy law officers should not be changed to that of a legal staff corps:

(1) The present system is working very well indeed. Nearly two full years of practical operating experience with the law specialist group has shown the system to be sound in principle, and has revealed no major weakness or practical difficulty. There appear to be no advantages inherent in a staff corps status sufficiently great to warrant the change to a new and untried organization of the Navy law group.

(2) It was at first considered that staff corps status might be necessary to provide adequate protection to the individual who becomes subject to court-martial proceedings. The proposed Uniform Code of Military Justice presently before the Congress, however, would remove any possible necessity for the provision of staff status to Navy law officers. The many safeguards set up by the Uniform Code of Military Justice for the protection of the rights of the individual in military justice matters would be augmented not at all by the reorganization of the law group as a staff corps. No officer in an administrative or command position with relation to the individual subject to court-martial proceedings can take arbitrary action prejudicial to the defendant's interest without subjecting himself to disciplinary action for violation of the law.

(3) Only about 50 percent of the duties of the Judge Advocate General and the Navy law group are concerned with military law. The remaining 50 percent are concerned with a variety of legal matters closely interwoven with the operation and administration of the Navy. These latter duties, in particular, require lawyers with a wide practical knowledge of the Navy and its operation, and with a wide variety of Navy experience. These qualifications can best be supplied by line offi-

cers who have been professionally trained in law, and who have had some opportunity to participate in the general administration and operation of the Navy. The formation of a legal staff corps would tend to effect a compartmentation of the Navy's law officers, divorcing them from any participation in the general administration of the Navy and detracting from their value in the handling of legal matters not associated with military law.

(4) Should the Navy law group be reorganized as a staff corps, the performance of law duties, including those concerned with military justice, would necessarily be restricted to members of the legal corps to the exclusion of the legally trained general-service line officers. This exclusion would have two serious disadvantages:

(*a*) Replacements would be necessary for those general-service line officers now assigned to law billets, and the Government's investment in their law training would in the future be wasted, along with the valuable combination of naval and legal experience which may be found in those officers.

(*b*) Officers of the legal staff corps would have to be made available on ships throughout the world, whereas previously the distribution throughout the fleet of general-service line officers with law training made it possible to keep the law specialist officers assigned primarily in central locations. The assignment of legal staff corps officers would frequently be necessary on ships having no space available for the quartering of officers whose duties are so highly specialized and rigidly confined.

(5) There is no advantage to be gained in organizing the Navy law group as a staff corps from the standpoint of separation of military justice matters from the influence of command. The administration of the machinery and procedures pertaining to military justice under the present system is the responsibility of the Judge Advocate General of the Navy. Command exerts no influence over the Judge Advocate General under the present system, as he is responsible only to the civilian head of the Naval Establishment.

(6) Similarly, creation of a corps would have no effect on the supposed possible pressures upon officer-lawyers by command which are misconceived to be exerted through the marking of fitness reports. As in the cases of other cures apparently expected by some to be effected automatically by the corps device, no actual change would result. If a corps were to be imposed upon Navy lawyers taking them out of their present status of officers of the line, their fitness reports would still, as a matter of practical necessity, have to be made out by the commanding officer who had actual contact with the Navy lawyer reported on. This is the present practice, based upon the entire experience of administration of the Navy, in the case of fitness reports of officers of the Supply Corps, Medical Corps, Dental Corps, and Civil Engineer Corps assigned to their commands. If it were desired to have the Judge Advocate General make out the fitness reports of all Navy lawyers, it would certainly not be necessary to create a corps to make this possible. It could be done just as well under the present form of organization. As a practical matter, however, no officer stationed in a central location could be in a position to make out adequate fitness reports upon hundreds of officers distributed all over the world and its oceans. At best, a central evaluation would be possible only of the paper work done by lawyers in the field. Navy lawyers must perform many other important functions than paper work. They must be qualified to give oral opinions and advice promptly when needed. They must be experts in administration. They must be able to think on their feet, and make forceful oral presentations of their cases, for either defense or prosecution, before courts martial. They must organize their work efficiently. They must be of such caliber that their local reputations and conduct will inspire confidence among enlisted men and officers of their respective commands, in the system of naval justice in action, as distinguished from a mere theoretical system. Only their immediate commanding officers are in a position to make a comprehensive and accurate evaluation of the totality of performance of duties by Navy lawyers. Creation of a corps could in no way change this.

