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Congressional Floor Debate

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on

The Uniform Code of Military Justice



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**CONGRESSIONAL FLOOR DEBATE
ON
UNIFORM CODE
OF
MILITARY JUSTICE**

United States HOUSE OF REPRESENTATIVES

(Cong. Record, Vol. 95, Pt. 3, p. 4120)

April 7, 1949

PUBLIC BILLS AND RESOLUTIONS

Under Clause 3 of rule XXII, Public bills and resolutions were introduced and severally referred as follows:

By Mr. Brooks: H.R. 4080. 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; to the Committee on Armed Services.

United States HOUSE OF REPRESENTATIVES

(Cong. Record, Vol. 95, Pt. 4, p. 5286)

April 29, 1949

**REPORTS OF COMMITTEES ON
PUBLIC BILLS AND RESOLUTIONS**

Under Clause 2 of Rule XIII, reports of committees were delivered to the Clerk for printing and reference to the proper calendar, as follows:

Mr. Brooks: Committee on Armed Services, H. R. 4080. 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; with amendments (Rpt. No. 491). Referred to the Committee of the Whole House on the State of the Union.

United States HOUSE OF REPRESENTATIVES

(Cong. Record, Vol. 95, Pt. 5, p. 5718)

May 5, 1949

UNIFORM CODE OF MILITARY JUSTICE

Mr. Sabath: Mr. Speaker, I call up House Resolution 201 and ask for its immediate consideration.

The Clerk read the resolution as follows:

Resolved, That immediately upon the adoption of this resolution it shall be in order to move that the House resolve itself into the Committee of

the Whole House on the State of the Union for the consideration of the bill (H. R. 4080) 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. That after general debate, which shall be confined to the bill and continue not to exceed 3 hours, to be equally divided and controlled by the Chairman and ranking minority member of the Committee on Armed Services, the bill shall be read for amendment under the 5—minute rule. At the conclusion of the consideration of the bill for amendment, the committee shall rise and report the bill to the House with such amendments as may have been adopted and the previous question shall be considered as ordered on the bill and amendments thereto to final passage without intervening motion except one motion to recommit.

Mr. Sabath. Mr. Speaker, this rule makes in order a bill which has been reported from the Committee on Armed Services. It aims to unify, 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. I know that will be pleasing and acceptable to all of us. The rule provides for 3 hours, general debate, and the bill will then be taken up, as usual, under the 5-minute rule. It is an extremely important bill, but the most important part, to my mind, is the section providing for a special Court of Military Appeals, which shall consist of three members to be appointed by the President, two of one party, and the third of the other party, which would have jurisdiction in all matters, instead of, as heretofore, having such matters under the control of the gentlemen of the Army and the Navy. I need not remind you of the many complaints that we have heard, and that the country has heard, relative to the unfair treatment accorded to enlisted men by those gentlemen. The gentlemen to be appointed to this court will be civilians, and will be appointed for life tenure. The salary will be comparable to that of a United States Court of Appeals justice. I think this legislation is a step in the right direction. In view of the fact that the extremely able chairman of the committee is present, as well as the members of his committee, who have heard the evidence, I know that they are in a much better position than I am to explain the bill in detail.

From what I have read of the bill and the evidence before our committee, I have come to the conclusion that it is a meritorious bill and really deserving of the unanimous support of the Members of the House who believe in justice to those who frequently get themselves in a little trouble, not because of their own fault, but because they disobeyed some of the unfair and arbitrary orders that some of these generals and colonels gave them, orders which they sincerely felt they were not obligated to comply with and which they felt were not germane to their draft status. But be that as it may, in this case those men will get justice in the future which has been denied them in the past.

Mr. Speaker, I reserve the remainder of my time, and I ask unanimous consent to revise and extend my remarks.

The SPEAKER pro tempore (Mr. Chelf). Without objection, it is so ordered.

There was no objection.

Mr. Sabath. Mr. Speaker, I yield 30 minutes to my colleague from Illinois (Mr. Arends).

Mr. Arends. Mr. Speaker, I have no requests for time on the rule on this side. I yield back my time.

Mr. Sabath. Mr. Speaker, if there are no requests for time, I move the previous question on the resolution.

The previous question was ordered.

The Speaker pro tempore. The question is on agreeing to the resolution.

The resolution was agreed to.

Mr. Vinson. Mr. Speaker, I move that the House resolve itself into the Committee of the Whole House on the State of the Union for the consideration of the bill (H. R. 4080) 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.

The motion was agreed to.

Accordingly the House resolved itself into the Committee of the Whole House on the State of the Union for the consideration of the bill H. R. 4080, with Mr. Lanham in the chair.

The Clerk read the title of the bill.

By unanimous consent, the first reading of the bill was dispensed with.

The Chairman. Under the rule, the gentleman from Georgia (Mr. Vinson) is recognized for 1½ hours.

Mr. Vinson. Mr. Chairman, after 5 weeks of careful study on the part of the subcommittee, of which the distinguished gentleman from Louisiana (Mr. Brooks) was chairman, that subcommittee reached a unanimous conclusion, and that was unanimously approved by the full committee.

This subcommittee has done an outstanding job. For 5 weeks the committee conducted hearings, oftentimes working 6 days a week.

This bill is endorsed and recommended by the Bureau of the Budget. It is approved by the National Military Establishment. It is approved by the administration, and it is unanimously approved, as I have said, by the Armed Services Committee.

No member of the committee is better qualified to explain this bill than the distinguished gentleman from Louisiana (Mr. Brooks), and the other members of his subcommittee. Therefore, Mr. Chairman, I am turning this bill over for explanation to the distinguished and learned gentleman from Louisiana (Mr. Brooks). I yield the gentleman such time as he desires to use.

Mr. Brooks. Mr. Chairman, I want to thank the chairman of the committee for the kind words he has said on behalf of the subcommittee which handled this bill. In the handling of the bill we always have the full cooperation of the chairman of the committee, the distinguished gentleman from Georgia (Mr. Vinson.) A number of times we had to appeal to him for guidance. He was always most cooperative. I feel that the cooperation he gave this subcommittee has gone a long way to make our labors pleasant and effective.

Mr. Chairman, to every member of the subcommittee, I wish to pay a personal tribute. The hearings by this committee, although extending over weeks, as the chairman of the full committee, the gentleman from Georgia (Mr. Vinson), has stated, oftentimes running 6 days a week and working late into Saturday afternoons, presented the unusual situation that instead of there being a falling off of attendance as the work went on, the attendance increased until during the last week of the hearings it was larger than at any previous time. All members of the committee participated actively in drafting this legislation, and it certainly was a most happy situation which presented itself when we finally voted on the bill and found every member of the committee in favor of it as reported, and all parts of it.

Mr. Chairman, the purpose of the proposed legislation is to establish a uniform code of military justice.

In July of 1948, Secretary of Defense Forrestal appointed a special committee to draft a uniform code of military justice, uniform in substance and uniform in interpretation and construction, to be equally applicable to all of the armed forces. Prof. Edmund Morgan, Jr., of the Harvard Law School, was designated chairman, the remainder of the committee being Assistant Secretary of the Army Gordon Gray, Under Secretary of the Navy John Kenney and Assistant Secretary of the Air Force Eugene Zukert. Supplementing the efforts of the main committee was a working group of approximately 15 persons, including officer representatives of each of the services and five civilian lawyers with service experience, under the chairmanship of Mr. Felix Larkin, assistant general counsel in the Office of the Secretary of Defense.

During the 7-month study which was conducted, the Morgan Committee and the working group considered the Revised Articles of War, the Articles for the Government of the Navy, the Federal Code, the penal codes of various States and voluminous reports on military and naval justice which have been made in recent years by various distinguished persons. The end result of this combined effort was H. R. 2498, a bill to provide a Uniform Code of Military Justice.

After 3 weeks of preliminary preparation, the committee conducted hearings 6 days a week for almost 5 weeks, during which time a total of 28 witnesses testified. They included representatives of the four major veterans' organizations, four bar associations, including the American Bar Association,

the Reserve Officers Association, the National Guard Bureau and the National Guard Association, the Under Secretary of the Navy, the Assistant Secretary of the Air Force and numerous other well-qualified witnesses. Upon the conclusion of all testimony the subcommittee gave detailed consideration to each article and section of this bill. Their deliberations, exclusive of two executive sessions, are embodied in a transcript of 1542 pages. As a result of committee amendments, H. R. 2498, was reintroduced. A clean bill, H. R. 4080, representing the final decisions, has been substituted for H. R. 2498.

The proposed code is presented in 11 sections and is further subdivided into 11 parts. Part 1 contains general provisions. Part 2 contains all of the provisions relating to apprehension and restraint. Part 3 pertains to non-judicial punishment. Part 4 sets forth the jurisdiction of courts martial. Part 5 prescribes the manner of appointment and composition of courts martial. Part 6 prescribes pretrial procedure. Part 7 prescribes trial procedure. Part 8 relates to sentences by courts martial. Part 9 prescribes the provisions for appellate review. Part 10 sets forth and defines the punitive articles. Part 11 contains miscellaneous provisions. Section 1 of the bill contains 140 articles. These articles embrace all of the provisions of the proposed Uniform Code of Military Justice. The 13 remaining sections relate to the subject of military justice, but are not germane to a uniform code of military justice and are, therefore, excluded from section 1 of the bill.

The proposed code is uniformly applicable in all of its parts to the Army, the Navy, the Air Force, and the Coast Guard in time of war and peace. It covers both the substantive and the procedural law governing military justice and its administration in all of the armed forces of the United States. If adopted, it will supersede the Articles of War, the Articles for the Government of the Navy and the disciplinary laws of the Coast Guard and will be the sole statutory authority for —

First. The infliction of limited disciplinary penalties for minor offenses without judicial action;

Second. The establishment of pretrial and trial procedure;

Third. The creation and constitution of three classes of courts martial corresponding to those now in existence;

Fourth. The eligibility of members of each of the courts and the qualifications of its officers and counsel;

Fifth. The review of findings and sentence and the creation and constitution of the reviewing tribunals; and

Sixth. The listing and definition of offenses, redrafted and rephrased in modern legislative language.

The code, while based on the Revised Articles of War and the Articles for the Government of the Navy, is a consolidation and a complete recodification of the present statutes. Under it, personnel of the armed forces, regardless of the Department in which they serve, will be subject to the same

law and will be tried in accordance with the same procedures. The provisions of section 1 of the bill will provide, for the first time in the history of this Nation, a single law for the administration of military justice in the armed forces.

Among the provisions designed to secure uniformity are the following:

First. The offenses made punishable by the code are identical for all the armed forces;

Second. The same system of courts with the same limits of jurisdiction of each court is set up in all the armed forces;

Third. The procedure for general courts martial is identical as to institution of charges, pretrial investigation, action by the convening authority, review by the board of review, and review by the court of military appeals in all the armed forces;

Fourth. The rules of procedure at the trial including modes of proof are equally applicable to all the armed forces;

Fifth. The Judge Advocates General of the three Departments are required to make uniform rules of procedure for the boards of review in each Department;

Sixth. The required qualifications for members of the court, law officer, and counsel are identical for all of the armed forces;

Seventh. The court of military appeals, which finally decides questions of law, is the court of last resort for each of the armed forces and also acts with the Judge Advocates General of the three Departments as an advisory body with a view to securing uniformity in policy and in sentences and in discovering and remedying defects in the system and its administration.

Among the provisions designed to insure a fair trial are the following:

GENERAL COURTS MARTIAL

First. A pretrial investigation is provided, at which the accused is entitled to be present with counsel to cross-examine available witnesses against him and to present evidence in his own behalf.

Second. A prohibition against referring any charge for trial which does not state an offense or is not shown to be supported by sufficient evidence.

Third. A mandatory provision for a competent, legally trained counsel at the trial for both the prosecution and the defense.

Fourth. A prohibition against compelling self incrimination.

Fifth. Provision for equal process to accused and prosecution for obtaining witnesses and depositions and a provision allowing only the accused to use depositions in a capital case.

Sixth. A provision giving an accused enlisted man the privilege of having enlisted men as members of the court trying his case.

Seventh. A provision whereby voting on challenges, findings, and sentences is by secret ballot of the members of the court.

Eighth. A provision requiring the law officer to instruct the court on the record concerning the elements of the offense, presumption of innocence, and the burden of proof.

Ninth. A provision for an automatic review of the trial record for errors of law and of fact by a board of review with the right of the accused to be represented by legally competent counsel.

Tenth. A prohibition against receiving pleas of guilty in capital cases.

Eleventh. A provision for the review of the record for errors of law by the court of military appeals.

This review is automatic in cases where the sentence is death or involves a general or flag rank officer. A review may be requested by petition on the part of the accused in any sentence involving confinement of 1 year or more.

SPECIAL AND SUMMARY COURTS MARTIAL

Under present law and procedure there is great variation in the nomenclature, composition, procedure and powers of the intermediate military courts. This bill completely eradicates all of those differences and establishes complete uniformity.

The foregoing constitutes a general summary of the provisions of this bill. However, there are a few provisions which gave the committee much concern and to which the witnesses devoted a majority of their testimony, an explanation of those provisions being as follows:

Article 2, subdivision (2), of the bill, as introduced, apparently conferred very wide jurisdiction over Reserve personnel. Technically speaking, Reserve personnel in uniform or even when taking a correspondence course would have been subject to the jurisdiction of this code. While we do not feel that the Armed Forces desired such wide latitude, we were unanimous in the decision that the jurisdiction should be limited by statute and not left to regulations. Therefore, we substituted an entirely new subdivision which we feel is entirely proper. You will note that Reserve personnel do not become subject to this code when on inactive duty training unless such training is pursuant to written orders which are voluntarily accepted and which specifically state that the acceptance of such orders will subject that particular Reserve to the provisions of this code.

The original provisions of article 3 (a) provided for a continuing jurisdiction by the military over persons who had returned to an inactive-duty status but had committed an offense against military law while on an active-duty status. The Reserve components voiced strenuous objection to such proposals and it is admitted that those proposals went much further than existing law. As a matter of fact, the military authorities have been most reluctant to prosecute the average offender who succeeds in returning to a civilian status before the discovery of his crime. On the other hand, the military authorities have found themselves confronted with a lack of juris-

diction to try certain aggravated cases of this character. You will recall the Durant jewel case. That case involved the theft of the crown jewels of Hesse. At the time, Mrs Durant, one of the accused, was apprehended, she was in a terminal-leave status. The point was raised by a petition for a writ of habeas corpus that the Army had ceased to have jurisdiction over the accused since her active service was terminated and she was only completing the unexpired portion of her terminal leave. A writ of habeas corpus was granted in District Court but ultimately reversed on the theory that the terminal-leave status is a service status and subjects one to the Articles of War. If charges and specifications had not been served on the accused until after the expiration of her terminal leave, neither the military nor our Federal courts would have had any jurisdiction over the case. You will also recall the more recent Hirshberg case. Hirshberg was a Navy enlisted man who allegedly abused other American military personnel who were under his supervision while they were all prisoners of war of the Japanese. Hirshberg's term of enlistment expired and after 1 day he reenlisted. The Navy then attempted to prosecute him for the alleged abuse of American persons. A writ of habeas corpus was granted in that case, not because it would be unconstitutional to provide for continuing jurisdiction in such cases, but because the present Navy statute confers no such continuing jurisdiction.

We felt that there was a solution to this problem and our proposed solution is offered in article 3 (a) which is a committee amendment to H. R. 2498. It provides for a continuing jurisdiction provided the offense against this code is punishable by confinement of 5 years or more and provided further that the offense is not triable in a State or Federal Court of the United States. We feel that this will provide ample protection against any capricious action on the part of military authorities, will limit military jurisdiction to serious offenses that could not otherwise be tried by military or Federal courts and will likewise correct the absurd situation of permitting an honorable discharge to operate as a bar to a prosecution for murder or other serious offenses.

Article 15 replaces the present provisions of the Navy for Navy and Coast Guard mast punishment and the present provisions of the Army and Air Force for disciplinary punishment by Commanding Officers. We were of the opinion that a 50 percent pay forfeiture for 3 months was an excessive penalty for disciplinary infractions by officers. Therefore, we reduce the maximum forfeiture from 3 months to 1 month. We likewise disagreed with the original provisions of this article which permitted a forfeiture of one-half of an enlisted person's pay for 1 month.

Enlisted persons are in a far different pay status than officers and we do not feel that a pay forfeiture is appropriate as punishment for disciplinary infractions by enlisted persons.

This article also provided for confinement for not to exceed seven consecutive days and confinement on bread and water or diminished rations for a period not to exceed five consecutive days. The Army and the Air Force have never used confinement, with or without bread and water, as a disciplinary punishment. On the contrary, it is a provision of longstanding in the Navy and Coast Guard. We are of the opinion that this type of disciplinary punishment should not be used ashore. However, we recognize that

disciplinary matters aboard ship present an entirely different problem. Accordingly, we have authorized confinement for 7 days or confinement on bread and water or diminished rations for not to exceed 5 days when imposed upon a person attached to or embarked in a vessel. In view of the fact that Army and Air Force personnel are stationed throughout the world and must necessarily spend a portion of their time aboard ship in reaching or returning from such stations, it is intended that the present provisions for confinement on bread and water shall not be restricted to Navy enlisted personnel but shall be equally applicable to all other enlisted personnel of the Armed Forces when attached to or embarked in a vessel. As a result of our amendments we have achieved uniformity in the types of disciplinary punishments which may be adjudged.

Article 26 provides the authority for a law officer of a general court martial. Under existing law the Navy has no law officer. The Army and Air Force do have a law officer for general courts martial who, in addition to ruling upon points of evidence, retires, deliberates, and votes with the court on the findings and sentence. Officers of equal experience on this subject are sharply divided in their opinion as to whether or not the law officer should retire with the court and vote as a member. In view of the fact that the law officer is empowered to make final rulings on all interlocutory questions of law, except on a motion to dismiss and a motion relating to the accused's sanity, and in view of the fact that the law officer will now instruct the court upon the presumption of innocence, burden of proof and elements of the offense, we feel that he should not retire with the court with the voting privileges of a member of the court. Article 26, in our opinion, contains the appropriate provisions on this matter.

Article 67 contains the most revolutionary changes which have ever been incorporated in our military law. Under existing law all appellate review is conducted solely within the military departments. This has resulted in widespread criticism by the general public, who, with or without cause, look with suspicion upon all things military and particularly matters involving military justice. Every Member of Congress, both present and past, is well aware of the validity of this statement. The original bill provided for the establishment of a judicial council to be composed of at least three members. In view of the fact that this is to be a judicial tribunal and to be the court of last resort for courts-martial cases, except for the constitutional right of habeas corpus, we concluded that it should be designated by a more appropriate name. We likewise questioned the number of members to be provided. As a consequence we have substituted a new subdivision (a) which establishes the Court of Military Appeals, consisting of three members who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate. Such appointees must be members of a State or Federal bar, shall hold office during good behavior and receive the same compensation, allowances, and retirement benefits as judges of the United States courts of appeals. We must frankly admit that it is impossible to ascertain with any degree of accuracy the case load which this tribunal must consider. You will note under subdivision (b) that it shall review the records of, first, cases affecting a general or flag rank or including the death sentences; second, cases which the Judge Advocate General may forward on his own motion, and, third, all cases reviewed by a Board of Review in which,

upon petition of the accused and on good cause shown, the court has granted a review. Rather than provide for a greater number of members than three for the Court of Military Appeals, we have concluded that it would be sounder to limit the number to three until such time as the facts may warrant an increase in number. The article as presently written embodies those conclusions.

Perhaps the most troublesome question which we have considered is the question of command control. Under existing law commanding officers refer the charges in general, special, and summary courts martial and convene the courts; they appoint the members of the court, law officer for general courts and counsel for trial; and, retain full power to set aside findings of guilt and modify or change the sentence, but are not permitted to interfere with verdicts of not guilty nor to increase the severity of any sentence imposed. We have preserved these elements of command in this bill. On the other hand, we have included numerous restrictions on command. The bill provides that the convening authority may not refer charges for trial until they are examined for legal sufficiency by the staff judge advocate or legal officer; authorizes the staff judge advocate or legal officer to communicate directly with the Judge Advocate General; requires all counsel at a general court-martial trial to be lawyers or law graduates and, in addition, to be certified as qualified by the Judge Advocate General; provides a law officer who must be a lawyer whose ruling on interlocutory questions of law will be final and binding on the court and who must instruct the court on the presumption of innocence, burden of proof and the elements of the offense charged; provides that the staff judge advocate of the convening authority must examine the record of trial for sufficiency before the convening authority can act on a finding or sentence; provides legally qualified appellate counsel for an accused before a Board of Review and the Court of Military Appeals; establishes a civilian court of military appeals, completely removed from all military influence or persuasion; and makes it a court-martial offense for any person subject to this code to unlawfully influence the action of a court martial.

Able and sincere witnesses urged our committee to remove the authority to convene courts martial from command and place that authority in judge advocates or legal officers, or at least in a superior command. We fully agreed that such a provision might be desirable if it were practicable, but we are of the opinion that it is not practicable. We cannot escape the fact that the law which we are now writing will be as applicable and must be as workable in time of war as in time of peace, and, regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations. Our conclusions in this respect are contrary to the recommendations of numerous capable and respected witnesses who testified before our committee, but the responsibility for the choice was a matter which had to be resolved according to the dictates of our own conscience and judgment.

It may not be generally known, but there is no requirement under present law that the Judge Advocate General of any of the services be a qualified lawyer. We think that that is a deficiency which should be corrected. In

view of these conclusions, we have added a new section to the bill which appears as section 13. You will note that it requires that the Judge Advocates General must be members of a Federal or State bar, must be judge advocates or law specialists, and must have at least 8 years' accumulative experience in a Judge Advocates Corps, Department, or Office, the last 3 years of which, prior to appointment, must be consecutive. Now, in order that there may be no misunderstanding by either the Navy or the Air Force, we point out that we are fully aware that the Navy has a number of unrestricted line officers who have law degrees and may qualify as law specialists as well as officers of the line. We do not intend that such officers shall be precluded from becoming Judge Advocates General as a result of this section. We do, however, insist that all Judge Advocates General be legally qualified, with a prescribed amount of experience, and that a substantial portion of that experience be obtained immediately prior to appointment to the Office of the Judge Advocate General.

If the Navy or the Air Force have officers who are not law specialists or judge advocates but are otherwise qualified under this section, they are not precluded from designating such officers as judge advocates or law specialists immediately prior to appointment. It is to be hoped, however, that neither the Navy or the Air Force will continue to relegate their legal personnel to positions of lesser importance and dignity than their counterparts in the line. We think it entirely sound and proper that the judge advocates general be chosen from those who have sacrificed the prerogatives of the line officer in order to follow a legal career in the services. We hope to see some revised thinking on this subject and will view future developments with interest.

In addition to the committee amendments to H. R. 2498 which appear as original provisions in H. R. 4080, two substantive amendments to H. R. 4080 which are worthy of comment have been adopted by the committee. The first amendment relates to the selection of judges for the Court of Military Appeals as provided in Article 67. The committee is of the opinion that it is desirable to remove every possible criticism from the proposed code and that a limitation on the number of judges who may be appointed from the same political party is not only appropriate but highly desirable. The committee has adopted such an amendment to article 67.

The second amendment pertains to article 2, page 5, subdivision 11, beginning on line 18, and subdivision 12, beginning on line 24. You will note that subdivision 11 confers jurisdiction over all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and certain Territories. Subdivision 12 confers jurisdiction over all persons within an area leased by the United States which is under the control of the Secretary of the Department and which is without the United States and certain Territories. It has been discovered that the United States Navy occupies certain territory in the Subic Bay region of the Philippine Islands, which territory was acquired for the use of the United States by virtue of the 1898 Treaty with Spain. This property is under the control of the Secretary of the Navy. We find that under the provisions of subdivision 12, we will have no jurisdiction over persons not otherwise subject to this Code who enter this property and commit offenses while on the property. It is considered desirable to

have such jurisdiction. On the other hand, we fully recognize the fact that certain limitations have been placed upon the jurisdiction of the United States by virtue of certain treaties and agreements and that this jurisdiction may be further curtailed by future agreements. Certainly, we do not desire to arouse the suspicion of any foreign governments by the use of any language in this Code which would appear to give the armed forces jurisdiction in excess of obligations which we have already or may in the future assume by treaty or agreement. In order that our intent be made perfectly clear, we have amended subdivisions (11) and (12) with clear and unmistakable language.

The adoption of the proposed amendments in subdivisions (11) and (12) will insure that the armed forces will have jurisdiction over both leased areas and areas otherwise reserved or acquired for the use of the United States and it will also insure that such jurisdiction is subject to the limitations imposed in any treaty or agreement to which the United States is or may be a party.

Mr. Chairman, I hope that I have succeeded in my endeavor to give you and the Membership of the House an understanding of the provisions of this bill. I cannot assure you that this bill is perfect, but I can assure you that it represents the best efforts and conclusions of many sincere and able men. I urge you to join the Membership of the Armed Services Committee in securing its enactment.

Mr. Curtis. Mr. Chairman, will the gentleman yield?

Mr. Brooks. I yield to the gentleman from Nebraska.

Mr. Curtis. Under the section of the bill dealing with specific offenses where it uses the language "shall be punished as a court martial may direct," is the death sentence permissible then?

Mr. Brooks. The death sentence must be specified in the article.

Mr. Vinson. In answer to the gentleman, I would say no, the death sentence would not be except where it is specifically stated in the article.

Mr. Curtis. Could we have enumerated for the RECORD a statement as to those offenses where it is possible to impose the death sentence?

Mr. Vinson. They are already in the bill.

Mr. Curtis. I am aware of that.

Mr. Vinson. Does the gentleman just want them in the CONGRESSIONAL RECORD?

Mr. Curtis. Yes.

Mr. Vinson. We will put them in there when we read the bill for amendment. That goes in the RECORD then.

They will be enumerated in the RECORD as a part of the RECORD; however we will compile that list. It will be a pleasure to compile it.

Mr. Curtis. That is what I would like to have.

Mr. Brooks. There are not many instances of that sort.

Mr. Elliott. Mr. Chairman, will the gentleman yield?

Mr. Brooks. I yield to the gentleman from Alabama.

Mr. Elliott. Under this bill how is counsel for an accused before a general court selected?

Mr. Brooks. Counsel for an accused before a general court?

Mr. Elliott. Yes.

Mr. Vinson. That is fixed by the convening authority unless the accused hires someone else.

Mr. Elliott. In other words, unless the accused hires counsel for himself he has no control over who his counsel might be?

Mr. Vinson. The gentleman is correct, he has not; but the counsel must be a well-qualified lawyer able to protect the rights of the accused. The accused is in exactly the same position as an accused in a State court. He is entitled to the benefit of counsel. If he does not hire one the court will give him the benefit of counsel. Ordinarily, the court selects well-qualified men. In this instance they will be outstanding lawyers who will be chosen as the advisor to the accused.

Mr. Elliott. Are those counsel drawn from the command of the convening authority or may they be drawn from another command? In other words, how are those able lawyers obtained?

Mr. Vinson. It may be from either source. It may be anyone within a certain sphere could be called, whether it is in that particular set-up or some other set-up. In other words, you will find here for the first time in the history of this Government that written into the law is every right to protect and see that every accused in the armed services has an opportunity to have a fair and impartial trial and have the benefit of qualified people to protect his interest.

Mr. Brooks. May I add that in my judgment and in the judgment of those who sat on the subcommittee, the accused actually has greater opportunity in a military trial under this code than he has in a civilian trial in a Federal court. His rights are abundantly protected by the restrictions which we place at various parts of this particular act.

Mr. Gross. Mr. Chairman, will the gentleman yield?

Mr. Brooks. I yield to the gentleman from Iowa.

Mr. Gross. Why do you limit the number of enlisted men to a third of the total membership of the court?

Mr. Brooks. Because that was the number agreed upon and the number

that is being used at the present time, and it has been found that that number operates nicely.

Mr. Vinson. Mr. Chairman, will the gentleman yield?

Mr. Brooks. I yield to the gentleman from Georgia.

Mr. Vinson. It says "not less than one-third." As a matter of fact, it could be all. There has been one instance where all the members of the court have been enlisted men.

Mr. Gross. Yes; but you leave a loophole here by which there may not be any enlisted men.

Mr. Brooks. Furthermore, in the case where death is a possible punishment or where life imprisonment is a possible punishment, the enlisted man can actually control the court by virtue of having one-third or more of the court.

Mr. Vinson. Mr. Chairman, if the gentleman will yield further, in answer to the last question it is entirely optional with the accused. If he does not request enlisted men, he gets an officer court. If he requests enlisted men, he gets enlisted men.

Mr. Gross. Even though he does request enlisted men, you leave a loophole here by which, through military exigencies, that may be impossible.

Mr. Vinson. No. If he requests in writing that he wants enlisted men on the court, at least one-third of the court must be enlisted men.

Mr. Gross. But you go on and say here, "whereas the persons cannot be obtained" you do have an exception right there.

Mr. Vinson. That is true. There may be instances on certain small ships on the high seas where you just cannot have them, and therefore that provision was put in there in the way it is written. It just might not be possible to get them.

Mr. Elston. Mr. Chairman, I yield myself such time as I may desire.

Mr. Chairman, in order that the Members may have a full appreciation of the importance of the legislation which is presented here today, I consider it both advisable and necessary to relate, in a general way, the events which have brought the subject of military justice to our attention.

During the course of World War II approximately 11,000,000 men saw service in the United States Army, and of that number approximately 80,000 were convicted by general courts martial. Even before the cessation of hostilities it was apparent to the War Department and to the Congress that a detailed study of the Army system of justice was appropriate, if not mandatory. Accordingly, in 1944 and 1945, the War Department sent Col. Phillip McCook, former prominent New York jurist, to various theaters of operation to conduct such studies. Additional reports were submitted to the War Department from other sources.

Within a few months after the end of hostilities the matter was brought to the attention of the American Bar Association, and on March 25, 1946, the War Department Advisory Committee on Military Justice was appointed by order of the Secretary of War. The committee, under the chairmanship of the Honorable Arthur T. Vanderbilt, and referred to as the Vanderbilt committee, consisted of nine outstanding lawyers and Federal jurists from eight States and the District of Columbia. From March 25, 1946, until December 13, 1946, a period of almost 9 months, the members of that committee engaged in studies, investigations, and hearings, and availed themselves of voluminous statistical data of the Judge Advocate General's Department and other sources.

At full committee hearings in Washington the Secretary of War and Under Secretary of War, the Chief of Staff, the Commander of the Army Ground Forces, the Judge Advocate General, the Assistant Judge Advocate General, numerous other officers, and the representatives of five veterans' organizations were heard. There were numerous personal interviews, supplemented by letters and the digesting of 321 answers to questionnaires from both military and nonmilitary personnel. Additional widely advertised regional public hearings were held at New York, Philadelphia, Baltimore, Raleigh, Atlanta, Chicago, St. Louis, Denver, San Francisco, and Seattle. The subsequent report of the committee was based on these extensive inquiries.

During the Seventy-ninth Congress, a military Affairs Subcommittee under the chairmanship of the gentleman from North Carolina, Mr. Carl T. Durham, devoted more than 1 year to detailed study of the Army system of justice.

Additional studies have been conducted by special committees of the American Legion, VFW, AMVETS, AVC, the New York County Lawyers' Association, the War Veterans' Bar Association, the Judge Advocate Generals' Association, and the Phi Alpha Delta law fraternity. The reports and recommendations of each of these groups were made available to the Armed Services Committee and representatives of each of the organizations appeared before the committee in public hearings in support of the recommendations. Other witnesses, who had particular knowledge of the subject by virtue of their service and experience in the recent war, were heard.

In our opinion, the combined efforts of these organizations and individuals represented the most comprehensive study of military justice ever conducted in the history of our country.

As a result of these studies and following the extensive hearings conducted during the Eightieth Congress a military justice bill for the Army was presented to the House and became law, being known as Public Law 759. The provisions of that law have largely been adopted in the bill before us today.

My able colleague the gentleman from Louisiana (Mr. Brooks) has given the membership a thorough summary of the general provisions of this bill and the consideration which has been given to it. I neither desire nor intend to impose upon your patience and time with matters which are

repetitious. You have already been advised of the difficulty we have experienced with the problems involved in the question of command control. During the Eightieth Congress these same problems aroused our interest and we devoted a great deal of time in an endeavor to determine the best solution. With your indulgence, Mr. Chairman, I want to elaborate on this matter because I believe it involves one of the most fundamental issues in military justice, and I shall for the present confine myself to this phase of the proposed legislation.

Two years ago today a subcommittee, of which I was chairman, considered the same problems of command control which were raised during our consideration of this bill.

What is command control?

It is a term which conscientious critics use to describe the present authority of commanding officers to appoint and control courts-martial. The appointment of courts-martial, including the members of the court, the trial counsel, defense counsel and law officer has always been a function of command. We did not disturb that authority 2 years ago and we have not disturbed it in this bill. I am well aware of the fact that this authority has been abused but I think such abuse is exceptional rather than general. Unfortunately we never hear reports which point out the accomplishments of military justice. We hear nothing but the complaints. It is my honest opinion that the accomplishments far outweigh the deficiencies and I oppose any proposal which would disorganize a system which has worked since 1776 in order to correct an occasional abuse.

It has been suggested that a judge advocate officer or a superior command appoint the members of a court martial from a panel. Now who would select that panel? I think it is inevitable that the same officer who selects the court under the present system would select the panel under the proposed system. Not only would you gain nothing, you would inject another delay into a system of justice which must be swift if it is to be effective.

We have preserved the right of commanding officers to appoint courts martial but we have provided numerous safeguards over that authority. In my opinion, one of the most effective safeguards which we have adopted is the provision which sets up mandatory qualifications for the trial counsel, defense counsel, and the law officer. These provisions are set out in articles 26 and 27 and they require that all prosecution and defense counsel in every general courts-martial case be at least graduates of an accredited law school and that the law officer must be a member of a State or Federal bar.

It was inevitable that these mandatory requirements, which are new, should lead us into a discussion of the merits of a separate Judge Advocate General's Corps for each of the services. During the Eightieth Congress I offered the amendments which created a separate Judge Advocate General's Corps in the Department of the Army. Those provisions became effective on February 1. So today the Army has a separate Judge Advocate General's Corps with a separate promotion list while the Navy and the Air Force do not.

Practically every witness who testified before our committee, except departmental witnesses, urged us to create separate corps for the Navy and the Air Force. The Navy and the Air Force strenuously opposed those proposals. Frankly, I have been an advocate for a separate legal corps for each of the services, but, for two reasons, I have refrained from urging those proposals in the present legislation. Our committee came to the conclusion that since we now have a Judge Advocate Corps in the Army, and since the Court of Military Appeals will have an opportunity to review the comparative results of the Army with its corps as against the Navy and Air Force without such a corps, that we should permit the services to operate under their present different plans until such time as we may be able to factually determine the best method of operation. I think that can be done within 1 year after the effective date of the proposed legislation. The second consideration which prompted me to reach this decision is to be found in the provisions of section 13 of the bill. This is a new section and is a committee amendment which has been unanimously adopted by the Armed Services Committee. As Mr. Brooks has already pointed out, there is no requirement today that a Judge Advocate General of any of the armed forces must be a lawyer. It is unthinkable to me that there have been no mandatory legal qualifications for the respective Judge Advocates General, who are the legal advisers of the Secretaries. Section 13 closes that gap. Not only does it require that the Judge Advocates General be legally qualified and be members of a State or Federal bar, it requires that they must have at least 8 years' cumulative legal experience in the Judge Advocate General's Corps, Department, or Office and that the last 3 years of this service, immediately prior to appointment, be consecutive.

While I have not been directly informed by the Air Force, I am advised that these new provisions are entirely acceptable to the Air Force. I hear a few rumblings from the Navy. However, I have heard no complaint from the Secretary of the Navy or Chief of Naval Operations who are fully aware of this committee amendment. I must point out that the Officer Personnel Act of 1947 created the position of Law Specialist in the Navy. These law specialists must be lawyers and there are more than 241 of them in the Navy today. They are the backbone of the Navy legal system but they are forbidden to command at sea and can exercise command ashore only when authorized by the Secretary of the Navy. These officers, many of whom are Annapolis graduates, have surrendered the prerogatives of command in order to follow a legal career in the service. I insist, Mr. Chairman, that these men are entitled to the right to become the Judge Advocate General of the Navy. They apparently have that right today but I can assure you that it does not work out that way in practice. The office of Judge Advocate General in the Navy is a position which is now reserved for line officers of the Navy who have acquired a legal education. Their first love is the sea and the office of Judge Advocate General is just another convenient position where they may obtain a spot promotion from captain to admiral. Now do not misunderstand me. The unrestricted line officers of the Navy are capable and highly respected officers. They are a credit to the Navy. But I hope you will agree with me that it is not necessary to know how to command a battleship or a submarine in order to administer the system of justice in the Department of the Navy.

Upon the basis of these considerations, Mr. Chairman, I fully endorse the legislation which is before you. I sincerely believe that its enactment will provide the most enlightened system of military justice that has ever been enacted.

Mr. Gross. Mr. Chairman, will the gentleman yield?

Mr. Elston. I yield.

Mr. Gross. In article IV, under "Dismissed officers right to trial by court martial", suppose the officer is not guilty after having been dismissed by the court martial? According to this bill the Secretary of the Department shall substitute for the dismissal order by the President a form of discharge authorized for administrative issuance. Why is not this officer issued an honorable discharge as all other soldiers are?

Mr. Elston. He would not be given any kind of discharge from the service if he had a good record.

Mr. Gross. But if he has been dismissed and found not guilty, why should he not be given an honorable discharge?

Mr. Elston. I do not think the law says that on acquittal he is given any kind of discharge.

Mr. Gross. It says the Secretary of the Department shall substitute for the dismissal order by the President a form of discharge authorized for administrative issuance.

Mr. Elston. That is where the dismissal has been ordered by the President.

Mr. Gross. Is this a special discharge?

Mr. Elston. Yes; that is an administrative type of discharge that he may be given where there is an order of dismissal by the President. And not in the case of an acquittal. A man acquitted would not be discharged by any type of discharge in any of the services.

Mr. Gross. I thank the gentleman.

Mr. Vinson. Mr. Chairman, the bill before the committee is to consider the problems involved in providing the best possible system of justice for the members of our armed forces.

There is nothing novel in our purpose.

In fact, George Washington faced exactly the same problem in 1774 when he began the formation of his army to fight for the independence of this Nation. He recognized the necessity to obtain absolute authority for the control of his troops if he was to have a disciplined army rather than an uncontrollable mob. At that time the British system of military justice was perhaps the most enlightened system in the civilized world. General Washington adopted it, word for word.

The authority to perpetuate this type of law was subsequently incorporated in article 1 of the Constitution. With minor changes that same system endured down through the years, even through World War I. The Congress revised the system in 1920 and those of you who were Members of the Eightieth Congress will recall that we accomplished a very substantial revision of the Articles of War in H. R. 2575. Time did not permit us to accomplish a similar revision of the Articles for the Government of the Navy. As a consequence, the Navy system, the main portion of which was adopted in 1862, has endured until this very moment with only minor changes.

Now, why should we be so concerned with this problem?

The answer can be expressed in just a few words but they are grimly serious words.

During the last war more than 15,000,000 Americans served in our armed forces. Many of them were just youngsters whose first experience with any system of law was with the military system of law.

In the Army alone more than 90,000 of these young men were convicted by general courts martial. It is safe to assume that a very large number of them have returned to civilian life with dishonorable discharges.

Of far more serious consequence is the fact that 141 of these young men were executed. They paid for their military crimes with their lives.

Unfortunately, the problem was not solved by the cessation of hostilities. Even with our reduced forces there are almost 1,200 general courts-martial trials in the Armed Forces every month.

And so I say, Mr. Chairman, the problem which confronts us demands our serious consideration. I can assure you that the bill which is now before you has received that type of consideration, and this fact prompts me to pay tribute where tribute is due.

I am sure you will all agree that the technical provisions of a bill of this character are about as difficult and uninteresting as the formula for atomic energy. Many of you will also agree that sometimes they are almost as explosive.

To state it very simply, the preparation of this legislation has involved efforts that can best be characterized as plain drudgery. A subcommittee of the Armed Services Committee, under the chairmanship of the gentleman from Louisiana (Mr. Brooks) began its consideration of this bill on last February 8. The eight lawyers and three laymen of that subcommittee conducted lengthy and difficult hearings for many weeks before reporting the bill to the full committee on April 27.

I am well aware of the conscientious and difficult service which those gentlemen have performed.

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I take this opportunity not only to pay my personal tribute to each of them but to commend their splendid efforts to the Members of the House.

The bill proposes to establish a uniform code of military justice, equally applicable to all of the armed forces. I do not mean to say that every department within the armed forces is thoroughly satisfied with all the provisions of the bill. When you stop to consider that they have gone their respective ways for more than 160 years, it is not surprising that they would be reluctant to surrender or alter provisions with which they are familiar. Each of the services has made concessions, reluctantly in some instances, but the results which have been achieved fully justify those concessions.

Now, in order to avoid any misunderstanding, I want to point out that no question of unification is involved in this bill. This bill does accomplish uniformity. And if there is any field of military endeavor which is susceptible to uniformity, this is it.

The enactment of the proposed legislation will provide uniformity in types and definition of offenses, pretrial procedure, the number and types of courts and the number and qualifications of the members of each court; the qualifications of trial counsel, defense counsel, and law officer; trial procedure and modes of proof; and authorized punishments and appellate review.

This is a remarkable accomplishment and one which is long past due.

During your consideration of this legislation, I caution you to keep in mind one fundamental proposition which can best be raised by a question.

Now, why was this bill assigned to the Armed Services Committee rather than to the Judiciary Committee?

The answer lies in the fact that life in the armed forces differs from civilian life.

The objective 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.

This being so, military institutions necessarily differ from civilian institutions. Many military offenses are acts that would be rights in the civilian society.

Every American cherishes his right to tell off the boss. But the same act in the military is an offense.

In civilian life, if you do not like your job you quit. The same act in the military constitutes desertion and, in time of war, may be punished by death.

In civilian life, a group of workers may walk off the job in protest. In the armed forces that act is mutiny and may be punished by death.

These examples point out and emphasize the fundamental difference between civilian society and the military. They are differences which must be preserved.

Now, this very fact prompts me to offer this word of caution.

Our problem stems from our desire to create an enlightened system of military justice which not only preserves and protects the rights of the members of our armed forces, but also recognizes the sole reason for the existence of a military establishment- - the winning of wars.

It is my sincere belief that those concepts are fully recognized in the legislation which is now before you.

This bill is the result of honest endeavor by sincere and capable men. I highly commend it to you.

Mr. Chairman, I yield 5 minutes to the gentleman from North Carolina (Mr. Durham).

Mr. Durham. Mr. Chairman, this is a subject that I have been deeply interested in for the past 8 years, and one with which I was deeply concerned, as a member of the old Committee on Military Affairs, which made a report on this matter. I suppose that this subject has probably had the attention of the ablest counsel and the ablest lawyers and has received more attention than any other subject that has ever come before this body in a long, long time. The first committee that we worked with was the so-called Vanderbilt committee, which was composed of 12 able lawyers. Then the American Bar Association also appointed a committee, which did a great deal of work. Much work was done by the War Department by several able lawyers. Therefore, this over-all question, which is before us today, in my opinion, has had as much study and going over, in the way of trying to work out what we feel would be an efficient and good administrative military justice bill than any other subject that I have ever had anything to do with, either on the Committee on Armed Services, or on the old Committee on Military Affairs.

I just want to point out some of the things that the Vanderbilt committee recommended to the Seventy-ninth Congress:

He has gone into this matter thoroughly on the basis of the studies that were made before, convinced that if we were to have another war such as we have just gone through we would not have the criticism that faced us at that time both through the press and over the radio. It became so bad that we had to pay some attention to it, and General Eisenhower himself appointed the first committee to go into this matter, and later Secretary Patterson, and later Secretary Royall.

The limitations and inadequacies of our system 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 the 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 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 other 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.

Mr. Vinson. Mr. Chairman, I yield 5 minutes to the gentleman from Massachusetts (Mr. Philbin).

Mr. Philbin. Mr. Chairman, at this late hour I will be very brief in my remarks. The previous speakers, the distinguished gentleman from Louisiana (Mr. Brooks), the distinguished gentleman from Ohio (Mr. Elston), and my esteemed and very able chairman have very fully and carefully and adequately explained this measure.

Mr. Chairman, at the very outset let me assure the House that this measure has been given exhaustive and most diligent and painstaking consideration by the subcommittee. I am happy to commend and thank my able colleague the gentleman from Louisiana (Mr. Brooks) for the penetrating judgment, wisdom, patience, and sagacity which he has shown in furnishing such able leadership in the formulation of this bill. To the other members of the subcommittee, I must also extend my commendation and appreciation for a task well done.