(7) Finally, the formation of a legal staff corps is subject to a broad objection from the standpoint of integration and homogeneity with the rest of the officer personnel of the Navy. The Navy has in the past attempted to meet the problem of specialization among tis officer personnel, specialization having become a necessity in an increasing number of fields, through the assignment of trained and qualified line officers to continuous duty in a particular field of activity. This has been accomplished, without the accompanying rigidity of a staff corps, by means of the designation of officers for special duty in such fields as engineering, communications, law, naval intelligence, photography, public information, psychology, and hydrography. The rentention by such specialists of their status as

line officers keeps the body of officers personnel as homogeneous as possible under the circumstances, and avoids breaking off from the main group of personnel a large number of small, highly specialized and readily distinguishable subgroups required by law to concern themselves only with their particular phase of the Navy's work. It was on this general principle that the Navy requested and received from the Congress the authority to assign officers to special duty categories as contained in section 401 of the Officer Personnel Act of 1947. To reverse our field at this time and to start making each of these special duty groups into a staff corps would be a definite step backward, would whittle away at the esprit de corps among the officers of the Navy, and would tend to create schisms and rivalries between the segregated specialist groups and the general-service line officers. Also, I consider it only fair to the individual officers concerned, who were professional lawyers and members of the Naval Reserve, to remember that upon their transfer to the regular Navy, in exchange for their giving up their professional careers as lawyers in civil life, they were offered commissions in the line of the Navy. Thus the commissions they accepted were line officer commissions. Many of these officers, especially those who were in substantial actual combat during the war, may feel that action without their consent depriving them of their status as officers of the line of the Navy would constitute a breach of faith. Faced with a substantial requirement of procuring additional lawyers, a difficult problem at best, considering the caliber of attorneys we need and the competition with more immediately remunerative employment available in civil life, it would be unfortunate indeed if through resignations we should lose any of our experienced and proved present group of Navy lawyers.

For these reasons, I believe the reorganization of the Navy law group as a legal staff corps to be neither necessary, justified, nor practically sound.

In short, I consider that the present organization of Navy lawyers as a special-duty-only group of line officers, augmented by general-service line officers with professional law training, has all the advantages of a staff corps without its disadvantages. I believe that the reorganization of this group as a legal staff corps would result in an immediate and pronounced loss in flexibility, efficiency, and exprit.

It is my further conviction that in no event should a shift to a Navy staff corps system be attempted until the Uniform Code of Military Justice has been in operation for several years. Experience under the Uniform Code will provide a hitherto unavilable opportunity to study and compare, under uniform operating conditions, the relative merits of the staff corps system as used in the Army with the special-duty-only system in use by the Navy. At the end of such a trial period, should one or the other of the systems prove vastly superior, consideration could be given to a reorganization having a sound foundation in actual experience.

Admiral RUSSELL. In the first place I would like to say that nobody has any more interest in seeing that justice is done in the Navy than I have. With respect to Mr. Zuckert's observation that we were at one extreme, I would like to say this. As we are now organized, we have something that we think is better than a corps. Before the war our courts martial were tried and men were prosecuted and defended entirely by unrestricted line officers. If an individual was fortunate enough to find one of them that was already a lawyer why so much the better. I think the war proved that that wasn't good enough. So we had the same decision to make 4 years ago that the Air Force has now. We debated at great length whether we should have a corps or some other type of organization. We decided against the corps for a variety of reasons, of which one is the economy of personnel and another is organizational flexibility. We don't call it insulation in the Navy. We call it compartmentation. When you get the lawyers in a corps, we were afraid that they wouldn't be available when you wanted them for other things and that they were likely to get into a rut. As a result we created what we called a law specialist. We now have 241 of them. They are supplemented by about 30 Naval Reserve officers who are retained on active duty, all of whom are lawyers and further by around forty-odd unrestricted

line officers who are qualified in law. Of that latter number there are only a few that are now working at it, of whom I am one. These law specialists are additional numbers in grade. They compete only among themselves for the promotion and for the assignment to authorized law billets. And they perform sea or shore duty appropriate to their special qualification as lawyers.

I would also like to comment on the thought that if one service has a corps the other ought to have one, too. I think that is a non sequitur because you start out with a different organization. I think the entire history of the Army is one of organization. We used to have the Cavalry and the Infantry and the Coast Artillery. And when aviation came along the most natural thing in the Army was to form an air corps, and they did so. The Navy's organization over the years was entirely different. We had to live together on board ship. You had the line officer, the doctor, the paymaster, the carpenters, and so forth. And to use aviation again, when that came along the most natural thing for the Navy to do was to integrate it. In other words, we start with a different organization. We have integrated our lawyers as line specialists. That is what we have done with them.

We think that it is a good thing to have a few unrestricted line officers working at the law business. They provide the background of service experience which the others do not have yet. I hope they will get it. And I think they will get more service experience if they are given a little more freedom of assignment to duty. For example, we have a law specialist on duty at Guantanamo Bay, Cuba. There isn't enough law business down there to keep that fellow busy all day long every day. So he is a number of other things. I think he acts as intelligence officer, he acts as public relations officer, and he has about four or five other jobs. And the commandant down there finds him very valuable. Now, if he were unavailable for anything but law business he would have time hanging pretty heavy on his hands. Furthermore, I think that in the Navy we are split up into smaller units and we cannot undertake to have a trained lawyer right there with all of them and expect to keep him busy. We have to rotate them around and make them available for larger units.

We found over a period of about 3 years that this system works wonderfully well. I can't see—I have listened to a lot of testimony—where it makes a particle of difference with respect to the fair deal that an individual being tried by courts martial gets, whether we are organized as a corps or whether we are organized the way we are.

Mr. HARDY. You have sort of a hybrid proposition, is that right?

Admiral RUSSELL. Yes. I think maybe we are in the middle, Mr. Hardy. But we like what we have. We find it works very well.

Mr. HARDY. You don't have quite a corps, but at the same time you have a little more coordination of your legal personnel than the Air Forces propose, apparently.

Admiral RUSSELL. We have control of our people, yes. They are also subject to the orders of the district commandants, for example, but it is up to me to shift them around or at least recommend it, and I haven't been turned down yet when I think they need shifting. Does that answer your question?

Mr. BROOKS. You feel, in other words, that you get more efficiency out of your personnel without a corps?

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Admiral RUSSELL. I believe we do.

Mr. BROOKS. We have had no experience with a corps, Mr. Chairman, and we can't say that from our experience, but that is our feeling.

Mr. BROOKS. Admiral, if there are no further questions——

Mr. NORBLAD. May I ask a question?

Mr. BROOKS. Surely.

Mr. NORBLAD. Is there anything to prevent your man at Guantanamo Bay from doing other work, should we set up a corps?

Admiral RUSSELL. Well, he is supposed to devote himself exclusively to law business.

Mr. NORBLAD. Primarily or exclusively?

Admiral RUSSELL. Exclusively, I would expect, if he is in the Corps.

Mr. NORBLAD. Couldn't the law be written to provide that in the event there were not sufficient legal duties for him to perform that he could be assigned to other general work?

Admiral RUSSELL. It could be. I don't say we couldn't function with a corps. We would make it work if we could, Mr. Norblad.

Mr. NORBLAD. I would like to ask you one other question. I was somewhat disturbed because of the fact that there is such a shift within the Navy of your legal personnel. I refer particularly to the witness who testified at the beginning of the hearing, I don't recall who he was, who said that he had a claim with the Navy of some several millions of dollars. He had gone over there to see the officer in charge with this particular claim and was advised by the officer's secretary that she was very sorry but he was out for the afternoon as he was attending law school. It was a very complex claim. Yet you have very capable men—your predecessor, Admiral Colclough, for instance.

Admiral RUSSELL. Yes.

Mr. NORBLAD. I understand he now has submarine duty.

Admiral RUSSELL. Yes.

Mr. NORBLAD. Yet he is a very capable lawyer.

Admiral RUSSELL. Yes.

Mr. NORBLAD. It seems to me it would be better to allow them to continue doing law work, rather than having so many in law work handling that duty and then going into submarine duty or other fields.

Admiral RUSSELL. A great majority of them do that, Mr. Norblad. There are only a very few that are eligible for command. Only a few unrestricted line officers are doing that. We have only six or seven on duty right now.