For the information of the Members of the House, let me state that the subcommittee has among its membership some of the very best lawyers in the Congress. The honorable chairman, the gentleman from Louisiana (Mr. Brooks) has distinguished himself before the bar and possesses a keen, analytical, legal mind. My distinguished friend, the gentleman from Ohio (Mr. Elston) has long been recognized, not only as one of the ablest civilian lawyers in the Nation, but also a specialist and outstanding expert in the field of military law. The remaining lawyers on the subcommittee are all of

commanding legal ability. The members of the subcommittee who are not lawyers are all men of learning, broad experience, and conspicuous ability and are without exception thoroughly versed, deeply interested, and exceptionally well-informed on the problems of military justice. Furthermore, I am happy to state to the House, our subcommittee has been most fortunate in that we have enjoyed the benefit of the advice, opinions and assistance of expert and eminent lawyers and specialists, highly qualified to grapple with these problems. To mention but a few, we have had the invaluable assistance of Professor Morgan, of the Harvard Law School; Mr. Felix Larkin, of the Department of Defense, Mr. Robert Smart, our own unexcelled professional staff member; and a great many other men who have carefully and laboriously studied every phase of the measure and related questions.

We also had the benefit of extensive testimony from military and civilian life, from high-ranking officers of the armed services, from representatives of veterans' organizations and bar associations, and others highly competent to pass upon the fundamental principles of the questions involved in the legislation. And at all times, of course, we have had the benefit of the farsighted, mature judgment of our own most distinguished and capable chairman, a man of broad knowledge and outstanding patriotism, the able gentleman from Georgia (Mr. Vinson). These are but a few of the acknowledgements which I desire to make in connection with the discussion of the bill, which has been reported to the House by the unanimous vote of our committee.

I am sure there is not a single Member of the House who is not familiar with the background of and the demonstrated need for this legislation. Military justice has long been under fire by civilian and legal groups for its arbitrary character, its severity, and its manifest denial of constitutional safeguards generally recognized by the civil courts since the establishment of the Government. The recent war served to bring out and dramatize the defects and shortcomings of the archaic and outmoded system of military justice. I dare say that every one of us who served in this body during the war, or indeed since the war, has had occasion at some time or other to have brought forcibly to his attention some case or cases which have demonstrated the inadequacies, limitations, and absence of substantial justice which have not infrequently accompanied the trial and disposition of military legal cases. No doubt many of these cases have been grossly exaggerated and unduly exploited by those seeking to discredit our armed services and the Congress. It would be a grave error for anyone here to regard these cases as the rule rather than the exception. It would be a grave error to attribute to our military leaders, as a whole, willful and deliberate disregard for fundamental principles of justice, for the rights of officers and enlisted men, or intentional unfairness or injustice. Thousands of these cases have been handled and disposed of under wartime conditions of stress and crises and it is remarkable that there have been relatively so few cases coming to our attention which indicated glaring and shocking violations of the ordinary canons of American justice. Nevertheless we should and must move to correct a system which is not organically sound and which permits continued injustice to some.

I do not propose to enter into any long discussion of the complaints and specific allegations which have been recorded against the existing system of military justice. It suffices to say that from the evidence as we have it and know it, it seems to me and it is my considered judgment, that the conclusion is inescapable that the system needs a complete and thorough overhauling in order to bring it into line with our concepts of judicial procedure and our ideas of the administration of justice, and our long-established principles safeguarding the rights of individuals as citizens of this great Republic who happen to be in the armed forces.

This bill is carefully designed to eliminate the abuses and excesses which so unfortunately have characterized military trials and cases in the past. We have endeavored, and I think very successfully, to unify, codify, and bring up to date the Articles of War, the Articles for the Government of the Navy, the Disciplinary Laws of the Coast Guard and to enact and establish a uniform code which will insure, henceforth, substantial, complete, and speedy justice, which will secure and guarantee the rights, privileges, and immunities of American citizens of every member of the armed services from the top to the bottom, or I should say - - and this is important - - from the bottom to the top, because, so far as I am concerned, the Members of this Congress have a primary responsibility to safeguard and protect in every possible way the rights, the interests, the well-being and welfare of every boy and girl who is enlisted in the armed forces of our country.

This bill provides for the protection of the individual enlisted man or officer at every level and every point. It regulates and checks arbitrary, capricious, and whimsical action of commanding officers at every level and every point. It lays down definite conditions governing apprehension and restraint, governing nonjudicial punishment, governing courts-martial jurisdiction, the appointment and composition of courts martial, pretrial procedure, trial procedure, sentences, review of court-martial decisions, and imposition of punishment.

It embraces the whole field of jurisprudence as applied to members of the armed services. It seeks to shield the accused substantially just as he is shielded by our Constitution and laws in civil courts, in most substantial particulars. We have carefully combed every possible way by which the rights of the accused have been or could be violated and have closed up any gap which we have been able to discern by which any member of the armed forces might be denied equal and full justice under the law. We have provided for full and complete specifications, for a speedy trial before competent judges, for confrontation of witnesses by the accused, for representation by qualified counsel of his own selection, if he so desires it, at every stage of the proceedings for careful definition and codification of specific crimes and offenses, for recognition of the laws of evidence as they pertain to judicial proceedings, and for abundant and painstaking review by highly qualified experts of the findings, the evidence and finally the questions of law in a given case.

After considerable discussion and protracted debate and consideration, recognizing the desirability insofar as is practicable and consistent with

the national defense and the exigencies of wartime, of the separation from strictly military control of the final determination of the legal cases in the armed services, we have set up and established in this bill a court of military appeals. This court is in effect a court of last resort similar to the United States circuit court of appeals. It consists of three civilian judges appointed by the President and confirmed by the Senate and having permanent tenure just as our high ranking Federal civilian judges. This court will be completely detached from the military in every way. It is entirely disconnected with the Department of Defense or any other military branch, completely removed from any outside influences. It can operate, therefore, as I think every Member of Congress intends it should, as a great, effective, impartial body sitting at the top-most rank of the structure of military justice and insuring as near as it can be insured by any human agency, absolutely fair and unbiased consideration for every accused. Thus, for the first time this Congress will establish, if this provision is written into law, a break in command control over court-martial cases and civilian review of the judicial proceedings and decisions of the military.

There are those who believe in the establishment of a separate Judge Advocate Corps for all the services. There are those who believe in taking away a larger measure of the administration of military justice from the control of the so-called high command. These proponents have ably argued their case and I have no quarrel with their fundamental philosophy. It is soundly based on very good principles and upon historic, American, legal traditions. But the commanding officers of the armed forces must, in the last analysis, be vested with disciplinary control over their members. We cannot completely detach the trial of military cases and the handling of military offenses from the ranking officers of the Army, Navy, Air Force, and Coast Guard without destroying essential discipline and creating a veritable chaos. In brief, we must as a legislative body consider the practicalities of the broader situation which confronts us. Obviously, in our fighting forces central authority must not only be recognized, but insured. There must be some central direction and guidance and disciplinary control or we will indeed be inviting demoralization of the services.

All in all, while this bill can and will be perfected as we acquire experience and concrete results from its operation, I feel that it is on the whole a very long step in the right direction in rooting out the overbearing authoritarian spirit and lack of substantial justice which has often accompanied military procedure and insuring to the accused what we all desire, a larger measure of democratic attitude and effective procedures accomplishing substantial justice than is enjoyed by the armed forces of any other nation. Cruel and unusual punishments will be positively prohibited and maximum limits will be placed upon sentences by this bill. Undue harshness and undue severity will be abolished and a fuller measure of leniency and humane consideration will be encouraged and insured. To the extent that autocratic and hard-boiled, arrogant methods have been used in the past by any high-ranking officer in the armed services in dispensing military justice, this measure protects against such offenses in the future. It goes much further. Under this law, rigged courts and punishments dominated and

dictated by the command will be absolutely prohibited and every member of the armed forces will be definitely assured of complete specifications of the offense or offenses which he is charged, a fair and impartial trial, qualified counsel, abundant expert review of his trial and case, and the utmost protection against injustice of any kind.

In short, as I interpret it, this bill, if enacted, will banish the evils of the past in the administration and substantive failures of military justice. It will insure to every member of our armed forces who may become involved in disciplinary difficulties of any kind or character, fullest opportunity to clear himself, fairest consideration at every stage of his case, fullest protection of all his rights, and honest, able, unbiased, and uncontrolled judgment of his case.

Because I believe that this bill is designed to meet a real crying need of our military organizations and because I know that it has been drawn so as to furnish the very maximum of assistance and protection to those in the armed forces who may become involved with the military law, I urge that the House adopt this bill.

The Chairman. The time of the gentleman from Massachusetts (Mr. Philbin) has expired.

Mr. Vinson. Mr. Chairman, I yield 10 minutes to the distinguished gentleman from Tennessee (Mr. Sutton), a very distinguished veteran, probably the most highly decorated veteran from the State of Tennessee.

Mr. Sutton. Mr. Chairman, I thank the chairman of the Committee on Armed Services for his kind words.

Mr. Chairman, I shall not take much of the time of the Committee, for I know the hour is late and the Members are anxious to get away, but this is a very important bill. I regret that every Member of the House is not present on the floor listening to this debate and discussion. Personally, I was intending to offer a bill to take general courts martial out of the Navy because of some cases that have come to my attention recently.

I wish to commend the chairman of the subcommittee and also the chairman of the Committee on Armed Services for doing away with autocratic, arrogant, pompous command-control brass in the Army and Navy. This bill does much to take away that command control which should have been taken away years ago, in my estimation. Had they used the Pentagon Building for what it was designed, a veterans' hospital, America would have been lots better off today. I appreciate the effort that has been made by this Committee to do away with a part of that command control, and I hope this is just the first step forward toward the objective. I wanted this time, Mr. Chairman, to relate the reason why I was going to introduce the bill to take the general courts martial out of the Navy.

There is one case in particular to which I wish to call your attention, the case of Bernis Amos Richardson, boatswain's mate, second-class, United States Navy, a boy who was in the Navy during the war 3½ years - -

11 battles he was in - - had an unusually good record. He was a. w. o. l. for 20 minutes one time and got a summary court martial for it -- a very minor offense - - and this was the only thing against his record. He had reenlisted, or shipped over, as we call it in the Navy, after the war was over, for a second hitch. He was aboard a ship that came into the port of Norfolk, and took shore leave. As most sailors will do - - and I speak first as a sailor, but later as an officer - - he went into town on liberty. This from the record. The record discloses that he was drinking - - as lots of sailors do. When he was returning home from his liberty - - and he called his ship "home", he was on board a bus. The record shows that he had been drinking excessively, and this I do not doubt; but it seems that aboard this bus there was also a "90-day wonder" - - and I was one myself, at one time, and I now say this apologetically, that after I finished midshipman school, with that little piece of gold braid on my arm I thought I was "the stuff", just like I can imagine this Ensign Briggs thought he was on the bus that night. It seems that Richardson was talking a little loud, and that Ensign Briggs, the "90-day wonder", told the boy to pipe down. The boy and his buddy who had been ashore with him, piped down for a little while, then they started again talking a little loud. It seems as if this ensign who went into the service after the war was over, had no military experience other than after the war had been declared over, went up to this boatswain's mate, second class - - and that is a good rate in the Navy, and told Richardson, according to the record: "I am your superior officer; pipe down. Pipe down. And I mean it." One thing led to another and just as two people frequently will do, getting into a heated conversation and argument, a fight ensued. The record reveals that this boatswain's mate, along with his buddy, got into a fight with Ensign Briggs this "90-day wonder."

Mr. Chairman, a fight ensued, and the record shows the ensign was beat up.

A general court martial was ordered, and it composed of the following:

Capt. John W. Marts, Jr., United States Navy; Commander Charles H. Clark, United States Navy; Maj. John W. Hughes, United States Marine Corps; Lt. Comdr. Lanceford B. Pruitt, Jr., United States Naval Reserve; Lt. Comdr. Paul E. Dickson, United States Navy; Lt. James F. Donnelly, United States Navy; Lt. Harry R. Schleppe, United States Navy, members; and Lt. Comdr. James C. Page, United States Navy, Judge Advocate.

Growing out of this accusation and this general court martial, the record of which I have before me, and growing out of this trial, the boy was convicted by these biased members of this courts-martial board. I say that to the Members of this Congress because, in my estimation, the judgment that was given by these members of the Navy and Marine Corps was biased and was prejudiced, and, in my opinion, as a Member of Congress and as a Reserve officer in the United States Navy, those men are not entitled to wear the navy blue uniform because of their prejudged opinions toward enlisted men.

They gave this man 5 years in the penitentiary and a dishonorable discharge. If that is justice, Mr. Chairman, I want no part of the United States Navy, and I am still a member of the Reserves in the Navy. I do not think

that is the justice that should be dealt out by any courts-martial board. That is the injustice, however, that was meted out to this boy.

I carried the matter up to Admiral Russell, Judge Advocate of the Navy, and he told me over the phone: "It looks like they threw the book at the boy."

I then carried the matter on to the Secretary of the Navy, who referred the case to a reviewing board, the head of which was Admiral Forte. I appeared before this board. They reduced his sentence to 29 months, together with a dishonorable discharge.

Mr. Chairman, I still maintain that is still too much. I maintain that justice should be brought about and at the most, 90 days in the brig would be excessive. I indeed thank you, personally, and the members of this committee for including in the bill a civilian review board or appeal board. In my opinion, it insures that such members of the armed forces as Bernis Amos Richardson and other boys of the Army, Navy, and Marine Corps will get justice in the future. My only objection to this is that it cannot be retroactive to correct some of the insults and some of the injustices that have been meted out by the top brass in the Pentagon Building and of the brass of the Army and Navy.

Mr. Chairman, I appreciate the opportunity to expose this particular case on the floor of the Congress. In no way do I intend my remarks to be a general indictment of all the officers of our great Navy, many of whom are most considerate and possess a great deal of what is known as the milk of human kindness. However, such a case as I have related today in many instances reflects on all of the officers of our armed forces.

Mr. Vinson. Mr. Chairman, I yield 5 minutes to the gentleman from Massachusetts (Mr. Furcolo).

Mr. Furcolo. Mr. Chairman, I want to ask one of the members of the committee, if I may, a couple of questions which I have in mind in connection with this matter.

On page 14, line 10 of the bill, I'm not quite clear as to just what the language means there when it says, "offender after having answered to the civil authorities."

What does that mean in the opinion of the committee?

Mr. Vinson. That means when the case has been disposed of.

Mr. Furcolo. Does that mean after sentence or going in and pleading guilty or not guilty? The words are not clear in my own mind.

Mr. Vinson. Well, it means after the case has been disposed of, either an acquittal or conviction. It is the end of the case.

Mr. Furcolo. The gentleman's interpretation, in other words, is that it also means after the man has served the sentence the civil court has given.

Mr. Vinson. Yes.

Mr. Furcolo. I thank the gentleman. Then, on pages 23 and 24, with reference to the enlisted person serving on the court, it says that enlisted persons may serve if they are not members of the same unit as the defendant. On 24, beginning with line 17, it defines what the word "unit" means. As I interpret that, if you had a ship at sea, for example, with five, six, or seven hundred men aboard, no enlisted man on that ship could serve on the court martial body. I just want to know if that is what the committee has in mind and if that is their interpretation of it.

Mr. Vinson. That would be a question to be determined by the commanding officer, and if the commanding officer decided that there was such a small number in the unit that they would be prejudiced, they would not be privileged to be on the court. Of course, the bill further says that if he denies him that right, he must make a written statement for the record.

Mr. Furcolo. I understand that. I also want to point out, for whatever consideration the committee might give it, on page 39, lines 17 and 18, there is a clause in there, and it is in all the court-martial books, which is supposed to be in there for the benefit of the defendant pointing out if after a plea of guilty the defendant sets up a matter inconsistent with the plea, you have to have a trial. I think probably you have to have that provision, but I do know that very often in a matter of mitigation or extenuation - - I have had it happen myself when representing one of these fellows - - you may have a matter that is inconsistent with the plea of guilty, but the defendant then has to go through a trial which often results in greater punishment to him because he did not plead guilty. I do not know how you would handle the situation, but I think the committee ought to give it some consideration.

Mr. Brooks. Mr. Chairman, if the gentleman will yield, does the gentleman not think that the defendant's attitude in being willing to plead guilty would have a great deal to do with the sentence imposed? I would think it would show his attitude toward the court, and that should be considered.

Mr. Furcolo. It might well be. I know of some cases where it does not. In conclusion, the only other thing I want to say is this: I think that this bill is a great step forward; there is no question about it. But, I do not think that this bill or any other bill that you are able to present at this time is ever going to remedy the grave injustices of the court-martial system or conduct of the court-martial system. On paper it gives the defendant as much protection as he wants; more than a civilian, in fact. But, the great difficulty is that you never get away from that command control, which means the administration of the system does not give the defendant the protection he gets on paper. It is not so much a question whether the commanding officer hands word down, as they do, but regardless of that, the whole atmosphere of the ship is permeated, and the members of the court know it. Even if the commanding officer says nothing, the members of the court-martial board still believe they should punish the defendant because they think their failure to do so may antagonize their commanding officer. They know the commanding officer signs their fitness reports, determines their promotions, and decides what sort of duty they will have. You are not going to get the sort of justice you are striving

for in that sort of situation. I think the committee is to be complimented for giving as much protection as possible, and I think it important that the military should know that the Congress intends to follow that situation as close as they can. I do not think that section 37, which tries to prevent the commanding officer from influencing the court, will amount to a hill of beans. I know it is put in there and it says a lot of things, but I do not think it is going to amount to too much. I think it is important that the military know the Congress is going to follow this matter up and is going to try to see that the command control is kept within bounds as much as possible.

Mr. Gross. Mr. Chairman, will the gentleman yield?

Mr. Furcolo. I yield to the gentleman from Iowa.

Mr. Gross. Can the gentleman tell me whether this appeals board that is to be set up, or appeals court, is to have at least one member of the court a former enlisted man?

Mr. Furcolo. I see Mr. Brooks on his feet. Perhaps he would prefer to answer that as he is a member of the committee and I am not.

Mr. Brooks. If the gentleman will yield, I think "board" is wrong terminology to use. What we want to build up there is not a board at all but a court, that will have the prestige and the background and the influence and the ability of the United States Court of Appeals. We hope that will happen, and we put in this bill as requirements for the members of this court the same requirements as for judges of the United States Court of Appeals. That is important in this respect, that perhaps you may want to go to the United States Court of Appeals to get a judge, and he would be available.

Mr. Gross. You do not require that a former enlisted man serve on that court?

Mr. Brooks. No.

Mr. Vinson. Mr. Chairman, I yield myself 1 minute to answer the gentleman.

Of course, the President has the right to appoint any type of man he sees fit to appoint. He can appoint a former enlisted man. He can appoint any lawyer, even though he has never had any any military experience. It is entirely up to the President to select the type of man, just as he selects any other lawyer for appointment to a court. However, military service may be a factor in selecting him.

Mr. Gross. Mr. Chairman, will the gentleman yield?

Mr. Vinson. I yield to the gentleman from Iowa.

Mr. Gross. Do you outlaw anywhere in this bill the despotism that now exists in the occupied areas of foreign countries by which civilians are still being tried in military courts?

Mr. Brooks. They are not tried under this code, they are tried under provost courts. This has nothing to do with provost courts. Perhaps Congress should go ahead and legislate on that matter, but it is not sought to do so under this bill.

Mr. Gross. I hope it will.

Mr. Cole of New York. Mr. Chairman, I yield 5 minutes to the gentleman from Iowa (Mr. Martin).

Mr. Martin of Iowa. Mr. Chairman, this bill, H. R. 4080, now under consideration, is the culmination of many years of study, bearing the earmarks of many controversies that have arisen over military justice. From actual experience and actual observation, I commend the committee on their good work and on what I consider a tremendous step in the right direction.

I speak with some real feeling in the matter. I started my experience in this matter back in 1917 as a young lieutenant in the Regular Army, and served several years. I came into Congress in 1939 and was assigned to the committee on Military Affairs and served with that committee for 8 years.

During the war we were fully aware of the need for revision of the court-martial procedure and in response to that need there was created in the Seventy-ninth Congress a special committee pursuant to House Resolution 20 of that Congress, on which special committee it was my privilege to serve. One of the subjects we studied extensively was the judicial system of the United States Army. The chairman of that special committee was my good friend from North Carolina (Mr. Durham), who has already taken some part in the discussion here today.

During 1946, as a member of the sub-committee, of which the gentleman from North Carolina (Mr. Durham) was chairman, I had the privilege of making a very special study of most of the shortcomings in the system of military justice as it was then functioning. I am very pleased to note in looking through the bill H. R. 4080 that most of the recommendations made by the special committee of the Seventy-ninth Congress in this field have been incorporated in this proposed legislation.

The recommendations made by the special committee on which I served may be found in House Report No. 2722 of the Seventy-ninth Congress, second session, dated August 1, 1946. I will not take up the time of the Committee now to make detailed comparisons, but I do want the Committee on Armed Services to know that I, for one, deeply appreciate your having developed this legislation after comprehensive and thorough study of the great issues involved. Many of those issues are fundamental and far reaching. You have built up a good piece of legislation here. It may not be completely free of the need for further revision in the future, but, knowing the personnel of the Committee on Armed Services, I have tremendous confidence in you and I know you will continue your study and observation and develop further legislation of this kind when needed. That you will do this job carefully and well is evident from the good work that you

have done on this bill. I know that you will always keep military justice on a high plane. I do not subscribe to any action by the Congress which will attempt or even tend to give Congress specific review powers or attempt to exercise any review powers of individual cases. I served on the subcommittee of the Committee on Military Affairs for 8 years that got just about all the complaints that came to Congress from fellows who had been caught, tried, and convicted for any offense during their military service.

It is highly important that a sound system of justice be devised and that such system be permitted to function without undue interference by Congress in specific cases. It is also important that Congress be ever ready to revise and improve the system in the way best illustrated by the bill H. R. 4080 now before us. I congratulate the gentleman from Georgia (Mr. Vinson), chairman of the Committee on Armed Services, and the gentleman from Louisiana (Mr. Brooks), chairman of the subcommittee, and all members of the committee who worked on this legislation.

Mr. Vinson. Mr. Chairman, I yield such time as he may desire to the gentleman from South Carolina (Mr. Rivers).

Mr. Rivers. Mr. Chairman, I am proud to be a member of the subcommittee which has written the proposed legislation. Our proposal received the unanimous approval of the full committee of the armed services and we received the special commendation of our great chairman, the Honorable Carl Vinson, who is handling this legislation today.

We are confident that our committee is rendering the present armed forces a notable service. We are confident we are making a worth-while contribution to posterity. We would not presume to infer we have fashioned a perfect document, but we are firm in the belief that this bill gives to military justice greater democracy than it has ever known in any nation since the world began.

Members of the armed services charged with commission of crimes are guaranteed more rights than any civilian enjoys today in our Nation. Notable among these are as follows:

First. This bill guarantees the accused the right to have military counsel without cost at the pretrial investigation.

Second. The appointing authority reviews the sentence of every court with full right to reduce the sentence in any amount, even to the extent of dismissing the case.

Third. The Board of Review reviews the facts as well as the law with full authority to remit the sentence or any part thereof and to reverse the case.

Fourth. The Judge Advocate General may, if authorized by the secretary of his department, further reduce the sentence.

The above are notable advances, and guaranties in future days that are to come. This bill may need further revision. If it does, you may rest as-

sure that our great chairman, the Honorable Carl Vinson, will lose no time in ordering proper revisions. We are convinced this is an excellent vehicle to further expand military justice with whatever changes the future may demand.

For, and on behalf of the committee, I want to thank our professional staff member Mr. Robert W. Smart. Mr. Smart is a former member of the armed services and served as a judge advocate during the recent war. He possesses a wealth of knowledge on this terrifically important and broad subject. He has worked unceasingly with the committee in the consecrated effort to help us bring you a document worthy of your consideration. We are deeply indebted to Mr. Smart for his long and tedious hours he has given in our preparation of this legislation.

Mr. Chairman, in presenting to the Congress this proposal, I urge its adoption.

Mr. Vinson. Mr. Chairman, I yield such time as he may desire to the gentleman from California (Mr. Doyle).

Mr. Doyle. Mr. Chairman, this 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, is clearly a distinct and timely step in the progress relating to military justice. For many years, both in time of war and in time of peace, committees of Congress have found it necessary and proper to study this subject matter and with varying degrees of success and failure. During this time, there has been a sort of feeling throughout the Nation, amongst millions of people, that there has been too much partiality, inconsistency, "command control," and even injustice, as a result of the system of military justice which we have been acting under, both in times of war and peace.

Having been a practicing lawyer and having been admitted before the supreme court of the State of California, and in like manner, for many years admitted to the bar of the United States Supreme Court, and having served as a member of the judiciary committee of the Bar Association of the State of California, and at present being a member of the legislative committee of the California State bar, I have sat in an advantageous position in knowing the need, yes, even the necessity of this uniform code of military justice. Behind it is the accumulation of years of experience and study.

The record of study and diligence of the Brooks subcommittee is undisputed and of a most distinguished nature. I congratulate him and the subcommittee members. By invitation, I had the pleasure of sitting with the subcommittee, without being an official member thereof, but because of my being a member of the Armed Services Committee and being especially interested in the subject matter. I, therefore, personally observed the impartiality, the forthrightness with which witnesses testified before the committee and with which the subcommittee considered same. I emphatically commend this bill to the unanimous approval of the House

as a step in the progress of military law, both as to the substance of the law and as to the procedure. It is the first time in the history of our Nation that there has been a uniform Code of Military Justice, and I mean uniform. It applies uniformly to all branches of the armed services, both in times of war and in times of peace, and it supersedes the existing articles of war, in the related fields of military justice. The civilian court of appeals is for the first time set up and is uniform for all armed services. The accused must have legally qualified counsel and is entitled to have the same upon request, and the court martial must be composed, in part, of a reasonable number of enlisted men also, and there is an automatic review of both the facts, as well as the law to be made by competent legal authorities. The members of the Reserve components are protected in temporary service by reason of the fact that unless they signed a consent in writing, that when on temporary duty, they are not subject to this code. General or flag officers are likewise subject to the same uniform procedures as are enlisted men. In substance and effect, it further requires that the Judge Advocate General must himself be a lawyer and must at least have 8 years accumulated experience.

There are many more revolutionary and sound improvements in the substance of the law and the processes by which the law is applied, of pronounced assurance, of increased protection against opportunity of unfair and unkind men doing and administering unfair practices and punishments in the military service. The trial and error of this Uniform Code of Military Justice will enable Congress to cooperate with the splendid men of the armed forces.

Assuming that the Senate will find reason to accept this bill, at least in substance, on account of its manifest soundness and fairness, I anticipate great satisfaction throughout the armed forces and in the civilian population of our Nation.

Mr. Vinson. Mr. Chairman, there are no more requests for time on this side.

Mr. Cole of New York. Mr. Chairman, we have no further requests for time. I yield back the balance of the time on this side.

The CHAIRMAN. The Clerk will read.

The Clerk read as follows:

Be it enacted, etc., 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 I. 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 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 or order to obey the same;

(2) Cadets, aviation cadets, and midshipman;

(3) Reserve personnel while they are on inactive duty training authorized by written orders which are voluntarily accepted by them which orders specify that they are subject to this code;

(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 hospitalization 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 assigned to and 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, or accompanying the armed forces without the continental limits of the United States and the following territories: That part of Alaska east of longitude 172° 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 172° west, the Canal Zone, the main group of Hawaiian Islands, Puerto Rico, and the Virgin Islands.

ART. 3. Jurisdiction to try certain personnel.

(a) Subject to the provisions of article 43, any person charged with having committed an offense against this code, punishable by confinement of 5 years or more and for which 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 the code, shall not be relieved from amenability to trial by courts-martial by reason of termination of said status.

(b) All persons discharged from the armed forces subsequently charged with having fraudulently obtained said discharge shall after apprehension 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, 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 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 made upon the recommendation 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 persons 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, oral or written, 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, oral or written, 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 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 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 the request of competent military authority, be returned to military custody for the completion of the said court-martial sentence.

PART III — 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 not to exceed one-half of his pay per month for a period not exceeding 1 month.

(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 week's 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) if imposed upon a person attached to or embarked in a vessel, confinement for a period not to exceed seven consecutive days; or

(F) if imposed upon a person attached to or embarked in a vessel, confined on bread and water or diminished rations for a period not to exceed five consecutive days.

(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 regulations specifically prescribe, as provided in subdivision (a) and (b).

(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 of 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, including the penalty of death when specifically authorized 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 of 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 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.

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, 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.

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, Air Force or Navy 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 general 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 summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases brought before it. 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 eligible 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

eligible 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) (1) Any person on active duty with the armed forces who is not a member of the same unit as the accused shall be eligible 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 serve as a member of a court only if, prior to the convening of such court, the accused personally 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 eligible 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.

(2) For the purpose 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 assistance as he deems necessary or appropriate. No person who

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, 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; 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

(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 members 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 5 members, the trial shall not proceed unless the convening authority appoints new members sufficient in number to provide not less than 5 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 3 members, the

trial shall not proceed unless the convening authority appoints new members sufficient in number to provide not less than 3 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 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 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 of his right to be represented at such investigation by counsel. Upon his own request he shall be represented 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 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 reason 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 he has 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 5 days subsequent to the service of charges upon him, or before a special court martial within a period of 3 days subsequent to the service of 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 uniform insofar as practicable and 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 any other exercise of its or his functions in the conduct of the proceedings. 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 directions 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 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) Each accused and trial counsel shall 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 3 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 2 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 6 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 3 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 a 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 to an offense for which the death penalty may be adjudged.

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 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 6 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 30 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 depositions 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 100 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) Subject to the requirements of subdivision (d) of this article, testimony by deposition may be adduced by the defense in capital cases.

(f) Subject to the requirements of subdivision (d) of this article, 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 under the rules of evidence, 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 and if the same issue was involved 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 42, 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 10 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 motion relating to the 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 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 Court of Military Appeals.
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 judgements.

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, and 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 forces of which the accused is a member.

ART. 62. Reconsideration and revision.

(a) If a specification 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 as he in his discretion 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 midshipman, dishonorable or bad-conduct discharge, or confinement for 1 year or more.

(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) The Judge Advocate General shall, unless there is to be further action by the President or the Secretary of the Department or the Judicial Counsel, 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.

(f) 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 Court of Military Appeals.

(a) There is hereby established in the National Military Establishment the Court of Military Appeals which shall consist of three judges who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate. No person shall be eligible for appointment to the Court of Military Appeals who is not a member of the bar of a Federal court or of the highest court of a State. The three judges of the Court of Military Appeals shall hold office during good behavior and shall receive

the compensation, allowances, perquisites, and retirement benefits of judges of the United States Court of Appeals.

(b) Under rules of procedure which it shall prescribe, the Court of Military Appeals 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 Court of Military Appeals 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 Court of Military Appeals has granted a review.

(c) The accused shall have 30 days from the time he is notified of the decision of a board of review to petition the Court of Military Appeals for a grant of review. The court shall act upon such a petition within 30 days of the receipt thereof.

(d) In any case reviewed by it, the Court of Military Appeals 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 Court of Military Appeals, 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 Court of Military Appeals shall take action only with respect to matters of law.

(e) If the Court of Military Appeals 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 Court of Military Appeals 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 court. 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 the decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(g) The Court of Military Appeals and The Judge Advocates General of the armed forces shall meet annually to make a comprehensive survey of the operation of this code and report to the committees on Armed Services of the Senate and of the House of Representatives and to the Secretary of Defense and the Secretaries of the Departments the number and status of pending cases and any recommendations relating to uniformity of sentence policies, amendments to this code, and any other matters deemed appropriate.

ART. 68. Branch offices.

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 to all cases involving sentences not requiring approval by the President.

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 Court of Military Appeals.

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 who shall be qualified under the provisions of Article 27 (b) (1).

(b) It shall be the duty of appellate Government counsel to represent the United States before the board of review or the Court of Military Appeals 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 Court of Military Appeals—

(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 a case to the Court of Military Appeals.

(d) The accused shall have the right to be represented before the Court of Military Appeals 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 6 months thereafter.

(c) No sentence which includes, unsuspended, a dishonorable or bad conduct discharge, or confinement for 1 year or more shall be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals.

(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 1 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 1 year or more, 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 Court of Military Appeals, the Judge Advocate General shall refer the petition to the board or court, 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, when designated by him, the Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer 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 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 judgements.

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, and the authority of the President.

PART X — PUNITIVE ARTICLES

Article

77. Principals.

78. Accessory after the fact.

79. Conviction of lesser included offense.

80. Attempts.
81. Conspiracy.
82. Solicitation.
83. Fraudulent enlistment, appointment, or separation.
84. Unlawful enlistment, appointment, or separation.
85. Desertion.
86. Absence without leave.
87. Missing movement.
88. Disrespect towards officials.
89. Disrespect towards superior officer.
90. Assaulting or willfully disobeying officer.
91. Insubordinate conduct towards noncommissioned officer.
92. Failure to obey order or regulation.
93. Cruelty and maltreatment.
94. Mutiny or sedition.
95. Arrest and confinement.
96. Releasing prisoners without proper authority.
97. Unlawful detention of another.
98. Noncompliance with procedural rules.
99. Misbehavior before the enemy.
100. Subordinate compelling surrender.
101. Improper use of countersign.
102. Forcing a safeguard.
103. Captured or abandoned property.
104. Aiding the enemy.
105. Misconduct as prisoner.
106. Spies.
107. False official statements.
108. Military property of United States—Loss, damage, destruction, or wrongful disposition.
109. Property other than military property of the United States—Waste, spoil, or destruction.
110. Improper hazarding of vessel.
111. Drunken or reckless driving.
112. Drunk on duty.
113. Misbehavior of sentinel.
114. Dueling.
115. Malingering.
116. Riot or breach of peace.
117. Provoking speeches or gestures.
118. Murder.
119. Manslaughter.
120. Rape and carnal knowledge.
121. Larceny.
122. Robbery.
123. Forgery.
124. Maiming.
125. Sodomy.
126. Arson.
127. Extortion.
128. Assault.

- 129. Burglary.
- 130. Housebreaking.
- 131. Perjury.
- 132. Frauds against the Government.
- 133. Conduct unbecoming an officer and gentleman.
- 134. General article.

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;
is a principal.

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 the offense charged or of 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 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.

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 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 toward 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, appre-

hends, 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) wilfully 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 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.

ART. 106. Spies.

Any person who in time of war is found lurking as a spy 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.

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, unlawfully 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;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under paragraph (1) or (4) of this article, he shall suffer death or imprisonment for life as a court-martial may direct.

ART. 119. Manslaughter.

(a) Any person subject to this code who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter

and shall be punished as a court-martial may direct.

(b) Any person subject to this code who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being—

(1) by culpable negligence; or

(2) 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 involuntary manslaughter and shall be punished as a court-martial may direct.

ART. 120. Rape and carnal knowledge.

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

(b) Any person subject to this code who, under circumstances not amounting to rape, commits an act of sexual intercourse with a female not his wife who has not attained the age of sixteen years, shall be punished as a court-martial may direct.

(c) Penetration, however slight, is sufficient to complete these offenses.

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 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.

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 an inhabited dwelling, or any other structure, movable or immovable, 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 wilfully 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 person 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 a criminal offense therein, 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; 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.

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 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 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 month after approval of this Act, or on July 1, 1950, whichever date is later: Provided, that section 12 of this Act shall become effective on the date of the approval of this Act.

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 or Aircraft.

—When the crew of any naval vessel or naval 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 re-assigned 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 (35 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. Under such regulations as the President may prescribe, The Judge Advocate General of any of the armed forces is authorized upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad-conduct discharge, previously executed, a form of discharge authorized for administrative issuance, in any court-martial case involving offenses committed during World War II in which application is made within one year after termination of the war, or after its final disposition upon initial appellate review whichever is the later: **Provided**, That only one such application for a new trial may be entertained with regard to any one case: **And provided further**, Within the meaning of this section and of article of war 53, World War II shall be deemed to have ended as of the effective date of this Act.

QUALIFICATIONS OF THE JUDGE ADVOCATES GENERAL

Sec. 13. Notwithstanding any other provision of law, the Judge Advocates General, exclusive of the present incumbents, shall be members of the bar of a Federal court or of the highest court of a State, shall be judge advocates or law specialists and shall have at least 8 years cumulative experience in a Judge Advocate's Corps, Department, or Office, the last three years of which, prior to appointment, shall be consecutive; **Provided**, That in time of peace the provisions of this section shall not be applicable to the Coast Guard.

Sec. 14. 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 provision of section 6, title I, of the Naval Reserve Act of 1938 (52 Stat. 1175, 1176, ch. 690), making members of the Fleet Reserve and officers and enlisted men who have been or may be transferred to the retired list of the Naval Reserve Force or the Naval Reserve or the honorary retired list with pay subject to the laws, regulations, and orders for the government of the Navy;

(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. VINSON (interrupting the reading of the bill). Mr. Chairman, I ask unanimous consent that further reading of the bill be dispensed with, and that the bill be printed at this point in the RECORD and that it be open to amendment.

The CHAIRMAN. Is there objection to the request of the gentleman from Georgia?

There was no objection.

Mr. VINSON. Mr. Chairman, I ask unanimous consent that all the committee amendments as set out in the report and as appearing in the bill be considered en bloc.

The CHAIRMAN: Is there objection to the request of the gentleman from Georgia?

There was no objection.

The Clerk read as follows:

Committee amendments:

On page 5, line 18, following "(11)" insert "Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law," and substitute a small a for the capital A in "All."

On page 5, line 24, following "(12)" insert "Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law," and substitute a small a for the capital A in "All," and after the word "by" insert "or otherwise reserved or acquired for the use of."

On page 6, line 2, substitute a capital T for the small t in "territories."

On page 6, line 18, delete "after apprehension" and on line 19, after "shall" insert "after apprehension."

On page 15, line 15, add "s" to "subdivision."

On page 20, line 24, hyphenate the words "court martial."

On page 25, line 4, insert a comma after "trial counsel."

On page 39, line 16, hyphenate "court martial."

On page 43, line 6, substitute "otherwise" for "other."

On page 54, line 13, substitute "Court of Military Appeals" for "Judicial Council."

On page 55, line 4, after "Senate." insert "not more than two of the judges of such court shall be appointed from the same political party."

On page 56, line 3, delete "g" from "withing."

On page 57, line 9, after "report" substitute "to" for "the," and in line 12, after "cases," insert "and."

On page 58, line 18, substitute a small "a" in "Article."

On page 58, line 25, substitute a dash for the period.

On page 59, line 12, substitute "Military" for "The."

On page 60, line 11, hyphenate "bad conduct."

On page 69, line 6, substitute "or" for "at."

On page 77, line 17, after "place" substitute "or" for "of."

On page 79, line 23, delete "pro-."

On page 99, line 5, substitute "dismissal" for "dismissed."

On page 99, line 6, hyphenate "bad conduct."

On page 99, strike the proviso beginning on line 25 and ending on page 100, line 2, and substitute the following new proviso: "Provided, that when the Coast Guard is operating as a service in the Treasury Department the provisions of this section shall not be applicable thereto."

The committee amendments were agreed to.

Mr. VINSON. Mr. Chairman, I offer another committee amendment.

The Clerk read as follows:

Committee amendment offered by Mr. VINSON: On page 27, line 14, strike out the words "have power to appoint a reporter," and insert in lieu thereof the following words: "Appoint qualified court reporters."

The amendment was agreed to.

Mr. VINSON. Mr. Chairman, I offer a further committee amendment.

The Clerk read as follows:

Amendment offered by Mr. VINSON: On page 103, after line 25, after section 15, insert:

"There is hereby authorized to be appropriated out of any moneys in the Treasury, not otherwise appropriated, such sums as may be necessary to carry out the purposes of this act."

The amendment was agreed to.

Mr. VINSON. Mr. Chairman, I offer a further amendment.

The Clerk read as follows:

Amendment offered by Mr. VINSON: On page 95, line 21, after "that" insert "the provisions of article 67 (a) and."

The Amendment was agreed to.

Mr. VINSON: Mr. Chairman, I offer a further amendment.

The Clerk read as follows:

Amendment offered by Mr. VINSON: On page 60, lines 8, 9, and 10, delete the words "has requested the reconsideration of a case before the Board of Review, or."

The amendment was agreed to.

Mr. VINSON: That is all the committee amendments, Mr. Chairman.

Mr. FURCOLO: Mr. Chairman, I offer an amendment which I sent to the desk.

The Clerk read as follows:

Amendment offered by Mr. FURCOLO: On page 14, line 14, strike out the period, insert a comma, and add the words "except that in those cases where the conviction in the civil tribunal is based on substantially the same facts as the court-martial sentence, any period of confinement served as a result of conviction in a civil tribunal shall be counted toward completion of any court-martial sentence of confinement."

The CHAIRMAN: The gentleman from Massachusetts (Mr. FURCOLO) is recognized for 5 minutes in support of his amendment.

Mr. FURCOLO: Mr. Chairman, this amendment has to do with the question I asked. It is intended to cover situations where a sailor may go ashore and get into some difficulty with the civil authorities and cause some damage and as a result of that he is brought to a court martial or some sort of punishment by the naval authorities. Let us assume he is given a sentence of 6 months or a year. According to the bill as it is written now, what would happen is that after he has served a week or a month, if the civilian authorities wanted him, he would then go to the civilian authorities and perhaps be given a sentence of 6 months or a year for the very same offense. Then he would serve that sentence, which might be on substantially the same facts.

Mr. VINSON: Mr. Chairman, will the gentleman yield?

Mr. FURCOLO: I yield.

Mr. VINSON: I wish the gentleman would explain his amendment. As I understand it, your amendment would have no relation to an offense committed in the armed services. If he commits an offense in the armed service and get 3 months and then he commits an offense at the same time in the civil jurisdiction and gets a 6-months sentence, then you want to give him credit to abate his 3-month sentence in the armed services?

Mr. FURCOLO. In effect there are many cases where, on substantially the same facts—and that is what the amendment provides—a man can be brought in by both the civilian and military authorities.

Mr. BROOKS. Mr. Chairman, will the gentleman yield?

Mr. FURCOLO. I yield.

Mr. BROOKS: The gentleman is aware that in civil life a man can be tried three times for the same offense?

Mr. FURCOLO. That is right.

Mr. BROOKS. Ordinarily the courts take that into consideration, and when the courts fail in their function, then the pardoning power steps in and exercises its right.

Mr. FURCOLO. The courts do take that into consideration.

Very frankly, as far as I am concerned, I should like to see it written right into law so that there could not be any discretion on the part of the military authorities to make that man serve double time, really, on the

same substantial facts; and that is what this provision of the bill would do. There are many many cases in which a man will go off on a tear and commit certain acts that will bring him before both the military authorities and the civilian authorities for the same offense. Six months would be adequate punishment for the offense committed, but without this amendment the military authorities could give him 6 months, he could serve 3, be turned over to the civilian authorities; they could give him another 6 months, make him serve it, and then he would have to be returned to the military authorities to serve the balance of his 6 months' sentence there. Such procedure is not just, but the way the bill is worded there can be no discretion, for it states that he shall be returned for the completion of the court-martial sentence. There is no discretion there. It practically makes a double sentence for the same offense mandatory. Briefly, the prevention of that injustice is the sum and substance of what I wish to accomplish by this amendment.

Mr. VINSON: Mr. Chairman, I rise in opposition to the amendment.

Mr. Chairman, the bill has been carefully thought out; and, as was stated in the debate, hearings were held on the bill for five solid weeks, oftentimes lasting 6, 7, and 8 hours a day. After the hearings were concluded the bill was studied section by section with the best lawyers of the Department, together with our own legal staff. This bill is highly technical, and we do not want to throw it out of balance. I do not believe the gentleman's amendment was intended to throw it out of balance, but I believe it will not be in the best interest of the service to accept the amendment, and I ask that it be rejected.

The CHAIRMAN: The question is on the amendment offered by the gentleman from Massachusetts.

The amendment was rejected.

Mr. FURCOLO: Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. FURCOLO: On page 37, lines 10 and 11, strike out the words "or absence without leave."

Mr. FURCOLO. Mr. Chairman, this has to do only with the statute of limitations. The bill provides that for certain offenses there is a period of time during which the statute runs, but on the more serious offenses the statute may not run.

Absence without leave is the sort of thing whether in time of war or in time of peace that happens hundreds and thousands of times; it is a fairly common offense in the services. Strange as it may seem, in many, many instances, even in time of war, it is not a very important offense, and I think absence without leave should not be included with the more serious offenses.

Mr. VINSON. Mr. Chairman, will the gentleman yield?

Mr. FURCOLO. I yield.

Mr. VINSON. Let us get right down to business; does the gentleman believe that a person charged with desertion or absence without leave in

time of war should have the benefit of the statute of limitations? Does the gentleman think the statute should run in such a case where the fate of the Nation is imperiled and they need him to do military duty?

Mr. FURCOLO. If a man can be absent without leave without his absence being noticed for 3 years, certainly it is not a very serious thing. Desertion and absence without leave are two very different things. Absence without leave is one of the most common offenses in the services; it happens hundreds of thousands of times. A man should not have that hanging over his head for the period of time indicated here.

Mr. VINSON. Mr. Chairman, I rise in opposition to the amendment, and ask that it be voted down. I believe the gentleman from Massachusetts has not made out a good case for his amendment.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Massachusetts.

The amendment was rejected.

Mr. FURCOLO. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. FURCOLO: On page 89, line 4, strike out all of the words in line 4, and insert the words: "Punished as a court martial may direct."

Mr. FURCOLO. Mr. Chairman, the bill as it is now written says that any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the armed services. There is no discretion; it is mandatory. There are many, many offenses that are relatively minor which can be construed, and actually they are correct in construing them, as being conduct unbecoming an officer and a gentleman and, of course, they must be dismissed. I would be satisfied to leave it up to the discretion of the court martial. You do that in the case of more serious offenses. That is the purpose of my amendment.

Mr. VINSON. Mr. Chairman, we accept the amendment.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Massachusetts (Mr. FURCOLO).

The amendment was agreed to.

The CHAIRMAN. Under the rule, the Committee rises.

Accordingly the Committee rose; and the Speaker having resumed the chair, Mr. LANHAM, Chairman of the Committee of the Whole House on the State of the Union, reported that that Committee, having had under consideration the bill (H.R. 4080) 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, pursuant to House Resolution 201, he reported the bill back to the House with sundry amendments adopted by the Committee of the Whole.

The SPEAKER. Under the rule, the previous question is ordered.

Is a separate vote demanded on any amendment? If not, the Chair will put them in gross.

The amendments were agreed to.

The SPEAKER. The question is on the engrossment and the third reading of the bill.

The bill was order to be engrossed and read a third time, and was read the third time.

The SPEAKER. The question is on the passage of the bill.

The bill was passed and a motion to reconsider was laid on the table.

GENERAL LEAVE TO EXTEND REMARKS

Mr. BROOKS. Mr. Speaker, I ask unanimous consent that all Members may have five legislative days in which to extend their remarks in the RECORD on the bill just passed.

The SPEAKER. Is there objection to the request of the gentleman from Louisiana?

There was no objection.

United States SENATE (Cong. Record, Vol. 95, Pt. 5, P. 5810)

May 6, 1949

HOUSE BILLS AND JOINT RESOLUTIONS REFERRED

The following bills and joint resolutions were severally read twice by their titles, and referred, as indicated:

H.R. 4080. An act 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; to the Committee on Armed Services.

United States SENATE

(Cong. Record, Vol. 95, Pt.5,6162-6170)

May 13, 1949

PROPOSED UNIFORM CODE OF MILITARY JUSTICE

Mr. McCarran: Mr. President, considerable publicity has recently been given to a letter which I addressed to the senior Senator from Maryland (Mr. Tydings), chairman of the Armed Services Committee, in connection with the bill (S. 875), now pending before that committee, which provides for a Uniform Code of Military Justice. My letter was a 35-page analysis of the provisions of the bill, and I regret that the newspaper comments seemed to be confined to the last 2 pages of the letter.

The official statement of the Navy setting forth the numbers and qualifications of the personnel of the Judge Advocate General's office appears in paragraph 2 of the statement made by Rear Adm. George L. Russell, Judge Advocate General of the Navy, before the House Committee on Armed Services, on Monday, April 4, 1949. In the fourth from last paragraph of the same statement is set forth the policy of the Navy with regard to the rotation of legal specialists to line duty and return.

As to the necessity for the establishment of the office of general counsel, staffed by civilians, I refer those interested to the hearings conducted before a Subcommittee of the Committee on Naval Affairs of the Seventy-eighth Congress, pursuant to House Resolution 30, of which subcommittee the present junior Senator from Texas (Mr. Johnson) was then chairman.

In order that all persons interested may have the opportunity of evaluating the full text of the letter which I addressed to the senior Senator from Maryland, I ask unanimous consent that it be inserted in the Record at this point as a part of my remarks.

There being no objection, the letter was ordered to be printed in the Record, as follows:

April 30, 1949

Hon. Millard E. Tydings,
United States Senate,
Washington, D. C.

My dear Senator Tydings: As you know, I have long been interested in the problems presented by the application of our courts martial system to both the personnel of the armed services and the civilians who happen to be subject to the same jurisdiction. I have always done my utmost to protect the civil rights, so far as it is constitutionally possible, of persons of both classes who must undergo trial by military tribunal. Accordingly, I have made an intensive study of S. 857, which purports to unify and revise the Articles of War and the Articles for the Government of the Navy so as to establish a uniform code of military justice. I am, therefore, sub-

mitting for your consideration the following comments relating to the provisions of the proposed legislation.

I regret that they are necessarily lengthy, but the bill is of such great import that it warrants the most detailed consideration possible. In this connection I respectfully request that this letter be made a part of the record on this bill so that all persons interested may have an opportunity to evaluate its contents.

In considering this proposed uniform code of military justice preliminary consideration should be given to the following points:

1. The committee on a uniform code of military justice, which formulated this proposed code, was composed of Prof. Edmund M. Morgan, Jr., acting as chairman, and four members of the Military Establishment. The staff which assisted this committee consisted of 15 members of the Military Establishment. Thus the work was weighted by 19 from the Military Establishment to 1 professor from civilian life.

2. This proposed code will govern in peacetime, as well as wartime, a large segment of the population of the United States consisting mostly of civilians and persons drafted from civilian life.

3. This segment of the population will be subject to administrative and military tribunals which Congress is asked to set up or continue completely outside the judicial system as provided in article III of the Constitution.

"In appraising the system of military justice, the emphasis must be on its actual operation rather than on the relevant statutory provisions standing alone. Experience has shown that legislation in this field may not always be taken at face value, since the pressures of military life tend to thwart congressional intention and to deprive statutory language of the meaning it would have in other contexts" (Wallstein, *The Revision of the Army Court-Martial System*, Col. L. R. 48: 219, March 1948).

COMMENT ON S. 857

Section 1 of S. 857, Eighty-first Congress, proposes a uniform code of military justice applicable to all of the armed forces, including the Coast Guard whether operating as part of the Navy or as an independent organization under the Treasury Department. The definitions are set out in article 1.

Article 2 lists the persons who are subject to the code. Included are persons "awaiting discharge after the expiration of their terms of enlistment." The commentary of the committee on a uniform code of military justice found on page 5 of "Uniform Code of Military Justice — Text, References, and Commentary ***" merely states that paragraph 1 in which this provision appears, "is an adaptation of Articles of War 2 (a)." However, a perusal of that section fails to disclose any such authority to hold a man subject to the Articles of War after the expiration of an enlistment. If this is to remain in the code it should be qualified to make certain that the code applies only to personnel held after the expiration of their enlistments pursuant to the legal order of a court martial as provided in paragraph (7).

Paragraph (11) subjects to the code "all persons serving with, employed by, accompanying, or under the supervision of the armed forces without the continental limits of the United States * * *" and certain territories. Paragraph (12) goes a step further subjecting "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 certain territories. The commentary of the committee on a uniform code of military justice states:

"Paragraph (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 AW 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."

Considering the number of persons who served in the armed forces during World War II and who will serve in the future, these provisions will place a very large portion of the population—both civilian and armed forces personnel—under an almost exclusive jurisdiction of military tribunals. As indicated in the commentary, military law has not heretofore been thus extended, especially in application to peacetime conditions.

Article 3 states that Reserve personnel who are charged with having committed an offense while in a status in which they were subject to this Code, may be retained on duty or may be placed on an active-duty status for disciplinary action without their consent. This provision appears to stem from section 301 of the act of June 25, 1938 (52 Stat. 1180; U. S. C. 34, 855), relating to the Naval Reserve. The enactment of this provision will foreclose appeals to the civil courts in circumstances such as those involved in *Hironimus v. Durant* ((1948)) 168 F. 2d 288), where a WAC captain on terminal leave was returned to active duty to stand trial. The general rule, heretofore applicable with regard to the Army, has been stated in *Mosher v. Hunter* ((1944)) 143 F. 2d 745, 746), thus:

"It is generally true, as contended, that courts-martial jurisdiction is co-existent and coterminous with military service and ceases upon discharge or other separation from such service (sec. 10, ch. 4, *Manual of Courts-Martial*, U. S. Army, 1928), and it does not extend to offenses committed against military law by those who are subsequently discharged or otherwise separated from such military service, unless courts-martial jurisdiction first attached before separation from the service, in which event jurisdiction continues until fully exhausted. (*Carter v. McClaughry* (183 U. S. 365, 383, 22 S. Ct. 181, 46 L. Ed. 236; *Ex Parte Wilson D. C.*, 33F. 2d 214. Cf. *Ex Parte Clark, D. C.*, 271 F. 533.) Furthermore, all persons under sentence adjudged by a court martial are subject to military law (2d art. of war, subsec. (e), 10 U. S. C. A., section 1473 (e)), and are therefore within the jurisdiction of courts martial for offenses committed against military law. This is true, although his military service ceased before jurisdiction attached and before trial and sentence *Carter v. McClaughry, supra*; *Kahn v. Anderson* (255 U. S. 1, 41 S. Ct. 224, 65 L. Ed. 469), and *Mosher v. Hudspeth, supra*.)"

With regard to subdivisions (b) and (c) of article 3, the commentary states that (b) 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* (1946) (65 F. Supp. 410), 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 (p. 8). In that case the court said (p. 410):

"It is the general rule that a person is amenable to the military jurisdiction only during the period of his service. (*United States v. McDonald* (2Circ., 265 F. 695; *Naval Courts and Boards*, sec. 334, at p. 92; *Winthrop, Military Law and Precedence* (sic), 2d Ed. (1920), at p. 89). And once honorably discharged, such honorable discharge is a final judgement passed by the Government upon the entire 'formal military record' of the person. (*United States v. Kelly*, 15 Wall. 34 * * *)."

Thus, article 3 proposes to authorize the retention of complete jurisdiction over personnel of the armed forces for indefinite periods.

Article 4 relates to a dismissed officer's right to a trial by court martial and should be read in conjunction with section 10. If enacted, paragraph (a) should at least be amended by inserting after "President" the following words, "under the provisions of section 10 of this act," so that the first part of the sentence will read:

"(a) When an officer, dismissed by order of the President under the provisions of section 10 of this act, * * *" etc.

The following commentary on this article (p. 10) is illuminative:

"This article should be read in conjunction with the provision being re-enacted in section 10 of this act. The right to trial will apply only in the case of a summary dismissal by order of the President in time of war. (Sec. 10 covers the provisions now found in AW 118 and AGN 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 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 ed., p. 64; *Digest of Opinions*, Judge Advocate General of the Army, 1912-40, sec. 227.)"

Article 5 states that this proposed "code shall be applicable in all places." Thus universal application is proposed. The commentary (p. 11) states:

"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 Keefe Report, p. 262 ff.)"

Article 6, paragraph (a) subjects the assignment of legal officers to the approval of the Judge Advocate General. In this connection we note that sections 246 and 247 of the act of June 24, 1948—Public Law 759—Eightieth Congress created the Judge Advocate General's Corps and provided for the permanent appointment of officers to serve in that corps. Thus the law specialists, insofar as the Army is concerned, would appear to be already under the control of that Judge Advocate General. This suggests that the status of the officers of other Judge Advocates be examined in the light of sections 246 and 247.

Paragraph (c) of article 6 states:

"(c) No person who has acted as a 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."

The commentary states (p. 12) that this paragraph is based on AW 11 (see sec. 208 of Pub. Law 759—80th Cong.), and is designed to secure review by an impartial staff judge advocate or legal officer.

While this paragraph appears to correct some of the abuses under the present system (see *Henry v. Hodges* (1948) 76 F. S. 968), it could go further toward assuring a thorough and impartial investigation by providing that the investigating officer should not act in any other capacity during the trial of a person he has investigated.

Part II, Apprehension and Restraint, contains articles 7 to 14. This part appears to be a codification of present practices with some enlargement. Any person, authorized under regulations governing the armed forces to apprehend persons, may do so, under the provisions of this proposed Code, upon reasonable belief that an offense has been committed and that the person apprehended committed the offense.

Part III, Nonjudicial Punishment, greatly broadens the authority heretofore exercised in the Army by a commanding officer under AW 104. Without commenting on the Navy phase of this proposal, we give hereunder AW 104 and proposed article 15. The enlargement of the power of a commanding officer to mete out "nonjudicial punishment" is apparent.

"Art. 15. Commanding officer's nonjudicial punishment.

"(a) Under such regulations as the President may prescribe, any com

manding 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 3 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 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 (It appears that this provision should go the way of flogging or at least be confined in its application to offenses committed while at sea.)

“(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.” (This would appear to give a vindictive commanding officer two bites at the apple, since a minor offense is nowhere defined.)

Part IV. Courts-martial jurisdiction: Proposed articles 16-21 establish three kinds of courts martial—general, special, and summary—and the jurisdiction of each.

At the outset it should be remembered that courts martial are the creatures of statutes, and, as a body or tribunal, they must be convened and constituted in conformity with provisions of the statute or they are without jurisdiction. (See *Flackman v. Hunter* (1948) (75 F. S. 871, 876); *Anthony v. Hunter* (1947) (71 F. S. 823, 828); and *Runkle v. U. S.* (1887) (122 U.S. 543, 555.)

Particular attention is invited to proposed article 18 which reads:

“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.”

The commentary on proposed article 17 states that it is derived from Articles of War 12 which reads:

“General courts martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: Provided, That general courts martial shall have power to adjudge any punishment authorized by law or the custom of the service including a bad-conduct discharge.” (There seems to be no reason why the offenses (infra) punished under this code should not be defined in the same language as the Federal Criminal Code and the limitations of punishments be identical. Consideration should also be given to trial in civilian courts, upon information, for offenses committed in United States which offenses are cognizable under Federal civil statutes.)

Article 21 states that the provisions of the proposed code conferring jurisdiction upon courts martial shall not be construed as depriving military

commissions or other military tribunals of concurrent jurisdiction. This provision stems from Articles of War 15. The Supreme Court has held that by this provision Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. (Ex parte Quirin (1942) 317 U. S. 1, 28.) Furthermore a military commission may be appointed for this purpose by any field commander, or by any commander competent to appoint a general court martial. (In re Yamashita (1946) 327 U. S. 1, 10.)

Articles 22, 23, and 24 list the persons who may convene courts martial.

Article 25 states 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." Under paragraph (b) warrant officers on active duty are competent to serve on general and special courts martial of any person other than an officer. Enlisted men, exigencies permitting and providing they are not of the same unit, shall constitute at least one-third of the membership of a general or special court martial if the accused makes a written request prior to the convening of the court for the inclusion of enlisted men. As enacted in section 203 of the Selective Service Act of 1948 (Public Law 759, 80th Cong.), from whence this provision stems, the wording is:

"Enlisted persons in the active military service of the United States or in the active military service of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on general and special courts martial for the trial of enlisted persons when requested in writing by the accused at any time prior to the convening of the court. When so requested, no enlisted person shall, without his consent, be tried by a court the membership of which does not include enlisted persons to the number of at least one-third of the total membership of the court."

Section 212 of Public Law 759, Eightieth Congress, states that: "No enlisted person may sit as a member of a court martial for the trial of another enlisted person who is assigned to the same company or corresponding military unit." Thus, while the basic right to have enlisted men sit on a court martial trying an enlisted man is retained, a new contingency depriving an enlisted man of this right is proposed, viz, "unless competent enlisted persons cannot be obtained on account of physical conditions or military exigencies." In such a case the convening authority must state the reasons in writing. As indicated by Wallstein earlier, the test of these provisions must be their actual operation and this operation will be under tribunals having neither continuity nor tenure.

Paragraph (d) (2) of proposed article 25 states that: "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." Apparently the addition of this limitation to wording in the last paragraph of Articles of War 4 is necessary even though

the requirement of a "thorough and impartial investigation" received careful attention and was enacted into positive law in 1920. This matter will be discussed later in connection with proposed article 32. Returning to the limitation, its need is illustrated in *Henry v. Hodges* ((1948) 76 F. Supp. 968) where Judge Ryan stated (p.974): "The functions of the investigating officer, as contemplated by Article of War 70 are those ordinarily performed both by the civil prosecuting officer and the grand jury. These functions are described in the *Soldier and the Law* by McCoomsey and Edwards (at p. 155) as being 'similar in many respects to a grand jury investigation in which the grand jury determines whether a man is to be tried.' Surely it would be travesty of justice to have the complainant-accuser sit on a grand jury, testify before it as a witness in support of the complaint and then vote for and return a true bill. The duties performed by the investigating officer are highly important to the accused. He must be strictly impartial, since he represents both the accused and the prosecution. It is his obligation to gather and record facts which would be admissible evidence in the court-martial trial and to do this he must investigate. It is upon his recommendation that the commanding officer relies in determining whether there is to be a trial at all, and, if so, for what offense and by what type of court. Can it be fairly said that one who assumes the duties of an investigator is not disqualified by reason of the fact that he has previously expressed in a written report his opinion as to the guilt of the accused, when such report has been made the basis of the very charge he is investigating? Can it be argued that one who is to give testimony on behalf of the prosecution (and who subsequently does so, as to the alleged admissions of the accused) has an open mind on the matter, so that his efforts will be directed along investigational channels which might lead as well to the acquittal of the accused as to his condemnation? Can we reasonably hope that such investigator will pursue interrogation and examination of proposed witnesses with the same zealous and unbiased effort as one who has had no previous contact with the case? The answer to these questions is obvious. It is manifestly impossible for him to conduct the thorough and impartial investigation contemplated and directed by act of Congress." (This paragraph (d) (2) should have added, "Violation of this paragraph shall void the proceedings.")

Proposed article 26 stems from the second paragraph of AW 8 which provides for a law member of a general court martial. In his place is a law officer who is no longer a voting member of the court and, except for putting the findings in proper form as required in proposed article 39, he does not consult with members of the court except in the presence of the accused, trial counsel, and defense counsel. (This article cripples the conduct of the court's deliberations in that the accused loses the important safeguard of having an informed lawyer present during the deliberations and voting of the court in closed session as is the present case in the Army and Air Force.)

Under proposed article 27 the commentary states (p. 41): "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 AW 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 * * *." In view of the mandatory language of proposed article 27, we are unable to understand the qualifying language in the commentary. We assume that there is no intention to permit the recurrence of a situation such as is found in *Beets v. Hunter* (1948), (75 F. Supp. 825), when a soldier was represented, contrary to his wishes, in court-martial proceedings by an officer who was wholly incompetent to represent him and who did so only on military orders. "The court has no difficulty in finding that the court which tried this man was saturated with tryanny; the compliance with the Articles of War and with military justice was an empty and farcical compliance only, and the court so finds from facts, and so holds as a matter of law" (p. 826).

Proposed article 28, derived from AW 115, shifts the power to appoint reporters and interpreters from the president of the court to the convening authority since the latter will have control of the available personnel (commentary p. 42). Article 29 establishes the procedure whereby general and special courts martial may continue with a case when the required membership has been reduced by reason of physical disability, challenge, or by order of the convening authority for good cause. Recorded testimony must be read to new members prior to continuing the trial.

Part VI. Pretrial procedure: The proposed articles forming part VI are taken largely from AW 46, as enacted in the Selective Service Act of 1948 (P. L. 759, 80th Cong., sec. 222), AW 24 (U. S. C. 10: 1495), and AGN 42 (c) (U. S. C. 34: 1200, art. 42 (c)).

The commentaries on two proposed articles, 31 and 32, merit careful consideration. Article 31 states:

"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. (That this can be overdone was brought to my attention in an Army case where the investigating officer, in testimony attempting to show that a confession was in fact voluntary, stated that he warned the accused no less than 20 times.)

"(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.

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

"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 AW 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 AW 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 intentional 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, U. S. C., sec. 3481.)"

A question may arise concerning the application of the provision of the fifth amendment stating that " * * * nor shall any person be compelled in any criminal case to be a witness against himself * * *" to personnel of the armed forces. Ex parte Benton (1945) 63 F. Supp. 808 and In re Wrublewaski (1947) 71 F. Supp. 143, affirmed 166 F. 2d 243 indicate that the constitutional guarantees of the fifth and sixth amendments may not be invoked in cases arising in the land or naval forces of the United States. See also Ex parte Quirin (1942) 317 U. S. 1, 43; Ex parte Milligan (1866) 4 Wall. 2, 123; and U. S. ex rel. Innes v. Crystal (1943) 131 F. 2d 576. Milligan (1866) 4 Wall. 2, 123; and U. S. ex rel. Innes v. Crystal (1943) 131 F. 2d 576.

Article 32 requires a thorough and impartial investigation; requires that the accused be advised of charges against him; that he be permitted to provide civilian counsel of his own or select military counsel if reasonably available. "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 * * * and the investigating officer shall examine available witnesses requested by the accused." The charges shall be accompanied by a statement of the substance or the testimony. The article concludes:

"(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." (The paragraph (d) should be amended to read "... and failure to follow them in any case shall constitute jurisdictional error.")

Taking this last element first, cases to date have held that such failure was a jurisdictional matter. (See Waite v. Overlade (1948) 164 F. 2d 722;

Reilly v. Pescon (1946) 156 F. 2d 632; cert. den. 329 U. S. 790; and Hicks v. Hiatt (1946) 64 F. Supp. 238.) Thus there is an obvious attempt to foreclose any possible review by Federal courts on this point. This is indicated by the commentary (p. 49).

"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."

While failure to conduct the investigation would be an offense under article 98, it is difficult to see how this will benefit the accused who must depend upon a nebulous right of review by a whole maze of reviewing authorities and tribunals.

This requirement of a "thorough and impartial investigation" has been a delicate point of controversy for a long period. The requirement first appears in article 70 of the Articles of War which were enacted as Chapter II of the Army Reorganization Act of June 4, 1920 (41 Stat. 759, 787, 802). This chapter revised an earlier revision of the Articles of War which had been enacted as section 3 of the Army Appropriation Act of August 29, 1916 (39 Stat. 619, 650, 661). As enacted in 1916, Article 70 did not contain the provision requiring "a thorough and impartial investigation."

Returning to the act of June 4, 1920, the law carries the bill number H. R. 12775-Sixty-sixth Congress. This bill, as introduced and passed by the House, was merely a reorganization proposal and did not deal with the Articles of War. On the Senate side another organization bill, S. 3792-Sixty-sixth Congress, was receiving legislative consideration. In the meantime S. 64--Sixty-sixth Congress entitled "A bill to establish military justice" and proposing an extensive overhauling of the Articles of War, had been the subject of prolonged hearings (1,395 pages) and had been reported. (See Congressional Record 59, pt. 6, 5712.) While the bill, as introduced, did not have the requirement of a "thorough and impartial investigation," the reported version did contain the wording later enacted in article 70. The report on this bill appears not to have been printed.

During the consideration of S. 3792, this reported version of S. 64 was accepted on the floor as an amendment. (See Congressional Record 59, pt. 6, p. 5836.)

In the meantime H. R. 12775 had passed the House and had been reported in the Senate (Congressional Record 59, pt. 6, p. 5883). Switching to that bill, the Senate struck out all after the enacting clause (p. 5895) and inserted the amended language of S. 3792, which now contained the amended Articles of War, and as amended, the Senate then passed H. R. 12775 (p. 5898) and this provision was agreed to in conference. The hearings and debate on this legislation are illuminative.

Returning to the application of this requirement, Hicks v. Hiatt (1946) (64 F. Supp. 238) has held that failure to employ required investigative technique may be a denial of due process. There Circuit Judge Biggs states:

The circuit court of appeals for this circuit in *United States v. Hiatt* (3 Cir., 141 F. 2d 664, 666) held that the basic guarantee of fairness afforded by the due-process clause of the fifth amendment applies to a defendant in criminal proceedings in a Federal military court as well as a Federal civil court and that an "individual does not cease to be a person within the protection of the fifth amendment of the Constitution because he has joined the Nation's armed forces and has taken the oath to support that Constitution with his life, if need be. The court went on to state: "This is not to say that members of the military forces are entitled to the procedure guaranteed by the Constitution to defendants in the civil courts. As to them, due process of law means the application of the procedure of the military law. Many of the procedural safeguards which have always been observed for the benefit of defendants in the civil courts are not granted by the military law. In this respect the military law provides its own distinctive procedure to which the members of the armed forces must submit. But the due-process clause guarantees to them that this military procedure will be applied to them in a fundamentally fair way. We conclude that it is open for a civil court in a habeas corpus proceeding * * * and the manner in which it was conducted ran afoul of the basic standard of fairness which is involved in the constitutional concept of due process of law and, if it so finds, to declare that the relation has been deprived of his liberty in violation of the fifth amendment and to discharge him from custody" (p. 248). (See also *Henry v. Hodges* (1948), 76 F. Supp. 968.)

This is, we believe, consonant with the idea that to those in the military or naval service of the United States, the military law is due process (*Reaves v. Ainsworth* (1911) (219 U. S. 296); *U. S. v. Weeks* (1914) (232 U. S. 383). To this might be added the logical conclusion that it is due process only when complied with.

Article 33 requires that the charges against a person held for a general court martial, together with the investigation and allied papers, be forwarded by the commanding officer to the officer exercising general court-martial jurisdiction within 8 days after arrest, if practicable.

Under article 34 the staff judge advocate or legal officer is required to review the charge and the evidence, prior to referring the charge to a general court martial, to see that such charge alleges an offense under the code and is warranted by the evidence indicated in the report of the investigation. The 1948 amendment to AW 47 (U. S. C. 10: 1518), from whence this proposed article stems, required also a finding "that a thorough and impartial investigation thereof has been made. * * *" This has been deleted. Perhaps it was felt that proposed article 32 covered the situation.

Article 35 requires the service of charges upon the accused and limits the time in which he can be brought to trial before a general or special court martial in time of peace.

Part VII, consisting of articles 36-54, inclusive, establishes the trial procedure. Article 36 authorizes the President to prescribe rules of procedure, including rules of evidence, which shall be reported to Congress. Article 37 seeks to curtail the influence of commanding officers and convening

authorities over courts martial. The commentary states that this will not preclude "fair comment" by the reviewing authority (p. 54). (Art. 37.) The mere prohibition of influence by command is not sufficient. This article should be moved over to "Offenses" and violation thereof punished as a court martial may direct.

Article 38 states that the trial counsel, in a general or special court martial, shall prosecute in the name of the United States; that the accused shall have the right of counsel; that defense counsel may file briefs and objections for inclusion in the record.

Deliberation and voting by general or special courts martial, under article 39, shall be private but the law officer and the reporter may be used to put the findings in proper form after the vote. "The law officer is not a 'member' of the court and is not to be present during its deliberations and voting" (commentary, p. 57).

Article 40 permits continuances while article 41 permits challenging of members for cause. The accused and trial counsel are each given one peremptory challenge. Article 42 relates to oaths while article 43 establishes the limitations on actions. Subdivision (f) of article 43 lifts section 3287 out of the recently enacted title 18. The reason for including this section is somewhat obscure. The commentary (p. 62) merely states that subdivision (f) incorporates the provision in title 16, subsection 3287, which otherwise might not be applicable to court martial cases. This is puzzling in view of the numerous provisions in title 18 relating to the armed forces which received no notice in the proposed code.

Article 44, captioned "Former jeopardy" reads:

"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." (The problem of double jeopardy was partially covered in the discussion of proposed article 31.)

The constitutional provision, the application of which is in doubt, reads: "Amendment (V) * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * * "Turner's Case (1676), 16 Charles II, first laid down this rule. (See 38 A. B. A. J. 745.) However, it has been held that the findings of a military court of inquiry acquitting a person of all blame is not a complete bar to a prosecution in the civil courts (U. S. v. Clark ((1887), 31 F. 710, 715; U. S. v. Cashiel ((1863), 25 Fed. Cas. No. 14, 744). Conversely U. S. v. Bayer ((1946), 156 F. 2d 964) (reversed on other grounds, 331 U. S. 532, rehearing denied 332 U. S. 785), and ex parte Benton ((1945), 63 F. Supp. 808) indicate that the principle of double jeopardy applies between military tribunals and Federal courts. See also In re Wrublewski ((1947), 71 F. Supp. 143, affirmed 166 F. 2d. 243.) U. S. ex rel. Pasela v. Fenno ((1947), 76 F. Supp. 203, affirmed 167 F. 2d 593); Wade v. Hunter ((1947), 72 F. Supp. 755) However, it is not clear that this rests on constitutional principles rather than upon A W 40 as enacted in the act of June 4, 1920, or R. S. 1342, article 102, or similar provisions. The

matter could be clarified by extending the protection of the provision of the fifth amendment rather than granting protection by means of different language in a statutory enactment.

Irregular pleading or silence shall be entered as a plea of not guilty. A plea of guilty will not be received in a capital case (art. 45).

Article 46 seeks to afford the accused an equal opportunity to obtain witnesses and other evidence.

Duly subpoenaed (sic) persons who neglect or refuse to appear before a military tribunal, commission, or officer designated to take a deposition are deemed guilty of an offense against the United States triable in the United States district court and punishable by maximum penalties of \$500 fine and/or imprisonment not to exceed 6 months. In view of other jurisdictional grants relating to activities of civilians, it appears strange that military tribunals should not seek to enforce their own process. (See art. 47). They have power to punish for contempts. See article 48, derived from AW 32 and AGN 42 (a).

Article 49 relates to depositions; 50 to admissibility of records of courts of inquiry; 51 and 52 to voting and rulings. Subdivision (b) of article 51 reads: "(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."

Before voting 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 crime and charge the court that the accused is presumed innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt; doubt must be resolved in favor of the accused; doubts as to degree of guilt must be resolved in favor of the lower degree; the burden of proof is on the Government.

Article 53 requires the court martial to announce its findings and sentence to the party as soon as determined. However, *Altmayer v. Sanford* ((1945), 148 F. 2d 161, 162) indicated that a failure to do so does not violate any fundamental right of the accused.

Article 54 relates to the records of trials and the authentication thereof.

Part VIII, Sentences, contains articles 55-58 relating to cruel and unusual punishments (on the basis, apparently, that the eighth amendment is inapplicable); to maximum limits; to the effective date of sentences; and to execution of confinement. Attention is invited to the commentaries on these articles. (Art. 58 should not be enacted without careful consultation with the Attorney General and Director of Prisons. The most serious con-

siderations should be given to the question of whether or not a discharge should be executed before transfer to a Federal institution so that the parole facilities of the Federal Parole Board may operate on a prisoner's behalf.)

Part IX, Review of courts martial, should be the focal point for considering the bill for it superimposes on the courts-martial system a review maze which probably will be as indecisive with regard to the rights of the accused as it attempts to be final with regard to possible review by the civil courts.

This labyrinth commences with proposed article 59 which states first that 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 rights of the accused. *Hicks v. Hiatt* (1946) (64 F. supp. 238) not only states that it is the duty of the trial judge advocate to see that the accused is dealt with fairly, but that when there are prejudicial errors, the failure of the reviewing authority to order a new trial is an abuse of legal discretion (p. 248). It is difficult to see how an enlarged labyrinth with a sealed outlet could afford an accused person such as Hicks any assurance of justice. The article does permit (subdivision (b)) the reviewing authority to affirm a lesser included offense.

The first review after the court martial is the convening authority or his successor or any officer exercising general court-martial jurisdiction (art. 60). The commentary states that this particular reviewing power vests in the office, not in the convening authority (p. 85). This authority is required by article 61 to refer the record to his staff judge advocate or legal officer for a written opinion if a general court martial is involved. Even if there is an acquittal of all charges, an opinion limited to questions of jurisdiction is still required. The purpose of such an opinion is obscure.

Article 62 brings forth a new proposal. 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. Thus the accused may find this passageway in the labyrinth taking him right back to where he started. Subdivision (b) permits nonprejudicial errors or omissions in the record to be corrected by the court when the record is returned by the convening authority for that purpose. The record may not be returned, however, for reconsideration of a finding of not guilty or to increase the severity of the sentence unless a mandatory sentence is prescribed for the offense. Note in this connection proposed article 37 relating to unlawfully influencing the action of a court martial. See also *Hurse v. Caffey* ((1945) 59 F. supp. 363) as illustrative of problems which arise in correcting a verdict.

The convening authority may order a rehearing or dismiss the charges if he disapproves the findings and sentence but he cannot order a rehearing where there is lack of evidence in the record to support the findings. A new court is required for a rehearing and while the accused cannot be retried on charges of which he was found not guilty, he may be found guilty of an offense not considered upon the merits in the original proceedings.

This provision raises the question: How is the accused to know what he is being tried for if such a finding can be made by the new court?

Under article 64 the convening authority approves only such findings and sentence as he finds correct in law and fact and determines should be approved. Then, under article 65, the convening authority, after taking final action in a general court-martial case, forwards the entire record to the appropriate judge advocate general. Where the sentence includes a bad conduct discharge, the record shall be forwarded to the officer exercising general court-martial jurisdiction to be reviewed or directly to the appropriate judge advocate general to be reviewed by a board of review. All other special and summary court-martial records shall be reviewed by a judge advocate or law specialist.

This board of review is provided in article 66 which authorizes the Judge Advocate General to constitute one or more of such boards which shall review "the record in every case of trial by court martial in which the sentence, as approved, affects a general or a 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." This review is automatic (commentary p. 94). The board acts only with respect to the findings and sentence as approved by the convening authority. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact. Except where the board sets aside the findings for lack of sufficient evidence, it may order a rehearing, otherwise it shall order the charges dismissed. However, the Judge Advocate General may within 10 days refer the case for consideration to the same or another board of review. This reference may not amount to a coercive act on his part but an opportunity to exert pressure is certainly afforded. Unless there is to be some farther action by the President, or by the Secretary of the Department, or by the Judicial Council, the Judge Advocate General shall instruct the convening authority to take action in accordance with the decision of the board. If the decision is that there shall be a rehearing, but the convening authority finds this impracticable, he may dismiss the charges. Common sense indicates that such a dismissal would not necessarily clear the record of the accused.

With reference to: Article 67. Review by the Judicial Council.

The two questions asked and preliminary answers are as follows:

1. Is this a court? Used in the general sense, this is a "court," however it is not a "court" in the strict constitutional sense in that it does not derive its power from article III of the Constitution. (Ex parte Quirin (1942) 317 U. S. 1, 39.) These military or naval "courts" derive their powers primarily from article I, section 8, clause 14, which states that, "The Congress shall have power * * * to make rules for the Government and regulation of the land and naval forces." The instrumentalities established are generally referred to as "tribunals" and they form no part of the judicial system of the United States. (Altmayer v. Sanford (1945), 148 F. 2d 161, 162.) At least one author has called these courts "instrumentalities of the executive power." Accordingly, while military and naval courts and commissions, whatever their nomenclatural designation, act like courts to a

certain extent, they are not courts in the strict sense and meaning established by article III of the Constitution of the United States. Various terms have been used to describe these organizations—the most common being the “tribunal,” but whatever their designations, they can and have, under certain circumstances, sentenced persons to death and they can and have sentenced men to terms of years in prison at hard labor with the added infamy of a dishonorable discharge.

2. If this is a “court”, can it be set up in the Military Establishment?

Subject to the above preliminary answer which indicates that this is a “court” only in the general sense of the word, rather than in the strict or special constitutional sense, the answer is in the affirmative. In other words the proposed judicial council does not belong to the judicial branch of the Government under present law; it belongs to the executive branch of the Government and can be created subject to certain qualifications to be indicated later.

THE CONSTITUTION

“The Constitution itself provides for military government as well as for civil government.” (Ex parte Miligan, 4, Wall. 2, 137.) “* * * there is no law for the government of the citizens, the armies or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution. And wherever our Army or Navy may go beyond our territorial limits, neither can go beyond the authority of the President or the legislation of Congress” (p. 141).

The constitutional (art. I, sec. 8) sources of military law and jurisdiction may be said to be the following: “The Congress shall have power * * * to define and punish * * * offenses against the law of nations (clause 10); to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water (clause 11); to raise and support armies * * * (clause 12); to provide and maintain a Navy (clause 13); to make rules for the government and regulation of the land and naval forces (clause 14); to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions (clause 15); to provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States * * * (clause 16); * * * To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or any Department or officer thereof (clause 18).”

Article II, section 1, clause 1, states: “The executive power shall be vested in a President of the United States of America * * *” and section 2, clause 1, states: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States when called into actual service of the United States * * * and he shall nominate, and by and with the advice and consent of the Senate, shall appoint * * * officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper, in the

President alone * * * (clause 2) he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States (sec. 3)." (See Ex parte Quirin, 317 U. S. 1, 25-26.)

We note also the fifth and sixth amendments relating to trials.

THE NATURE OF THE JUDICIAL COUNCIL

Article 67 of the proposed Uniform Code of Military Justice (S. 857 and H. R. 2498, 81st Cong.) establishes a Judicial Council of not less than three members who shall receive the pay and allowances of judges of the United States Court of Appeals (\$17,500 salary per year. Public Law 646, 80th Cong., enacting title 2 of U. S. C., sec. 44). We do not wish to infer that salary is the factor which determines whether or not an officer is an inferior officer. It is not. The test is whether Congress has vested the power of appointment in the President alone, in a court of law, or in the head of a department. See Collin's case ((1878) 14 Ct. Cl. 568, 574) and *United States v. Perkins* ((1886) 116 U. S. 483, 485).

Two qualifications are required. Appointees shall be from civilian life and shall be members of the bar of the Supreme Court of the United States. Under rules of procedure, which it shall prescribe, the Council shall review on the record:

(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.

The accused has 30 days to petition for a review and the Council must act upon the petition within 15 days. Review is limited to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Judge Advocate General's board of review. Where the Judge Advocate General orders the case forwarded to the Council "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."

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

After acting 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 its decision. Otherwise, unless there is to be further action by the President or the Secretary of the Department, the Judge Advocate General shall instruct the concerning (sic) authority to take action in accordance with that decision. If the Council has ordered a re-

hearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

You will note that while this Judicial Council has the appearance of an appellate tribunal, its findings are subject to executive or administrative action of the President or the Secretary of the Department. Thus the proposed tribunal is in the final analysis nothing more than an agency of the Executive Department. We believe the following excerpts from Winthrop, *Military Laws and Precedents*, second edition, 1896, volume I, pages 53-57 (certain citations omitted) characterize this proposed Judicial Council:

"Courts martial of the United States, although their legal sanction is no less than that of the Federal courts, being equally with those authorized by the Constitution, are, unlike those, not a portion of the Judiciary of the United States, and are thus not included among the 'inferior' courts which Congress 'may from time to time ordain and establish.' In the leading case on this subject, the Supreme Court, referring to the provisions of the Constitution authorizing Congress to provide for the government of the Army, excepting military offenses from the civil jurisdiction, and making the Commander in Chief, observes as follows:

"These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations, and that the power to do so is given without any connection between it and the third article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely independent of each other' (*Dynes v. Hoover* (1858), 20 How. 79).

"Not belonging to the judicial branch of the Government, it follows that courts martial must pertain to the executive department; and they are in fact simply instrumentalities of the executive power, provided by Congress for the President as Commander in Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives.

"Thus indeed, strictly, a court martial is not a court in the full sense of the term or as the same is understood in the civil phraseology. It has common-law powers whatever, but only such powers as are vested in it by express statute, or may be derived from military usage. None of the statutes governing the jurisdiction or procedure of the 'courts of the United States' have an application to it; nor is it embraced in the provisions of the sixth amendment to the Constitution. It is indeed a creature of orders, and except insofar as an independent discretion may be given it by statute, it is as much subject to the orders of a competent superior as is any military body or person.

"A temporary summary tribunal—not a court of record. As a purely executive agency designed for military uses, called into existence by a military order and by a similar order dissolved when its purpose is accomplished (*Mills v. Martin* (19 Johns., 33); *Brooks v. Adams* (11 Pick., 442) *Brooks v. Daniels* (22 Pick., 501)); In the *Matter of Wright* (34 How. Pr., 211; 3 Greenl. Ev., sec. 470) the court martial, as compared with the

civil tribunals, is transient in its duration and summary in its action. 'The discipline necessary to the efficiency of the Army and Navy required other and swifter modes of trial than are furnished by the common-law courts.' *Ex parte Milligan* (4 Wall. 123). In *Coleman v. Tennessee* (97 U. S. 513), the court refer to the 'swift and summary justice of a military court! It is not, in a legal sense, a court of record (*Chambers v. Jennings* (7 Mod., 125) *Ex parte Watkins* (3 Peters 209); *Wilson v. John* (2 Binn., 215)) and, unlike the superior courts of record, has no fixed place of session, no permanent office or clerk, no seal, no inherent authority to punish for contempt, no power to issue a writ or judicial mandate, and its judgment is simply a recommendation, not operative till approved by a revisory commander. It thus belongs to the class of minor courts of special and limited jurisdiction and scope, whose competency cannot be stretched by implication, in favor of whose acts no intendment can be made where their legality does not clearly appear, and which cannot transcend their authority without rendering their members trespassers and amenable to civil action (*Runkle v. U. S.* (122 U. S., 556; 19 Opins. At. Gen. 503)).

"Not subject to judicial revision. Further, the court martial being no part of the judiciary of the Nation, and no statute having placed it in legal relations therewith, its proceedings are not subject to be directly reviewed by a Federal court, either by certiorari, writ of error, or otherwise, nor are its judgments or sentences subject to be appealed from to such tribunal. It is not only the highest but the only court by which a case of a military offense can be heard and determined; and a civil or criminal court of the United States has no more appellate jurisdiction over offenses tried by a court martial—no more authority to entertain a rehearing of a case tried by it, or to affirm or set aside its finding or sentence as such—than has a court of a foreign nation. In *Dynes v. Hoover*, above cited, this principle is well illustrated by the Court in the declaration that a duly confirmed sentence of a court martial 'is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever,' and further that with the legal sentences of competent courts martial 'civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise (—it is added—) the civil courts would virtually administer the rules and articles of war irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts.' This ruling has been abundantly affirmed and illustrated in later cases. ('The Judiciary Act of 1789 gave the Federal judiciary no such control, and none has been given since.' *Woolley's Case*, Am. S. R., M. A., v. IV, p. 853. And see *Porret's Case*, *Perry's Oriental Cases*, 419; *Ex Parte Vallandigham*, 1 Wallace, 243; *Ex parte Milligan*, 4 Do., 123; *In re Grimley*, 137 U. S., 147; *Ex parte Reed*, 100 U. S., 13., 23; *In re White*, 17 Fed. 724-5; *In re Davison*, 21 Fed., 618; *In re Zimmerman* 39 Fed., 176; *In re Spencer*, 40 Fed., 149; *Swain v. U. S.* (28 Ct. 173); *In re Esmond*, 5 Mackey, 64; *Moore v. Houston* (3 S. & R., 197); *State v. Davis* (1 South., 311); *Ex parte Dunbar*, 14 Mass., 393; *Tyler v. Pomeroy* (8 Allen, 484); *State v. Stevens* (2 McCord 38); *Ex parte Bright*, 1 Utah, 148, 153; *Whiting*, War Powers, 278; *Cooley*, Prins. Const. Law, 113; 12 Opins. At. Gen., 332; *Maltby*, 151; also *Wales v. Whitney* and *Smith v. Whitney* (116 U. S. 168.))

"In the recent case of *Wales v. Whitney* (116 U. S. 564) a proceeding instituted against the Secretary of the Navy for the discharge on habeas corpus of an officer of the Navy, the Supreme Court of the United States, in holding that no Federal tribunal 'has an appellate jurisdiction over the Naval court martial nor over offenses which such a court has power to try,' adds that no such tribunal 'is authorized to interfere with' a court martial 'in the performance of its duty by way of a writ of probation or any order of that nature.'

"This ruling was presently affirmed in the case of *Smith v. Whitney* (116 U. S. 168) where a petition for a writ of probation to the Secretary of the Navy and to a naval general court martial, to prohibit such court from trying a naval officer, was specifically refused by the same court. More recently the same writ has been refused in an Army case by a United States circuit court (*U. S. v. Maney* (61 F. 140)). In a still more recent instance (*Johnson v. Sayer* (April 1895) (158 U. S. 109)) the Supreme Court, in denying relief to a naval court martial, declares, generally—"the court martial having jurisdiction of the person and offense' and 'having acted within the scope of its legal powers, its decision and sentence cannot be reviewed or set aside by the civil courts by writ of habeas corpus or otherwise.' "

Returning now to the proposed judicial council, you will note that no term or tenure is provided nor is there the requirement that the nominations be submitted to the Senate. Thus these officers, for whom salaries of \$17,500 and allowances are provided, could be considered only as "inferior officers" under articles II, section 2, clause 2. They would serve ostensibly at the pleasure of the President. This appears to be a paradoxical proposal in view of the numerous Executive nominations received in the ordinary course of business of the Senate. See, for example, the Congressional Record, January 27, 1949, pages 604-640. However, Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone and by article 67 Congress is asked to do so.

That this proposed Judicial Council is merely another administrative agency, as indicated earlier, rather than a military supreme court is indicated by the commentary of the Committee on a Uniform Code of Military Justice. This commentary reads:

"This article is new although the concept of a final appellate tribunal is not. Proposed AGN, article 39 (g) provides for a board of appeals while AW 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 be 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 AW 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."

QUALIFICATIONS OF THE MEMBERS OF THE JUDICIAL COUNCIL

Inasmuch as this is not a constitutional court or a part of the Federal judicial system, as indicated earlier (see *Altmayer v. Sanford* (1945), 148 Fed. 161), and inasmuch as Congress has power to vest the appointment of "inferior officers" in the President, it would appear that Congress could constitutionally provide standards of quality for persons designated to fill the positions. In this case there are two. Appointees shall be civilians and they shall have been admitted to practice before the bar of the Supreme Court. Without expressing an opinion as to the legitimacy of these proposed qualifications, we raise, however, the question of whether or not the jurisdiction sought to be conferred ought to be granted to such "inferior officers."