Mr. NORBLAD. I just happen to know that particular case.

Admiral RUSSELL. I can't imagine a law student handling a million-dollar claim by himself, either.

Mr. NORBLAD. Do you recall that, Mr. Chairman? Somebody testified on that at the beginning of the hearing. I don't recall who it was. We had so many witnesses.

Mr. BROOKS. Well, I think that follows the line that you have suggested there.

Admiral RUSSELL. I would like to say also—it is awful hard to say in percentages, but the courts-martial work that we do is probably less than 50 percent of our legal business. We have admiralty, claims, tax matters, legislation, and administrative law. I consider myself the Attorney for the Secretary. And I might say that three

out of the four secretaries are lawyers and I had better be right. Incidentally, there is this difference in our organization: There is no command influence being exercised on the Judge Advocate General. I am responsible directly to the Secretary of the Navy.

Mr. BROOKS. Admiral——

Admiral RUSSELL. As Mr. Kenney told you the other day—and off the record——

(Statement off the record.)

Mr. BROOKS. Any further questions? Admiral, if there are not, I promised you an opportunity to be heard again on a question that really we have disposed of but we are always glad to get the benefit of wisdom from you especially. That is article 66.

Admiral RUSSELL. Yes.

Mr. BROOKS. Subsection (e), which the committee struck out the other day.

Admiral RUSSELL. Yes. Well, I appreciate the opportunity to be heard on it because it is a matter of real concern to me. It was on my recommendation that that particular portion that was stricken from the bill was put in there and I did it for this reason: I tried to visualize how I would run that type of organization, if I am to be the head of it. I may not be by the time this goes into effect. I have no quarrel with the idea of passing up to the Court of Military Appeals these questions of law. What worried me was primarily what about the sentence. I just don't like to be held responsible in the view of the American people and in the view of the Congress, and individual Congressmen, for both the law and the sentence, whether it is true or not, and yet not having the say about it. I am going to be in the position, I am afraid, of being, well, very well insulated from the courts-martial work.

Mr. BROOKS. I might say this: In the discussion which occurred when that was stricken out, the feeling was that you would have a great deal to say about sending a case to a certain board. The committee felt at that time certainly that if you sent a case to one board you should be willing to accept the result of the board and not want the authority to send that same case to another board, especially in the light of the fact that you have the authority to certify these cases up to the new court which we are establishing.

Admiral RUSSELL. I can certify them on the law, Mr. Brooks, but not on the sentence. And suppose a case comes to me that is either way. Suppose there is 10 years when I think it ought to be 12 months. There is nothing I can do about it. That has to go through the clemency process and come back afterward. Once in a while we get a case the other way. We had a very bad murder and rape case out in Saipan and we heard on that from everybody, in spite of the fact that the Judge Advocate General as of now has nothing whatever to do with the sentence. There was a great deal of indignation at the lightness of those sentences.

Mr. BROOKS. Now, doesn't the Secretary of the Navy have something to do with the sentence?

Admiral RUSSELL. Yes. He does now.

Mr. BROOKS. Doesn't he listen to your recommendation?

Admiral RUSSELL. I don't make any recommendation on the sentence now, sir. That is what this bill contemplates. If whenever one thinks of the court martial, which seems to me to be the case, they

immediately think of the Judge Advocate General, then I am afraid I am going to be catching it from all sides and I am going to have to say kind of lamely, "Well, there are three officers in my office who think otherwise." As a matter of fact, I have never been able to see why I shouldn't have the authority to throw out a case. The convening authority in the field can do it and three of my subordinates can do it, but the Judge Advocate General, as the chief law officer, hasn't anything to say about it.

Mr. BROOKS. The Secretary of the Navy has some authority, too, under this?

Admiral RUSSELL. Nor with respect to throwing it out, no sir.

Mr. BROOKS. What does he have with reference to this bill?

Admiral RUSSELL. He has the authority to extend clemency after the case has been processed and it comes back again. And that is based on the behavior of the individual and whether or not he is a good risk to be rehabilitated.