To cure this defect will necessitate the amendment of the bill so that members will be appointed by the President, by and with the advice and consent of the Senate. By thus hoisting these proposed positions out of the "inferior officer" classification, the next question becomes: Of what force and effect are the two proposed qualifications? Only a partial answer is found in the numerous acts of Congress which have sought to prescribe qualifications. While these statutory stipulations may have some merit in that they serve as a guide to the President and also serve as advance notice of what Congress desires in the way of appointees and what the Senate will approve, it is doubtful if such stipulations have any binding legal significance. Notwithstanding a statute setting forth qualifications for a position, and there are many, if the President nominates, the Senate advises and consents thereto, and the nominee is duly commissioned by the President, it may well be doubted seriously if the status of the officer commissioned could be attacked collaterally in a manner which would effect his ouster from the office.

WHY NOT USE CONSTITUTIONAL COURTS?

As Winthrop indicates, Congress has never made proceedings of courts martial subject to direct review by Federal courts. He might have added that at no time in the history of the Federal judiciary have the lower courts been vested with all the jurisdiction that the Constitution gives them the capacity to receive. Harris, the *Judicial Power of the United States*, page 91. Professor Harris points out that during the debate on the bill which became the Judiciary Act of 1789 (1 Stat. 76) two general groups appeared. The federalists, or proconstitutionalists, took the view that Congress could not withhold from the courts the jurisdiction specified in article III. The other group, he states, consisted of extreme advocates of States' rights and opponents of the new Constitution who wished either to confine the jurisdiction of the Federal courts within narrow limits or to refuse to provide altogether for courts inferior to the Supreme Court and vest their original jurisdiction in the State courts with only appellate jurisdiction vested in the Supreme Court of the United States. Neither group prevailed in its views but the compromise reached was an express recognition by legislative construction of the theory of broad congressional power upon which the opponents of a strong Federal judiciary based their contentions (pp. 87-88). The act of 1789 is important for its omission in certain instances. Congress failed altogether to confer original jurisdiction upon the Federal courts in cases arising under the Constitution, laws, and treaties of the United States. "Except for the brief period between the enactment of the act of 1801 (2 Stat. 89) and its repeal in 1802 (2 Stat. 132), the lower Federal courts had no jurisdiction in that very important group of cases involving a Federal question, and it was not until 1875 that they were vested with judicial power over such cases * * *" (p. 90).

Harris goes further to state that ever since this practical legislative construction of article III by the First Congress, the national legislature has always proceeded upon the assumption that it had complete discretion to regulate and restrain the jurisdiction, powers, and procedure of the lower Federal courts. Congress has not been alone, he states, in this broad construction of its powers relating to the organization, jurisdiction, and procedure of the lower Federal judiciary. As early as 1799 the Supreme Court concurred in this view (p. 19, citing *Turner v. Bank of North America* (1799) 4 Dall. 8).

Thus, while Congress could confer upon lower Federal courts jurisdiction with regard to military and naval offenses, it has not done so.

OTHER PENUMBRAL AREAS

The government of the armed forces is not the only instance in which the Congress can set up a judicial system outside the purview of article III of the Constitution. Under article IV, section 3, clause 2, Congress has "Power to * * * make all needful rules and regulations respecting the territory * * * belonging to the United States." Under this provision, even such rights as trial by jury in criminal cases (*Dowell v. U. S.* (1911) 211 U. S. 325, 332) or presentment or indictment by a grand jury (*Ocampo v. U. S.* (1914) 234 U. S. 91) were held to be statutory matters rather than constitutional rights when applied to Territorial possessions.

SUMMATION

The foregoing indicates that the proposed judicial council (subject to the infirmities noted) cannot be considered a part of the Federal judicial system established under the authority of article III of the Constitution. It is more properly within the designation of a military tribunal, appellate in character. Generally speaking military tribunals established under the authority of acts of Congress are constitutional. *Ex parte Reed* (1879) 100 U. S. 13, 21; *Ex parte Quirin* (1942) 317 U. S. 1; and *Application of Yamashita* (1946) 327 U. S. 1. Accordingly it would be possible to establish an appellate tribunal similar to that proposed by article 67.

Article 68 authorizes the President to direct the establishment of extra boards of review, and in time of emergency, temporary judicial councils.

Article 69 authorizes the office of Judge Advocate General to review minor sentences.

Article 70 authorizes the accused to have representation by counsel at appellate reviews as well as the armed services.

Subdivision (a) of article 71, relating to the execution of sentence and the suspension of sentence, raises an intriguing question as to intent. The subdivision reads:

"(a) No court martial 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."

Numerous readings of the last clause stating that the President " * * * may suspend the execution of the sentence or any part of the sentence, as approved by him, except a death sentence" lead to the conclusion that this intends a limitation on the constitutional powers of the President as President and as Commander in Chief. The Constitution not only makes the President Commander in Chief (art. 2, sec. 2, cl. 1), the same article grants to him " * * * Power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." Now these court-martial cases are to be prosecuted in the name of the United States. See proposed article 38, also AW 17. Accordingly, is this not an attempt to control legislatively the pardoning power of the President? (See 20 Op. Atty. Gen. 668; 27 Op. Atty. Gen. 178; *ex parte Garland* (1867) 71 U. S. 333), and Taft, *Our Chief Magistrate and His Powers* (1926), page 121). If something else is intended by the proposed wording, then subdivision (a) should be changed to convey that intention. If it is actually intended to limit the constitutional power of the President, then we invite attention to the statement of Attorney General Jeremiah S. Black in his opinion concerning the memorial of Capt. M. C. Meigs. He stated (9 Op. Atty. Gen. 462, 469):

"Congress is vested with legislative power; the authority of the President is executive. Neither has a right to interfere with the functions of the other. Every law is to be carried out so far as is consistent with the Con-

stitution, and no further. The sound part of it must be executed, and the vicious portion of it suffered to drop. A legislative act is not to be treated as void merely because it is coupled with an abortive attempt to usurp executive powers. It stands to reason that if a condition, such as this is asserted to be, is void, it can have no effect whatever, either upon the subject matter or upon other parts of the law to which it is appended. To say that it is void, and yet of such force that it controls the operation of the statute in which it is found, is a contradiction in terms. As a rule of constitutional interpretation, I think this is nowhere denied, and it agrees with all the analogies of the law. The principle universally applied to public and private grant is, that where a grant is made upon an illegal condition, the grant is absolute and the condition void. It is as old as the Year Books (2 Henry IV, 9); it is laid down by Coke (Co. Litt. 206); the old reports are full of it, (Rolls, Abr., 418; 2 Vent. 109); and no modern authority disputes it. You are therefore entirely justified in treating this condition (if it be a condition) as if the paper on which it is written were blank."

Article 72 establishes the procedure for vacating a suspended sentence.

Article 73 permits a petition for a new trial within 1 year where the sentence extends to death, dismissal, dishonorable or bad-conduct discharge, or to confinement for more than 1 year.

Article 74 permits the Secretary, under Secretary or Assistant Secretary of the Department, or commanding officer designated by the Secretary to remit and suspend unexecuted portions of sentences other than those approved by the President. An administrative form of discharge is authorized.

Article 75 relates to restoration to duty.

Article 76 seeks to foreclose any possible review by Federal courts. It reads:

"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."

This provision is substantially the same as AW 50 (h) as enacted by the Eightieth Congress (U. S. C. 10: 1521). Considering *Schita v. Cox* (1944) 139 F. 2d. 971; *Henry v. Hodges* (1948); and *Innes v. Crystal* (1943) 131 F. 2d 576, cert. denied 319 U. S. 755, rehearing denied 319 U. S. 788, the question of whether or not Congress desires to completely foreclose review by Federal constitutional courts. Mention should be made of article 140 which provides

for the delegation and subdelegation by the President of all the authority so carefully granted him in the preceding articles. The constitutional question thus presented concerning the right to delegate a judicial function is too involved to be discussed here if there is to be any limit at all to this brief.

Part X, Punitive articles, includes articles 77-134 and will not be discussed in this memorandum.

Section 2 of the bill carries the savings clause. Section 3 states that no inference of legislative construction is to be drawn from the position of any article in the bill or by reason of the catch lines. Section 4 retains jurisdiction of crimes committed prior to the enactment of this bill. Section 5 proposes an effective date 12 months after approval or on July 1, 1950, whichever is the later date.

Section 6 carries technical amendments relating to residual Articles of War.

Section 7 sets out the authority of naval officers after loss of vessel; the authority of officers of separate marine organizations; the commanders' duties of example and correction; the requirement of divine service and reverent behavior.

Section 8 prescribes the oath of enlistment. Section 9 provides for the removal to Federal district courts of all civil or criminal prosecution commenced in State courts against personnel of the armed forces on account of activities arising from their status or duties. Section 10 relates to dismissal of officers; sections 11, 12 carry certain amendments and repeals.

SUMMATION S. 857

As indicated at the beginning, in appraising the system of military justice, the emphasis must be on its actual operation rather than upon the relevant statutory provision standing alone.

From the viewpoint of judicial proceedings, review in S. 857 is provided ad infinitum, but nowhere is there assurance that this maze of review will be for any purpose other than to fix the record in such a manner or to such an extent that possible intervention by a constitutional court be precluded.

This brief should not be concluded without some special attention to the operation of the Navy court-martial system, especially since most of the articles under consideration seem to have been adopted from either the present AGN or the proposed AGN.

The Navy has not been subject to the volume of criticism that has befallen the Army for three reasons. First, it is a smaller and more compact organization; second, because of its 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 the Army.

The present AGN were adopted, in the main, in 1862. There have been no changes of significance since then. Thus it will be seen the situation

is substantially different than that prevailing in where great reforms have been effected as late as 1948.

Unlike the Army, the Navy has not now and never has had, a corps of officers who were regular line officers, but who had been sent to law schools. Most of them had never been admitted to any bar outside of an officer's club. Of all the Judge Advocate Generals of the Navy, not more than three have been graduates of law school admitted to practice before the bar of any State of the Union after taking a bar examination. (During the war most legal billets were filled by Reserve officers called for that purpose or by retired Regulars who had had some legal training in the past.) Hitherto the practice was to send officers to sea for a tour of duty after their "legal training." After the sea tour was completed they returned ashore for 3 years' duty in a legal capacity. This rotating system, at the beginning of the present war, forced the creation of the Office of the General Counsel of the Navy Department to provide competent legal assistance in the Navy Department on contract and procurement matters, although the Judge Advocate General continued to pretend that he was the "legal adviser" to the Secretary. The civilian office still functions. In effect, it causes two separate (and how distant) offices to carry on the legal work of the Navy.

Since the war the Judge Advocate General has accepted some Reserve lawyers in the Regular Navy in the evident hope of regaining some lost ground. However, the Navy continues to consider these lawyers as specialists, and apparently has no plans for integrating them properly into their promotion system, holding fast to the belief that a prerequisite to being the Judge Advocate General is the training and experience necessary to command a battleship or a division of destroyers.

The system presently in vogue is not changed in the proposed code. It is earnestly hoped that Congress will amend the bill so as to set up in the Navy a system similar to the Judge Advocate General 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.

Consideration should be given to having only one Judge Advocate General of all the armed forces, with deputies in the three branches. If we are going to have unification, let's have it.

Finally the bill should be amended so as to provide that no discharge other than one under honorable conditions shall be given except pursuant to sentence of a court martial.

With kindest personal regards, I am,
Sincerely,

Pat McCarran,
CHAIRMAN

United States SENATE
(*Cong. Record*, Vol. 95, Pt. 6, p. 7538)
June 10, 1949

REPORTS OF COMMITTEES

The following reports on committees were submitted:

Mr. Kefauver, from the Committee on Armed Services:

H.R. 4080. 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; with an amendment (Rept. No. 486).

United States SENATE
(*Cong. Record*, Vol. 95, Pt. 6, p. 8020)
June 21, 1949

BILL PASSED OVER

The bill (H.R. 4080) 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 was announced as next in order.

The Vice President: Is there objection to the present consideration of the bill?

Mr. Morse: I object.

The Vice President: Objection being heard, the bill will be passed over.

United States SENATE
July 29, 1949

Cong. Record, Vol. 95, Pt. 8, 10427-10428)

UNIFORM CODE OF AMENDMENT TO THE BILL (H. R. 4080)

Mr. KEM. Mr. President, I ask unanimous consent to submit, out of order, an amendment to House bill 4080, to establish a uniform code of military justice.

The VICE PRESIDENT. The amendment will be received, printed, and lie on the table.

Mr. KEM. Mr. President, since my service in the Army during World War I, I have been interested in efforts to improve the court-martial rules for the armed services, particularly in eliminating inequities and possibilities of miscarriages of justice.

In the Eightieth Congress, my amendment to the Selective Service Act, providing for revision of the court-martial rules for the Army and Air Force was approved. That amendment was based on extensive studies by various organizations and individuals, both military and civilian, including prominent judges and lawyers. The efforts of these organizations and indi-

viduals represented the most comprehensive study of military justice that has ever been conducted in the history of our country.

That amendment was adopted by Congress and has been the established procedure for Army and Air Force courts martial for nearly a year. Its working, in actual practice, has received high praise from many sources, including enlisted personnel and the so-called Army and Air Corps "brass."

I would like to review in general terms the changes made last year in the Army court-martial system.

First. Enlisted men were authorized to sit as members of courts martial.

Second. Officers were subjected to trial by special courts martial.

Third. It prohibited the unlawful influence of courts martial or the members thereof.

Fourth. Warrant officers were authorized to sit as members of courts martial.

Fifth. It provided that an accused, if he so desires, may have counsel at the pre-trial investigation.

Sixth. Authority to grant a bad-conduct discharge was granted to general and special courts martial.

Seventh. The review and appellate provisions were strengthened and improved.

Eighth. A lesser punishment than death or life imprisonment for murder or rape was provided.

Ninth. A lesser punishment than dismissal from service for officers drunk during time of war was provided.

Tenth. The authority of commanding officers under the one hundred and fourth Article of War was increased so far as it pertains to officers but not to enlisted men.

Eleventh. A separate Judge Advocate General's Corps was established for the Army, but not for the Air Force.

These changes were designed to correct the following five basic defects in the court-martial system:

First. Punishments imposed by courts martial were not uniform for the same offense under similar circumstances.

Second. Members of courts martial were subject to "command" influence in arriving at findings and imposing sentence.

Third. Punishments varied in degree for officers and enlisted men. Because officers could not be tried except by general courts martial, and because punishment for officers under Article of War 104 was limited to cap-

tains and lieutenants, and as to extent of punishment, officer personnel frequently was permitted to escape disciplinary action.

Fourth. Qualified defense counsel was too frequently not made available to persons being tried by courts martial, even for capital offenses.

Fifth. Appellate procedure was inadequate.

The extensive hearings held since the war disclosed that the system of justice in the Navy is as much in need of improvement as was that of the Army. The same five defects are present in the Navy system and are in need of correction. They can be corrected, insofar as is possible for legislation to regulate the human element involved, by the adoption for the Navy of the same system now in effect for the Army.

However, we have pending before us a measure which would wipe out the changes of last year and which would eliminate all existing court-martial rules and procedures for all services, and, in the name of unification, start all over again, completely from scratch, and write a completely new set of rules and procedures.

Mr. President, I contend this is unnecessary.

One of the main purposes of unification was simplification.

To abolish all existing rules and start out with a completely new set, certainly would not contribute to that end. To the contrary, it seems to me, this would introduce a complication that is entirely unnecessary.

There is no question that a unified code of courts-martial rules is desirable. But the simple, direct, and satisfactory way to accomplish the desired end is to extend to the Navy the revised rules already provided for the Army and Air Force.

To that end I am today introducing an amendment in the nature of a substitute for House Bill 4080, the proposal now pending. My amendment would extend to the Navy the revised and liberalized rules and regulations under which the Army and Air Force are now operating.

My amendment also proposes that there be established a separate Judge Advocate General's Corps in the Navy and in the Air Force. Such a corps for the Army was provided last year and is now in effect.

We now have a good system of military justice for the Army. It has been tried. Rather than junk what we have and enter into a field of confusion, let us make this improved system applicable to all three services. We then will have the unification desired.

United States SENATE
(Cong. Record, Vol. 95, Pt. 10, p. 13300)

September 27, 1949

BILL PASSED OVER

The Presiding Officer: The bill (H.R. 4080) 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 was announced as next in order.

Mr. Langer: Over.

The Presiding Officer: Objection is heard, and the bill will be passed over.

United States SENATE

(Cong. Record, Vol. 95, Pt. 11, p. 14723)

October 17, 1949

BILL PASSED OVER

The Presiding Officer: The bill (H.R. 4080) 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 was announced as next in order.

Mr. Schoepfel: Over.

The Presiding Officer: The bill will be passed over.

United States SENATE

February 1, 1950

(Cong. Record, Vol. 96, Pt.1,1292-1310)

CODIFICATION OF THE ARTICLES OF WAR

Mr. Lucas. Mr. President, I move that the Senate proceed to the consideration of House Bill 4080, which is Calender Order No. 481.

The VICE PRESIDENT. The Secretary will state the bill by title.

The LEGISLATIVE CLERK. A bill (H. R. 4080) 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.

The VICE PRESIDENT. The question is on agreeing to the motion of the Senator from Illinois.

The motion was agreed to, and the Senate proceeded to consider the bill (H. R. 4080) 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, which had been reported from the Committee on Armed Services with an amendment.

Mr. TOBEY. Mr. President, I ask unanimous consent to have printed at this point in the RECORD, as a part of my remarks, my amendments

lettered B to Z to House bill 4080, which is the unfinished business, together with explanations of the amendments.

There being no objection, the amendments and the explanations thereof were ordered to be printed in the RECORD, as follows:

AMENDMENT B

On page 106, beginning with line 21, strike out all down to and including line 23 and insert in lieu thereof the following:

"(12) 'Judge advocate' shall be construed to refer to all officers of the Regular Army or Air Force appointed in the appropriate Judge Advocate General's Corps, and nonregular officers of any component of the Army or Air Force of the United States on active Federal duty assigned to the appropriate Judge Advocate General's Corps by competent orders."

On page 119, beginning with line 18, strike all down to and including line 20 and insert in lieu thereof the following:

"(1) General courts-martial, which shall consist of any number of members not less than five".

On page 127, beginning with line 22, strike out all down to and including line 6 on page 128 and insert in lieu thereof the following:

"ART. 26. Law member of a general court-martial.

"The authority convening a general court-martial shall appoint as a member thereof a law member who shall be a judge advocate or a law specialist or 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 a law member in a case in which he is an accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case."

On page 138, beginning with line 12, strike out all down to and including line 23 and insert in lieu thereof the following:

"ART. 39. Sessions.

"Whenever a general or special court-martial is to deliberate or vote, only the members of the court shall be present. All other proceedings, including any consultation of the court with counsel, shall be made a part of the record and be in the presence of the accused, the defense counsel, and the trial counsel."

On page 147, beginning with line 17, strike out all down to and including line 3 on page 148 and insert in lieu thereof the following:

"(b) The law member 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. All rulings shall be made in open court and recorded. Any such ruling made by the law member 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 member may in any case consult with the court, in closed session, before making a ruling, and 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."

On page 12, line 11, strike out "officer" and insert in lieu thereof "member."

On page 128, line 17, strike out "law officer" and insert in lieu thereof "law member."

On page 139, line 5, 13, and 16, respectively, strike out the word "officer" and insert in lieu thereof respectively the word "member."

On page 148, line 5, strike out "officer" and insert in lieu thereof "member."

EXPLANATION

H. R. 4080 as reported abolishes the law member who has been a most useful member of Army courts martial since 1920 and substitutes for him a figurehead "law officer." The proponents have convinced the Armed Services Committee that the change is a desirable one on the theory that the law officer is analogous to a judge. In its report the committee stated (S. Rept. 486):

"Article 26 provides the authority for a law officer of a general court martial. Under existing law the Navy has no law officer. The Army and the Air Force do have a law officer for general courts martial who, in addition to ruling upon points of evidence, retires, deliberates, and votes with the court on the findings and sentence. Officers of equal experience on this subject are sharply divided in their opinion as to whether the law officer should retire with the court and vote as a member. In view of the fact that the law officer is empowered to make final rulings on all interlocutory questions of law, except on a motion to dismiss and a motion relating to the accused's sanity, and under this bill will instruct the court upon the presumption of innocence, burden of proof, and elements of the offense, it is not considered desirable that the law officer should have the voting privileges of a member of the court. This is consistent with the practice in civil courts where the judge does not retire and deliberate with the jury."

It is significant that those witnesses who are really familiar with the administration of military justice under the present army system have uniformly scoffed at the analogy. I quote from the statement of the Judge Advocate General of the Army:

"2. Limitation on the powers of the law member.

"Article 26 creates the position of a 'law officer.' This officer, unlike the law member appointed pursuant to article of war 8, is not a member of the court. He may rule on interlocutory questions, instruct the court as to

the presumption of innocence, and assist the court in preparing the formal findings after the actual findings have been made, but he is deprived of his vote and excluded from the closed sessions of the court. This results in the loss of legal experience and learning during the most critical stage of the proceedings and deprives the court of legal guidance at a time when it most urgently requires such guidance. The requirement of the Kem amendment that a law member be a lawyer and that he participate in all proceedings of a court martial is regarded by all who have had experience in the administration of military justice as the most significant improvement since automatic appellate review. The limitation on the effectiveness of the law member will result in miscarriages of justice both to the detriment of accused persons as well as to the detriment of the interests of the Government."

The only argument for the change which I have been able to discover advanced by the proponents of the bill is that it is desirable to have the law member's instructions appear upon the record. I have no objection to that. The present Manual for Courts-Martial requires that the law member's instructions be given in open court.

Professor Morgan, for whom I have a great deal of esteem, justified this provision to the House Armed Services Committee as follows:

"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' " (hearing on H. R. 2498, p. 607).

I doubt if any lawyer law member ever said a thing like that. The presence of the law member in the closed sessions is infinitely more likely to prove a deterrent against the expression of such a sentiment by anyone.

The analogy between the proposed law officer and a civilian judge is more apparent than real. For example, he rules subject to objection to any member of the court on the question of a motion for a finding of not guilty under article 51. Suppose that he has ruled, as a matter of law, that the prosecution has not proved a prima facie case and a member objects to his ruling. Under the proposed code the court closes—excludes the law officer, and votes on this legal question. The law officer cannot explain his ruling, defend it, or vote to sustain it. Although under Article of War 31 such a ruling by the present law member is also subject to objection at least he can defend his ruling against the argument of a member who may not be well versed in the law. I don't believe this change which makes the law member a mere figurehead is defensible.

Col. Fredrick Bernams Wiener, who is a prolific writer on military law, told the House committee:

"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 contributions 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."

Lt. Col. Thomas H. King, national judge advocate of the Reserve Officers' Association told the House Committee:

"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."

To me it is quite obvious that the law officer set up by article 26 is far from being a judge. A judge can direct a verdict of not guilty without having a member of the jury object and override him. He can sentence the accused; he can set aside a verdict as being against the weight of the evidence and he can grant a new trial. Without those powers he is no more than a referee or an umpire. I can think of no better safeguard to insure that a case be judged by the evidence and not by passion or suspicion than to have the law member present in the closed sessions of the court. I suspect that Professor Morgan and the Armed Services Committee have been sold a bill of goods by the services which does (sic) not now have a law member. I suspect that the Navy is willing to provide for the appearance of due process by accepting a figurehead law officer, but it does not want a legal conscience present in the closed sessions of the court to deter the expression of sentiments such as Professor Morgan attributes to an anonymous law member. I agree with General Green that it is highly doubtful that a lawyer law member ever said a theory like that. Although I have not seen the Senate Armed Services Committee hearings, I understand that General Harmon, the Judge Advocate General of the Air Force agreed with General Green. The view of the two services which have had experience with law members has greater weight with me than the patently fictitious theory that a figurehead law officer performs the functions of a judge. My amendment B is calculated to restore the law member to the position which he now holds under the Kem amendment to the Selective Service Act.

AMENDMENT C

On page 107, beginning with line 19, strike out all down to and including line 22.

On page 107, strike out line 7 and insert in lieu thereof the following:

"The following persons are subject to these articles and shall be understood as included in the term 'any person subject to this code.'"

On pages 107 and 108, renumber all succeeding paragraphs in article 2.

On page 109, beginning with line 9, strike out all down to and including line 16 and insert in lieu thereof the following:

"(a) Subject to the provisions of article 43, jurisdiction is hereby conferred upon the several district courts of the United States to try and punish according to the applicable provisions and limitations of this code and the regulations made thereunder—

"(1) any person charged with having committed an offense against this code while in a status in which he was subject to this code which status has been terminated;

"(2) any person of the Reserve component of the armed forces for an offense against this code committed while such person is on inactive duty training authorized by written orders which are voluntarily accepted by such person;

"(3) retired personnel of a Regular component of the armed forces who are charged with having committed an offense against this code and who are entitled to receive pay."

On page 108, beginning with line 22, strike out all down to and including line 7 on page 109 and insert in lieu thereof the following:

"(12) In time of war or national emergency, subject to the provisions of any treaty or agreement to which the United States is or may be a party, all persons within an area leased by or otherwise reserved or acquired for the use of 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 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands, except insofar as these articles define offenses of such nature that they can be committed only by military personnel."

EXPLANATION

Article 2 (3) of H. R. 4980 (sic) extends military jurisdiction to "Reserve personnel while they are on inactive duty training authorized by written orders which are voluntary accepted by them, which orders specify that they are subject to this code."

Article 3 (a) continues military jurisdiction with respect to persons who have been separated from the service.

This seems to me unwarranted. The civilian components bitterly oppose these extensions of military jurisdiction. My amendment is substantially that proposed by General Green, the Judge Advocate General of the Army. His statement to the Armed Services Committee is an honest expression of a reasonable military man who is opposed to the extension of military power over the civilian population.

1. Extension of military jurisdiction over civilians.

"It has long been recognized that non-military persons who travel and serve with an army in the field must be subject to the discipline of the army, else their conduct can seriously affect the security and discipline of that force. Consequently, such persons have been subject to military laws since the Articles enacted by the Continental Congress. When, however, there is no exigent need for the exercise of military jurisdiction over civilians, Congress has been very zealous to preserve civilian jurisdiction.

"Insofar as Army and Air Force personnel are concerned, articles 2 (3) and 3 (a) of the code extend military jurisdiction over persons not now subject to it. I believe this is unnecessary and the inevitable result will be public revulsion against its exercise. It has been my experience

that, no matter how just and fair the system of military justice may be, if it reaches out to the civilian community, every conceivable emotional attack is concentrated on the system. This is as it should be. The framers of the Constitution recognized that civilians should be tried by civilian courts and they established a military system of courts for the Army and Navy. I recognize that reservists on inactive duty training may commit offenses, perhaps serious ones. I also recognize that many serious offenses committed by persons subject to military law are not detected until the person is separated from the service. I do not advocate that such persons should go unpunished. I merely suggest that you confer jurisdiction upon Federal courts to try any person for an offense denounced by the code if he is no longer subject thereto. This would be consistent with the fifth amendment of the Constitution.

"Article 3 (a) is particularly unworkable. It provides that, subject to the statute limitations, any person charged with having committed an offense against the code, punishable by confinement of 5 years or more and for which he cannot be tried in a Federal or State court while in a status in which he was subject to the code, shall not be relieved from amenability to trial by courts martial. The question as to whether he can be tried by a Federal or State court for the offense becomes a jurisdictional one. It may be hard to decide. In *United States v. Bowman* (260 U. S. 94) the Supreme Court held that any offense directly injurious to the Government for which Congress provided no territorial limitation may be tried by a district court no matter where the offense is committed. Whether a particular offense comes within this limited category is a fit subject for debate among lawyers. It may not be settled except by the Supreme Court. It is not a proper subject for determination by a court martial. If you expressly confer jurisdiction on the Federal courts to try such cases, you preserve the constitutional separation of military and civil courts, you save the military from a lot of unmerited grief and you provide for a clean, constitutional method for disposing of such cases."

I quote from the statements of representatives of the Reserve components before the House committee.

Mr. John J. Finn, representing the American Legion:

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 probability that within a few hours after 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 fool-proof 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."

Col. Melvin Maas, national president of the Marine Corps Reserve Association:

"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?

"Col. 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.'

Lieutenant Colonel King, national judge advocate, Reserve Officers' Association:

"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."

These are samples of the views of the Reserve components. I think they are reasonable. I see no reason for extending military jurisdiction over civilians. I concede that Reserve personnel on inactive duty may be guilty of serious offenses and that serious offenses are frequently not brought to light until the culprit has been separated from the service. No one, except the offender perhaps, would argue that such offenders go untried and unpunished, but there can be no objection to according civilians a right to a trial by jury and trial by a civilian court. The chairman of the subcommittee of the House of Representatives, when confronted with a similar proposal, questioned whether the Federal courts would have jurisdiction over offenses committed outside their district. I submit that title 18 of the United States Code is full of penal statutes denouncing acts committed on the high seas and elsewhere in the special territories and maritime jurisdiction of the United States. We are all familiar with the treason trials where offenses were committed in Germany or Japan and tried in United States district courts. The Supreme Court in *U. S. v. Bowman* (260 U. S. 94), held that a Federal court had jurisdiction to try a conspiracy to defraud the United States where the conspiracy was committed on foreign soil. Title 18, United States Code Section 3238 provides for venue in such cases; 18 United States Code, 3238, provides as follows:

"The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought."

There is nothing unconstitutional about my amendments; on the other hand, there is grave doubt as to the constitutionality of the provisions of article 3 (a) under the fifth amendment. Are these cases arising in the land and naval forces, or are they causes? A case, as I understand it, arises when a prosecution is instituted, a cause, when an offense is committed. Have courts martial the power to try a person who is a civilian when the case arises. I suggest we void the grave constitutional doubt by adopting this amendment.

With respect to retired personnel a different problem arises. Although they are merged with the civil population they are still a part of the armed forces. They are now subject to military law although it is contrary to the policy of the Army to try them, except for the most serious offenses. My amendment would leave their status as it now is, except that it would give the Federal courts concurrent jurisdiction to try them for offenses against the code.

Article 12 (a) as originally proposed by the Morgan group attempted to confer military jurisdiction over all persons in leased bases, such as the British base in the West Indies, in time of peace as well as war, for all

sorts of offenses, military offenses as well as offenses of a civil nature. I made my views known to the House committee and told them that the provision is contrary to executive agreements entered into with the British and Phillipine Governments and that, moreover, it was contrary to international law. In an attempt to meet the criticism, the House committee amended the section by providing that it be "subject to the provision of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law." Other than the fact that this is putting the cart before the horse, I wonder whether every officer exercising special court-martial jurisdiction is going to know about all treaties, executive agreements, and rules of international law.

The proponents of the bill have consistently stated that it was patterned after 34 United States Code 1201. This statute was extremely well drafted by thoughtful draftsmen. In part, it provides:

"In addition to the persons now subject to the articles for the government of the Navy, all persons, other than those persons in the military service of the United States * * * which is within an area leased by the United States which is without the territorial jurisdiction thereof and which is under the control of the Secretary of the Navy, shall, in time of war or national emergency, be subject to the articles for the government of the Navy, except insofar as these articles define offenses of such nature that they can be committed only by naval personnel."

This statute is consistent with and declaratory of international law in that it limits this extraordinary jurisdiction to-

1. Offenses other than purely military ones, and is operative.
2. Only in time of war or national emergency.

To my way of thinking, the salient applicable rules of international law should be stated right in the statute so that no one need be confused or have any doubts thereon. Otherwise we will run into international complications every time some irritated junior officer attempts to exercise military jurisdiction in peacetime over a resident of a foreign island who has no connection with our forces other than that he might reside in a leased area, for some such offense as disrespect to a commissioned officer. The limitation pertinent to treaties and agreements is not objectionable and might do some good.

AMENDMENT D

On page 116, beginning with line 5, strike out all down to and including line 18 and insert in lieu thereof the following.

"Art. 14. Delivery of offenders to civil authorities.

"(a) When any person subject to this code, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under this code, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Colum-

bia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused persons to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial.

"(b) When, under the provisions of this code, delivery is made to the civil authorities of an offender undergoing sentence of a court martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of such court-martial sentence."

On page 121, lines 1 and 2, strike out "and may adjudge any punishment permitted by the law of war."

On page 130, beginning with line 12, strike out all down to and including line 16.

On page 180, line 17, strike out "(b)" and insert in lieu thereof "(a)".

On page 130, line 25, strike out "(c)" and insert in lieu thereof "(b)".

On page 179, beginning with line 16, strike out all down to and including line 24 and insert in lieu thereof the following:

"Art. 98. Noncompliance with procedural rules or provisions for turning over offenders to civil authorities.

Any person subject to the code who willfully fails to enforce or comply with any of the requirements of articles 14, 30 through 34, or 37 shall be punished as a court martial may direct."

EXPLANATION

Article 14: The present seventy-fourth article of war makes it mandatory in time of peace for military authorities to hand over to the civilian authorities a man charged with an offense by civilian authorities, unless the accused is being held by the Army for a military offense. In the Navy though surrender of such a person is discretionary here again the Navy's view won out. There isn't any good reason why the civil authorities in the United States should not exercise their jurisdiction over all citizens whether they be civilians or soldiers. This statute making discretionary whether a criminal should or should not be turned over to civil authorities grants a license for misprison of a felony at the whim of any local commander. I can see no reason for the invasion of the sovereignty of States and I recommend that we stay within the law as it is now administered by the Army. Let us avoid conflict between the State authorities and military authorities and not leave matters such as these to vague discretion.

In order to preserve the punitive provisions of article of war 74, I am expressly making it a part of article 98 of this code—now compliance with procedural rules. That article as proposed by the National Military Estab-

lishment and passed by the House is a remarkable piece of legislation. It provides among other things:

Any person subject to the code who * * * knowingly and intentionally fails to enforce or comply with any provisions of the code regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct.

I ask the many lawyers in this body how they would like to practice law or sit as judges in a jurisdiction with a penal statute like this. To be sure, to be criminal a procedural error must be intentional. But everyone is presumed to know the law; ignorance of the law is no excuse and intent is something which the court may infer from the circumstances. Intent is something easier to prove than to disprove. The implications of the article are startling. The proponents say innocently in their commentary:

"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)."

And it is on this line that the proposed article is urged throughout the hearings and reports. It is supposed to put teeth in article 37, a very good section indeed taken directly from article of war 88 of the Kem amendment to the Selective Service Act of 1948. That article is supposed to forbid an appointing authority from censuring, reprimanding, or admonishing a court or any member 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 proceedings.

Now article 98 is supposed to put teeth into this statute—and so it does provide a means to punish the appointing authority who censures or reprimands a court with a "skin letter." But it also has teeth in the back of its head. Although the convening authority may not censure or reprimand any court member or counsel, he is in fact encouraged to prefer charges against them for any procedural error. Now let us limit this dangerous article so that it may not be used as a device to circumvent the very abuse it was intended to correct. Let us limit its application to violations of those articles which are intended to insure prompt and proper disposition of cases and to the provision forbidding the unlawful influence of courts with respect to their judicial functions.

My amendment is substantially the one proposed by General Green. In support thereof he said:

"The amendment is calculated to put teeth into the requirement of the code for prompt and proper disposition of cases and for the provision forbidding the unlawful influence of courts without destroying the freedom of exercise of their judicial functions of courts, counsel, and reviewing authorities. I am afraid that, as written, article 98 would make it possible to punish any member of a court or counsel for the slightest procedural error. It might authorize commanders who are forbidden to censure, reprimand, or admonish courts prefer charges against its members or personnel

for such errors as the improper admission or exclusion of evidence, improper action on a challenge, or for finding an accused guilty of an offense not necessarily included in that charged."

Any flagrant violation of other procedural rules, like those for which a lawyer might be disbarred, may be prosecuted under article 134, the general article.

When the hidden implications of article 98 become generally known, I doubt that many young lawyers will seek legal careers in the armed forces.

Amendment D also strikes out of article 18 the power of a general court martial to "adjudge any punishment permitted by the law of war." This particular power is not now in article of war 12 and somehow general courts martial have been able to get along without it. The article already confers upon such courts the power to adjudge any punishment not forbidden by the code, including the penalty of death when specifically authorized by the code. This should certainly suffice the punitive powers of general courts martial without importing new and unknown factors like the law of war. I have searched in vain the hearings before the House committee for an intelligent explanation of what is to be gained by the addition to the punitive powers of a general court martial. (See pp. 958 and 959 of the hearings.) The House committee adopted the language in spite of the doubts, because it was assured that it was in the present Articles of War. I can assure you that it is not.

Lastly my amendment D proposes to strike out of the bill article 29 (a), which provides:

"(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."

Now at first blush that does not appear unreasonable. It certainly is the duty of every member to be present at every session of the court unless he is excused by the convening authority or challenged. If he is not, he is absent without leave from his place of duty and can be punished for violating article 86. But the matter I object to is that the article may make the presence and accounting for each member a jurisdictional prerequisite. If in the course of a long and difficult trial one of the members were to fail to appear, under the section the whole proceedings might well have to be disapproved on jurisdictional grounds despite the fact that more than the minimum number of members now required were present throughout the trial. Emergencies happen in the military service whereby the interest of the Nation might require that a member be excused from the court for other vital duties although the convening authority who might be 1,000 miles away could not be reached. Are we going to force the administration of military justice into a strait-jacket of technical jurisdictional requirements which will impair not only the administration of justice but also the operation of the force. Gentlemen, I assure you that the section adds nothing to the law or practice now in effect except a reason for disapproving proceedings on artificial jurisdictional grounds.

AMENDMENT E

On page 116, beginning with line 20, strike out all down to and including line 13 on page 118 and insert in lieu thereof the following:

"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, unless the accused demands trial by court martial —

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

"(A) withholding of privileges for a period not to exceed 1 week; or

"(B) restriction to certain specified limits, with or without suspension from duty for a period not to exceed 1 week; or

"(C) if imposed by an officer exercising general court-martial jurisdiction, forfeiture of not to exceed one-half of his pay per month for a period not exceeding 1 month;

"(2) upon other military personnel of his command:

"(A) withholding of privileges for a period not to exceed 1 week; or

"(B) restriction to certain specified limits, with or without suspension from duty, for a period not to exceed 1 week; or

"(C) extra duties for a period not to exceed 1 week, 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) if imposed upon a person attached to or embarked in a vessel, confinement for a period not to exceed seven consecutive days.

"(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, and the categories of commanding officers authorized to exercise such powers."

On page 121, line 25, beginning with the comma, strike out all down to and including the word "appropriate" on page 122, line 6.

On page 126, line 21, after the word "shall", insert a comma and the following: "without his consent."

On page 126, line 24, beginning with the comma, strike out all down to and including line 5 on page 127.

EXPLANATION

Article 15, nonjudicial punishment: This article is presumably patterned somewhat after the so-called disciplinary power of the commanding officers under article of war 104 of the Kem amendment. Under the article, commanding officers of companies or higher units may impose such punishments as admonition of reprimand, withholding privileges that fatigue duty, or restriction to specified limits upon enlisted persons. None of these punishments may be given for a period longer than 1 week from the day imposed. In addition certain commanders may also impose a forfeiture of one-half of a month's pay on officers and warrant officers. Now there is no court martial involved here, but in the Army and Air Force the statute gives every person who considers himself innocent the right to refuse to accept disciplinary punishment and demand a trial by a court martial instead. This is eminently fair. Disciplinary punishment under the Articles of War is relatively minor and is a marvelous way to straighten out a soldier who misbehaves without impairing his usefulness by a stiff court-martial sentence. But if he thinks that he is being unjustly accused of an offense he can demand and get his day in court. That's the way our police courts work—it's the American system of fair play even for minor offenses.

Now that is not the system in the Navy. There is no limit on minor punishment such as withholding of privileges and extra duty, in addition, the Navy also now has confinement for 10 days, confinement on bread and water for 5 days, and solitary confinement for 7 days. Despite the fact that these relics from the log of Captain Bligh are infinitely harsher than the punishment authorized without trial in the Army, the Navy does not give an accused the right to a day in court. The accused is simply haled before the master of the ship at a ceremony known as captain's mast and without being given an opportunity to demand a trial, he may be given 7 days' solitary confinement, or an unlimited amount of time swabbing a deck.

Apparently the Navy won this round, too, when the code was being drafted. This harsh Navy system was adopted with but minor modification but more detrimental to morale than this harshness is that the unfairness inherent in arbitrary punishment without the right to a day in court was also adopted — subject to departmental regulations. This, the proponents say, will enable the Army to keep its system, and I add, the Navy to keep its harsh and unfair system. I have no doubt that Mr. Gray will leave the Army system as it is—but we must not forget that there once was a Secretary of War, Mr. Stanton, whose harshness and arbitrariness is a matter of history.

Would a secretary like Mr. Stanton hesitate for 1 minute to adopt a harsh and arbitrary system of disciplinary punishment if authorized by statute?

It is true that the House ameliorated some of the harsh features of the bill initially introduced and the Senate committee improved it still more. The confinement features and the bread and water was limited to shipboard. I can agree that aboard a ship confinement may occasionally be necessary for disciplinary purpose because restriction alone is not much of a punishment to a person who cannot leave a ship in the middle of the ocean. I propose to leave them this power. But I see no reason why confinement on bread and water for as much as 3 days should be left in the bill. Neither can I

see why the minor punishments should be extended to 14 days instead of 7 days.

The feature I object to most in the bill before you, however, is the denial of the right to demand trial unless the Secretary by regulation grant that trial. That is so abhorrent to my sense of fair play that I cannot support it. My amendment leaves things pretty much as they are in the Army and Air Force today except that confinement for 7 days is still authorized for offenses committed by persons embarked upon vessels.

I don't think this will destroy the Navy. I am reminded of the opposition of many naval officers to the abolition of flogging 99 years ago. Somehow the Navy survived.

My position is that, if a man commits an offense for which a more severe punishment than that authorized now in the Army is appropriate, he ought to be tried by a court.

The changes this amendment proposes for article 20, Summary courts martial, are intended to make it consistent with my changes to article 15. A summary court martial is one officer. He acts somewhat like a police court judge except that he also acts as prosecutor and defense counsel as well. He can adjudge confinement for 1 month, hard labor without confinement for 45 days, restriction for 2 months, and forfeiture of two-thirds pay for 1 month.

This article as reported gives every person except those who have been permitted to refuse nonjudicial punishment the right to demand trial before a higher court where he would be entitled to a defense counsel. He could also receive a more severe punishment before a higher court. I have read with interest the comments of General Green with respect to article 20. He said:

"I do not believe it wise to give every accused the absolute right to demand trial by a higher court than a summary court martial. The punitive powers of such higher courts are greater and it is frequently to the advantage of an accused to stand trial before a summary court martial rather than before a general or special court martial. The right to demand trial by a higher court should be reserved to noncommissioned officers, but less well informed soldiers should be protected against their own folly."

He proposed leaving the right to demand trial before a higher court to departmental regulations.

This is one place where I must depart from the views of the general, whose other comments impress me as being extremely sound. In view of the summary nature of such a court, and particularly in view that no defense counsel is provided or authorized, I believe every soldier should have the right, if he desires, to demand a trial before the higher court. It may or may not be folly; he may or may not receive a higher sentence, but perhaps with a defense counsel he may have a much better chance of getting an acquittal than before one officer who is the prosecutor, defense counsel,

and judge all in one. I do not agree with General Green that rank or experience should be a criterion affecting this right.

This amendment also guarantees to enlisted persons the right to have soldiers sitting on the court which tries him. This is now the law under the Articles of War as amended by the Kem amendment last year. It has worked remarkably well, I am informed, and I gather from the data collected in the House hearings that soldiers definitely desire the privilege of making an election whether or not they want enlisted persons on the court. The bill as reported whittles down this right by providing that enlisted men may be tried by an all-officer court if "eligible enlisted persons cannot be obtained on account of physical conditions or military exigencies." This strikes me as a patent attempt to circumvent the provision the congress enacted last year. Certainly enlisted persons should be more plentiful than officers and be more readily available than officers. As I understand it, the excuse is that members of the same unit are not eligible to sit as members of the same court. A unit is defined as "any regularly organized body as defined by the secretary of a 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.

When asked on the floor of the House why the exception was made, the chairman of the House Armed Services Committee replied that it was calculated to take care of isolated outposts and the crews of small vessels. I should like to ask the distinguished Senator from Maryland just how small the crew of the U. S. S. Missouri or the carrier Midway is? Now, I understand that the Navy does not very often have a trial aboard a ship. Usually they wait until they reach a base. They can get all sorts of eligible enlisted men on a base. If they must have a trial aboard a vessel, is it so tremendously difficult to get some eligible enlisted persons from another vessel? Let us not whittle away substantial rights on the basis of specious arguments.

AMENDMENT F

On page 129, beginning with line 1, strike out all down to and including line 22 and insert in lieu thereof the following:

"(b) Any person who is appointed as trial counsel or defense counsel of a general court-martial shall, if available, be a judge advocate or a law specialist or 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.

"(c) In any case referred for trial before a general or special court martial in which the officer who is appointed as trial counsel shall be a judge advocate or a law specialist or 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, the defense counsel appointed by the convening authority shall be one of the foregoing.

"(d) In any case referred for trial before a general or special court martial in which the conduct of the prosecution devolves upon an assistant trial counsel who is a judge advocate or a law specialist or 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 neither the defense counsel nor any of his assistants or individual counsel present is one of the foregoing, the proceedings will be adjourned pending procurement for the conduct of the defense of a defense counsel who is one of the foregoing, unless the accused expressly consents to proceeding with the trial in the absence of such legally qualified defense counsel."

EXPLANATION

This amendment deals with the provision of article 29 which requires that both trial counsel and defense counsel before every court martial must be members of a State or Federal bar and must be certified as qualified by the Judge Advocate General. My first impression was that this was desirable. However on studying the comments of two men who have studied the problem from both the theoretical and practical standpoints I have changed my mind. Let me quote you General Green's comments:

"3. Mandatory requirement for legal qualification of counsel.

"Article 27 requires that the trial counsel and defense counsel of each general court martial must be a qualified lawyer and certified to be competent to perform his duties by the Judge Advocate General. If their assistants are to perform in any capacity other than in a merely clerical one, they too must be so qualified under article 38.

"AW 11 of the Kem amendment now provides that if the trial judge advocate is a lawyer, the defense counsel must also be a lawyer. This is a fair rule and corrects many of the defects in the former system justly criticized by the public and the legal profession. In the Army we now have approximately 6,000 general court martial cases per year. In time of war we have many more. I would say that fully 70 percent of these cases involved extremely simple issues which can be adequately and fairly tried by line officers. I would like them tried by lawyers, it is true, but the difficulty of procurement of sufficient lawyers to provide at least 3 for every 1 of 6,000 general court-martial cases is enormous. If I am to certify each one as qualified I will have to satisfy myself that he is qualified to try any kind of a general court-martial case, not just a simple a. w. o. l. or desertion case which rests on a morning report. I can't just certify every lawyer no matter what his trial experience or criminal-law background may be. If bar membership were the only qualification necessary, why would Congress require me to certify the lawyers qualification? Where can I find lawyers so qualified in sufficient numbers to try 6,000 cases a year? Unless I find them, the few lawyers I have will have to try the cases, simple and difficult, to the exclusion of all other duties which may be more important to the Government than the trial of simple cases which could as effectively be tried by line officers — or lawyers learning military justice. The inevitable result will be long delays in the disposition of cases pending the procurement of three lawyers at the right time and place. Some cases are long and difficult. While a team of three lawyers is trying a case which takes weeks to try—many accused whose cases could be disposed of in an hour or less will be waiting in a guardhouse until their cases can be reached. I don't think this is the result you want to attain. I don't think it's necessary because there will

be a trained and experienced law member on the court to see that the rights of the accused are protected in even a simple case. In addition, the review of the staff judge advocate and automatic appellate review will protect the accused's substantial rights against the errors of counsel. The practical difficulties of the article could be ameliorated if you gave the accused, at his option, the right to be defended by a lawyer provided by the appointing authority even though the trial judge advocate is not a lawyer. I would also have no objection if the requirement of the proposed article 27 were limited to cases in which the death penalty or confinement in excess of 10 years might be adjudged."

Now I want to quote the testimony of Col. Frederick Bernams Wiener, a former Assistant Solicitor General, a Reserve officer, and a writer on military justice matters:

"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 judgement, 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 sometime 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 judgement 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 non-flying 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 attractive, 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 spending 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, the

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 records; 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 provisions 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 *Butts 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 to 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."

My view, after reading the foregoing, is that the provisions of the mandatory lawyer provision will delay trials to such an extent that it will work a tremendous hardship on most accused persons. I would like the armed forces to procure the necessary lawyers first, before we enact the proposed provision. If they get the lawyers, I'll be all for it—but let us hold this is (sic) abeyance until such time as they have the lawyer. The present system requiring equalization on each side is satisfactory and fair enough. My section (d) plugs any loophole that may have existed under the Kem amendment, by requiring that if an assistant trial judge advocate who is

"(b) Except as otherwise provided in this article, a person shall not be liable to be tried by court martial for desertion in time of peace or any of the offenses punishable under articles 119 through 132, inclusive, if the offense was committed more than 3 years before the charges therefore are referred for trial.

"(c) Except as otherwise provided in this article, a person shall not be liable to be tried by court martial for an offense committed more than 2 years before the charges therefore are referred for trial, nor may he be punished under article 15 for an offense committed more than 2 years before the imposition of such punishment.

"(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 other than Federal civil authorities, or in the hands of the enemy, shall be excluded in computing the period of limitation prescribed in this article."

EXPLANATION

This amendment deals with the statute of limitations, article 43. The bill as reported has 2 pages devoted to the statute of limitations but, if the sleepers are considered, there isn't any statute of limitations left.

Under article of war 39, applying to the Army and Air Force, the statute of limitations stops at a very definite point, arraignment. Under article 43 of the Uniform Code it stops, of all places, when sworn charges are received by an officer exercising summary court-martial jurisdiction. This is a very nebulous stage of the proceedings and there is really nothing to prevent such charges from simply resting on ice, for years perhaps, before someone decides to bring them to trial — especially when the witnesses for the defense have disappeared. It's an open invitation to fraudulent back-dating of charges — and it eliminates any certainty on the part of an accused as to what his rights under the statute of limitation may be. I have examined the House hearings and I find that there is an enormous amount of confusion on the subject. See pages 1031-1046; 1264-1265. I think I detected a lack of sympathy for the basic idea of a statute of limitations. Now if you want to abolish the limitations let's do it frankly and openly — I think there's a sound reason for limitations and our civilian practice makes liberal use of it.

I think the Judge Advocate General of the Army knows whereof he speaks on the subject. This is what he said:

"Article 43 (b) of H. R. 4080 provides a 3-year statute of limitations for peacetime desertion, felonies of a civil nature, and frauds against the Government. The time when the period of limitation will stop running is made the time when sworn charges are received by an officer exercising summary court-martial jurisdiction. Under ARTICLE OF WAR 39 the time when the statute stops running in arraignment.

"In the Army an officer exercising summary court-martial jurisdiction frequently exercises special or general court-martial jurisdiction. He may

be a field artillery battalion commander, or he might be an army commander. Under article 43 (b) H. R. 4080, such an officer might receive charges appropriate for trial before a higher court which he has authority to appoint. He is under no duty to forward them to anyone else. He might simply decide that the charges do not merit trial and file them. Such charges might later be resurrected. Since officers exercising summary court martial are not courts of records with dockets, time stamps, etc., which civilian lawyers are accustomed to in the office of clerk of a court of record, I believe that the proposed statute of limitations is fraught with danger of serious abuse. I prefer that the statute of limitations stop running at a more definite stage of the proceedings. I believe that reference for trial is such a definite stage. It must come after an investigation into the nature of the charges and the available evidence, after consideration of the staff judge advocate, and after the determination of the responsible commander that there should be a trial. This is consistent with the Federal statute of limitations which stops running after the indictment is found or the information is instituted (18 U. S. C. 3282).

"It has been contended in favor of article 43 (b) that stopping the running of statute of limitations at arraignment might prevent the bringing of a fugitive to trial. I believe that article 43 (d) provides ample safeguards for the contingency. Furthermore, there is no reason why a case cannot be referred for trial even though the accused is a fugitive. It cannot be tried until he is found, it is true, but it is better to keep it in suspension after an investigation than before."

As I read the testimony of the proponents before the House committee I see that it is supposed to be a compromise between Army and Navy practices. In the Navy the statute runs when charges are preferred, but under Navy practice charges are not preferred until after there is an investigation. In the Army there is an investigation after charges are forwarded to an officer exercising general court-martial jurisdiction. So it seems to me that the compromise, if any, was to shove back the time when the statute stops running to a point before the point where the Navy's statute now stops running. If we adopt General Green's suggestions embodied in my amendment we will leave the stopping point about where it now is in the Navy and exactly where it is in the Federal courts. It will be a definite point, not subject to abuse or fraud.

My amendment to 43 (d) is also based on General Green's suggestions.

"Article 43 (d) of H. R. 4080 attempts to define 'manifest impediment' to amenability to military jurisdiction provided in article of war 39. It would include periods during which the accused is in the custody of Federal authorities. I believe this is unjust, since he would be amenable to military process if the United States desires to make him so amenable. Accordingly, I recommend that periods during which an accused is in Federal custody be not excluded from the running of the statute of limitations."

AMENDMENT I

On page 141, beginning with line 23, strike out all down to and including line 11 on page 142, and insert in lieu thereof the following:
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 and specification shall, as to such charge and specification, be held to be a trial in the sense of this article until the findings of guilty have become final after review of the case has been fully completed; nor shall any proceeding which has been terminated before findings on the general issue be held to be a trial in the sense of this article unless evidence on the general issue has been received by the court martial and the hearing has been terminated for a reason other than manifest necessity in the interest of justice.

EXPLANATION

Article 44. Former jeopardy: (c) This section added by the Senate committee is intended according to the report to cover the precise factual situation presented by *Wade v. Hunter* (336 U. S. 684). It is however, badly drawn, and in view of the failure to punctuate the section, makes it difficult to determine whether dismissal or termination by the convening authority would constitute a trial only where such action is taken for failure of available evidence or witnesses — or whether the phrase is intended to modify motions of the prosecution only. In any event this provision would freeze into the law the mechanical concept of jeopardy expressed in *Cornero v. United States* (48 F. 2d 69). This view was expressly rejected by the United States Supreme Court in the *Wade* case:

"The district court viewed the record as showing that the only purpose of dissolving the court martial was to get more witnesses. This purpose, the district court held, was not the kind of 'imperious' or 'urgent necessity' that came within the recognized exception to the double-jeopardy provision. See *Cornero v. United States* (48 F. 2d 69). We are urged to apply the *Cornero* interpretation of the 'urgent necessity' rule here. We are asked to adopt the *Cornero* rule under which petitioner contends the absence of witnesses can never justify discontinuance of a trial. Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula. The value of the *Perez* principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interests" (*Wade v. Hunter*, supra, 691).

The Supreme Court unambiguously adopted the rule of the *Perez* case:

"The rule announced in the *Perez* case has been the basis for all later decisions of this Court on double jeopardy. It attempts to lay down no rigid formula. Under the rule a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to dis-

continue would defeat the ends of justice. We see no reason why the same broad test should not be applied in deciding whether court-martial action runs counter to the fifth amendment's provision against double jeopardy" (*Wade v. Hunter*, supra, 690).

My amendment would clearly adopt the broad rule of the *Wade* case, applicable to all interruptions of a trial by court martial and not freeze it inartfully to the specific factual situation of that case.

AMENDMENT J

On page 150, beginning with line 5, strike out all down to and including line 14 and insert in lieu thereof the following:

"(a) Each general court martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the trial counsel. In case the record cannot be authenticated by the president and trial counsel, by reason of the death, disability, or absence of either or both of them, it shall be signed by a member in lieu of the president and by an assistant trial counsel if there be one, in lieu of the trial counsel, otherwise by another member of the court."

EXPLANATION

My amendment to article 54 (d) preserves the method of authenticating record of trial now used in the Army and the Air Force.

The bill as reported provides that the president and "law officer" shall authenticate records but under article 38 the trial counsel prepared the record. He ought to be in a better position than any one to know the accuracy of the record. Therefore he ought to authenticate it along with some member of the court. This could be the president or the law member. I have chosen the president consistently with the law as it is today.

AMENDMENT K

On page 152, beginning with line 9, strike out all down to and including line 23, and insert in lieu thereof the following:

"(a) Under such instructions as the Department concerned may prescribe, any sentence to confinement adjudged by a court martial or other military tribunal may be carried into execution by confinement in any place of confinement under control of an armed force: Provided, That any sentence to confinement which includes dishonorable discharge or dismissal not suspended and any sentence to confinement adjudged against a civilian may be carried into execution in any penal or correctional institution under the control of the United States or a Territory, district, or possession thereof. Persons so confined in a penal or correctional institution not under the control of an armed force shall be subject to the same discipline and treatment as persons confined or committed by the courts of the United States, or of the Territory, district, or possession of the United States in which the institution is situated."

EXPLANATION

Article 58. Execution of confinement: Under the present ARTICLE OF WAR 42 a convicted accused may be sent to a Federal penitentiary only for 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. Other offenses are punishable by confinement in a disciplinary barracks or guardhouse. This bill (art. 58 (a)) provides that, subject to departmental regulation, any accused, no matter what his offense might be, and no matter how long his sentence to confinement, or whether accompanied by a bad-conduct discharge or not, may be confined "in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use."

This means that any soldier, convicted of a short absence without leave, or disrespect to an officer can be sent to a United States penitentiary, or correctional institution with all the opprobrium and lasting effect upon his reputation that penitentiary confinement incurs. Penitentiary confinement is recognized by the Supreme Court as "infamous punishment" (*Ex parte Arlson*, 114 U. S. 417; *Parkinson v. U. S.* (121 U. S. 281); *U. S. v. DeWalt* (128 U. S. 393). In the case of *Medly*, petitioner (139 U. S. 169) the Supreme Court said that the disgrace of confinement in a penitentiary pending execution of the death penalty was adding to the punishment in violation of the ex post facto provision of the Constitution, when imposed in a case where the defense (sic) was committed at a time when the law provided for confinement in a county jail pending execution. That's how serious penitentiary confinement is regarded by the Supreme Court, yet the armed services want to confine soldiers there even while they remain soldiers.

But this is not the worst feature of the article. What are these places "which the United States may be allowed to use"?

Would they include State chain gangs, foreign prisons, Devil's Island, perhaps? Certainly they would if the State or foreign government allows the military authorities to use them. Now it may be said that the draftsmen had no such intent in mind. I will agree to that—but the road to hell is paved with good intentions. If we give the services this power some commander some day will abuse it.

Perhaps the proponents will argue that foreign prisons cannot be used because under article 12 no member of the armed forces may be placed in confinement in immediate association with foreign nationals.

But if they are placed outside the custody of an armed force they cease to be persons subject to this code and they are no longer members of the armed forces under article 2 (7).

I propose to strike the authority to confine anybody in any State or foreign prison, and authorize confinement only in Federal places of confinement or those under the control of territory, district, or possession of the United States. I also propose that any persons who are no longer soldiers, that is, those who have been dishonorably discharged, may be confined in such a Federal institution and that others remain in the hands of the ar-

med forces in disciplinary barracks, rehabilitation centers and similar places where they can be rehabilitated as soldiers.

AMENDMENT L

On page 155, beginning with line 12, strike out all down to and including line 18, and insert in lieu thereof the following:

"(a) If the convening authority or confirming authority disapproves a sentence or when any sentence is vacated by action of the board of review or judicial council and the judge advocate general, or by the United States Court of Appeals for the District of Columbia, the disapproving or vacating authority may, except where there is lack of sufficient evidence in the record to support the findings, order or authorize a rehearing, in which case such authority shall state the reasons for disapproval or vacation."

On page 156, after line 4, insert the following:

"No sentence of a court martial shall be carried into execution unless it has been approved by the convening authority."

On page 156, beginning with line 19, strike out all down to and including line 5 on page 157, and insert in lieu thereof the following:

"(b) Where the sentence of a special court martial as approved by the convening authority includes a bad-conduct discharge the record shall be forwarded to the officer exercising general court-martial jurisdiction over the command for action under article 61 and 64 as in the case of a record of trial by general court martial. 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."

On page 157, beginning with line 12, strike out all down to and including line 11 on page 166, and insert in lieu thereof the following:

"ART. 66. Appellate review in the Office of The Judge Advocate General.

"(a) Board of review; judicial council: The Judge Advocate General shall constitute, in his office, a board of review composed of not less than three judge advocates or law specialists. He shall also constitute, in his office, a judicial council composed of three general or flag officers who are judge advocates or law specialists: **Provided**, That the Judge Advocate General may, under exigent circumstances, detail as members of the judicial council, for periods not in excess of 60 days, judge advocates or law specialists of grades below that of general or flag officers: **Provided further**, That the general counsel of the Treasury may detail as members of the board of review of the Coast Guard civilian members of the bar of a Federal court or of the highest court of a State of the United States, and he may detail as members of the judicial council of the Coast Guard law specialist of grades below that of flag officer or civilian members of the bar of a Federal court or of the highest court of a State of the United States, whenever the Coast Guard is not operating as a part of the Navy.

"(b) Additional boards of review and judicial councils: Whenever necessary, the Judge Advocate General may constitute two or more boards of

review and judicial councils in his office, with equal powers and duties, composed as provided in the first paragraph of this article.

"(c) Action by board of review when approval by President or confirming action is required. Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted to the President or such other confirming authority, as the case may be, it shall be examined by the Board of Review which shall take action as follows:

"(1) In any case requiring action by the President, the Board of Review shall submit its opinion in writing, through the judicial council which shall also submit its opinion in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the board's and council's opinions, with his recommendations, directly to the Secretary of the Department for the action of the President: **Provided**, That the judicial council, with the concurrence of the Judge Advocate General, shall have powers in respect to holdings of legal insufficiency equal to the powers vested in the board of review by subparagraph (3) of this paragraph.

"(2) In any case requiring confirming action by the judicial council with or without the concurrence of the Judge Advocate General, when the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence it shall submit its opinion in writing to the judicial council for appropriate action.

"(3) When the board of review is of the opinion that the record of trial in any case requiring confirming action by the President or confirming action by the judicial council is legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall submit its holding to the Judge Advocate General and when the Judge Advocate General concurs in such holding, such findings and sentence shall thereby be vacated in accord with such holding and the record shall be transmitted by the Judge Advocate General to the appropriate convening authority for a rehearing or such other action as may be proper.

"(4) In any case requiring confirming action by the President or confirming action by the judicial council in which the board of review holds the record of trial legally insufficient to support the findings of guilty and sentence, or the sentence, and the Judge Advocate General shall not concur in the holding of the board of review, the holding and the record of trial shall be transmitted to the judicial council for confirming action or for other appropriate action in a case in which confirmation of the sentence by the President is required under article 70.

"(d) Action by board of review in cases involving dishonorable or bad-conduct discharges or confinement for 1 year or more.—No authority shall order the execution of any sentence of a court martial involving dishonorable discharge not suspended, bad-conduct discharge not suspended, or confinement for 1 year or more unless and until the appellate review required by this article shall have been completed and unless and until any confirm-

ing action required shall have been completed. Every record of trial by general or special court martial involving a sentence to dishonorable discharge or bad-conduct discharge, whether such discharges be suspended, or not suspended, and every record of trial by general court martial involving a sentence to confinement for 1 year or more, other than records of trial examination of which is required by subsection (d) of this article, shall be examined by the board of review which shall take action as follows:

"(1) In any case in which the board of review holds the record of trial legally sufficient to support the findings of guilty and sentence, and confirming action is not by the Judge Advocate General or the board of review deemed necessary, the Judge Advocate General shall transmit the holding to the convening authority, and such holding shall be deemed final and conclusive.

"(2) In any case in which the board of review holds the record of trial legally sufficient to support the findings of guilty and sentence, but modification of the findings of guilty or the sentences is by the Judge Advocate General or the board of review deemed necessary to the ends of justice, the holding and the record of trial shall be transmitted to the judicial council for confirming action.

"(3) In any case in which the board of review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General concurs in such holding, the findings and sentence shall thereby be vacated in whole or in part in accord with such holding, and the record shall be transmitted by the Judge Advocate General to the convening authority for rehearing or such other action as may be appropriate.

"(4) In any case in which the board of review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General shall not concur in the holding of the board of review, the holding and the record of trial shall be transmitted to the judicial council for confirming action.

"(e) Appellate action in other cases: Every record of trial by general court martial the appellate review of which is not otherwise provided for by this article shall be examined in the office of the Judge Advocate General and if found legally insufficient to support the findings of guilty and sentence, in whole or in part, shall be transmitted to the board of review for appropriate action in accord with subsection (d) of this article.

"(f) Weighing evidence: In the appellate review of records of trials by courts martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact.

"Art. 37. Branch offices.

"Whenever the President deems such action necessary, he may direct the Judge Advocate General to establish a branch office, under an Assis-

tant Judge Advocate General who shall be a general or flag officer who is a judge advocate or law specialist, with any distant command, and to establish in such branch office one or more boards of review and judicial councils composed as provided in article 66. Such Assistant Judge Advocate General and such board of review and judicial council 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 the board of review and judicial council in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President: Provided, That the power of mitigation and remission shall not be exercised by such Assistant Judge Advocate General, but any case in which such action is deemed desirable shall be forwarded to the Judge Advocate General with appropriate recommendations.

"ART. 68. Review by United States Court of Appeals for the District of Columbia.

"(a) In any case transmitted to them for action pursuant to article 66 or article 70, in which an issue of uniformity of interpretation or construction of the code may arise, the President, the Secretary of a Department, or the Judge Advocate General is authorized to certify the record of trial to the United States Court of Appeals for the District of Columbia for action pursuant to this article, prior to taking action thereon pursuant to article 70 or article 66, respectively.

"(b) Under such rules of procedure as it shall prescribe the United States Court of Appeals for the District of Columbia shall review the records in any case certified to it pursuant to subsection (a) of this article.

"(c) In any case reviewed by it, the United States Court of Appeals for the District of Columbia shall act only with respect to the findings and sentence as approved by the convening authority and only with respect to the issues raised by the authority who has certified the record to it. It shall take action only with respect to matters of law.

"(d) When the United States Court of Appeals for the District of Columbia is of the opinion that a record of trial is legally sufficient to support the findings of guilty in whole or in part, it shall transmit its opinion in writing to the authority who has certified the record to it for completion of action pursuant to article 66 or article 70.

"(e) When the United States Court of Appeals for the District of Columbia is of the opinion that a record of trial is legally insufficient to support the findings of guilty and the sentence in whole or in part, such findings of guilty and such sentence or such part of a sentence shall thereby be vacated. If the United States Court of Appeals for the District of Columbia sets aside the entire sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings of guilty, authorize a rehearing. Otherwise, it shall order that the charges be dismissed, if the court has authorized a rehearing, but the convening authority finds a rehearing impractical, he may dismiss the charges.

"(f) (1) 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 who shall possess the same qualifications as a law member under the provisions of article 26.

"(2) It shall be the duty of appellate Government counsel to represent the United States before the United States Court of Appeals for the District of Columbia in any case transmitted to such court under the provisions of this article, when directed to do so by the Judge Advocate General.

"(3) It shall be the duty of appellate defense counsel to represent the accused before the United States Court of Appeals for the District of Columbia in any case transmitted to such court under the provisions of this article.

"(4) Whenever a case is transmitted to the United States Court of Appeals for the District of Columbia under the provisions of this article it shall be the duty of the Judge Advocate General to notify the accused that the case has been so transmitted and such notification shall be given promptly in order that the accused may have an opportunity to select civilian counsel to represent him before such court. The accused shall have the right to be represented before the United States Court of Appeals for the District of Columbia by civilian counsel, if provided by him.

"ART. 69. Advisory Council on Military Justice.

"There is hereby established in the National Military Establishment an Advisory Council on Military Justice which shall consist of not more than five members who shall be appointed from civilian life by the Secretary of Defense. No person shall be eligible for appointment to the Advisory Council on Military Justice who is not a member of the bar of a Federal court or of the highest court of a State. The council and the Judge Advocate Generals of the armed forces shall meet at least twice annually to make a comprehensive survey of the operation of the code and to report to the Committees on Armed Services of the Senate and of the House of Representatives and to the Secretary of Defense and the Secretaries of the Departments the number and status of pending cases and any recommendations relating to uniformity of sentence policies, amendments to this code, and any other matters deemed appropriate.

"ART. 70. Confirmation.

"In addition to the approval required by article 64 and subject to the provisions of article 68, confirmation is required as follows before the sentence of a court-martial may be carried into execution, namely:

"(a) By the President with respect to any sentence—

"(1) of death; or

"(2) involving a general or flag officer: Provided, That when the President has already acted as approving authority, no additional confirmation by him is necessary;

"(b) By the Secretary of a department with respect to any sentence not

requiring approval or confirmation by the President, when the Judge Advocate General does not concur in the action of the judicial council;

“(c) By the judicial council, with the concurrence of the Judge Advocate General, with respect to any sentence —

“(1) When the confirming action of the judicial council is not unanimous, or when by direction of the Judge Advocate General his participation in the confirming action is required; or

“(2) involving imprisonment for life; or

“(3) involving the dismissal or reduction to the lowest enlisted grade of an officer other than a general or flag officer; or

“(4) involving the dismissal or suspension of a cadet or midshipman;

“(d) By the judicial council with respect to any sentence in a case transmitted to the judicial council under the provisions of article 66 for confirming action.

“ART. 71. Powers incident to power to confirm.

“The power to confirm the sentence of a court-martial shall be held to include—

“(a) the power to approve, confirm, or disapprove a finding of guilty, and to approve or confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

“(b) the power to confirm, disapprove, vacate, commute, or reduce to legal limits the whole or any part of the sentence; by any finding or sentence disapprove or vacated;

“(c) the power to restore all rights, priveleges, and property affected

“(d) the power to order the sentence to be carried into execution;

“(e) the power to remand the case for a rehearing under the provisions of article 64.”

On page 167, beginning with line 8, strike out all down to and including line 19, and insert in lieu thereof the following:

On page 166, strike out line 12 and insert in lieu thereof the following:

“ART. 72. Suspension; vacation of suspension.”

On page 166, before line 13, insert the following:

“(a) The power to order the execution of a sentence of a court—martial shall include the power to suspend the whole or any part thereof, except that a death sentence may not be suspended. The authority which suspends the execution of a sentence may restore the person under sentence to duty during such suspension; and the death or honorable discharge of

a person under a suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence."

On page 166, at the beginning of line 13, strike out "(a)" and insert in lieu thereof "(b)".

On page 166, at the beginning of line 20, strike out "(b)" and insert in lieu thereof "(c)".

On page 166, in line 25, strike out "article 71(c)" and insert in lieu thereof "subsection (e) of this article."

On page 167, at the beginning of line 4, strike out "(c)" and insert in lieu thereof "(d)".

On page 167, after line 7, insert the following:

"(e) No order of suspension of a sentence shall be vacated unless and until confirming or appellate action on the sentence has been completed as required by articles 66 and 70.

"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 one year or more 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, the judicial council or before the United States Court of Appeals for the District of Columbia, the Judge Advocate General shall refer the petition to the board, council, or court, respectively, for action. Otherwise, the Judge Advocate General shall act upon the petition."

On page 169, line 3, strike out "or" and insert after "affirmed," "or confirmed."

On page 169, line 16, strike out "or" and insert after "affirmation," "or confirmation."

At the end of the bill add the following new section:

"SEC. 16. The President is authorized to appoint, by and with the advice and consent of the Senate, three additional circuit judges for the District of Columbia circuit. According, title 28, United States Code, section 44 (a), is amended to read as follows with respect to such circuit:

'Circuits:

Number of judges

District of Columbia — — — — — Nine'

On page 153, between lines 4 and 5, strike out numbers 66 through 72, inclusive, and substitute in lieu thereof the following:

"66. Appellate review in the Office of the Judge Advocate General.

67. Branch offices.
68. Review by the United States Court of Appeals for the District of Columbia
69. Advisory council on military justice.
70. Confirmation.
71. Powers incident to power to confirm.
72. Suspension; vacation of suspension."

EXPLANATION

Amendment L preserves the present system of appellate review now used in the Army and Air Force, but provides that for the sake of uniformity of interpretation and application, question of interpretation or construction may be certified to the United States Court of Appeals for the District of Columbia.

The present system of automatic appellate review is a unique feature in the Army and Air Force system of justice which accords to every person accused of a serious offense rights which no other judicial system civil, or military, does. Perhaps it would be well to explain it at this time. Let us trace a case from its beginning until its final disposition.

An offender is apprehended and charges are prepared against him after a preliminary investigation. These charges are forwarded to his regimental commander who orders a fair and impartial investigation. At the investigation the accused has a right to be represented by counsel furnished him by the officer exercising general court-martial jurisdiction. He can cross-examine witnesses for the Government and introduce his own. The report and recommendations of the investigating officer and the views of the regimental commander together with the charges and the allied papers then go to the officer exercising general court-martial jurisdiction. The latter refers the charges and all papers to the staff judge advocate for advice, whether the case warrants trial or whether the charges should be dismissed. Assume then that the charges are referred for trial and a trial is had and results in a conviction. The verbatim record must then be carefully reviewed by the staff judge advocate who prepares a review in writing for presentation to the reviewing authority. Many cases are dismissed at this and earlier stages for a multitude of reasons. If the staff judge advocate finds the record legally sufficient to support any sentence of bad conduct discharge or worse, and the record is approved by the reviewing authority, it goes to a board of review in the Judge Advocate General's office.

If the board of review holds the record of trial bad—and the Judge Advocate General agrees, the case is ended right there.

If the board holds the record good and the Judge Advocate General agrees that it is, the reviewing authority can order the sentence into execution, except that every very serious case like a case involving a death sentence, a life sentence, dismissal of an officer or a case involving a general officer

must also be confirmed. The confirming authority in cases of death sentences is the President. In other cases it is the judicial council consisting of three general officers of the Judge Advocate General's Corps acting together with the Judge Advocate General.

Now let us suppose the Board of Review holds a case good, and the Judge Advocate General disagrees. He then refers the case to the Judicial Council, even though it is not one of the serious cases which goes to the Council automatically. If the Judicial Council and the Judge Advocate General are in disagreement then the question is resolved by the Secretary of the Department.

Now all these agents are independent judicial bodies removed from command influence. The Board of Review and the Council have minds of their own and if you take the trouble to examine the various volumes of reports in which the opinions of the Board of Review are collected, you will find no evidence of command influence over their actions.

This system of checks and balances, except for the Judicial Council, was the capstone of Military Justice during World War II. Now there has been a lot of criticism of the system of military justice, mostly about excessive sentences and command influence at the lower levels. There has been no criticism of the system of appellate review. It is this system, which evoked a grudging tribute from the critical Vanderbilt committee. That Committee reported:

"The Army system of justice in general and as written in the books is a good one;

*** it is excellent in theory and designed to secure swift and sure justice;

*** the innocent are almost never convicted and the guilty are seldom acquitted."

The committee found some faults and made certain recommendations, most of which were enacted into law last year. The abuses dealing with excessive sentences and command influence have been corrected in the Kem amendments and in the new manual for courts martial.

Unfortunately the bill now before you chips away and whittles away some of the rights for which the Senator from Missouri fought so valiantly last year. Its worst overall feature is that it destroys the checks and balances which insure justice to the accused and to the Government.

Now to emphasize the point, it is to be borne in mind that under the Kem amendment and under the bill before us, the appellate agencies in the Judge Advocate General's office have extraordinary powers which are rarely exercised by appellate courts. They have the power to weigh the evidence, judge the credibility of witnesses and determine controversial facts.

Instead of a system of checks and balances, the uniform code before you makes the Board of Review the final and only appellate agency to consider questions of fact. Under article 66 (c) it is given absolute discretion to

approve any such findings or sentences or parts of sentences only what it determines should be approved. If it acts on the facts, or on policy or anything other than law, its determination is final and conclusive. Neither the Judge Advocate General nor the accused can appeal any question other than one of law to the Court of Military Appeals. Of course, the accused can always petition for a review, but under article 67 (d) the Court of Military Appeals would be precluded from considering it.

Now there goes your system of checks and balances—all up in smoke, predicated upon a notion that a copy of our usual civilian system of appeals is better. And there goes the unique feature of automatic appellate review, because now the person who secures a dismissal or a life sentence must perfect an appeal, probably hire a lawyer, and petition the Court of Military Appeals for a review in the hope that the clerk who considers his petition will grant him one, whereas under the Kem amendment he is guaranteed automatic consideration by the board of review, by the judicial council, and by the Judge Advocate General in every case.

I urge you not to make this retrograde step. Leave the appellate system as it is in the Army and Air Force and give it also to the Navy. Then you will have uniformity. Now to insure uniformity of interpretation, let the Judge Advocate General, or the Secretary, or the President certify particular cases in which there may be conflicting views or one requiring interpretation of the statutes to the United States Court of Appeals for the District of Columbia.

Those are essentially the recommendations of General Green, except that he would prefer to set up a court of appeals consisting of the three Judge Advocate Generals and the general counsel of the Treasury. There is a great deal of merit in his proposal, but the drive of civilian review is so great that I feel there must be some merit in it too. Rather than set up another specialized court, I would rather see those cases go to a United States court in whom all concerned can have confidence—not into one which must, by statute, be constituted on the basis of political consideration. I have never before heard a proposal like that contained in article 67 (a) (1) that “not more than two of the judges of such court shall be appointed from the same political party.” Political considerations, one way or the other, have no place in the appointment of a judicial body for the armed forces.

Although my amendments do not follow altogether General Green's views, I would like the Senate to hear the views of the one man in the Government who has had the most widespread and over-all experience with a military system of appellate review.

“4. Powers of the Board of Review.

“Article 66 (c) provides in part that the Board of Review ‘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.’

"Under articles 66 and 67 the determination of the Board of Review is final as to any matter other than a question of law. The latter is subject to appeal to the Civilian Court of Military Appeals either by the Judge Advocate General or the accused. This in effect authorizes the Board to disapprove or mitigate legal sentences which have been approved by responsible senior commanders. It authorizes them to consider other than legal matters in determining what part of a finding or the sentences, should be approved. For example, a board may consider that a given order which an accused is charged with having violated is unwise, and that therefore, on the basis of the entire record, a finding should be disapproved. This makes possible an unwarranted invasion of the command prerogative and would authorize the Board of Review to substitute its judgment on military policy for that of the commander in the field. This determination under the proposed bill would be absolutely final. I could not appeal that case to the Court of Military Appeals because the Board's determination would not be based on a question of law.

"Under the present case load in my office I have six boards of review. I may soon need more. Under the proposed bill I would need even more. The members are bright, well qualified, and conscientious military lawyers. They have experience both as soldiers and as lawyers. Many of them are relatively young. They function well in determining legal sufficiency of records and in weighing evidence. They have not all, however, attained the wisdom in matters of policy which comes with experience and age nor have they all attained the instinctive familiarity with military matters which comes with many years of experience with troops. The powers which article 66 gives them have heretofore been exercised by the confirming authority, i. e., the President, the Secretary or the Judicial Council, and the Judge Advocate General—all of whom have far greater responsibility with respect to the accomplishment of the military mission than do the boards of review. I believe it unwise to entrust such sweeping powers to such relatively younger officers or civilian employees (as authorized by the code). I must use younger officers on these boards—because I can't concentrate all my older and wiser heads in Washington. Some of them are needed in the overseas theaters and other commands where difficult military legal problems arise. And even in Washington I have to use senior officers to head my claims, military affairs, contracts, procurement, and patent divisions. Under the proposed article 70 I would have to provide an undetermined number of my ablest appellate officers as appellate government and defense counsel to represent the Government and the accused before boards of review and before the Court of Military Appeals. In spite of the fact that the proposed bill will increase somewhat the number of cases to be examined by a board of review, the Judge Advocate General will have to reduce the number of boards because of the especially high qualifications these extended powers will demand and because the increased demand for the services of my most qualified officers to fill other positions. This too will delay the disposition of cases.

"The bill proposed by Professor Morgan's committee had a remedy for this provision—it authorized the Judge Advocate General to refer a case to another board of review if he was dissatisfied with its holding. This was somewhat unjudicial and the House committee struck it out—wisely, I think.

It did, however, point out the extremely critical problem. Some judicial remedy should be provided. I urge you to leave the power to commute and consider nonlegal matters with a confirming authority and to authorize the Judge Advocate General to dissent with the board and refer any case to a higher confirming authority or a Military Court of Military Appeals. This brings me to my final major point of disagreement.

"5. Civilian Court of Military Appeals.

"At the outset I would like to state that I am in accord with the underlying principle of article 67g which provides for a continuing study of military justice, matters to be conducted by a body of eminent jurists in conjunction with the Judge Advocate Generals of the services and annual report to the responsible Secretaries and the Congress. The remarkable accomplishment of the Vanderbilt committee clearly demonstrates the usefulness of such a study. It provides helpful liaison with the legal profession. It would ultimately lead to further perfection of the system of military justice.

"But with respect to a wholly Civilian Court of Military Appeals I cannot agree. Military justice is a field of the law which requires not only a thorough familiarity with criminal law—but also experience and training in military matters. You would not entrust a complicated patent problem to a tax lawyer who was not thoroughly familiar with the engineering or other technical matters involved no matter how good a tax lawyer he might be. The capstone of the system of military justice should consist of those military lawyers who are most highly experienced and trained both from a military and a judicial viewpoint; both as soldiers and as judges. The legal services of the Army, Navy, and Air Force have produced such judges and are ideally organized to produce more such judges. This requirement can't be met merely by providing that the Civilian Court of Military Appeals will consider only questions of law. Every lawyer knows that questions of fact and questions of law cannot be separated in airtight compartments. Military law in itself embodies hundreds of complicated problems of status arising out of customs of the service as well as statute and regulation.

"In the files of my office there is a case of a corps artillery group commander who was tried for the willful disobedience, before the enemy, of a division commander's orders to go into a particular position with his battalions and stay there. In the heat of the battle his group left that position. He contended that he was going to an alternate position from which he could more effectively accomplish his mission.

Among the issues in the case was the question of whether he was attached to the division or merely supporting it. This involved both a question of fact and of military law. If he was merely supporting the division, to what extent did the division commander have authority to order him to stay in a position which he considered poor; if he was attached, to what extent did the group commander have discretion in exigent circumstances to leave a position given him by the division to go to another one of his own choosing?

"These are all problems which required a thorough and detailed knowledge of tactical organization, the legal effect of a corps' standing operating procedure, and customs of the service in general. What special qualifications do civilians without extensive military experience have to determine such questions? I can cite you many such cases. For instance, is an air base several hundred miles from a target "Before the enemy"? And consider the purely military legal problem presented by *Wade v. Hunter* as to whether military exigency constituted imperious necessity with respect to former jeopardy. These are problems which ultimately would be resolved by the Court of Military Appeals.

"Is there a need for such a court? Has the administration of military justice broken down at the appellate level? I submit that there has been no such failure. The opinions and holdings of the boards of review since their creation in 1920 constitute one of the most comprehensive bodies of criminal reports in the United States, reports which compare favorably with those of both Federal and State appellate courts. The remarkable success of the military appellate system is attested to by the fact that, out of more than 200 habeas corpus cases arising since World War II only one accused has been released from confinement as the result of final court action on his petition. The grounds upon which the one exception was released was overruled by the Supreme Court of the United States 2 weeks ago in *Humphrey v. Smith*. I am proud of that record.

"Under our present system the most serious cases such as those involving death sentences, life imprisonment, cases involving general officers, and cases extending to dismissal of officers go automatically to the Judicial Council created by the Kem amendment for confirming action. Other cases where either the Judge Advocate General or the Board of Review believes that confirming action should be taken in the interest of justice may also be referred to the military Judicial Council. The case load is sufficient to keep the Council busy but not enough to create a bottleneck. Under the proposed bill only death cases and cases involving general officers will go to the Court of Military Appeals automatically but each accused will have a right to petition for review by that court. I think it has been estimated that in peacetime in 85 percent of 14,000 cases, or in almost 12,000 cases, the accused will have a right to petition the Court of Military Appeals for review. I think it fair to assume that a substantial percentage of those 12,000 accused will exhaust their remedy. Although only a small percentage of those cases may result in review, the task of considering the petitions themselves will be enormous. If the Court of Military Appeals of three judges gives the consideration which each petition deserves it is self-evident that substantial and deleterious delays will occur.

"I think I have demonstrated that there is no need for further review for legal sufficiency of records after military appellate review. Under the uniform code there is unquestionably a need for uniformity of sentences and uniform interpretation. Our present system is working well in the Army, and as far as I know, in the Air Force. It can be extended, with modification perhaps, to fit the needs of the other services. It preserves to each service the control of individual cases within the service. I recommend that our system be preserved. In order to provide for uniformity of sentences and of interpretation I would suggest that there be estab-

lished in the National Military Establishment a military Court of Military Appeals composed of the Judge Advocate Generals of the services. Their function, together with a civilian advisory body, should be to recommend uniform policies of punishment and improvements in the administration of military justice. To provide for uniformity of interpretation, each Judge Advocate General should be empowered to certify any case for legal determination by the entire Court of Military Appeals whenever uniform legal interpretation is required.

"The proposal I make would preserve the advantage of completely automatic appellate review for all cases of the same class—which is perhaps the most important right of an accused in the military service and which is not accorded him by civil jurisdictions. It also preserves to all appellate agencies the power to weigh evidence and determine controverted questions of fact which are powers not generally exercised by civil appellate courts and which afford to an accused person rights which no other judicial system does. It would preserve the significant reforms in the administration of military justice made since 1920. Finally, by retaining the military judicial council created by the Kem amendment it would provide a career incentive which will attract able lawyers to the military service to perform the many functions which the bill requires."

I will now explain briefly each article contained in amendment L:

Article 63. Rehearings: This has been left as proposed by the committee except for changes in terminology consistent with articles 66, 68, and 70.

Article 64. Approval of the convening authority: The only change in this article as reported is to clarify that no sentence may be executed unless approved by the convening authority. The other requirements are set forth in articles 65, 66, and 70. This was taken from 47d.

Article 65. Disposition of records after review by the convening authority: Paragraph (h) spells out the requirement that in addition to the approval by the convening authority, record of trial by special court martial which is approved include a bad conduct discharge, must also be approved by the officer exercising general court-martial jurisdiction and be treated in every respect like a record of trial by general court martial. I have stricken the provision for advisory review by a board of review before the convening authority acts. Since the record must go back to a board of review before the bad conduct discharge is executed after the reviewing authority approves it I can see no reason for two trips to Washington. As I see this system, the board of review will be too busy to do the job of staff judge advocates. Since there is no such provision under article 61 with respect to general courts martial such special time-wasting provision with respect to a special court-martial record seems foolish to me.

Article 66. Appellate review in the office of the Judge Advocate General: This is almost identical to article of war 50 of the Kem amendment now in force in the Army and Air Force. There has been added to the cases requiring automatic appellate review any case in which there is adjudged confinement for 1 year or more whether accompanied with a bad-conduct discharge or not.

Article 67. Branch offices: Is the same as article of war 50 (c) which provides for the establishment of branch offices with boards of review and a judicial council in a distant command. It is to be borne in mind that death sentences cannot be confirmed by the branch office but must be sent to Washington for confirming action of the President. Theater commanders no longer have confirming powers.

Article 68. Review by the United States Court of Appeals for the District of Columbia: This article preserves to each service an appellate system similar to that now in effect in the Army and Air Force. In the interest of uniformity, the President, the secretary of a department, or a judge advocate general are authorized to certify any case referred to them for confirming or appellate action to the United States Court of Appeals for the District of Columbia, if a question of uniformity or interpretation of the statute shall arise. The court will consider questions of law only, since other questions are fully covered by the ordinary appellate review and confirming action. It will have final authority to disapprove findings or sentence in whole or in part. If it holds any finding or sentence legally sufficient, it shall return the record to the authority who certified the case for completion of confirming or appellate action.

Article 69. Advisory Council on Military Justice: This article will provide a confirming study on the administration of military justice by a body of eminent jurists in conjunction with the Judge Advocate General such as that provided for in article 67g of the bill as reported. This is the only desirable feature of the article 67 as reported.

Article 70. Confirmation: This is substantially the same as ARTICLE OF WAR 48. It provides confirmation of the more serious sentences as follows:

1. A sentence to death involving a general or flag officer may be confirmed by the President before it can be carried into execution.

Sentences involving life imprisonment, dismissal, or reduction to the ranks of an officer, or dismissal or suspension, a cadet or midshipman will be confirmed by the Judicial Council and the Judge Advocate General. If the Judge Advocate General and the Council disagree the sentence will be confirmed by the Secretary of the Department concerned.

Other cases which either the Board of Review or the Judge Advocate General has transmitted to the Council in the interest of justice or because of a disagreement may be confirmed by the Council alone unless it is not unanimous, or unless the Judge Advocate General desires to participate in the confirming action, in which event his participation is necessary.

Article 71 lists the powers incident to the power to confirm; they include the power to approve, confirm, or disapprove the whole or any part of a finding of guilty or a sentence. It includes the power to commute sentences; restore rights, privileges, and property affected of a finding or sentence disapproved or vacated; the power to order the sentence to be carried into execution; or to remand a case for rehearing.

Article 72. Suspension, vacation of suspension: This has been clarified to show that any authority competent to order the execution of a sentence, that is the reviewing authority of the confirming authority, may suspend a sentence, or part of a sentence, except a death sentence when that authority takes his action. It also provides that the death or honorable discharge of a person under a suspended sentence operates as a complete remission of the unexecuted portion of the sentence.

Section 16 — at the end of the bill — provides for the creation of three additional judges to the United States Court of Appeals for the District of Columbia to take care of the additional business that court will have as a result of article 68, and to relieve the pressure of work of that court with respect to its other matters.