Incidentally, there is another point. Take the case of an officer, enlisted man, or whoever he is. He is a borderline case for retention. There is a big argument. Should he be put on probation or shouldn't he. I don't think that that is a proper question for the Judicial Council. I think that ought to be decided by people in uniform in that Service: Do we want this fellow, is he a good risk? Now if I can get enough people in my office on these boards it might work. And I would probably feel like consulting with, well, say the Commandant of the Marine Corps or the Chief of Personnel and ask "How do you feel about this?" before the decision was made.

Mr. BROOKS. That is just exactly what the committee doesn't like I mean, they feel like a man is on trial and you shouldn't dispose of his case before it is tried there.

Admiral RUSSELL. This is after the trial, sir.

Mr. BROOKS. Oh, after the trial.

Admiral RUSSELL. Yes. This is the question now: What is his punishment going to be; shall we give him another chance?

Mr. PHILBIN. You should have authority to do that.

Admiral RUSSELL. We have a lot of cases where a man does something, yes, but upon a close examination you find, well, he made a mistake and we don't think he is really dishonest; he is probably a victim of something and maybe is drunk or whatever it is and give him another chance and put him on probation. Let him earn his honorable discharge.

Mr. BROOKS. But what about the case where this first board finds he is innocent and you certify him back to another board and keep on until you get a plea of guilty sentence?

Admiral RUSSELL. I have no desire to shop around. What I am afraid of is the case won't get as good a review as it gets now. We don't have a very large number of these cases, as I said a minute ago, that involve these legal arguments. My office has been told in so many words: Now this is a law office. You are entitled to speak your mind. And invariably, if we have an important case, I don't care who the initial reviewer is, he gets a change to come up to my office and say what he thinks. We have as many as 8 or 9 officers review an important case or a close case right now. If we are only going to have three people doing it and that is going to be final, I am just afraid of it.

Mr. BROOKS. Of course, now you have a set-up which is very admirable, I will say that, but is not under statute and they are purely advisory to you—just like I would hope the Secretary of the Navy before he commutes a sentence would get the advice of his best officers on that.

Admiral RUSSELL. Yes.

Mr. BROOKS. But when you write it into the law the committee felt like one hearing should be final, especially when a man is found innocent on appeal, that you shouldn't send him back again to another board to find him guilty.

Admiral RUSSELL. Well, there are some awful close questions of law, Mr. Chairman. There are honest differences of opinion. If we didn't have those opinions, I am afraid our lawyers wouldn't do very well.

Mr. DEGRAFFENRIED. But on those questions of law, Admiral, they go to the court of appeals.

Admiral RUSSELL. Yes, if that is close, I probably would, if for no reason than "Now there is a point that ought to be brought out and promulgated to the three services so they will know what the law is on this particular point."

Mr. BROOKS. I had this thought; that, in cases where the Judge Advocate General felt that an error had been made by the board which he created and to which he certified the case, we might amend this to give him authority to certify the case to the Court of Military Appeals on both the law and the evidence.

Admiral RUSSELL. I am afraid they would bog down on that, sir. I don't believe they can handle it. We were discussing here not long ago their work load. The law questions that, I would think, would be certified up are few enough, but I don't think they could possibly handle all these cases where, for example, the——

Mr. BROOKS. Let me ask you this, then.

Admiral RUSSELL. Yes?

Mr. BROOKS. Do you anticipate that your boards are going to be that far wrong?

Admiral RUSSELL. I hope not.

Mr. BROOKS. That you can't set up good boards to start with who will render substantial justice in their decisions?

Admiral RUSSELL. I hope they will.

Mr. DEGRAFFENRIED. You see, Admiral, what we were concerned with was this: You have a board of review here who might say a man is innocent. All right. You don't think their decision is correct, for some reason. You refer it to another board of review and they come out with a different decision from the first board of review. There you have two boards of review, each with equal authority, not one higher than the other. One board has declared him guilty on the facts. And the court of appeals can't review those facts except where they are just insufficient as a matter of law to constitute a conviction.

Admiral RUSSELL. Yes.

Mr. DEGRAFFENRIED. So you have two boards with equal power, one of which has declared him innocent and the other has declared him guilty. Now, he is declared guilty because that one happened to pass on it last and yet the other one has just as much authority. That was the thing we were confronted with.

Mr. BROOKS. Well, we thank you very much, Admiral. Mr. Smart, you have something?