Amendments M to Y inclusive: The next group of amendments deals with the punitive articles. These are the articles which denounce and define offenses. This, after all, is the meat of any penal code — everything else is procedural. In spite of their enormous importance the punitive articles appear to have received the least consideration of any body which has considered the bill. It is obvious from the glaring errors which appeared in the bill when first introduced that Professor Morgan's group considered these articles very hastily. In the original proposal voluntary manslaughter was apparently not an offense. This the House committee corrected in part. We next come to the consideration given by the House committee. The records of the hearings show that the punitive articles — all 45 of them — were considered on one Saturday afternoon. There were able lawyers on that committee. They saw several of the more glaring defects and hastily corrected them. The hearings show that the representatives of the National Military Establishment were utterly confused when searching questions were directed at them with respect to the few articles considered in detail. Nevertheless, only a few hours were devoted to this important article and many a grievous error was overlooked. Now, I do not maintain that my amendment will correct every error. For all I know there are many other sleepers in these articles. I think they should be considered very carefully indeed by people who know and understand criminal law. But if you want the bill to become law in a hurry, the amendments I am proposing will correct many of the mistakes of substantive law which the bill as reported contains.

I have not proposed an amendment to article 134, the general article, because it is drawn substantially in the same words as ARTICLES OF WAR 96. The construction of the article which appears in the Manual for Courts Martial is not, however, the one cited by the committee in its reports.

That article provides:

“Though not specifically mentioned in the code, all disorders and neglect 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 degree of the offense, and punished at the discretion of the court.”

Now what are these crimes and offenses, not capital. The President's interpretation in the Manual for Courts Martial, following the ancient construction placed upon the article by the Judge Advocate General for many years stated:

"Crimes or offenses, not capital, which are referred to and made punishable by article 96 include those acts or omissions not made punishable by another article which are denounced as crimes or offenses by enactments of Congress or under the authority of Congress and made enforceable by Federal civil courts.

"State and foreign laws are not included within the crimes or offenses not capital referred to in article 96 and violations thereof may not be prosecuted as such except insofar as State law becomes Federal law of local application under title 18, United States Code, section 13. On the other hand an act which is a violation of a State law or a foreign law may constitute a disorder or neglect to the prejudice of good order and military discipline or conduct of a nature to bring discredit upon the military service and so be punishable under the first or second clause of article 96."

Now the committee's report, based on erroneous information contained in the House hearings states:

"This will permit the punishment of disorders and neglects to the prejudice of good order, and military discipline in the armed forces, and all conduct of a nature to bring discredit upon the armed forces. It will also authorize trial by court martial for violations of State and Federal crimes which are not enumerated as offenses under the code."

I should like to ask the distinguished Senator from Maryland whether the committee means that State law is now included in the "crimes and offenses not capital clause" and if so, what consideration moved them to upset the ancient administrative construction?

Conceivably the President did not impute to Congress an abdication to State legislatures of its constitutional power to make rules for the government of the Army and Navy?

We must bear in mind that violation of a State law is not punishable by a Federal court martial as such; it is punishable only if the act or omission is actually prejudicial to good order and discipline or if it tends to bring discredit upon the service.

AMENDMENT M

On page 177, line 3, after the word "who" insert a comma and the following: "being inferior in grade."

EXPLANATION

Article 91. Insubordinate conduct toward noncommissioned officers: My amendment makes it clear that this article deals with insubordinate conduct of a subordinate toward his superior. It was proposed to the committee by General Green. This is what he said:

"The addition of the words 'being inferior in grade' is intended to make the article consistent with its title: 'Insubordinate conduct toward non-commissioned officer.'

"Without the proposed amendment it would be possible to construe the article as follows:

" ' Any warrant officer * * * who * * * willfully disobeys the lawful order of a * * * noncommissioned officer * * *; or treats with contempt or is disrespectful in language or deportment toward * * * non-commissioned officer * * * while such officer is in the execution of his office shall be punished as a court martial may direct.'

"It is not believed that the committee intended to punish under this article a warrant officer for disrespect to a corporal."

AMENDMENT N

On page 179, lines 13 and 14, strike out "except as provided by law" and insert in lieu thereof "willfully and without authority of law."

EXPLANATION

Unlawful detention of another: This, too, was proposed by General Green for the following reasons:

"The proposed amendment inserts the word 'willfully' as describing the offense denounced. It is believed that the amendment will prevent prosecution for merely technical violations of the code pertaining to apprehension, arrest, or confinement. It will require that the act be done with unlawful intent."

AMENDMENT O

On page 192, beginning with line 6, strike out all down to and including line 10 and insert in lieu thereof the following: "Any person subject to this code who, with intent to commit a felony therein, 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."

EXPLANATION

This deals with article 129, burglary.

This is one on the Senate committee for the House version was considerably more sensible.

The committee's version is:

"Any person, subject to the code who, with intent to commit an offense punishable under article 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."

This limits burglary to breaking and entering at night with intent to commit one of the following, but no other, offense:

1. Murder.
2. Manslaughter.
3. Rape and carnal knowledge.
4. Larceny and wrongful appropriation.
5. Robbery.
6. Forgery (whoever heard of anyone breaking and entering with intent to forge).
7. Maiming.
8. Sodomy.
9. Arson
10. Extortion.
11. Assault.

But what about the person who breaks and enters a dwelling in the nighttime with intent to commit malicious destruction (18 U. S. C. 1363 and art. 109 of the Code). He is not guilty of burglary—even though malicious destruction is a felony under 18 United States Code 1363. See 18 United States Code 1 for a definition of a felony. There must be hundreds of other felonies not included in the restrictive definition. Then bear in mind what the restrictive definition does to murder defense in article 118. Under that article an unlawful homicide committed while perpetrating a housebreaking (example—breaking and entering a dwelling in the nighttime with intent to commit malicious destruction or breaking and entering a warehouse with intent) would under article 118 (4) and articles 119 (C) (2) as presently phrased, be guilty of involuntary manslaughter only. The law reports are full of cases to the contrary. On the other hand, the person who breaks and enters a dwelling with intent to commit forgery would be guilty of murder if an unlawful homicide occurs. I cannot follow the logic of this.

The House committee changed the Morgan group's proposal to "with intent to commit a criminal offense therein." The Senate committee went back to the Morgan proposal which, in my opinion, has little merit. I suggest we follow the common law which required only the intent to commit a felony, felony being a term which varies with the course of history and experience of mankind. The present definition is too limited in scope and unnecessarily excludes the breaking and entering a dwelling in the nighttime with intent to commit one of the many felonies (18 U. S. C. 1) not denounced in articles 118 through 128 of the Code.

AMENDMENT P

On page 180, between lines 3 and 4 insert the following:

"(1) misbehaves himself; or."

On page 180, renumber all succeeding paragraphs.

On page 180, line 22, after "ance" insert a comma and the following:
"consistent with his duty and mission."

EXPLANATION

Art. 99. Misbehavior before the enemy:

This amendment is one proposed by General Green in his testimony. He commented:

"The foregoing amendment adds the general provision contained in article of war 75 'who * * * misbehaves himself.' (1) This term has long been construed as making culpable under the article any conduct by an officer, or a soldier not conformable to the standard of behaviors before the enemy set by the custom of our arms. It has been used to punish flagrant misconduct before the enemy not specifically denounced elsewhere in the same article. In view of its long established construction I recommended its retention in the code.

"Section (10) has been amended to make it clear that it is not intended to compel a soldier or commander to abandon a mission of paramount importance in order to render relief to troops, etc., who may be in distress. For example, it is standard instruction to infantrymen that they must continue to advance during an attack without stopping to render aid to the wounded. Such functions are left to medical aid men."

AMENDMENT Q

Art. 118. Murder.

Any person subject to this code who unlawfully kills a human being with malice aforethought is guilty of murder and shall suffer such punishment as a court martial may direct, except that if found guilty of premeditated murder he shall suffer death or imprisonment for life as a court martial may direct.

EXPLANATION

Murder: The article attempts to define murder, but departs both from the common law definition and from that of 18 United States Code 1111.

As defined in MCM, 1949, and in 18 United States Code 1111:

"Murder is the unlawful killing of a human being with malice aforethought."

The definition of the proposed article retains the requirement that the killing be unlawful by prescribing that it must be without justification or excuse, although the usual construction of "unlawful" is without legal justification or excuse. In lieu of the requirement that it be accompanied by malice aforethought, the article prescribes, in the alternative, four states of mind or intents:

1. A premeditated design to kill; or
2. An intent to kill or inflict great bodily harm; or
3. Engaging in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or
4. Engaging in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, aggravated arson.

The first alternative sufficiently supplies the necessary element for premeditated murder for which the mandatory punishment is death or life imprisonment. The other three supply some, but not all, of the instances which have in the past been deemed sufficient to show malice aforethought. For example, there is omitted "intent to oppose force to an officer or other person lawfully engaged in arresting, keeping in custody, or imprisoning any person, dispersing an unlawful assembly, suppressing a riot or affray, or otherwise keeping the peace, provided the offender has noted that the person killed is such officer or other person employed."

Intent to commit a felony inherently dangerous to life has been traditionally regarded as proof of malice aforethought. This article limits the felonies which might be considered as involving malice to the ones specified. The selection is not particularly logical. An unintentional killing in the perpetration of a housebreaking would be involuntary manslaughter, whereas such a killing in the perpetration of a burglary would be murder. Considering that the distinction between burglary and housebreaking might be only as to whether the unlawful entry was affected a few minutes before or after sunset, the danger of overly close definition in a punitive statute becomes readily apparent.

My proposed amendment is the Federal definition of murder as defined in 18 United States Code 1111.

AMENDMENT R

Art. 119. Manslaughter.

(a) Any person subject to this code who unlawfully kills a human being in the commission of an intentional act inherently dangerous to life, done in the heat of sudden passion brought about by adequate provocation or in good faith upon, but in manifest excess of, the authority of law or apparently lawful superior order, is guilty of voluntary manslaughter and shall be punished as a court martial may direct.

(b) Any person subject to this code who unintentionally kills a human being in the commission of a culpably negligent act or in the commission of an act wrongful in itself but not inherently dangerous to life is guilty of involuntary manslaughter and shall be punished as a court martial may direct.

EXPLANATION

Article 19. Manslaughter: The present article as reported is a distinct improvement over that initially proposed by the National Military Estab-

ishments in that it at least defines voluntary manslaughter. General Green, however, proposed some changes in the improved version, as follows:

"As to voluntary manslaughter, the proposed amendment to article 119 does away with the necessity for definition of the phrases 'intent to kill' appearing in the article as presently drawn. It will be noticed that the proposed definition of voluntary manslaughter follows that set forth in paragraph 180a, MCM 1949. Voluntary manslaughter is homicide which would be murder were not the malice aforethought ordinarily implied from the doing of an act likely to result in death excusable because of adequate provocation *Commonwealth v. Webster* (5 Cush (Mass.) 295).

"The proposed definition of involuntary manslaughter has also been taken from paragraph 180a, MCM 1949 and is considered to be a most modern and complete definition of that crime. See *Lee v. United States* (112 F. 2d 46, and 40C. J. S. p.868 (and cases there cited)), to the effect that homicide unintentionally committed in the perpetration of an act not inherently dangerous to life, though the act be a felony, is not murder but at most involuntary manslaughter. The act must, of course, be wrongful in itself (*malum in se*). It is thought that the requirement in the article as presently written that the act be one 'directly affecting the person' is misleading and perhaps too restrictive."

I think it would be well also to incorporate into the definition of voluntary manslaughter one recognized by the courts but which is seldom found in statutes - namely, the killing in good faith by use of excessive force by a soldier or a military policeman in manifest excess of the authority of law or apparently lawful superior order. Such a case might arise where a guard shoots an escaping prisoner whom he should have been able to recapture without such force.

AMENDMENT S

Art. 121. Larceny and wrongful appropriation.

Any person subject to this code who, knowingly and with intent to deprive the true owner permanently of his proprietary interest, wrongfully appropriates personal property to the use of a person other than the true owner without such owner's consent, or with his consent obtained by false pretense, steals such property and is guilty of larceny, and shall be punished as a court-martial may direct; but if the appropriation is committed with intent to deprive the true owner only temporarily of his proprietary interest, he is guilty of wrongful appropriation and shall be punished as a court martial may direct. Whether the property initially came lawfully or unlawfully into the hands of the person appropriating it shall be immaterial with respect to these offenses.

EXPLANATION

Larceny: This is a slight improvement over that passed by the House in that it does not brand as a thief the person who appropriates property without to deprive the owner permanently of his property. However, as long as it seems to be the trend of modern legislators to abolish the dis-

inction between larceny, embezzlement, and other forms of theft, I do not see why we burden this article with the manner in which the thief initially gets his hands on the stolen property. Why do we bother with trespass, withholding, or obtaining, the beginnings of a wrongful appropriation. Let us concern ourselves with the end result.

1. If all forms of theft are to be combined in one definition, it would seem completely unnecessary to inquire whether the thief initially came by the property as a result of taking (common law larceny), withholding (presumably embezzlement), or obtaining (presumably obtaining by false pretense). It should be sufficient if, whatever the original means of acquisition, he thereafter, with the requisite intent, wrongfully appropriated it to the use of one other than the true owner without such owner's consent, or with his consent if obtained by false pretense. This point is tacitly admitted in the new subsection (2).

2. Throughout the definition there is an indication that one may commit larceny by taking, etc., from the possession of the true owner (the person who has the immediate and exclusive right to possession) or of any other person, even though there is no intent to deprive the true owner and even though the true owner consents. Thus, one who wrongfully took property from a thief with intent to return it to the true owner would, under this definition, be guilty of larceny. Such a person might be guilty of an incidental branch of the peace, but he certainly should not be held guilty of larceny. Of course, with respect to pleading, any person with a possessory (special) interest may alleged to be an owner, even though he be a thief himself. But this is simply a matter of pleading, the purpose of which is merely to identify the property stolen, which matter should properly be treated in the manual and should have no place in the definition of the substantive offense of larceny.

3. With respect to the element of intent in the article as presently drawn there would seem to be no real difference between an intent to deprive, an intent to defraud, and an intent to appropriate. Obviously, all are intent to deprive. Fraud, in the sense of the crime of obtaining, is covered in my proposal by way of negating consent when obtained by false pretense.

4. The words "article of value of any kind" following the words "personal property" indicate that disseisin and adverse possession of real property may be larceny.

There seems to be little point in the armed services in question of law of real property. In this connection, my proposed definition would cover property severed from the realty by the thief, for the reason that once the property is severed it becomes personal property and when it is then moved or otherwise made the subject of a wrongful exercise of dominion, it is "appropriated."

The amendment I am proposing is an extension of the definition of that crime in paragraph 180, Manual for Courts Martial, 1949. It includes all forms of theft; larceny, embezzlement, obtaining by false pretenses, and knowingly receiving stolen property. The word "appropriate" is well known to the military and has often been defined to comprehend various

forms of wrongful use of property of another without regard the property initially came lawfully or unlawfully in the hands of the person appropriating it (article of war 99; article for the government of the Navy 19).

AMENDMENT T

Art. 122. Robbery.

Any person subject to this code who, with intent to steal, wrongfully takes personal property from the person or in the presence of another, against his will, by violence or intimidation, is guilty of robbery and shall be punished as a court martial may direct.

EXPLANATION

Article 122. Robbery: This article greatly increases the type of intimidation which can supply the element of intimidation in robbery.

The proposed article would make "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 anyone in his company" sufficient intimidation to establish robbery. By failing to qualify the nature of the property contemplated, the article makes a threat to destroy some inconsequential item of personal property sufficient for intimidation in robbery.

The true test is that the intimidation, be it a threatened injury to the victim's property or that of a relative, is of sufficient gravity to warrant giving up the property demanded by the assailant. My proposed amendment omits the unnecessary and dangerous part of the definition of robbery.

AMENDMENT U

Art. 123. Forgery.

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

(1) falsely makes or alters any writing of a public or private nature, which might operate to the prejudice of another; or

(2) passes, utters, offers, issues, or transfers such a writing as true and genuine, knowing it to be so made or altered; is guilty of forgery and shall be punished as a court martial may direct.

EXPLANATION

Forgery: This amendment is proposed by General Green in his appearance before the committee. His comments were:

"The definition of this crime as presently set forth in article 123 is much too narrow insofar as it states that the instrument 'would, if genuine,' apparently impose a legal liability on another or change his legal right or liability to his prejudice.' There is no reason for requiring that the instrument might operate to the legal, as distinguished from other, prejudice of another. False instruments which tend to impair or impede a governmental function

have been held to be subjects of forgery. **Head v. Hunter** (141 F. 2d 449, 451). The proposed definition is taken from section 22-1401 of the Code of the District of Columbia."

AMENDMENT V

Art. 126. Arson.

Any person subject to this code who willfully and maliciously sets fire to or burns any building or structure, movable or immovable, is guilty of simple arson and shall be punished as a court martial may direct; but if the building is a dwelling or if the life of any person in the building or structure is put in jeopardy, he is guilty of aggravated arson and shall be punished as a court-martial may direct.

EXPLANATION

Article 126. Arson. Paragraph (b) defines and denounces simple arson as the malicious burning or setting on fire the property of another except as provided in subdivision (a). Presumably the setting on fire of any personal property—no matter how insignificant in value—and no matter whether it be shelter, a chair, or a bundle of old newspapers would constitute arson.

This article is much too broad.

My amendment delates so much of the definition of arson as indicated that the crime may be committed by burning any kind of property. The definition I suggest follows generally that contained in 18 United States Code 81.

AMENDMENT W

Art. 127. Extortion.

Any person subject to this code who, verbally or in writing, threatens to accuse another of a crime or offense or threatens an injury to the person or property of another, with intent thereby to obtain anything of value or to compel any person to do an act against his will, is guilty of extortion and shall be punished as a court martial may direct.

EXPLANATION

Article 127. Extortion: In proposing this amendment, General Green commented:

"The definition of extortion as presently written in Article 127 does not set forth the type threats which the law considers of a sufficiently grave nature to warrant a conviction of extortion, and does not mention intent to make a person do an act against his will, which is generally considered to be a sufficient intent. See section 22-2305, District of Columbia Code; Massachusetts General Laws, chapter 265, section 25.

AMENDMENT X

Article 128. Assault.

(a) Any person subject to this code who, with unlawful force or violence, attempts to do bodily harm to another or puts another in reasonable fear of immediate bodily harm is guilty of assault and shall be punished as a court martial may direct.

(b) Any person subject to this code who, intentionally or through culpable negligence, unlawfully applies force to the person of another by a material agency, mediately or immediately, is guilty of assault and battery and shall be punished as a court martial may direct.

(c) Any person subject to this code who commits an assault with a dangerous weapon or other instrument or force likely to produce great bodily harm, or commits an assault with specific intent to do great bodily harm, is guilty of aggravated assault and shall be punished as a court martial may direct.

(d) Any person subject to this code who commits an assault with intent to commit any felony is guilty of felonious assault and shall be punished as a court martial may direct.

EXPLANATION

Article 128. Assault: The proposed definition of assault is taken from paragraph 180k, Manual for Courts Martial, 1949.

Article 125 (b) of the present draft restricts assault with intent to do bodily harm (not with a dangerous weapon) to cases where bodily harm is actually committed. There seems to be no warrant for this restriction and the proposed amendment follows 18 United States Code 113 (c).

The proposed amendment adds felonious assaults (assaults with intent to commit any felony). Such assaults are denounced in 18 United States Code 113 (a) and (b). The Morgan report states that such assaults were intentionally omitted from the code because they were actually attempts. This is thought not to be the law, for a person can assault another (for example, a watchman en route to his place of employment) with intent to commit a felony (for example, a housebreaking) without having gone far enough with respect to the intended felony to constitute an attempt to commit it.

My amendment also includes a definition of assault and battery which I believe to be an appropriate offense for inclusion in the code. The definition was taken from the Manual for Courts Martial.

AMENDMENT Y

On page 200, line 12, after the word "any", insert "nonjudicial."

EXPLANATION

Article 140, Delegation by the President. In explaining to the Committee on Armed Services of the House of Representatives the intention of the draftsmen with respect to the article, Mr. Larkin stated:

"I think, despite the 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" (Hearings on H. R. 2498, p. 1260).

In *Runkle v. United States* (122 U. S. 543, 556) the Supreme Court held that the President could not delegate his judicial function. Its reason was clearly stated to be that the law under which he acted did not permit such delegation. Speaking of a court martial, the Supreme Court stated:

"To give effect to its sentence it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all statutory regulations governing its proceedings had been complied with.
* * *

"There can be no doubt that the President, in the exercise of his Executive power under the Constitution, may act through the head of the appropriate executive department. * * *

"Here, however, the action required of the President is judicial in its character, not administrative. As Commander in Chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts martial in cases of this kind."

I emphasize that the Supreme Court said by law — and not by any inherent constitutional power — but simply by statute.

"This implies that he is himself to consider the proceedings of courts martial in cases of this kind. This power he cannot delegate. * * * And this because he is the person, and the only person, to whom has been committed the important judicial power of finally determining upon an examination of the whole proceedings of a court martial, whether an officer * * * shall be dismissed * * * as punishment for an offense with which he has been charged and for which he has been tried."

Now the proponents implied that if this section were construed as applying to judicial acts of the President it would be unconstitutional. I'm not a lawyer but I do not so construe the Runkle case. To me it clearly implies that if we pass a statute authorizing the President to delegate his judicial functions—that will be the law and we cannot complain if he exercises the power by delegating to anyone he sees fit the power to approve or disapprove death sentences. Now if we don't want him to delegate his judicial function we had better say so clearly and unambiguously right in the sta-

tute. Even if the proponents were right in their construction of the effect of the law I see no reason why the Congress should enact a statute of doubtful constitutionality and wait for the Court to construe it consistently with the Constitution and with common sense.

My amendment effects what Mr. Larkin said was intended.

On page 206, between lines 12 and 13 insert the following new sections:
"JUDGE ADVOCATE GENERAL'S CORPS FOR THE NAVY

"Sec. 14. (a) There is hereby established in the United States Navy a Judge Advocate General's Corps which shall consist of one Judge Advocate General with the rank of rear admiral, one assistant with the rank of rear admiral, three other officers with the rank of rear admiral, and an active list commissioned officer strength to be determined by the Secretary of the Navy, but such strength shall not be less than 1½ percent of the authorized active list commissioned officer strength of the United States Navy, and in addition warrant officers and enlisted men in such numbers as the Secretary of the Navy shall determine.

"(b) (1) Regular Navy officers shall be permanently appointed by the President, by and with the advice and consent of the Senate, in the Judge Advocate General's Corps of the Navy in the commissioned officer grades of rear admiral, captain, commander, lieutenant commander, lieutenant, and lieutenant (junior grade). The names of commissioned officers of the Judge Advocate General's Corps of the Navy below the grade of rear admiral shall be carried on the judge advocate's promotion list. The Judge Advocate's promotion list shall be established by entering thereon the names of qualified officers of the Navy who make application to transfer to such corps and whose applications are approved by the Secretary of the Navy. The names of all such officers shall be entered on such list without change in their order of precedence on the existing promotion list. The authorized numbers in each of the several grades in the Judge Advocate's promotion list shall be prescribed by the Secretary of the Navy, but the members thus authorized shall not exceed the following percentages of the total strength authorized for that list: 8 percent in the grade of captain, 14 percent in the grade of commander, 19 percent in the grade of lieutenant commander, 23 percent in the grade of lieutenant, and 36 percent in the grade of lieutenant (junior grade): **Provided**, That numbers may be authorized for any grade in lieu of authorization in higher grades: **Provided further**, That this provision shall not operate to require a reduction in permanent grade of any officer now holding a permanent appointment.

"(2) Officers whose names are carried on the Judge Advocate's promotion list of the Navy shall be promoted to the several grades as now or hereafter prescribed for promotion of promotion-list officers generally and the authorized numbers in grades below captain on such list shall be temporarily increased from time to time in order to give effect to the promotion system now or hereafter prescribed by law for promotion-list officers.

"(3) Within the authorized strength of the Judge Advocate General's Corps of the Navy additional officers may be appointed by transfer of qualified officers of the Navy, or by appointment of qualified Reserve naval offi-

cers or qualified civilian graduates of accredited law schools. Those originally appointed in the Regular Navy in the Judge Advocate General's Corps shall be credited with an amount of service for the purpose of determining grade, position on promotion list, permanent-grade seniority, and eligibility for promotion as now or hereafter prescribed by law.

"(c) The Judge Advocate General of the Navy shall, in addition to such other duties as may be prescribed by law, be the legal adviser of the Secretary of the Navy and of all officers and agencies of the Department of the Navy; and all members of the Judge Advocate General's Corps shall perform their duties under the direction of the Judge Advocate General.

"(d) Notwithstanding any other provisions of law, the Judge Advocate General, the Assistant Judge Advocate General, and flag officers of the Judge Advocate General's Corps of the Navy shall be appointed by the President, by and with the advice and consent of the Senate, from among officers of the Judge Advocate General's Corps of the Navy who are recommended for such positions by the Secretary of the Navy. Upon the appointment of an officer to be the Judge Advocate General or Assistant Judge Advocate General with the rank of rear admiral, he shall at the same time if not then holding permanent appointment in such grade be appointed a permanent rear admiral of the Regular Navy.

"JUDGE ADVOCATE GENERAL'S CORPS FOR THE AIR FORCE

"Sec. 15. (a) There is hereby established in the Regular Air Force a Judge Advocate General's Corps which shall consist of one Judge Advocate General with the rank of major general, one assistant with the rank of major general, three officers with the rank of brigadier general, and an active list commissioned officer strength to be determined by the Secretary of the Air Force, but such strength shall not be less than 1½ percent of the authorized active list commissioned officer strength of the Regular Air Force, and in addition warrant officers and enlisted men in such numbers as the Secretary of the Air Force shall determine.

"(b) (1) Regular Air Force officers shall be permanently appointed by the President, by and with the advice and consent of the Senate, in the Judge Advocate General's Corps of the Air Force in the commissioned officer grades of major general, brigadier general, colonel, lieutenant colonel, major, captain, and first lieutenant. The names of commissioned officers of the Judge Advocate General's Corps of the Air Force below the grade of brigadier general shall be carried on the Judge Advocate's promotion list. The Judge Advocate's promotion list shall be established by entering thereon the names of qualified officers of the Air Force who make application to transfer to such corps and whose applications are approved by the Secretary of the Air Force. The names of all such officers shall be entered on such list without change in their order of precedence on the existing promotion list. The authorized numbers in each of the several grades in the Judge Advocate's promotion list shall be prescribed by the Secretary of the Air Force, but the numbers thus authorized shall not exceed the following percentages of the total strength authorized for that list: Eight percent in the grade of colonel, 14 percent in the grade of lieutenant colonel, 19

percent in the grade of major, 23 percent in the grade of captain, and 36 percent in the grade of first lieutenant: **Provided**, That numbers may be authorized for any grade in lieu of authorization in higher grades: **Provided further**, That this provision shall not operate to require a reduction in permanent grade of any officer now holding permanent appointment.

“(2) Officers whose names are carried on the Judge Advocate’s promotion list of the Air Force shall be promoted to the several grades as now or hereafter prescribed for promotion of promotion-list officers generally and the authorized numbers in grades below colonel on such list shall be temporarily increased from time to time in order to give effect to the promotion system now or hereafter prescribed by law for promotion-list officers.

“(3) Within the authorized strength of the Judge Advocate General’s Corps of the Air Force additional officers may be appointed by transfer of qualified officers of the Air Force, or by appointment of qualified Reserve Air Force officers or qualified civilian graduates of accredited law schools. Those originally appointed in the Regular Air Force in the Judge Advocate General’s Corps shall be credited with an amount of service for the purpose of determining grade, position on promotion list, permanent-grade seniority, and eligibility for promotion as now or hereafter prescribed by law.

“(c) The Judge Advocate General of the Air Force shall, in addition to such other duties as may be prescribed by law, be the legal adviser of the Secretary of the Air Force and of all officers and agencies of the Department of the Air Force; and all members of the Judge Advocate General’s Corps of the Air Force shall perform their duties under the direction of the Judge Advocate General.

“(d) Notwithstanding any other provisions of law, the Judge Advocate General, the Assistant Judge Advocate General, and general officers of the Judge Advocate General’s Corps of the Air Force shall be appointed by the President, by and with the advice and consent of the Senate, from among officers of the Judge Advocate General’s Corps who are recommended for such positions by the Secretary of the Air Force. Upon the appointment of an officer to be the Judge Advocate General or Assistant Judge Advocate General with the rank of major general, he shall at the same time if not then holding permanent appointment in such grade be appointed a permanent major general of the Regular Air Force.”

AMENDMENT Z

On page 206, line 14, strike out “14” and insert in lieu thereof “15.”

On page 209, line 9, strike out “15” and insert in lieu thereof “16.”

EXPLANATION

Amendment Z: This amendment creates a separate Judge Advocate General’s Corps in the Air Force and in the Navy. There is considerable to be said for the proposition that the act of June 25, 1948 “To provide for the administration of military justice within the United States Air Force,

and for other purposes" incorporated for the Air Force not only the Articles of War but also "all other laws now in effect relating to the Judge Advocate General's Department, the Judge Advocate General of the Army, and the administration of military justice within the United States Army." Under this statute it may be argued that the provisions of the Kem amendment relating to a Judge Advocate General's Corps are applicable to the Air Force. The Air Force however, has seen fit to pick one part of the Kem amendment and disregard others. My amendment would require each of the services to operate under this feature of the Kem amendments which the Congress saw fit to accept last year over the emphatic objection of the War Department and the Army. I think the considerations, pro and con, were aptly stated by the Armed Services Committee of the House of Representatives on July 22, 1947, in reporting on H. R. 2575, Eightieth Congress, which later became law as the Kem amendment:

From Report No. 1034, House of Representatives, first session, Eightieth Congress:

"Should an independent Judge Advocate General's Corps, with a separate promotion list, be established?

"The War Department opposes the establishment of a separate Judge Advocate General's Corps; however, our committee, favors such a corps. It is important to note that every organizational representative and every individual who testified before the committee except War Department witnesses, not only favored but urged the establishment of a separate Judge Advocate General's Corps with a separate promotion list.

"Under present law command has an abnormal and unjustified influence over military justice. In opposing our decision the War Department stresses the necessity for preserving proper discipline and for giving line commanders authority which is commensurate with their responsibility. We fully agree that discipline is of the utmost importance and must be preserved; however, we feel equally certain that in the administration of military justice there is a point beyond which the considerations of justice are paramount to discipline. Under present law and under this bill, as amended, command has abundant authority to enforce discipline. It refers the charges for trial, convenes the court, appoints the trial judge advocate, law member, and defense counsel who must now be qualified personnel of the Judge Advocate General's Department and, after the trial reviews the case with full authority to approve or disapprove the whole or any part of the sentence.

"We contend that command should ask for nothing more in the furtherance of discipline. At the conclusion of a trial, under the present system, the same officers who conducted the case return to the command of a line officer who has full authority over their efficiency ratings, promotion recommendations, leaves, and duty assignments. These officers, many of whom have families and have chosen the Army for a career, would be less than human if they ignored the possibilities of such influence. We contend that those who are charged with the impartial administration of military justice must have sufficient freedom of judicial determination to meet the responsibility.

"During the course of the lengthy hearings by the Legal Subcommittee, it became apparent that it was the majority desire to establish a separate Judge Advocate General's Corps with a separate promotion list. The Under Secretary of War, Hon. Kenneth C. Royall, and Lt. Gen. Lawton Collins requested the opportunity to be heard in opposition to such a provision. Both of these witnesses appeared before the subcommittee and ably presented the views of command officers in opposition to a Judge Advocate General's Corps. In spite of this testimony by these able and respected witnesses, the subcommittee was still of the opinion that a separate corps should be established. When the matter was brought before the full committee for final action, the Secretary of War, Hon. Robert P. Paterson, and the Chief of Staff, Hon. Dwight Eisenhower, requested that they be permitted to appear before the full committee in opposition to a separate Judge Advocate General's Corps. Even though the request was unusual and was at variance with the established procedure of the committee in its consideration of subcommittee reports, the request was granted and both the Secretary of War and the Chief of Staff appeared before the committee and voiced their strenuous objections to the curtailment of the clemency power in the Office of the Secretary of War, and the establishment of a separate Judge Advocate General's Corps. As hereinbefore stated, the clemency power was restored to the Secretary of War; however, the full committee endorsed the action of the subcommittee in voting to establish a Judge Advocate General's Corps with a separate promotion list.

"The use of the term 'independent Judge Advocate General's Corps', has been rather loose and has resulted in some unfortunate and unjustified conclusions. The primary mission of every member of the armed forces of the United States is the winning of battles in wartime and the preparation to win them in peacetime. Regardless of their technical status in the armed forces, members of the Judge Advocate General's Department or Corps have that same primary mission and we do not intend that it shall be changed. Judge Advocate officers are properly members of the War Department team and while the duties of their assignments are necessarily noncombatant in nature, it seems wholly unjustified to say, as has been done, that they are less interested in the primary mission of the Army than any other member of the armed forces.

"It has been said that this is another attempt to establish special privileges for another professional group. Nothing could be further from the truth. During the entire hearings which began on April 18 and were not concluded until the latter part of June, no member of the subcommittee nor any witness who appeared before it gave the slightest intimation that he was interested in legislating for lawyers as a class. As a matter of fact, there is a shortage of qualified legal talent in the Army, and it seems inevitable that if we are to attract qualified personnel into the Judge Advocate General's Department that we must do more than has been done heretofore. The Vanderbilt committee states that approximately 25,000 lawyers applied for duty with the Judge Advocate General's Department during the war and it remains a fact that a very small percentage of these lawyers were accepted. Many lawyers preferred not to serve in the Judge Advocate General's Department because of its unusual susceptibility to 'command.'

The evidence was undisputed that many line commanders declined to use such legal talent as was available to them in matters of military justice and even went so far as to reprimand those lawyers who made an honest attempt to serve the cause of justice in military trials. Even if a separate Judge Advocate General's Corps is established, the Army will have great difficulty in obtaining qualified personnel to staff such a corps. The Army will find itself in somewhat the same position as it now finds itself with respect to doctors. They are in great demand in civilian life, and it is certain that the emoluments of civil practice exceed those offered by the Army. Some inducement must be offered to retain the qualified officers now on duty and to attract qualified graduates of our law schools into the service. The present condition does neither.

"The Secretary and the Chief of Staff have criticized a separate promotion list for the Judge Advocate General's Corps, stating that it is contrary to the basic provisions of H. R. 3830, the promotion bill, which was recently passed by the Armed Services Committee and the House. It is admitted that there are humps in certain grades in the Judge Advocate General's Department; however, any objective study of this matter will reveal that the same situation exists in other branches of the service, particularly the Air Corps. It is important to note that it is not mandatory that the Secretary of War fill all grades under the promotion bill. He may do so at his discretion, and it is inconceivable that he would take any action in this respect which was not uniform throughout the other branches of the service.

"It seems apparent that 'command' considers the Judge Advocate General's Department to be composed of a nonprofessional group, whereas we are of the opinion that the Judge Advocate's Department must be a professional group, specially trained in order that it may properly perform its function. We have been reliably informed that approximately 90 percent of the field work of the Judge Advocate's Department consists of matters relating directly to military justice and that more than 50 percent of its work in Washington is of the same nature. Another considerable function consists of the investigation and adjustment of claims. It can hardly be expected that unqualified personnel can handle these assignments. If they could, this subject would not be before us today.

"The Secretary states that the creation of a separate corps of the Judge Advocate's will not decrease the load on combat officers. We think that the creation of a separate corps would inevitably result in lessening the burden on combat officers. It is an indisputable fact that throughout the war the trial judge advocates, law members, and defense counsel, in addition to officers who investigated claims, were largely drawn from officers of the line. This resulted in those officers having a dual function and the testimony before our committee made it very apparent that the added function of military justice and claims was held to be of secondary importance.

"It is difficult to determine the costs which would be incurred by the enactment of this legislation. The War Department has estimated that the enactment of H. R. 2575 would require a total of 937 officers and a com-

parable number of enlisted men, at a cost of \$3,200,000. Since the War Department endorses this bill, it is assumed that, if enacted, adequate qualified personnel will be provided as rapidly as they become available. Our amendment proposes a corps of 750 officers, and warrant officers, and enlisted men in such numbers as the Secretary of War may determine. In any event we are of the opinion that the establishment of a separate Judge Advocate General's Corps would cost no more than the enactment of the original provisions of H. R. 2575.

"We are now on the threshold either of universal military training or of the maintenance of a professional army at least five times larger than that maintained before the last war. The future Army, no matter how it may be raised, will be composed 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. We believe that it is our duty so far as lies within our power, to see that the system to which they are exposed is reasonably designed to achieve justice. The system now in effect cannot guarantee the desired result.

"Except for the committee amendment relative to the establishment of a Judge Advocate General's Corps with a separate promotion list, the War Department favors the enactment of this legislation as is evidenced by the letter from the Secretary of War which is hereto attached and made a part of this report. The Armed Services Committee favors the enactment of the proposed legislation, as amended."

The reasons advanced in 1947 with respect to the Army are equally applicable today to the other services.

Amendment A is a composite of amendments B to Z in the form of a complete substitute bill.

United States SENATE
(Cong. Record, Vol. 96, Pt. 1, p. 1344)
February 2, 1950

CODIFICATION OF THE ARTICLES OF WAR

The Senate resumed the consideration of the bill (H.R. 4080) 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.

Mr. Kefauver: Mr. President, I ask unanimous consent that during the consideration of House bill 4080, the unfinished business, and the debate on it, Mr. Felix Larkin and Mr. Robert Hadock may sit with me on the floor of the Senate.

The Presiding Officer: Without objection it is so ordered.

United States SENATE

February 2, 1950

(Cong. Record, Vol. 96, Pt. 1, 1353-1368)

CODIFICATION OF THE ARTICLES OF WAR

The Senate resumed the consideration of the bill (H. R. 4080) 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.

Mr. KEFAUVER obtained the floor.

Mr. SALTONSTALL. Madam President, will the Senator yield for the purpose of my suggesting the absence of a quorum, it being understood that he will not thereby lose the floor?

The PRESIDING OFFICER. Does the Senator from Tennessee yield to the Senator from Massachusetts?

Mr. KEFAUVER. I yield for that purpose.

Mr. SALTONSTALL. I suggest the absence of a quorum.

The PRESIDING OFFICER. The Clerk will call the roll.

The Chief Clerk proceeded to call the roll.

Mr. SALTONSTALL. Mr. President, I ask unanimous consent to withdraw my suggestion in the absence of a quorum, and that further proceedings under the call be suspended.

The PRESIDING OFFICER (Mr. Magnuson in the chair). Is there objection? The Chair hears none, and it is so ordered.

The Senator from Tennessee has the floor.

Mr. KEFAUVER. Mr. President, I desire to speak at some length in support of House bill 4080, as amended, which was reported favorably to the Senate by the Senate Committee on Armed Services on June 10, 1949. The bill, which was passed by the House of Representatives on May 5, 1949, is entitled "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."

I desire to pay my very high respects, Mr. President, to the able Senator from Massachusetts (Mr. Saltonstall), who has worked long, and with his usual patience and ability, on this proposed legislation; to the Senator from Oregon (Mr. Morse); to the chairman of the Committee on Armed Services, the Senator from Maryland (Mr. Tydings), who has taken a great deal of interest in the subject, and also to Mr. Mark H. Galusha, of the Senate staff, who has done a great deal of worthwhile work in connection with this proposed legislation.

This is a most important bill, and I hope full consideration will be given to it by the Members of the Senate. Its purpose is to provide a new and

better system of justice in the military forces of the United States. It was drafted by a special committee in the National Military Establishment, which was instructed by the late Secretary Forrestal to achieve three important objectives. He desired that there be a uniform code of military justice which would protect the rights of those subject to it, increase public confidence in military justice, and not impair the performance of military functions. Secretary Johnson has joined in urging the passage of the bill. Our committee is of the opinion that the proposed code more nearly achieves these objectives than does any other study that has been made.

Before I explain the general provisions of the bill now before us, I think it will be profitable for all Members to consider this new bill against the background of experience with the present court-martial systems.

As Senators well know, historians have traced the origin of military law to the armies of the Greeks and the Romans. Military law has existed side by side with civilian codes and statutes over the centuries. Our own military and naval codes derive more immediately from western European procedures as developed in England and on the Continent. Continental influence has been strong, and, as a consequence, our military law has always borne many striking resemblances to the civil law, as contrasted with the Anglo-American common law. Over the years, many rules and practices have been brought over from the common law, such as the presumption of innocence, the privilege against self-incrimination, and the common-law rules of evidence. The proposed Uniform Code makes a number of additional steps in this direction.

I shall not take the time to trace the development of British military law, but it was from this source that present court-martial systems of the Army and Navy were adopted. The Articles of War, first adopted by the Continental Congress on June 30, 1775, were copied from British articles of 1765. They were redrafted by John Adams and reenacted in 1776 and enacted again as Articles of War in 1806 pursuant to the section of the Constitution which provides that Congress may make rules for the Government and regulation of the land and naval forces. There was, thereafter, no formal revision of the Articles of War until 1874, and this was more a rearrangement and classification than an actual revision. A further rearrangement took place in 1916, but it was not until 1920 that the Articles of War were completely revised.

Many radical changes were made at that time to meet the objections of those who had criticized the existing code. The articles of 1920, as amended in 1931, 1937, 1942, and 1948, constitute the law of the United States Army and Air Force today.

As was the case with the early American Articles of War, the first American Naval Articles were compiled by John Adams, who based them on the British Naval Articles of 1749. The present Articles for the Government of the Navy were enacted by Congress on July 17, 1862. This statute consisted of the 1775 Articles revised and brought down to date and included the act of 1855 creating summary courts martial. In fact, the phraseology of many of the present articles is directly traceable to the British Articles of 1749. The Articles for the Government of the Navy have been amended

several times since 1862, some of the most important amendments having been in 1893, 1895, 1909, 1916, and 1946.

While the present military and naval codes have a common origin and while in theory, substance, and administration they are fairly similar, there are, nevertheless, substantial differences between them, differences which are due to differences in operations and traditions of the services and due also to the fact that the great changes made in the Articles of War of 1920 were not incorporated in naval law.

The history of efforts to reform the court-martial systems of the services is almost as old as the Articles themselves. The major impetus to reform is well within our own memories and occurred principally after the two World Wars. As I have stated, a major reform occurred in the Articles of War in 1920. This was due entirely to the pressure of criticism. The same type of criticism took place during and since World War II and, in response to it, the Army and Navy, both, introduced amendments to their basic statutes in the Eightieth Congress. These proposed amendments were largely the results of studies by a number of groups of prominent attorneys organized by the services themselves. It will be recalled that the Army had a post-war study of court-martial sentences by a committee headed by former Justice Owen Roberts and they also had a study of court-martial procedures by a committee of which Judge Arthur Vanderbilt was chairman. The Navy had committees under the chairmanship of Mr. Arthur Ballantine, Judge Matthew McGuire, and Mr. Arthur Keeffe.

All these various reports, which were made by these eminent committees after World War I, both as to Army and Navy courts-martial, are very critical of the lack of uniformity in the two systems, the fact that men, even in the same service, but different theaters, have not been treated uniformly. The Government has gone to a great deal of expense in having these reports made, and reviewing all the courts-martial decisions. Of course, there has been a great deal of criticism and hard feeling, and a sense of unfairness of treatment on the part of many servicemen and their families who have had experience in courts martial.

The amendments proposed to the Articles of War were adopted, as you will recall, in Public Law 759 of the Eightieth Congress. In the Senate they become part of title II of the Selective Service Act by virtue of the amendment of the Senator from Missouri (Mr. Kem). The Senator from Missouri brought about many needed reforms in the amendment adopted in the Eightieth Congress, most of which, as I shall point out later, have been reincorporated and kept in the uniform code which is now before the Senate.

In this connection, it will be recalled that the Senator from South Dakota (Mr. Gurney), who has been greatly interested in this matter for years, urged a more comprehensive approach to the problem of court-martial reform. He did not feel it should be limited to the Army, but should include all the services. The Kem amendment in the Eightieth Congress being an amendment to the Selective Service Act applied only to the Army and to the Air Force, and not to the Navy.

The Senator from South Dakota (Mr. Gurney) recommended that a single uniform code of military justice be drafted to end the continual piece-meal amendments to the Articles of War and the Articles for the Government of the Navy. He spoke to Secretary Forrestal, who was then grappling with the difficult problems of the first year of unification. Secretary Forrestal agreed that a uniform code of military justice was not only one of the most logical areas of unification in the Military Establishment, but was one of the most necessary.

As a result of these discussions, Secretary Forrestal constituted in June of 1948 an interdepartmental committee in his office, and directed that they draft a uniform code of military justice for all the armed services. He appointed as chairman of this group the distinguished legal scholar, Prof. Edmund M. Morgan, of the Harvard University Law School who is one of the most eminent authorities on the law of evidence. In case any graduates of Yale or Columbia Law Schools might resent the fact that a Harvard man was selected, I might state that Dr. Morgan previously taught at both Yale and Columbia Universities.

The Morgan committee labored all last summer and fall and submitted to Mr. Forrestal in February of this year a draft of the uniform Code.

The Morgan committee made an intensive study of the Articles of War and the Articles for the Government of the Navy and has not only succeeded in codifying the two laws, but, in many instances, has completely revised their provisions. That committee considered all the studies and recommendations that have been made in recent years and compiled an impressive bibliography of reference works. They faced a more difficult problem, however, than committees in the past in that in addition to making recommendations they were called upon to draft legislation and to do it on a uniform basis to apply to all-services.

Mr. President, I have had an opportunity of examining the extensive findings and the report of the Morgan committee. It is one of the most remarkable studies and works I have ever seen. The committee considered every proposal and every viewpoint, and I think it has done a noteworthy work in getting together recommendations for a unified code, to which all the services have agreed, and which all the services recommend. I have here in my hand a copy of the Morgan report, which is only the report, not the testimony, and which is considerably thicker than a Sears, Roebuck catalog.

Heretofore, all studies have been made on a one-service basis and the many criticisms voiced against military law and procedures have not uniformly applied.

The Morgan committee, as I have said, was an interdepartmental committee. Mr. Gordon Gray, now Secretary of the Army, represented the Army. The then Under Secretary, John Kenney, represented the Navy, and Assistant Secretary Eugene Zuckert represented the Air Force.

Mr. Felix E. Larkin, general counsel of the Office of the Secretary of Defense, acted as executive secretary of the committee, and headed a working staff of some 15 lawyers from the Office of the Secretary of De-

fense and the Judge Advocate Generals' offices of the Army, the Navy, the Air Force, and the Coast Guard.

Mr. Larkin, let me say, has devoted more than 2 years of study to this problem, and his assistance, both to the Armed Services Committee of the House and the Armed Services Committee of the Senate, has been a great contribution and of tremendous aid to us in the consideration of the pending bill.

This working committee gathered and processed all the material for the main committee.

The results of the work of this committee, exemplified by the proposed Uniform Code of Military Justice, are an outstanding accomplishment. Considering the difficulty of the subject matter, its complexity, and, in many cases, its highly technical nature, the committee achieved a remarkable degree of uniformity. Naturally, a number of the provisions are the result of a compromise and, naturally, there was no final agreement on a few of them and a decision had to be made by Secretary Forrestal.

I wish to say that in examining the attitude of the services on the various proposals which have been incorporated in the unified code which is here presented, there was agreement between the services on a remarkably large number of the proposals, I should say away above 90 percent. Only a very few had to be submitted to Secretary Forrestal for determination one way or another.

The bill was submitted to the Bureau of the Budget, was carefully studied by them, and was approved by them as fully in accord with the program of the President. On February 8, 1949, Mr. Forrestal transmitted it simultaneously to the Senate and House, and it was introduced as S. 857 and H. R. 2498. Mr. Forrestal strongly supported the code, and Secretary Johnson has also informed our committee of his strong support of the bill. He has listed this as urgent legislation in the interest of our National Defense Establishment, and in the interest of unification.

The house Committee on Armed Services, through a subcommittee, conducted extensive hearings for 6 days a week over a period of 5 weeks, during which time they heard a total of 28 witnesses. Their deliberations are contained in a transcript of 1,542 pages, a very full hearing, and the subcommittee of the Armed Services Committee made much use of the extensive hearings and statements of witnesses before the Armed Services Committee of the House.

As a result of this consideration, the House committee made a number of amendments to the bill, and reintroduced the original bill in the form of a clean bill, which became H.R. 4080. This bill was favorably reported to the House of Representatives by a unanimous vote of the House Committee on Armed Services and after debate passed the House by a voice vote, almost a unanimous vote, on May, 5, 1949.

Let me say that any bill of this complicated nature which receives the unanimous vote of the distinguished members of the Armed Services Com-

mittee of the House, which I believe is composed of 26 or 27 members, must have been formulated very carefully.

The Senate Committee on Armed Services then undertook extensive hearings and, in addition to Senate bill 857, which was the original bill introduced by the Senator from Maryland (Mr. Tydings), chairman of the Senate Armed Services Committee, considered the House version, House bill 4080.

The committee heard witnesses from the major veterans organizations, the American Bar Association, the New York City Bar Association, the New York County Lawyers Bar Association, and the War Veterans Bar Association. In addition, testimony was presented by numerous well-qualified witnesses and by representatives of the Department of Defense. The committee also had the benefit of Professor Morgan's views. He testified at considerable length and strongly supported the bill. The committee scrutinized with great care the entire code and carefully considered the amendments made by the House of Representatives. Since so much of the Code and so many of the House amendments seemed appropriate to us, it was decided to report to the Senate the House version of the bill, together with the amendments made by our committee.

The reason we did not use the House language, and why we did not strike out House language, when we had amendments to take the place of the House bill language, was that some rearranging and some substantial changes were made, so we decided to report the amendments together in lieu of the House bill, so that all the language of the House bill is stricken out.

In general, the amendments of our committee have been of a technical and clarifying nature. We have tightened the provisions on jurisdiction over persons who are subject to the code; we have scaled down some of the punishments that can be imposed by commanding officers as company punishment; we have increased the protections of double jeopardy; and we have redefined and clarified several of the punitive articles.

We have changed the tenure of the Court of Military Appeals, which is provided for in the bill.

We feel that a conscientious effort has been made by a large group of people who have worked a long time on this whole subject and, though necessarily not perfect, the code has a large number of advantages to recommend it. In that connection, I would like to quote from both Mr. Forrestal's letter of transmittal and a recent letter of Secretary Johnson.

Mr. Forrestal concluded his letter by stating:

I regard this proposed bill as an outstanding example of unification in the armed services. In my opinion, the proposed bill is well designed to protect the rights of those subject to it, will increase public confidence in military justice, and will not impair the performance of military functions. Accordingly, I strongly urge its passage by the Congress.

Mr. President, I ask unanimous consent to have Mr. Johnson's letter printed in the RECORD at this point.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

As you know, I requested Prof. Edmund M. Morgan to inform your committee of my support of the Uniform Code of Military Justice when he appeared before you on my behalf.

I would appreciate it if this letter is incorporated in the record of your hearings and the committee report, because I am anxious to reiterate my strong support of the uniform code.

The code was drafted and transmitted to the Congress before I assumed office. I have taken the time, however, to familiarize myself with its principal provisions and I concur in Mr. Forrestal's opinion that the code represents an outstanding example of unification in the armed services. In my opinion, the code provides a number of very desirable protections for the accused without interfering with necessary military functions. In addition it represents a great advance in military justice in that it provides the same law and the same procedures for all persons in the armed forces. By its terms, the same rights, privileges, and obligations will apply to Army, Navy, Air Force, and Coast Guard. I cannot emphasize too much the importance of this equality and the fact that I believe it will be an item which will enhance the teamwork and cooperative spirit of the services.

I am aware of the conscientious and objective work of your committee and the House committee. I know that the bill has been improved by these constructive efforts and I wish to express to you and the members of your committee my deep appreciation. In order that the benefits of the code may be available at the earliest possible time, I strongly urge its passage at the present session of the Congress.

Mr. KEFAUVER. Mr. President, the proposed code, for the first time in the history of the armed services in this country, provides a single law for the enforcement of discipline and the trial and punishment of offenders. It is uniformly applicable in all its parts to the Army, the Navy, the Air Force, and the Coast Guard in time of war and peace.

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 any 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 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 proceedings.

If adopted, the code will be the sole statutory authority for—

First. The infliction of limited disciplinary penalties for minor offenses without judicial action;

Second. The establishment of pretrial and trial procedure;

Third. The creation and constitution of three classes of courts-martial corresponding to those now in existence;

Fourth. The eligibility of members of each of the courts and the qualifications of its officers and counsel;

Fifth. The review of findings and sentence and the creation and constitution of the reviewing tribunals; and

Sixth. The listing and definition of offenses, redrafted and rephrased in modern legislative language.

The code, while based on the revised Articles of War and the Articles for the Government of the Navy, is a consolidation and a complete recodification of the present statutes. Under it, personnel of the armed forces, regardless of the Department in which they serve, will be subject to the same law and will be tried in accordance with the same procedures.

Among the provisions designed to secure uniformity are the following:

First. The offenses made punishable by the code are identical for all the armed forces.

Second. The same system of courts with the same limits of jurisdiction of each court is set up in all the armed forces.

Third. The procedure for general courts-martial is identical as to institution of charges, pretrial investigation, action by the convening authority, review by the Board of Review, and review by the Court of Military Appeals in all the armed forces.

Fourth. The rules of procedure at the trial, including modes of proof, are equally applicable to all the armed forces.

Fifth. The Judge Advocates General of the three Departments are required to make uniform rules of procedure for the boards of review in each Department.

Sixth. The required qualifications for members of the court, law officer, and counsel are identical for all of the armed forces.

Seventh. The Court of Military Appeals, which finally decides questions of law, is the court of last resort for each of the armed forces and also acts with the Judge Advocates General of the three Departments as an advisory

body with a view to securing uniformity in policy and in sentences and in discovering and remedying defects in the system and its administration.

The code, of course, has its foundation in the Articles of War and the Articles for the Government of the Navy and incorporates a large number of the provisions of both of these statutes. In addition, it includes most of the provisions of the Articles of War as amended by Public Law 759 of the Eightieth Congress.

Mr. President, in that connection let me say that the distinguished Senator from Missouri (Mr. Kem) in many respects greatly improved the Articles of War, as I shall set forth later, by the amendment he offered to the Selective Service Act in the Eightieth Congress, which is known as the Kem amendment. The Armed Services Committee is greatly obligated to the distinguished Senator from Missouri for his suggestions to the bill, most of which have been adopted, and most of which were contained in his amendment to the Selective Service Act which was applicable to the Army and to the Air Force.

For example, the code provides—

First. For enlisted men on general and special courts for the trial of other enlisted men.

These are some of the amendments which were in the Kem amendment, and which were carried forth in the unified code.

Second. That officers be subject to trial by special courts martial.

Third. That censure or reprimand of the courts or their members by the convening authority is prohibited.

Fourth. That the accused have the right to counsel at pretrial investigation.

Fifth. That company officer punishment be extended to a larger class of officers.

The above provisions were not only retained, but are now applicable to all the armed services, whereas under Public Law 759 they applied to the Army and Air Force only.

Among the provisions designed to insure a fair trial are the following:

GENERAL COURTS MARTIAL

First A pretrial investigation is provided, at which the accused is entitled to be present with counsel, to cross examine available witnesses against him and to present evidence in his own behalf. It has some features of preliminary hearing and some of pretrial discovery as used in the civil courts.

Second. A prohibition against referring any charge for trial which does not state an offense or is not shown to be supported by sufficient evidence.

Third. A mandatory provision for competent, legally trained counsel at the trial for both the prosecution and the defense.

Fourth. A prohibition against requesting any statement from the accused without warning, and against compelling self-incrimination, and against reception in evidence of improperly obtained statements.

Fifth. Provision for equal process to accused and prosecution for obtaining witnesses and depositions and a provision allowing only the accused to use depositions in a capital case.

Sixth. A provision giving an accused enlisted man the privilege of having enlisted men as members of the court trying his case.

Seventh. A provision whereby voting on challenges, findings, and sentence is by secret ballot of the members of the court.

Eighth. A provision requiring the law officer to instruct the court on the record concerning the elements of the offense, presumption of innocence, and the burden of proof.

Ninth. A provision for an automatic review of the trial record for errors of law and of fact by a board of review with the right of the accused to be represented by legally competent counsel.

Tenth. A provision for the review of the record for errors of law by the Court of Military Appeals. This review is automatic in the case where the sentence is death or affects a general or flag officer and is upon petition showing probable error of law where the sentence involves more than 1 year's confinement, with the right to be represented by competent counsel.

Eleventh. A prohibition against receiving pleas of guilty in capital cases.

SPECIAL COURTS MARTIAL

In addition to certain of the above provisions which also apply to special courts martial, there is provided as follows:

First. The trial counsel and defense counsel must be equally qualified.

Second. In cases where a bad-conduct discharge has been imposed, a full stenographic transcript must be taken and the case is reviewed in the same fashion as a general court-martial record.

Third. Peremptory challenge and voting by secret ballot is provided as in a general court martial.

Fourth. Review by judge advocate or legal officer is required.

SUMMARY COURTS MARTIAL

First. Provision is made for permitting an accused to refuse trial by summary court upon request.

Second. Review by a judge advocate or legal officer is required.

Among some of the provisions designed to prevent interference with the due administration of justice are the following:

First. The convening authority may not refer charges for trial until they have been examined by the staff judge advocate or legal officer and have been found legally sufficient.

Second. The staff judge advocate or legal officer is authorized to communicate directly with the Judge Advocate General.

Third. All counsel at a general court-martial trial are required to be lawyers and to be certified by the Judge Advocate General as qualified to perform their legal duties.

Fourth. The law officer—a competent lawyer—rules on all questions raised at the trial, except on a motion for a directed verdict and on the issue of the accused's sanity.

Fifth. The convening authority must not act on a finding or sentence of a general court martial without first obtaining the advice of his staff judge advocate or legal officer.

Sixth. The Board of Review, situated in the office of the Judge Advocate General and removed from the convening authority, is composed of legally trained men and reviews the trial record for errors of law and of fact.

Seventh. The Court of Military Appeals is composed of civilians and passes finally on all questions of law.

Eighth. When counsel appear before the Board of Review and the Court of Military Appeals, both parties must be represented by qualified lawyers.

Ninth. Censure by a commanding officer of a court martial or any member or officer thereof because of any judicial action of the court or any member or officer is forbidden and any attempt improperly to influence official action in any aspect of a trial or its review is prohibited.

The proposed legislation is presented in 15 sections. Section 1 contains the Uniform Code, which is subdivided into 11 parts. Part I contains general provisions. Part II contains all of the provisions relating to apprehension and restraint. Part III pertains to nonjudicial punishment. Part IV sets forth the jurisdiction of courts martial. Part V prescribes the manner of appointment and composition of courts martial. Part VI prescribes pretrial procedure. Part VII prescribes trial procedure. Part VIII relates to sentences by courts martial. Part IX prescribes the provisions for appellate review. Part X sets forth the punitive articles, which define the various offenses. Part XI contains miscellaneous provisions. Section 1 of the bill contains 140 articles. These articles embrace all of the provisions of the proposed Uniform Code of Military Justice. The 14 remaining sections relate to the subject of military justice, but are not appropriately part of a code of military justice and are, therefore, not included therein.

I believe that a summary of the contents of each part of the Uniform Code will indicate to you the scope of this legislation and will enable me to high light for you those articles which are incorporations of present provisions and practices of the Army and the Navy, those which are incorporations of the amendment of 1948 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 2 sets forth the persons subject to the code and, in general, re-incorporates the provisions in the present law. A new provision worthy of comment is found in subdivision 3, which makes Reserve personnel while on inactive-duty training subject to court-martial jurisdiction. Under the Articles of War, Reserve personnel on inactive duty are not subject to military law at the present time. The Articles for the Government of the Navy, however, are applicable to members of the Naval Reserve when they are on active duty; authorized training duty, with or without pay; drill or other equivalent instructions or duty or while they are in uniform. The provision set forth in the code strikes a middle ground between the present lack of jurisdiction of the Army and the extensive jurisdiction of the Navy, but it was felt necessary to cut down and restrict the broad jurisdiction of the Navy, but it was felt unnecessary to retain jurisdiction over Reserve personnel on inactive duty under circumstances where they are engaging in certain types of training—notably week end flight training or sea duty. Under present Reserve training programs, reservists frequently partake of inactive-duty training over week ends and during the course of that training use expensive and dangerous equipment. That refers to airplanes, tanks, and equipment of that sort. It is felt necessary that, under such circumstances, there be control over such training. To insure, however, that reservists on inactive duty are not generally subject to courts martial, this provision has been carefully drafted so that it will apply only when reservists are authorized to undertake such training by written orders which are voluntarily accepted by them and which specify that they become subject to the code. Some Reserve groups were alarmed that this would make them subject to the code when they attended monthly meetings or wear their uniform or receive correspondence courses. The jurisdiction is not intended to cover such occasions, and will not cover them, both because of the requirement that the orders be voluntarily accepted and because no such acceptance will be requested except in connection with duty which involves the use of dangerous and expensive equipment.

Mr. HOLLAND. Mr. President, will the Senator yield?

Mr. KEFAUVER. I yield.

Mr. HOLLAND. I have been following with interest the distinguished Senator's statement on the application of the jurisdiction of courts-martial to reservists not on active duty. I would like to be sure, and I should like to have the RECORD state with certainty, just what is intended by that provision. Is it correct to assume that under the wording which is now included in the bill there is no intention whatever of covering within the jurisdiction of courts martial, reservists who, while required to wear uniforms during training, are not assigned to the handling of expensive and dangerous equipment?

Mr. KEFAUVER. I am delighted that the able Senator from Florida has asked the question, because it is a subject which I think should be amplified to some extent.

Under the present Articles for the Government of the Navy, as the Senator so well knows, when a naval reservist wears his uniform to attend a meeting, for example, he is subject to the provisions of the Articles for the Government of the Navy. It is a very tight kind of provision. The Army reservist, on the other hand, is not subject to such a provision. The proposal attempts to strike a happy balance between those two situations. The subject is covered both in the House committee report and in the report of the Armed Services Committee of the Senate.

I should like to read from page 10 of the House committee report:

Paragraph (3) is adapted from 34 U.S.C., section 855, and, in its present form, represents a committee amendment. It should be noted that before Reserve personnel can be subject to this code they must voluntarily accept written orders for inactive-duty training, which orders specify that they are subject to the code.

A similar provision is set forth in the Senate committee report. As chairman of the subcommittee, I wish to make it clear that reservists wearing their uniforms in a period of training or attending a course or a lecture, or something of that kind, are not intended to be covered by the code. It is intended that they be covered by the code only when they report for duty involving the use of dangerous equipment, such as an airplane. I think the Senator will agree that under such conditions reservists should be subject to the military code. They are given orders, and they must accept the orders in writing, specifying that they are subject to the code. If they do not accept the orders, they are not subject to the code.

Mr. HOLLAND. Mr. President, will the Senator yield further?

Mr. KEFAUVER. Before I yield further, I should like to read into the RECORD an excerpt from the report of the Morgan committee on this subject.

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.

I now yield to the Senator from Florida.

Mr. HOLLAND. Is it fair to say that no such orders will be issued in the case of officers and men who are assigned to duty other than to air flight duty, of which the Senator has spoken?

Mr. KEFAUVER. I should not like to limit it to air flight duty. I should say sea duty or duty requiring the use of dangerous and expensive equipment. However, I should say it would be principally air flight duty and sea duty.

Mr. HOLLAND. Mr. President, will the Senator yield further?

Mr. KEFAUVER. I yield.

Mr. HOLLAND. Is it fair to say that such orders are not expected to be

issued, nor required to be accepted, by personnel of the Infantry Corps, the Field Artillery Corps, the Anti-Aircraft Artillery, the Corps of Engineers, the Hospital and Sanitary Corps, or officers and men of various other corps other than the Air Corps and the Navy?

Mr. KEFAUVER. I may say to the distinguished Senator from Florida that it is my information and I am sure the representatives of the Army, the Air Corps, and the Navy have so testified, that the Army did not expect to use it at all, or certainly not in the instances to which the Senator has referred; that the Air Corps expects to present written orders and to ask for their acceptance only in the use of airplanes in flight duty, and the Navy only in the case of sea duty.

Mr. HOLLAND. Mr. President, will the Senator yield for a further question?

The PRESIDING OFFICER (Mr. Benton in the chair). Does the Senator from Tennessee yield to the Senator from Florida?

Mr. KEFAUVER. I yield.

Mr. HOLLAND. If I correctly understand the Senator's last answer, it is that there is no expectation on the part of the Army to make use of this feature of the law in any way whatever.

Mr. KEFAUVER. That is my information.

Mr. HOLLAND. I understand that the expectation to use it is confined to the Air Force and the Navy, and then only, in the case of the Air Force, when air flight duty is required, in the use of expensive and dangerous equipment; and in the case of the Navy, only when afloat, or in air flight duty in the use of expensive and dangerous equipment.

Mr. KEFAUVER. That is my understanding, and I shall say for the sub-committee that that is the testimony that was given to us, and that is the legislative history of the provision.

Mr. HOLLAND. Mr. President, will the Senator yield for a further question?

Mr. KEFAUVER. I yield.

Mr. HOLLAND. Is it correct that even when used in those cases, the order of the Air Force or of the Navy, as the case may be, must be brought to the attention of, and delivered to, the particular officer or enlisted individual who is involved, and must be accepted by him in writing before it is applicable to him?

Mr. KEFAUVER. The Senator is entirely correct.

Mr. HOLLAND. I thank the Senator.

Mr. KEM. Mr. President, will the Senator yield?

Mr. KEFAUVER. I yield.

Mr. KEM. I should like to ask a question in regard to subsection (11) of article 2, to which the Senator has just made reference. It appears on page

108 of the bill. Am I correct in interpreting subsection (11) to mean that a wife who accompanies her husband, who is a member of the armed forces, to a point outside the continental limits of the United States, would be subject to this code?

Mr. KEFAUVER. If the wife accompanies her husband outside the continental limits of the United States and outside the Territories listed in subsection (11), on page 108, she will be subject to the uniform code as presented in this bill, just as she is subject to the military code today.

Mr. KEM. I should like to ask the Senator whether any exceptions are made in respect to the Territories listed in the last three and one-third lines of the paragraph.

Mr. KEFAUVER. In line 17, on page 108, I think it would be clearer if the word "without" had been inserted between the words "and" and "the." I have no objection to an amendment to that effect.

Mr. KEM. Is it not necessary that such an amendment be made, if the interpretation the Senator has suggested be given to that paragraph?

Mr. KEFAUVER. With the permission of the Senator, I shall read the paragraph; it is short. I read now subsection (11) of article 2, on page 108 of the bill:

(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and—

And at that point the word "without" should be inserted—
the following Territories: That part of Alaska east of longitude 172° west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

It is intended to except those Territories or at least all the Territories except where we have a force. The Aleutian Islands are not expected. They are not expected now. That is the reason for the reference to longitude.

Mr. KEM. The point I have in mind is this: Does not the Senator from Tennessee agree that in order to make that interpretation clear, it would be essential to insert in line 17 the additional word "without," or something to that effect? In other words, does the Senator mean that the committee intends to amend the language by inserting the word "without," in line 17? If that is done, it seems to me the interpretation the Senator places on the language there is correct. But in the absence of such a change, it seems to me it is at least doubtful whether such an interpretation will be correct.

Mr. KEFAUVER. I say to the Senator from Missouri that probably such a change would make the language clearer, although I did not think it was needed. But certainly I have no objection to it, and I agree with the Senator that it will make the meaning clearer.

So, Mr. President, I shall submit as a committee amendment the insertion of the word "without" between the word "and" and the word "the," in line

17, on page 108 of the bill.

Mr. KEM. I thank the Senator.

Mr. KEFAUVER. I appreciate greatly the Senator's suggestion in that respect.

Mr. SALTONSTALL. Mr. President, will the Senator yield?

Mr. KEFAUVER. I yield.

Mr. SALTONSTALL. If the amendment just referred to is made, should not a similar amendment be made in sub-paragraph (12), at the top of page 109?

Mr. KEFAUVER. That is correct; it should be made in line 3, on page 109. On behalf of the subcommittee, I shall offer the same amendment at that point.

Mr. SALTONSTALL. Mr. President, will the Senator yield for a question which I hope will be a clarifying question?

Mr. KEFAUVER. I am delighted to yield to the able Senator from Massachusetts, who worked so long and who knows much more about this proposal than does the junior Senator from Tennessee.

Mr. SALTONSTALL. I hope the Senator's other statements are of greater veracity than his last one. (Laughter.)

Mr. KEFAUVER. The statement represents the conviction of the Senator from Tennessee about the matter.

Mr. SALTONSTALL. My question is this: Some doubt has been raised, particularly by the chairman of the Judiciary Committee, relative to civilians and the inclusion of civilians under subparagraphs (11) and (12) of article 2. It is my understanding that subparagraph (11), with the exception of the change from the word "territorial" to the word "continental," is the same language as that now contained in the Army code; that subparagraph (12) is now in the code of the Navy in wartime; that what subparagraphs (11) and (12) really do is to cover in peacetime, as well as in wartime, civilians who accompany the Army, the Navy, or the Air Force; and that it is necessary to include subparagraph (12) for application in peacetime as well as in wartime, for the Navy particularly, because of its trusteeship over some of the islands in the far Pacific, where there is no other code of justice. Am I correct in that assumption?

Mr. KEFAUVER. The Senator is correct; that is a correct statement.

Mr. SALTONSTALL. So that when the Chairman of the Committee on the Judiciary argues that the matter should be brought to his committee because of these provisions, he is incorrect, in that they are already a substantial part of the present military code. Is that not correct?

Mr. KEFAUVER. The distinguished Senator from Massachusetts is correct. That will be found in the report of the House committee, which, under the Ramseyer rule, was to report on the whole law, as the law is to

be amended, as the Senator well knows. On page 42 of the House report, subsection (d) of article 1 applies to the Army. Then there is, under the Ramseger rule, a similar provision in the House report as the Navy. I thank the Senator for clarifying that issue.

Article 3 represents a new provision in military law. It provides a type of continuing jurisdiction over persons who have been separated from military service or are on inactive duty, who, nevertheless, are charged with having committed offenses while in an active-duty status. Under the Articles of War, persons who commit serious crimes overseas, such as murder, theft of crown jewels, or mistreatment of American prisoners, or who commit a military offense in this country, may not be tried by court martial or in any court after they have been discharged from the service. Moreover, Army reservists may not be tried for such crimes after they go on inactive duty. In a recent Supreme Court case, the case of *United States ex rel. Hirshberg v. Cooke, Commanding Officer* (226 U. S. 210), it was held that a person discharged from the naval service cannot be tried by court martial during a subsequent reenlistment for a crime committed during the first enlistment, even though in this case it was 1 day only that he was out of the service. But the same principle would apply if he had been out of the service for 20 minutes only. Of course, the crime committed in the Hirshberg case was not discovered until after the reenlistment, and that, of course, could happen very readily.

By virtue of these inadequate provisions, a considerable number of persons were able to escape trial for serious offenses committed while in the armed services, and it was apparent to the Senate committee that this situation should be corrected. The House committee was of the same opinion. There is in the House hearings a great deal of discussion about abuses which have resulted from this holding by the Supreme Court. It was felt, however, that the jurisdiction of courts martial should not, in general, be extended to civilians, and for this reason the continuing jurisdiction provided over the types of cases I have described is limited to cases which fall, first, within the statute of limitations; second, which are not triable by Federal courts; and, third, which involve serious crimes calling for a sentence of at least 5 years. In other words, there is continuing jurisdiction only in those cases. This provision would, therefore, correct the inadequate jurisdiction heretofore provided and, at the same time, limit and restrict the jurisdiction to proper areas.

Article 4 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 by the Kem amendment, 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. It also emphasizes the independence of the staff judge advocate or legal officer in matters relating to military justice by authorizing him to communicate directly with the staff judge advocates or legal officers of superior or subordinate commands or with the Judge Advocate General himself.

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 prohibiting confinement of members of the armed forces with enemy prisoners.

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 will be noticed, the article lists all the punishments now so imposable by both the Army and the Navy, with certain modifications which I shall explain. The present practice of the Army differs from that of the Navy. The permitted punishments are different. That is necessary, of course, by virtue of their different operations. The Army practice has been to impose less severe penalties and give the accused an option to demand trial by court martial. The Navy has imposed somewhat more severe punishments and has given the accused no option. This diversity in practice is due to two factors: first, men on shipboard are necessarily in a different situation with reference to freedom of motion and availability of replacement than men in camp; second, in the Navy mast punishment is imposed by the Captain, and a summary court necessarily consists of an officer inferior to him in rank, while in the Army such an incongruity in rank between a commanding officer and a summary court would be virtually unknown since the court normally would be appointed by a higher command. 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. In addition, the committee felt that the more severe penalties of the Navy, involving confinement for 7 days and bread and water for 5 days, should be imposed only at sea where there is reason and justification for their application. For this reason, the language, as originally submitted, was modified and the imposition of bread and water was reduced from 5 to 3 days. One further provision of interest in this article is subsection (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. Of course, until the President authorizes reciprocal jurisdiction it cannot be put into effect, but in certain things like the MATS there were joint operations. I think it should be pointed out at this place, however, that even though the original trial may be conducted by another service, the review authority will be from the serviceman's own service.

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.

Articles 22, 23, and 24 continue the present practices of the Army, the Navy, the Air Force and the Coast Guard in that they provide members of general, special, and summary courts martial be appointed by the President, the Secretaries of the three Departments, and certain commanding officers. This, as I have said, is a continuation of the present methods of selecting members of courts martial and is now provided in Articles of War 8, 9, and 10 and in Articles for the Government of the Navy 26, 38, and 64. I believe it is advisable at this point to stop and outline for the members of the Senate the controversy which exists in connection with the provisions of these three articles. Certain witnesses before our committee and the House committee opposed this method of selecting court members and claimed that it is the one serious defect of the Uniform Code, in that it enables a continuance of command control, which, in their opinion, deprives courts martial of their independence. The witnesses who espouse this viewpoint are representatives of some of the bar associations in this country. I may say, parenthetically, that the position of the bar associations on this subject is not unanimous. The New York State Bar Association, for instance, strongly supports the provisions as written. The critics of these provisions concede that the commanding officer should retain the right to refer charges for trial, select the trial counsel, and review the sentence after trial. They would, however, take away from the commanding officer the right to appoint the members of the court. In substitution therefor, they would have court members and defense counsel selected by a staff judge advocate from a panel of eligible officers made available and selected by commanding officers. It is their view that this method of selecting court members would remove the influence of the commanding officer over the members of the court.

The committee considered this proposal at great length, having heard a great deal of testimony on the subject, and rejected it. The House committee came to the same conclusions after considerable study. This idea

of a panel of court members is not a new one. It was part of the Chamberlain bill for the reorganization of the Articles of War in 1919 and was proposed last year by the same bar association witnesses when Congress considered the Kem amendment, which became law as Public Law 759.

I know that representatives of many associations urged the Senator from Missouri to adopt the idea.

The Department of Justice opposes the idea of a panel of prospective court members on the grounds that it is impractical, unwieldy, and will not achieve the result claimed for it. The proposal was submitted to and considered by the Morgan committee and was rejected by them. Professor Morgan so testified before our committee. It is the position of the National Military Establishment that the uniform code has a number of added protections for the accused not found in the Articles of War or the Articles for the Government of the Navy which will guarantee a greater amount of justice and will provide a more legal proceeding which will effectively counteract any unwarranted command influence. They give a strong warning that completely divorcing command responsibility from command authority will impair military functions. We concluded that, recognizing necessary military participation, there were a sufficient number of protections in the bill to justify the present method of selecting courts.

Another thing which should be pointed out, Mr. President, is that of having a panel available for various courts martial, which would immobilize or take out of operation that number of officers and men. It would be unwieldy to have such a panel available for that purpose. It does not seem to add very much protection to have the commanding officer select the panel, in the first place, and then have members of the court selected from the panel. The committee could not see that it gave a great deal of protection. The other considerations outweigh it.

Article 25 provides for the service of enlisted men on courts which try enlisted men and follows the provisions of Public Law 759 of the Eightieth Congress. Article 26 provides for a law officer on general courts martial. It is generally agreed that every general court martial should have assigned to it an officer with legal training and experience who will make rulings on interlocutory questions and advise the court on matters of law. There has been some controversy, however, as to the status of this officer—as to whether he is to be a member of the court who retires and votes with the court on the findings and sentence, or whether he is to be more in the nature of a judge with completely independent functions.

Article 26 adopts the second view and provides for the appointment of what is called a law officer. He can neither vote on the findings and sentence nor retire with the court during its deliberations. In this way he differs from the law member now provided for in the Articles of War. He is an innovation for the Navy, which has never had either a law officer or a law member attached to its courts.

The judge concept, as contrasted with the member concept, has been supported by all the recent studies of the naval court-martial system. It was recommended by the House Military Affairs Committee in a study made of the Army system in 1946. It has been supported by many of the

witnesses appearing before the Senate committee, including the witnesses for the bar associations. Just a few months ago it was fully adopted in Great Britain pursuant to a report of the Army and Air Force Courts-Martial Committee. There the law officer did not have a vote, but prior to the report he was allowed to retire with the court during its deliberations.

There are two strong arguments for the system adopted in the bill. The first is that the withholding from the law officer of the functions of a juror makes him better able to carry out his judicial functions objectively. Second is that all instructions given by the law officer will be on the record and subject to review. This eliminates the situation in which, if erroneous advice on the law is given by the law member in closed session, there would be no record of the error on which to base an appeal.

In support of the member concept it has been said that the presence of a trained legal expert in the closed sessions is of great value in assuring that justice is done. In answer to this it should be pointed out that under article 51 the court will have the benefit of the law officer's instructions on the elements of the offense, the presumption of innocence, and the burden of proof, and that the same article does not prevent him from giving further instructions on other appropriate matters.

Article 27 contains one of the most important safeguards provided in this bill.

Mr. KEM. Mr. President, will the Senator yield?

Mr. KEFAUVER. I yield.

Mr. KEM. As I understand, under article 26 the law officer is not permitted to retire with the other members of the court, or to vote. Is that correct?

Mr. KEFAUVER. That is correct.

Mr. KEM. Under that provision, is not the court deprived of the counsel and advice of the law officer when it might be most needed?

Mr. KEFAUVER. I may say to the distinguished Senator that there are two views in regard to that question. The Navy has never had a law member or a law officer. Under the Army system, the law member would retire with the court and would advise the court and vote with it. So this is a compromise between the Navy procedure and the Army procedure, but it so happens that it represents the recommendation, I think, contained in most of the studies of persons who have gone into the problem.

Answering more directly the question of the distinguished Senator from Missouri, it seems to me that following the jury concept in the matter is a pretty safe thing to do. The law officer is distinguished from a member of the court, and he must be a lawyer. He instructs the court on the record. If the court desires additional instructions it has a right to call him in, and the additional instructions are also on the record. The facts of the case are decided by the non-legal members of the court.

There have been many complaints, as the Senator well knows, regarding the law member retiring with the court, with no record being made of what he says. Other persons feel that with his superior knowledge of the

law he might unduly sway the members of the court against the person who is being tried.

Mr. KEM. Mr. President, will the Senator further yield?

Mr. KEFAUVER. I yield.

Mr. KEM. Does the Senator recall the testimony of Maj. Gen. Thomas H. Green, who was the Judge Advocate General of the Army when he appeared before the Senate subcommittee?

Mr. KEFAUVER. Yes.

Mr. KEM. The testimony to which I refer appears on page 257 of the hearings.

Mr. KEFAUVER. Yes; I remember that he appeared before the subcommittee.

Mr. KEM. The portion of General Green's testimony to which I should like to invite the Senator's particular attention is as follows:

The requirement of the Kem amendment that a law member be a lawyer and that he participate in all proceedings of a court martial is regarded by all who have had experience in the administration of military justice as the most significant improvement since automatic appellate review. The limitation on the effectiveness of the law member will result in miscarriages of justice both to the detriment of accused persons as well as to the detriment of the interests of the Government.

Does the Senator agree with that statement of Major General Green?

Mr. KEFAUVER. That is the view of General Green, of course, but there is one point which I should make, namely, that the Kem amendment did not as a matter of fact require that the law member be a lawyer. It said, "if available."

Mr. KEM. Of course the amendment did not contemplate that the officers be directed to accomplish the impossible. If there were not a lawyer available, of course, they could not have one.

Mr. KEFAUVER. I think that exception resulted in not having a lawyer as a law member, on the ground that he was not available, when many times a lawyer would have been available, but they did not want to have him serve.

Mr. KEM. But that is not in issue here.

Mr. KEFAUVER. That is not in issue. This is merely getting a little closer to the civilian approach in court-martial proceeding. It approaches the judge idea. I think in its general tendency and general aim the pending bill while not going overboard in attempting to adopt civilian technique is an attempt to bring the system a little further into harmony with civilian methods. This method of having the law officer instruct, and what he says appear on the record, and not retire and not vote with the court, is exactly what is done in civilian trials before juries today.

Mr. KEM. Does the Senator recall the language which Major General

Green used in dealing with the proposed analogy between the law officer and a civilian judge?

I invite his attention to page 257 of the hearings, where it appears that General Green said:

The analogy between the proposed law officer and a civilian judge is more apparent than real. For example, he rules subject to objection by any member of the court on the question of a motion for a finding of not guilty under article 51. Suppose that he has ruled, as a matter of law, that the prosecution has not proved a prima facie case and a member objects to his ruling. Under the proposed code the court closes—excludes the law officer—and votes on this legal question. The law officer cannot explain his ruling, defend it, or vote to sustain it. Although under A. W. 31 such a ruling by the present law member is also subject to objection at least he can defend his ruling against the argument of a member who may not be well versed in the law. I don't believe this change which makes the law member a mere figurehead is defensible.

Mr. KEFAUVER. This change does not make him a mere figurehead. General Green is wrong in saying that the law member cannot sustain his ruling.

Mr. KEM. He cannot sustain it when an important decision is being made by the court.

Mr. KEFAUVER. He certainly explains his ruling to the members of the court. He can be as emphatic as he desires. Of course, he cannot go into secret sessions and press the matter further.

Mr. KEM. How can he anticipate what course the argument and the discussion by the court will take when they retire?

Mr. KEFAUVER. I believe the Senator is talking about the facts of the case. Of course, if we are going to say that the position of the law member should prevail, that he ought to be able to retire with the board and argue with them in private, without what he says being on the record, in a closed session, we might as well abolish the other members of the court. At present he has only one vote in any event, and it seems that the general view of the Keefe Board, and of all the other boards, is that we would have at least a better decision on the facts of a case if he acted as in the nature of a judge, rather than as a member.

Mr. KEM. Does not the Senator feel that the court is being deprived of the services of a law officer when the court most needs them?

Mr. KEFAUVER. It depends on the concept. It may be that the judge should retire with the jury and discuss the case during the deliberations. Perhaps courts martial really need a judge to help them decide a case. But we have never operated on that basis in civilian courts. The pending proposal tries to place courts martial on more of a civilian basis.

Mr. KEM. As General Green says, the analogy between the civilian court and the military court is more apparent than real.

Mr. KEFAUVER. I may say also that I have gone over the reports which have been filed relating to naval courts martial, in which there is no law

member. There has not been a law member even to instruct on the law, not to say argue with the members when they are reaching their decisions, and they have accomplished justice just about as well as the Army and the Air Corps have under the present system.

Mr. KEM. I do not know about that. I think that all during the last war the Members of Congress received about as many complaints about the character of justice rendered in the Navy as in the Army.

Mr. SALTONSTALL. Mr. President, will the Senator from Tennessee yield?

Mr. KEFAUVER. I yield to the Senator from Massachusetts.

Mr. SALTONSTALL. I should like to say to the Senator from Missouri—and I think the Senator from Tennessee will support me—that we discussed this matter at great length in the subcommittee hearings. We discussed it with Professor Morgan, and I believe our feeling was, after hearing both sides of the argument, that it would be very much more helpful, and in the end would be fairer to the defendant and fairer to the court, to have a lawyer member outside and not going in with the court. The court could always get the legal point of view restated by the lawyer member if it so desired, and have it placed on the record. It was felt that with the new court of appeals, composed of civilians, up at the top, it would be very much wiser and fairer to have the legal side of the differences of opinion all on the record, than to have the lawyer member saying things in private to the court when they were giving the matter their consideration. It was that balance of judgement, the weighing of both those things, which made me, as one member of the committee, feel that the committee's report was correct.

Mr. KEM. Is the Senator proceeding on the theory that the advice and counsel of the lawyer member would be unsound, or that he would overpower the judgement of the other members of the court?

Mr. SALTONSTALL. It is on the same ground on which the distinguished Senator and I have never been permitted to serve on a jury, the idea being, as I understand it, that a trained lawyer sitting on a jury is likely to influence the jury. He may have different points of view from the judge who directed the jury, and therefore it is wise to exclude him. If we are to accept the analogy of the civilian court, I agree that is entirely so, but if we are going to accept that analogy, we would by the same token have to find many faults with the pending bill. I use that analogy in this instance because it was the thing which determined me as one member of the committee, and I think determined the judgement of the committee as a whole.

Mr. KEM. Is not the Senator like the devil who quotes Scripture to his purpose? Is he not insisting on the analogy when it serves his purpose and disregarding it entirely when it does not?

Mr. SALTONSTALL. If the Senator from Massachusetts can quote Scripture for any purpose, at any time, he is very happy.

Mr. KEM. Mr. President, will the Senator from Tennessee yield?

Mr. KEFAUVER. I yield to the Senator from Missouri.

Mr. KEM. I do not like to bear on the point unduly but it seems to me that the experience which the Army had during the period in which the law officer, as he is termed now—or “law member,” as it was in the other bill—was permitted to participate in the proceedings, was good. The testimony is that it was highly beneficial, and that it worked well in practice. Having tried that and found it good, I dislike to see the Congress abandon the principle and adopt something new and untried.

Mr. KEFAUVER. Mr. President, there was controversy about this proposal. The Committee did have some difficulty in reaching a decision. We hope the method we propose will work better than the old method. We believe the one particular advantage our proposal has over the procedure whereby the law officer retires with the members of the court into executive session, is that whatever the law officer says will be on the record, so that the reviewing authorities may see what his attitude about the matter was and what he had to say about it. If the law officer retires into executive session with the members of the court, and talks back and forth with them, and votes with them, it is going to be very hard to have on the record his exact position, for purposes of the reviewing officers.

Mr. KEM. Mr. President, will the Senator yield further?

The PRESIDING OFFICER (Mr. Frear in the chair). Does the Senator from Tennessee yield to the Senator from Missouri?

Mr. KEFAUVER. I yield.

Mr. KEM. The official position of the Army before the Morgan committee was that the law officer should be permitted to participate in the deliberations.

Mr. KEFAUVER. Yes; that is correct.

Mr. KEM. And the official position of the Navy was to the contrary?

Mr. KEFAUVER. The Navy has never had either a law officer or a law member.

Mr. KEM. And the position of the Navy was that the law officer should not participate in the deliberations.

Mr. KEFAUVER. I have been advised that the Navy and Air Force both voted for a law officer.

Mr. KEM. The Navy's position was that the law officer should not participate in the deliberations after the court retired.

Mr. KEFAUVER. I think the Navy's position was that it did not want one in the first place.

Mr. KEM. But the Navy voted for one, the Senator says. After having accepted him, the Navy did not want him to participate. Is that correct?

Mr. KEFAUVER. The Navy and the Air Force, as I have been advised, voted for the law officer concept.

Mr. KEM. Was it the position of the Air Force that the law officer, or law member, whichever the Senator may choose to call him, should participate in the deliberations of the court?

Mr. KEFAUVER. I have been consulting with some of the staff with respect to the position taken by the Army and the Navy and the Air Force in this matter. I think I made a misstatement a little while ago. My present information is that the Army and the Air Force wanted a law officer to retire with and vote with the court.

Mr. KEM. Then the voting was 2 to 1 in the armed services, and yet the committee has accepted and adopted the view of the minority?

Mr. KEFAUVER. The vote was really 2 to 2, because the chairman of the committee voted with the Navy.

Mr. KEM. The committee did not give him the same weight as it did to the large number of officers in one of the branches of the armed services, did it?

Mr. KEFAUVER. Anyway, the services did stand 2 to 1.

Mr. KEM. Would it not be sounder for the Congress to adopt the view of the majority rather than the minority in this important matter?

Mr. KEFAUVER. I will say to the Senator from Missouri that this is a compromise between the concept, on the one side, of the Navy, which had no law member at all, and that of the Army and Air Force, on the other side, which have a law member. So the compromise provides a law officer for each of the services.

Mr. KEM. Is it not true that the Army and the Air Force both had had experience with the law member and knew what that procedure was like, and to what use the law member could be put, and they liked that procedure and wanted to continue it? The Navy did not know any thing about it and objected to that about which they knew nothing.

Mr. KEFAUVER. The Navy had had experience without the law officer, and they thought they had gotten along very well on that basis.

Mr. KEM. The mere fact that the committee was sitting shows that the Navy had not gotten along too well.

Mr. SALTONSTALL. Mr. President, will the Senator yield to me at that point?

Mr. KEFAUVER. I yield.

Mr. SALTONSTALL. I should like to make a comment in connection with the question asked by the Senator from Missouri, and I hope it may be helpful. There were only two instances in the whole report, as I understand, where the services were not in unanimous agreement. In those two instances Secretary Forrestal made the decision. He made the decision after hearing both sides, and after listening to Professor Morgan. He made the decision in the way it came to the committee. The committee went through the same process again, discussed the question, and after having listened to the discussion and after having listened to the recommendations made by Professor Morgan, came to the same conclusion Mr. Forrestal had

reached. That is my memory and my understanding regarding how we reached the decision. We did not reach it on the basis of the minority presentation. We reached it on the decision made by Secretary Forrestal, when there was a difference of opinion between the services.

Mr. KEM. Of course, Secretary Forrestal had recently retired from the position of Secretary of the Navy and was in the corner of the Navy, so to speak. He had had no more experience with the law member than the other representatives of the Navy. On the other hand, the representatives of the Army and the Air Force had seen the procedure in operation for something like a year.

Mr. KEFAUVER. I may say also to the Senator that the old Military Affairs Committee of the House had some time back recommended the law officer concept. That committee at that time had jurisdiction over the Army and the Air Force only. Anyway, the problem was one of the difficult problems with which the committee had to deal, and the provision in the bill represents the compromise arrived at.