Mr. SMART. I might point out, on this question that you raised a minute ago, Mr. Chairman, that the Secretary of the respective Department would have more or less unlimited powers. Under article 74 of the code, you will notice that under "Remission and suspension", "The Secretary of the Department" and others whom he may designate "may remit or suspend any part or amount of the unexecuted portion of any sentence, including all uncollected forfeitures, other than a sentence approved by the President." In your initial consideration of this matter, I think that when you deleted article 66 (e) you concluded that if there had been a grievous mistake made in the severity of the sentence it was then within the prerogative of the Judge Advocate to recommend to the Secretary that it be appropriately reduced when it came to him. I would say under article 74 he had that authority. Last year, when we considered 2575, you will recall that we came to a matter of clemency power and the committee vested it in the Judge Advocate General. You will further recall that, when the matter was brought before the full committee, General Eisenhower and then Secretary of War Patterson came in, and for cogent reasons the committee changed that and revested that same authority back in the Secretary to the exclusion of the Judge Advocate. You have perpetuated that same situation here.

Mr. BROOKS. Yes, this is the law that we are presently using.

Mr. SMART. It carries forward the same theory that you adopted previously.

Mr. HARDY. Well, when you give it to the Secretary, you anticipate that a good bit of the decision will hinge on the Judge Advocate General; isn't that right?

Mr. SMART. I should think so. I certainly think he has the greatest of confidence in his Judge Advocate General and would certainly abide by his recommendation.

Col. DINSMORE. Mr. Chairman, I would like to point out——

Mr. BROOKS. All right, Colonel.

Colonel DINSMORE. That the Elston bill did not divest the Judge Advocate General of authority in those matters but made his action subject to supervision by the Secretary.

Mr. SMART. Well, as to clemency, you will recall, we revested clemency in the Secretary, to the exclusion of the Judge Advocate General.

Admiral RUSSELL. My action is subject to the supervision of the Secretary of the Navy right now, but I won't have any action to take under this.

Mr. BROOKS. You will have the action if you are dissatisfied——

You will have this action: First you set up your boards of review which is lots of authority, in my judgement, in the handling of a case. Then you will have the right to remove that board if it is not functioning properly. Then, in addition to that, it seems to me you have the authority of selecting the board you want the case to go to.

Admiral RUSSELL. Yes.

Mr. BROOKS. Then finally, if the board doesn't give you a satisfactory decision, I mean in your judgment, for the good of the service, you have the authority to certify that case up to the Court of Military Appeals for a decision. And, furthermore, you have the authority

to present your views to the Secretary of the service. All of which, it seems to me, gives you four or five opportunities, for the good of the service, to really affect that case. Now I just mention that. Of course, we are happy to hear from the admiral and have his views. I would be glad at the next meeting of the committee to present the matter again for whatever hearing they want to give.

Mr. SMART. I am wondering if this would answer Admiral Russell's criticism: If we would perpetuate the same authority which the Judge Advocate General of the Army has today under Article of War 53, I believe it is, which gives him certain powers to remit and to suspend sentence, in the respective Judge Advocates General but still not permit the Judge Advocate General to refer it to another board of review——

Mr. BROOKS. I think that is what the committee is objecting to—not your authority to remit or suspend but the closing of a case which had a hearing.

Admiral RUSSELL. I am just interested in seeing that we are not handcuffed with a system here which I am afraid might result in a poorer review than it now gets. And this business was prompted because I thought to myself: "Well now, what is going to happen to this sentence, who is going to have the say-so on that?"

Mr. BROOKS. Mr. Smart, could you draft some language between now and the next session, tomorrow, which would give the authority to the Judge Advocate General to remit and suspend in certain cases?

Mr. PHILBIN. To throw out a case if he doesn't think that the case is sustained?

Mr. BROOKS. Is that what you have in mind, Admiral?

Admiral RUSSELL. Yes; that is more like it, sir.

Mr. BROOKS. Fine. If there is no objection, then, that suggestion will be adopted.

There is a full committee meeting tomorrow?

Mr. SMART. Mr. Vinson told me there was a full committee meeting tomorrow.

Mr. BROOKS. This will conclude the public hearings and without objection we will meet in executive session on Wednesday, April 6, and try to finish the bill.

(Whereupon, the hearing was adjourned at 12:12 p. m.)

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