Article 27 contains one of the most important safeguards provided in the bill. This is the requirement that both the trial counsel and the defense counsel in a general court martial case shall be lawyers. It is in line with the recommendations of the Keefe Board and of the House Committee on Military Affairs and is a provision that has been strongly supported by the bar associations and favored in a poll of the members of the Judge Advocates Association. It was unanimously recommended by the Morgan committee.

The existing Navy law has no provision with respect to the qualifications of counsel and naval courts and boards, or regulations which govern the procedures before naval courts martial. It merely provides that the accused has a right to counsel. The Articles of War, as amended by the Kem amendment of 1948, provide that lawyers must act for the prosecution and the defense, but this requirement is binding only if lawyers are available. It has been held that the determination of the availability of the lawyers is a matter entirely within the discretion of the convening authority, a discretion which can be and has been abused.

This committee is strongly of the opinion that absolute requirement that legally trained counsel conduct the prosecution and defense is one of the strongest and, at the same time, most practical and workable guaranties that trials will be conducted in accordance with due process of law.

Part VI contains the provisions governing pretrial procedure, and, in the main, the articles in this part follow present Army practice as prescribed in the Kem amendment of 1948. Article 31, as amended by the committee, fully guarantees the privilege against self-incrimination and contains a provision requiring that an accused must be informed of this privilege before being interrogated. Article 32 provides for an impartial investigation of charges before trial by general court martial is ordered. The accused has a right to be present at this investigation, to be represented by counsel, to cross-examine witnesses against him, to have witnesses questioned in his behalf, and to present anything he may desire in his own behalf. This investigation has elements of both an indictment and a discovery proceeding. The formal collection and presentation of evidence serves as a basis for

determining whether a general court martial should be ordered and thus prevents frivolous or unfounded charges from going to trial. At the same time, it gives the accused a more complete knowledge of the nature of the case against him, enabling him better to prepare his defense. Incidentally more protection is given to an accused in a court martial investigation than is given to a civilian in a grand jury investigation, because a civilian cannot be present when a grand jury deliberates and votes.

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 in 1948 prohibiting unlawful influence on the actions of court martial. The committee believed it most desirable to continue this salutary prohibition, which will do much to eliminate so-called command control.

Reverting again for a minute to the question of command control, it is believed that article 37, which was brought in by the Kem amendment, coupled with article 98, will be a most effective weapon against any interference with the independence of the court by a commander. Not only is a commander prohibited from admonishing or reprimanding a court or its members under the provisions of article 37, but it becomes a court martial offense for him to do so under article 98.

Article 41, which provides one peremptory challenge of members of general and special courts, follows present Army practice, but changes Navy practice, which heretofore had no provision for peremptory challenges. I will say to the distinguished Senator from Missouri that the Army won over the Navy on this change.

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.

Article 44 deals with former jeopardy.

The distinguished Senator from Nevada (Mr. McCarran) wrote the committee a lengthy letter in which he made a great many suggestions. Some of his suggestions dealt with this subject, and many of them were adopted by the committee. The committee heard considerable objection to the jeopardy rules as they exist in the services today and has amended them in line with the recommendations of the Senator from Nevada.

This has been done in such a way as not to interfere with the highly desirable system of automatic review under which every court-martial case is reviewed for error by higher authority whether or not the accused requests it. Article 44, as amended, not only protects a person from being tried twice for the same offense but also makes it clear that a case which is terminated by the prosecution for failure of available evidence or witnesses

shall be a complete trial in the jeopardy sense. In other words, in a court-martial proceeding, if the trial is merely called off or delayed because the prosecution believes it does not have sufficient witnesses and wants an adjournment in order to obtain additional witnesses, another trial would constitute double jeopardy. If the trial is called off because of imperious necessity—for example, because of the advance of the enemy or because of bombardment—to continue with the trial would not constitute double jeopardy. I believe the doctrine of imperious necessity under another name is recognized in civilian-court practice.

Part VIII, articles 55 to 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 to 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. The present procedures of the Army and Navy differ widely. The chart in the center shows the Army procedure. The one in the rear shows the Navy procedures of appeal review, and the chart on the right shows the procedure provided for in the Uniform Code for all the services. It will be seen that the proposed procedure is very much simpler than the more complex ones now followed by the Army and by the Navy.

The Army system particularly is exceedingly complex. To the review by the convening authority and the Board of Review, further review was added in 1948 by Congress by a judicial council, composed of three general officers. The course of review for several types of cases 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 non expert to diagram or understand. 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 Personnel and by a Sentence Review Board. The action of all these agencies, however, is advisory only. The Morgan 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 record 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 Court of Military Appeals 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.

The result of this pattern for an appellate system will be that the appellate procedure will be strengthened by a greater centralization of authority in tribunals, rather than in individuals as at present. This appellate system also has the virtue of being less complex than the present systems and should result in greater protection for an accused. In general, it is patterned after the appellate system of the Federal courts, with the Court of Military Appeals closely following the procedures of the Supreme Court of the United States.

While some differences of opinion were expressed by the witnesses on the merits of the Court of Military Appeals, the preponderance of opinion was favorable. Several individuals and some of the reserve associations criticized the court as too civilian in nature and as accomplishing an unnecessary amount of unification. There was also a difference of opinion between the services themselves, with the Department of the Army registering a dissent to this type of court. On the other hand, the Navy, the Air Force, Professor Morgan, the bar associations, the AMVETS, the American Veterans Committee and a number of other witnesses strongly favor such a supreme civilian court of military law. The position of the proponents of this court is that it is necessary if the substantive and procedural law of the Uniform Code—which applies to all persons in the services—is to be uniformly interpreted. In addition, they see a need for a final authority on the law and feel that the present system—whereby the Secretaries of the Departments or the President are called upon to decide questions of law—is completely inadequate. In addition, they believe that a court of this character, with the prestige of a United States Court of Appeals, will do a great deal to insure public confidence in the fairness of military justice. The House committee and our committee feel that a court of this character will result in major improvements in the trial of courts martial.

As originally drafted, the judges of this court were to be appointed by the President, after confirmation by the Senate, for life. Our committee carefully considered this provision and felt that, since the court represents a new concept in military law, it was advisable to provide the appointment of the judges for a term of years, rather than for life. Accordingly, our committee amended the provisions relating to tenure and has made them similar to the Tax Court of the United States and some of the Territorial courts.

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 Court of Military Appeals. These counsel are to be appointed by the Judge Advocates General with provision for the accused to have his own

counsel. Article 72 provides for a 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 proposed punitive articles. In the first place, there are 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 them that the punitive articles consolidate a number of offenses, in the same fashion as many other provisions are consolidated in 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—paragraph 6—and 8—paragraph 21.

In addition, several offenses which were previously punishable under the general article are specifically set forth. One of them is designated 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.

As I have already indicated, the remaining sections of the bill relate to military justice but are not appropriately part of the Uniform Code. I would like to comment particularly on two of them, the first is section 12, which provides for a petition to the Judge Advocate General for review of court-martial cases involving offenses committed during World War II. The Kem amendment of 1948 contained a similar provision but it was applicable to the Army and Air Force only. This section extends the right to such review to members of all the services.

Mr. KEM. Mr. President, will the Senator yield?

Mr. KEFAUVER. I yield.

Mr. KEM. I should like to ask the Senator whether his committee has made a study of the business which would come before the Court of Military

Appeals which is established by the bill, as provided at page 161.

Mr. KEFAUVER. Yes, the committee has considered that problem and has made some study of it.

Mr. KEM. In the course of a normal year in time of peace, how many cases would the court have to consider?

Mr. KEFAUVER. Cases will go to the Court of Military Appeals if the accused petitions to have the court consider his case or if cases are sent to the court by the Judge Advocate General.

When cases go to the Court of Military Appeals, they will do so only on questions of law, in other words, the situation will be analogous to that under the principle of a petition of certiorari to the Supreme Court of the United States.

The greatest number of the cases of course would be settled and disposed of before they ever reached the Court of Military Appeals; cases would go to that court only on matters of law or of military jurisdiction.

Mr. KEM. I understand that.

Mr. KEFAUVER. Considering the number of courts martial, the witnesses who testified before our committee, the Morgan committee, and the House committee, including those representing the three armed services, as I understand, were of the opinion that this court would be sufficient to handle the cases which would come before it.

Mr. KEM. I had no doubt that it would be sufficient; but my question was predicated on whether the court would have enough to do to keep its members busy, whether the bill would give the court jurisdiction sufficiently broad to keep three men busy throughout the year, in time of peace.

Mr. KEFAUVER. I may say that was one of the questions which arose and which caused the Senate committee to recommend that the terms of the three judges be not for life, but for a certain number of years, the idea being that after a certain amount of experience we would know fairly well whether there should be additional judges or fewer judges.

But the general feeling was that there would be sufficient work or perhaps a little more than sufficient, for them to do, to keep them very busy; that probably 2,000 or 3,000 cases a year would come to them.

Mr. KEM. Of course, there is no way to estimate the number of writs of certiorari which would be granted.

Mr. KEFAUVER. There is no way to determine that now. It would be the privilege of an accused to apply for one. I suppose that if the court wished to take on more work, it could grant more writs of certiorari.

But we have no present way of determining how much work the court will have to do! I suppose the only way we can tell will be by experience.

Mr. President, one very worth-while section of the proposed code is that which requires the Court of Military Appeals to make to the Congress an annual report in which it will state the number of cases it has tried, the

disposition of the cases, and its recommendations for improvement of the system. At the present time Congress does not receive annual recommendations or reports about military justice.

A second part of the bill relating to military justice, on which I should like to comment at this point, is section 13, which is related to the issue of whether or not officers in the legal branch of an armed force should be on a separate promotion list, or, to put it another way, whether a Judge Advocate General's corps should be created in each of the services. Such a corps was created in the Army by the Kem amendment. The bill before us maintains the status quo, which means that there will continue to be no such corps in the Navy or Air Force.

Members of the House who have been strong supporters of the corps idea have agreed that its operation in the Army should be tested further before creating a corps for each of the other services. At the same time, they feel that the bill should contain more specific requirements with respect to the legal qualifications of the Judge Advocate General. These requirements are incorporated in section 13 of the bill.

Our committee agrees that the operation of the corps in the Army should be evaluated over some further period, to determine whether or not it serves its purpose. I believe the corps has now been in operation since February 1, 1949.

Mr. KEM. Mr. President, will the Senator yield at this point for a question?

Mr. KEFAUVER. I yield.

Mr. KEM. Do I correctly understand that the bill provides for a separate Judge Advocate General's corps for the Army, but not for the Air Force or for the Navy? Am I correct in my understanding as to that?

Mr. KEFAUVER. The bill leaves the corps for the Army as is provided by the Senator's amendment of 1948.

Mr. KEM. The bill does not provide a similar corps for the Air Force or the Navy, does it?

Mr. KEFAUVER. It does not.

Mr. KEM. What is the justification for having a separate Judge Advocate General corps for the Army, but not for the other branches of the Military Establishment?

Mr. KEFAUVER. It was established separately at the time of enactment of the Senator's amendment. The amendment did not apply to the Navy or to the Air Force. The Navy has never wished to have a separate corps, and my information is that the Air Corps does not wish to have a separate corps. I think there is something about their operation which would make a separate corps less suitable for them than it is for the Army; at least, that is the way the other two services feel about the matter.

Mr. KEM. I may say to the Senator that it was intended that the amendment apply both to the Army and to the Air Force. I think the discussion on the floor at the time will show that the Members of the Senate, at least, understood that was the purpose and intention regarding the legislation then proposed.

But my question of the Senator is this: If a separate Judge Advocate General's corps is sound as an institution for the Army, why is it not equally sound for the Air Force and for the Navy. On the other hand, if it is not sound for them, why should we go to the trouble and expense of establishing one in the Army?

Mr. KEFAUVER. That is what we wish to find out; we wish to ascertain how it will work and whether it will meet all the expectations of the Senator or of some of those in the Army. It has been in effect in the Army only 1 year from yesterday, I believe. After a trial of it and after the passage of this unification bill, after we see how it works, if it works very satisfactorily, perhaps the Air Corps and the Navy will later wish to have a similar corps for themselves, and the Congress will give it to them.

Mr. KEM. I am surprised to hear the Senator say that, because I thought the justification for the unification bill was that there would be actual unification of the armed forces, and I thought that this bill is being presented to us as a unified code of military justice.

Mr. KEFAUVER. Actually, I think the matter of a separate corps should be handled as an amendment to the National Defense Act. That matter does not have much to do with military justice. I believe that the bill creating a separate corps for the Army was an amendment to the National Defense Act.

Mr. KEM. It was an amendment to the Selective Service law.

Mr. KEFAUVER. But the amendment stated that the National Defense Act should be amended so as to make that provision.

Mr. KEM. There is no reason why it could not be done in this bill, however.

Mr. KEFAUVER. Yes; it could be done in that way. But, properly, it should come up when the National Defense Act is being considered for amendment, because it would amend that act, although it was offered to the Selective Service law.

Mr. SALTONSTALL. Mr. President, will the Senator yield?

Mr. KEFAUVER. I yield.

Mr. SALTONSTALL. Am I correct, I ask the Senator from Tennessee, when I say to the Senator from Missouri, that, particularly in the case of the Navy, the reasons the committee had for not extending this corps to the Navy were very practical ones, namely, that the Navy pointed out that a separate legal force would upset their whole arrangements and procedure with respect to officers, not only on shipboard, where, of course, general courts martial do not often occur, but also in their various land installations, which are generally very far apart. In such case the legal officer would have little work of this sort to do; and in order to utilize his services sufficiently he would have to be assigned other work, and so would any assistants he might have. In fact, if there were to be a legal officer for this purpose at such points, there would not be sufficient work for him and for his assistants to do to justify the establishment of a separate force.

In my opinion that is the reason why a separate corps should not be established in the Navy, although it is established in the Army. I believe we should wait to see how it will work in the Army. I ask the Senator whether that was the testimony?

Mr. KEFAUVER. Yes; that was the testimony—in short, to wait to see how it will work.

I may also say to the Senator from Missouri that Public Law 759, the Kem amendment, at page 64, section 247, creates a separate corps. Section 8 of the National Defense Act, as amended, was amended in that way, and the corps was created. So actually this matter should come up in the consideration of an amendment to the National Defense Act; and I am sure that, after experience with this provision of the pending bill, it will.

Mr. KEM. I should like to ask the Senator whether the reasoning of the Senator from Massachusetts as to the Navy would apply to the Air Force?

Mr. KEFAUVER. That was the position of the Air Force. They have fewer members, who are here and there, and not stationed so permanently as are Army forces. So they thought the conditions applicable to the Navy would apply to the Air Force. As I said before, our committee agreed that the operation of the corps in the Army should be evaluated over a further period to determine whether or not it serves its purpose. That purpose is to assure to legal officers and judge advocates an independence which will encourage a fair and objective exercise of their judicial functions. Whether, as a practical matter, an independent promotion list does this, or is the way to do it, is very much open to question. Much more important may be the provisions I have already mentioned which allow judge advocates in the chain of command to communicate directly with one another and which put the control of the assignment of staff judge advocates and legal officers in the hands of the Judge Advocate General. For these reasons our committee feels that consideration of the corps question—a question which is one of internal organization and relates to the National Defense Act rather than to the Uniform Code of Military Justice—should be postponed. Such a postponement will give Congress the benefit of the views of the judges of the Court of Military Appeals in the annual report prescribed in article 67.

As I have said before, we feel that a conscientious effort has been made by a large group of people who have worked a long time on this whole subject, and, though necessarily not perfect, the code has a large number of advantages to recommend it. It makes uniform the application of one law, substantive and procedural, to all persons serving in the armed services, and this, in itself, is a tremendous improvement over the present diverse systems in operation. In addition, it provides a large number of added protections, and meets, to a large extent, the criticisms that have been leveled against military justice over the years. It is a code that is drafted in modern legislative language, arranged in an orderly sequence, and should be far more understandable to laymen and to civilian lawyers, as well as to men learned in military law than the present statutes in this field.

On behalf of the Senate Committee on Armed Services, I strongly urge favorable action by the Senate on this bill.

Mr. KEM. Mr. President, will the Senator from Tennessee yield for a further question?

Mr. KEFAUVER. Yes; I yield to the Senator.

Mr. KEM. I should like to invite the Senator's attention to page 202 of the bill, and particularly to the section headed "Commanders' duties of example and correction," which reads, in part, as follows:

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.

Why is not that provision made applicable to the other branches of the armed services?

Mr. KEFAUVER. I may say to the distinguished Senator that this provision, or substantially this, has been in the Articles of War and in the Articles for the government of the Navy for a long time.

Mr. KEM. We are here dealing with unification, are we not?

Mr. KEFAUVER. The Navy wanted to keep it. The Navy did not want it in the code, and the Army and the Air Force did not want it in the code, so it was put in as a general statutory provision.

Mr. KEM. Are we to take it that, generally speaking, those duties are to be placed on the Navy, because the commanding officers and others in authority in the other branches of the armed services are not so well qualified "to show in themselves a good example of virtue, honor, patriotism, and subordination," and so they are not required "to be vigilant in inspecting the conduct of all persons who are placed under their command"?

Mr. KEFAUVER. The Army and the Air Force did not feel they needed statutory provisions requiring them to do their duty, but the Navy had an additional and supplemental interest in the provision, and it is very anxious to keep it. It is separate and distinct from the code, and we thought it would do no harm. The Navy wanted it, and we put it in the back of the bill. It is not in the code. It is the code we try to make uniform.

Mr. KEM. Does it have any purpose in a unification law, a law that purports to apply uniformly throughout the armed services?

Mr. KEFAUVER. I may say to the distinguished Senator, it is not in the code. The code ends on page 200. This is a separate statutory provision in the back of the bill. The Navy has a sentimental interest in the provision that the others do not share. That is the situation.

Mr. KEM. It is a part of the same bill, is it not?

Mr. KEFAUVER. Yes; but it is the code that we are trying to make uniform.

Mr. KEM. Is it a part of the same bill?

Mr. KEFAUVER. Yes; it is part of the same bill, but it is not in the Uniform Code.

Mr. KEM. Where does the Senator find in the bill anything indicating that the code ends before this provision is reached?

Mr. KEFAUVER. The articles of the code continue to the middle of page 200.

Mr. KEM. Where is the provision that indicates that to be so?

Mr. KEFAUVER. If the Senator will turn to page 104, beginning in line 13, he will note the following:

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—."

That is section 1. What the Senator was reading is section 7 (c) of the bill, but that is not the code.

Mr. KEM. I did not understand the Senator's reference to the language which indicates the exclusion from the code of the part to which I referred. If the Senator will direct my attention to that language, I shall appreciate it.

Mr. KEFAUVER. The particular language is that, beginning on page 104, in lines 17 and 18, "and the articles in this section may be cited as 'Uniform Code of Military Justice, article * * *.'" It is section 1, and is followed by part 1, general provisions.

Mr. KEM. The articles in this section?

Mr. KEFAUVER. Yes. Then section 2 begins on page 200; so from 104 to the middle of page 200—

Mr. KEM. Where does section 1 begin?

Mr. KEFAUVER. Section 1 begins on page 104, line 13, of the bill, as proposed by the committee to be amended. The Senator will note that the House text is all stricken out down to line 13, page 104.

Mr. KEM. The bill is entitled "An act 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." It does not say anything there about requirements of attendance on church or of proper subordination in the Navy.

Mr. SALTONSTALL. Mr. President, will the Senator yield?

Mr. KEFAUVER. I yield.

Mr. KEM. If the Senator will permit me to complete my question, I shall appreciate it very much.

Mr. SALTONSTALL. I beg the Senator's pardon.

Mr. KEM. It seems to me if the Senator's position is that the bill covers more than a uniform code, the title should be amended. It is misleading.

Mr. KEFAUVER. The code is contained in section 1, following which certain statutory provisions are proposed to be enacted.

Mr. KEM. Should not the title be amended to show the inclusion of certain salutary admonitions to the Navy.

Mr. KEFAUVER. The title is rather broad, I think.

Mr. KEM. The title is, "An act 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." Certainly no person reading it would get the idea that additional enactments with reference to the Navy were to be incorporated in the bill.

Mr. McCARRAN. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. McCARRAN. Who has the floor?

Mr. KEFAUVER. I have the floor.

The PRESIDING OFFICER. The Senator from Tennessee has the floor.

Mr. SALTONSTALL. Mr. President, will the Senator yield?

Mr. KEFAUVER. I yield to the Senator from Massachusetts.

Mr. SALTONSTALL. Mr. President, my answer to the Senator from Missouri would be that this bill is written as every other bill is written. In almost every bill the first section immediately follows the title, and it is called section 1. In this bill section 1 begins on line 13, page 104, and provides:

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 so forth. Then we come to section 2, on page 200. Section 2 is a sort of catch-all. For instance, it is not necessary in the case of the Army, to take care of things that happen on the high seas. In the Navy the captain of a ship has always been supreme. He must be supreme. Therefore his conduct must be good. It seems to me that is a situation which applies particularly to the Navy. So the provision referred to by the Senator from Missouri is not a part of the code, for the technical reason that it is in section 2, and is not in section 1.

Mr. KEM. Mr. President, the question I want to ask the Senator from Tennessee is this: If we are going to lay down requirements as to virtue, honor, patriotism, subordination, dissolute and immoral practices, and so forth, why have we singled out the Navy?

Mr. KEFAUVER. One reason is that they have asked for it and the

other services have not. There are some things applying to the Navy which are a little different from things which apply to the Army and the Air Corps, and they are not a part of the code. This bill is an effort to get all these matters together in the same bill.

Mr. HOLLAND. Mr. President, will the Senator yield?

Mr. KEFAUVER. I yield.

Mr. HOLLAND. I should like to ask the Senator from Tennessee if it is correct to say for the record that there is nothing in this bill which is applicable to the National Guard of the several States?

Mr. KEFAUVER. There is not, unless members of the National Guard are on Federal service.

Mr. HOLLAND. Does the Senator mean by his answer to state that the National Guard and no components of personnel thereof would be affected by or subject to any of the provisions of this bill until and unless they have been actually federalized?

Mr. KEFAUVER. Until they have been actually called or ordered to duty or training by the Federal Government.

Mr. HOLLAND. I thank the Senator.

Mr. KEFAUVER. That provision is found on page 107 of the bill. I thank the Senator from Florida for asking the questions.

Mr. McCARRAN. Mr. President, I advised the Senator from Tennessee (Mr. Kefauver) earlier in the day that I would, at an early time, during the consideration of House bill 4080, move that the bill be referred to the Committee on the Judiciary. The hour is too late, it seems to me, to present that motion at this time. I should not care to suggest the absence of a quorum now. Hence, I shall defer making the motion until the Senate reconvenes tomorrow. I shall, however, after the Senate reconvenes tomorrow, and at the earliest opportunity, move that the bill be referred to the Committee on the Judiciary for consideration by that committee.

Mr. KEFAUVER. Mr. President, will the Senator yield?

Mr. McCARRAN. I yield.

Mr. KEFAUVER. If the Senator's motion is not to be made tonight, I wonder if the exchange of correspondence between the Senator from Nevada and the Senator from Maryland (Mr. Tydings), the chairman of the Armed Services Committee, can be inserted in the RECORD at this time. It might be of some enlightenment to the Members of the Senate. Will the Senator from Nevada place that correspondence in the RECORD, or would he object if I should do so?

Mr. McCARRAN. I have here a copy of my letter, as chairman of the Committee on the Judiciary, addressed to the Senator from Maryland (Mr. Tydings) on July 1, 1949. I do not have at hand the reply of the Senator from Maryland, but that can be furnished. I have also a copy of my letter of July 19, addressed to the Senator from Maryland on the same subject. If the Senator from Tennessee has the letter in reply to that, the correspondence can go into the RECORD so that it may become a part of the RECORD at this time in connection with my motion to refer the bill to

the Committee on the Judiciary, if that is satisfactory to the Senator from Tennessee.

Mr. KEFAUVER. Yes; it is satisfactory to me. There will be included in the RECORD first, the Senator's original letter of July 1, the response to that letter dated July 13, and the reply of the Senator from Nevada dated July 19.

The PRESIDING OFFICER. Is there objection to including in the RECORD the correspondence referred to?

There being no objection, the correspondence was ordered to be printed in the RECORD, as follows:

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,

July 1, 1949.

Hon. Millard E. Tydings,
United States Senate,
Washington, D. C.

My Dear Senator: H. R. 4080, the so-called code of military justice, was reported to the Senate from the Committee on Armed Services on June 10, 1949.

In many of its provisions this bill deals with matters which I believe to be properly within the jurisdiction of the Committee on the Judiciary; therefore, I believe it to be my duty to attempt to enforce what I consider to be the jurisdiction of the committee of which I have the honor to be the chairman. Therefore, I intend to move that the bill, H. R. 4080, be taken from the Senate Calendar and referred to the Committee on the Judiciary.

I hope you may feel it will not be necessary to oppose my motion, for I should like to have your cooperation in this matter.

I do not wish to burden you now with a detailed discussion of this question, but let me cite some of the more compelling instances of provisions in the bill which I feel should have the scrutiny of the Committee on the Judiciary.

Article 2 of the proposed new code of military justice makes it clear that those to whom the code applies (in addition to regular and volunteer personnel) include:

"(1) * * * all inductees from the time of their actual induction into the armed forces of the United States, and all other persons lawfully called 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 or order to obey the same; * * * (2) Reserve personnel while they are on inactive duty training authorized by written orders which are voluntarily accepted by them, which orders specify that they are subject to this code; * * * (10) in time of war, all persons serving with or accompanying an armed force in the field; (11) subject to the provisions of any treaty or agreement to which the United States is or may be party or to any accepted rule of

international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and the following Territories: That part of Alaska. . . , the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands."

The above provisions greatly broaden the scope of authority and jurisdiction of military courts. In fact, those civilians who would thus be brought within the jurisdiction of military justice appear to include Mr. McCloy and all personnel of the Allied military government, as well as, no one knows how many, persons in Hawaii, since article 5 provides that this code shall be applicable in all places.

Article 3 of the proposed code lays the jurisdiction to try former personnel for offenses committed while subject to the code, if they cannot be tried in the United States courts and if the sentence could be 5 years or more.

This provision, like the provision above referred to, is extremely important when it is realized the code does not provide for bond, arraignment, or any of the usual rights accorded to even the worst type of civilian defendant.

Article 76 of the proposed code seeks to make the administrative action taken final and binding upon all departments, courts, agencies, and officers of the United States.

This seems to me an extremely dangerous provision and subject to serious question on constitutional grounds. It is questionable whether an act of Congress could thus rob the Supreme Court of appellate jurisdiction. I do not believe all civilian courts should be closed to anyone with respect to all matters which may have been tried before a military tribunal or administratively determined by the military. I question the wisdom of conferring absolute finality upon the decisions of an alleged court, the members of which are subject to removal by an administrative officer.

I believe the above is sufficient to show the reasons for my conviction that this bill should have the most serious consideration of the Committee on the Judiciary before being enacted into law.

Kindest personal regards.

Sincerely,

Pat McCarran,

Chairman.

Hon. Pat McCarran,
Chairman, Committee on the Judiciary,
United States Senate,
Washington, D. C.

July 13, 1949.

My Dear Senator McCarran: This will acknowledge your letter of July 1, 1949, in connection with H. R. 4080, the so-called code of military justice bill, and informing me of your intention to move that bill be taken from

the Senate Calendar and referred to the Committee on the Judiciary.

You will recall our earlier conversations on this subject and your agreement that jurisdiction properly lay in the Committee on Armed Services. In view of this, I am surprised that you now feel the bill should be referred to your committee. Your letter of April 10, 1949, to me setting forth your recommendations with respect to H.R. 4080 created the impression in my mind that you desired the Committee on Armed Services, in the exercise of its jurisdiction, to consider your suggestions. As you know, a number of your recommendations now appear in the bill as amended by this committee. In addition, I am sure you are aware of the extent of the hearings in the House of Representatives and before this committee on this bill and the full consideration given to it. I hope that you will reconsider your intention of moving that the bill be taken from the Senate Calendar, and would like to briefly outline for you some of the considerations this committee had before it when it considered the articles you cite in your letter.

You mention that you feel that parts of the code deal with matters within the jurisdiction of your committee and you state, specifically, that you feel article 2 is such a provision. Your comment on article 2 is that it greatly broadens the scope of authority and jurisdiction in military courts. I think you will find that a close scrutiny of the present statutory provisions covering jurisdiction as found in the Articles of War and the Articles for the Government of the Navy disclose that article 2 is, to a large extent, a reincorporation of the present laws and there are no subdivisions of it which can be said to create new jurisdiction or broaden the present authority of either the Army or the Navy, or a combination of both of them. For instance, article 2, subdivision (1) is drawn from present Article of War 2, 10 United States Code, section 1473 (a) and section 12 of the Selective Service Act of 1948.

Article 2, subdivision (2), which reads, "Reserve personnel while they are on active duty training authorized by written orders," etc., is actually a restricted version of the authority heretofore provided for the Navy in 34 United States Code, section 855. Very close attention was given to this article. I am sure you are familiar with the extensive discussion in the House hearings and our hearings on that single subdivision. For your convenience, I here quote the present Navy jurisdiction and you will note that, by comparison with it, subdivision (2) greatly restricts the jurisdiction.

"S. 855. Naval Reserve, application of laws, regulations, and orders of 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: **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: **Provided further**, That for the purpose of carrying the provisions of this section into effect, members of the Naval Reserve may 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. (June 25, 1938, ch. 690, title III, p. 301, 52 Stat. 1480.)"

Subdivisions (10) and (11) are reincorporations of provisions found in the Articles of War and the Navy Statutes (see Article of War 2 (d) 10 U. S. C. sec. 1473, and see 34 U. S. C. sec. 1201). In this connection, further, I would like to point out that our committee considered the suggestions you made in your letter of April 30, 1949. I note that in your letter you suggested amendments to subdivisions (10) and (11) and I think that, as approved by our committee, they reflect your ideas. Furthermore, I think a close reading of subdivision (11) would result in the opposite construction of the language to the one apparently placed in your letter; to wit; jurisdiction is specifically not provided in the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Philippines. In passing, I am positive that these subdivisions would not bring within the jurisdiction of courts martial a person in the position of high commissioner. The reason I take this position is that the language of article 2 is practically identical to Article of War 2, which has always been construed by the Federal courts and the military as follows. I quote from Court Martial Manual 329933, 7 bulletin, Judge Advocate General 125 (June 17, 1948):

"Under the provision of AW 2 (d), persons 'accompanying or serving with' the armies of the United States without the territorial jurisdiction of the United States are subject to the Articles of War. The word 'accompanying' first appeared in the code of 1916 (see General Crowder's remarks in Senate Report No. 130, 64th Cong., 1st sess., p. 37), but the jurisdictional phrase 'serving with' may be found in all the American military codes from the earliest times (1775 articles, art. XXXII; 1776 articles, sec. XIII, art. 23; 1806 articles, art. 60; 1874 articles, art. 63) * * * In those cases, however, where a civilian has been held to have been 'accompanying' the armies, it appeared that he has either moved with a 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 * * * Conversely, one may be 'serving with' the armies without accompanying them, as in the case of an employee of a military installation 'in the field in time of war' or 'without the territorial jurisdiction,' which is located near the employee's civilian residence and at which he performs his daily work, living as he would were he employed at some nonmilitary task in the locality (see SPJGW 1945/4990, 23 June and 2 July 1945, 4 Bull, JAG 223, and cases cited therein)."

Article 3 of the code provides, in general, for a continuing jurisdiction under certain circumstances where jurisdiction has previously attached and was segregated from article 2 for that reason, even though as you pointed out, it generally covers the question of jurisdiction. The problem encountered in connection with this article, and particularly subdivision (a) of it, concerns those types of situations where persons have committed offenses while serving on active duty in the armed services and who, thereafter, by virtue of some artificial situation, are unable to be tried either by courts martial or the Federal courts. In general, the classes of cases fall into three categories:

(1) Reservists who go on inactive duty; (2) persons who are discharged from the service; and (3) persons who, although once discharged, reenter the service. A number of cases falling into these categories have taken place, and it has been found that no jurisdiction resides in any court to bring them to trial. Several cases of this kind received a considerable amount of publicity and you will undoubtedly remember them. For instance, a case falling in the category of reenlistment is the Hirshberg case in the Navy. You will recall that Hirshberg was captured by the Japanese and, after being rescued and returned to this country, was discharged from the Navy and on the same day reenlisted for a new term. There later came to light facts which warranted the charge that he had mistreated fellow-American prisoners while he was a Japanese captive for purposes of enhancing his own fortunes. The alleged acts, of course, occurred overseas, outside the jurisdiction of the Federal courts. The question of whether or not the Navy had jurisdiction to try him for these charges, where the discharge intervened—even though he was out of the service for 1 day only—was settled by the Supreme Court, which held that the Navy had lost jurisdiction by virtue of the discharge. Under these circumstances, no court—military or civilian—had jurisdiction to determine whether or not Hirshberg had committed a serious offense. I think it is noteworthy to point out that the Supreme Court's decision was based entirely on a lack of statutory authority and specifically did not involve a constitutional question.

Another case falling within one of these classifications was the Durant case, in which it was charged that Mrs. Durant, at one time a captain in the WAC, was implicated in the theft of the crown jewels of Hesse. Since the theft was committed in Europe, the civilian courts had no jurisdiction and the question of jurisdiction of the military courts was raised because the facts were not discovered, nor was the trial instituted, until Mrs. Durant was on terminal leave. You will recall, in this case, that it was held that the Army courts martial had jurisdiction, but it is clear that, if the referral for trial had been delayed for another 2 or 3 weeks, when her terminal leave would have expired, Mrs. Durant could not have been tried at all for a very serious crime of which she was ultimately convicted. Providing jurisdiction in this type of case, as this subdivision attempts to do, finds some precedent in the existing Articles of War and Articles for the Government of the Navy, which, of course, give a continuing jurisdiction over certain types of offenses committed while on active duty involving frauds against the Government. (See article of war 94, 10 U. S. C., sec. 1566, and article 14 of the Articles for the Government of the Navy, 34 U. S. C., sec. 1200.)

Insofar as reservists in inactive duty are concerned, I assume you have already noted from Thirty-fourth United States Code, section 855, that the Navy has jurisdiction over reservists who have previously committed offenses while on active duty.

It was for the purpose of covering cases of this type, over which there is no present jurisdiction, that article 3 (a) was drafted. It seems entirely fair that, within the statute of limitations, persons who have committed offenses should not gain an immunity or be excused by virtue of the administrative act of going off active duty or being separated from the armed forces. However, it was not intended to extend blanket jurisdiction over

cases of this type, or to convey to military courts jurisdiction under these circumstances over every trivial offense. For that reason, the jurisdiction is limited to serious crimes only by virtue of the provision that the offense must call for a sentence of at least 5 years. In addition, it was felt that where the Federal or State courts have jurisdiction, such jurisdiction should not be disturbed, and there would be no justification in also giving it to the courts martial. For that reason, it is provided that the courts martial are to have jurisdiction only if the civil courts do not have it.

I note that in your letter of April 30, 1949, you make the comment that the enactment of article 3, as then written, would foreclose appeals to the civil courts in cases such as the Durant case. That case was not an appeal in the narrow sense of the word but was a petition for habeas corpus, which as you know, was denied. Article 3 in no way interferes with the right to seek habeas corpus. You make the same comment with respect to article 76 in your letter of July 1, 1949. This article is drawn almost word for word from Article of War 50 (h), 10 United States Code, section 1522, and is a statement of the law as interpreted by the Federal courts. See *Humphrey v. Smith* (93 L. ed. 774 (Supreme Court 1949)); *Schita v. Cox* (139 F. 2d 971 (C. C. A. 8th 1944), certiorari denied, 322 U. S. 761); *Henry v. Hodges* (76 F. Supp. 698 (S.D.N.Y. 1948)). The reports of both the senate and House Armed Services Committees specifically state that article 76 does not foreclose the right to habeas corpus in the Federal courts.

Based on the above analysis of the points you bring up, I think you can be satisfied that careful considerations of those items were given by the House and Senate committees. In addition, I think the explanation demonstrates that they contain no new material which would bring them within the jurisdiction of the Committee on the Judiciary.

In my opinion, the whole subject of military justice is one which falls wholly within the jurisdiction of the Committee on Armed Services. This opinion is based on my interpretation of the jurisdiction of the Committee on Armed Services and the Committee on the Judiciary as set forth in the Legislative Reorganization Act, and based on a long-standing precedent. You will find that in the last 50 years all matters on this subject have been considered as falling within the jurisdiction of the Committees on Armed Services or their predecessor committees. In the Eightieth Congress, the Committee on Armed Services had jurisdiction over the bills which ultimately became Public Law 759 and also over proposed amendments to the Articles for the Government of the Navy. Legislation on military justice has been before the Military Affairs Committees in 1912, 1913, 1916, 1919, 1937, and 1942.

In view of all these considerations I hope you will not go forward with your intention of moving that the bill be taken from the Calendar. It is an extremely important step toward unification and provides for reforms in the court-martial system which should be enacted as soon as possible. I have received a letter from the Secretary of Defense in which he strongly urges its passage in the present session of Congress. My present feeling is that it should go forward at this time, and for that reason I would not like to be required to oppose your motion.

I would appreciate it if you would let me know your decision in this matter and would welcome your support of the bill.

Sincerely,

Millard E. Tydings,
Chairman.

July 19, 1949.

Hon. Millard E. Tydings,
Chairman, Committee on Armed Services,
United States Senate,
Washington, D. C.

My Dear Senator Tydings: I have your letter of July 13, with regard to the motion which I have advised you I intend to offer, to refer the bill H. R. 4080 to the Committee on the Judiciary.

I do, indeed, recall our earlier conversations on this subject. They began with discussion of resolutions pending before the Committee on the Judiciary for the investigation of military justice. You pointed out that similar resolutions were pending before the Committee on Armed Services, and that the committee was also working on a new code of military justice; and, as I recall it, you suggested that I allow the matter to rest with the Committee on Armed Services until you had concluded your deliberations on this bill, with the thought that then we could discuss the matter further.

In conformance with this agreement, the Judiciary Committee has taken no action on the resolutions pending before it for the investigation of military justice, and the jurisdiction of the Committee on Armed Services to consider and deal with the bill H. R. 4080 has not been challenged. I am not challenging that jurisdiction now, and I have no intention of challenging it. All I am doing is asserting that the bill includes subject matter clearly within the jurisdiction of the Committee on the Judiciary, and asking that now, after the Committee on Armed Services has had its say, the bill may be referred to the Committee on the Judiciary for consideration of those matters which do lie within the jurisdiction of the Committee on the Judiciary.

While it is true that, in a spirit of cooperation, I submitted to you, as chairman of the Committee on Armed Services, a very lengthy letter expressing some of my personal views with regard to the bill H. R. 4080, it must be clear that this did not amount to action or consideration by the Committee on the Judiciary, and I cannot feel that the opportunity given me personally to express my views, and the consideration given by the Committee on Armed Services to the views so expressed, should operate to divest the Committee on the Judiciary of its jurisdiction.

Because I know there is not and will not be any acrimony between us with respect to this matter, I do not wish to attempt a point-by-point traverse of your letter. However, in fairness, I believe I should make one or two comments.

Article 2, subdivision (3) may be a "restricted version of the authority heretofore provided for the Navy" but it cannot be denied that it expands jurisdiction to members of the Army and Air Force Reserve. Furthermore, one must bear in mind that, under article 3, such personnel may be recalled to duty without their consent for trial of offenses committed while on such duty with a questionable statute of limitations applicable and limited only (as to military offenses) by the 5-year sentence proviso. This latter limitation is in turn limited only by article 56 which grants the President authority (which he may delegate under art. 140) to prescribe limits.

In arriving at your conclusions with respect to subdivisions (10) and (11) of article 3, you have evidently not considered the decision rendered in *McCune v. Kilpatrick* (53 Fed. Supp. 80), where a civilian cook, hired to provide meals for a merchant-marine crew and armed guard, was held amenable to trial by court martial on charges of desertion, when he quit his job after learning that he was also supposed to cook for about 500 Army troops being transported overseas.

As to the Hirshberg and Durant cases, it can just as reasonably be argued that Congress should confer jurisdiction on civilian courts to try such cases as that we should further expand the authority of military tribunals.

The fact that extant laws provide or do not provide remedies for certain offenses is not the basic question here. It is rather the limit to which we have permitted or will expand the jurisdiction of military courts over the lives and fortunes of our ordinary citizens and nationals. There can be no denial of the power of Congress to confer jurisdiction on our inferior courts to consider all matters relating to military offenses. The pattern to be followed by military courts in times of emergency was set in Hawaii following December 7, 1941.

I do not doubt that careful consideration was given to every word of the bill by both the Senate and House committees, but I submit that the viewpoint from which the consideration is given is most important. Although the committee reports state that it was not the intention to foreclose petitions for writs of habeas corpus, I believe you will agree that the proposed language of the bill is clear and unambiguous and would, therefore, never be required to be interpreted by reference to the committee report. Under this language, even if it should be held that the writ might lie—which is doubtful—the action of a military court would not be subject to challenge, and therefore the writ could provide no real relief.

I cannot agree that "the whole subject of military justice is one which falls wholly within the jurisdiction of the Committee on Armed Services." The Legislative Reorganization Act specifically commits to the Committee on the Judiciary jurisdiction over "judicial proceedings, civil and criminal, generally," and over "civil liberties." Where the rights and liberties of civilians are concerned, I believe the jurisdiction of the Committee on the Judiciary should stand unquestioned; and there is no doubt such rights are involved in the bill H. R. 4080.

I certainly do not wish to enter into a controversy with you over this matter; and I assure you that if the bill is referred to the Committee on

the Judiciary it will be considered most promptly, and most promptly reported back to the Senate.

Kindest personal regards.

Sincerely,

Pat McCarran,

Chairman.

United States SENATE
(Cong. Record, Vol. 96, Pt. 1,1369-1370)
February 2, 1950

CODIFICATION OF THE ARTICLES OF WAR

The Senate resumed the consideration of the bill (H.R. 4080) 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.

Mr. MORSE. Mr. President, I understand that the distinguished Senator from Nevada (Mr. McCarran) is going to move tomorrow that House bill 4080 be referred to the Committee on the Judiciary. As a member of the Armed Services Committee of the Senate, to which committee the bill was referred in the first instance, I shall support the motion of the Senator from Nevada, because it is my opinion that the bill should never have been referred to the Armed Services Committee in the first instance. The bill covers many basic questions involving the administration of justice in this country, and I see no reason why questions as to judicial right on the part of men in the armed services should be considered by any committee other than the Committee on the Judiciary of the Senate.

My experience in connection with the bill further convinces me, Mr. President, that it ought to have been submitted to the Committee on the Judiciary in the first instance. I speak as a member of the Armed Services Committee, and as a member of the subcommittee of that committee which conducted hearings on the bill when I say I hope that tomorrow the motion of the Senator from Nevada will be adopted, because I should like to have the contents of the bill and the implications of the bill, insofar as the administration of American justice is concerned, considered by the Committee on the Judiciary. I happen to be one who believes that we should not draw the type of curtain between civilian and military justice that is drawn by this bill. I think the standing committee of the Senate which has jurisdiction over questions of the administration of American justice should have the bill assigned to it.

Furthermore, Mr. President, I wish to say at this time that if the Senate should decide tomorrow not to refer the bill to the Committee on the Judiciary for further study by that committee, which committee, in my judgement, is best versed in questions of the administration of justice, then I shall ask consideration of a series of amendments to the bill, which I now send to the desk and ask to have printed and lie on the table.

The Presiding Officer (Mr. Jenner in the chair). The amendments will be received, printed, and lie on the table.

Mr. MORSE. Mr. President, I urge the Senate to give the most careful consideration to these amendments because although they bear my name; after all, they are not, in the main, the product of my pen; they are the

result of very careful study and consideration which has been given to the problem of military justice by an appropriate committee of the American Bar Association.

I should like to say, Mr. President, that I think the interest of the American Bar Association and the demonstrated proof time and time again of its insistence upon setting up a sound system of American justice, should recommend to the Senate of the United States the most careful consideration of the amendments which I have sent to the desk.

Mr. LUCAS. Mr. President, will the Senator yield?

Mr. MORSE. I will yield in a moment.

I have conferred at length with members of the American Bar Association who have urged upon me the importance of seeing to it that certain changes are made in House bill 4080 before it is passed by the Senate. They have convinced me that those changes are necessary. Therefore, if the bill is not referred to the Committee on the Judiciary tomorrow, I shall want to speak, as briefly as possible, but as long as necessary, to see to it that a record in support of the amendments is made for the consideration of the Senate. I sincerely hope that because of the importance of the issues involved in the bill the Senate will not agree to proceed to any vote on the bill, at least tomorrow.

I now yield to the Senator from Illinois.

Mr. LUCAS. The Senator from Oregon has offered amendments at this time, which he has asked to have printed and lie on the table. I am wondering—and I should like to ask as a matter of information—if the amendments were offered in the Committee on Armed Services?

Mr. MORSE. The subject matters of the amendments were offered. Representatives of the American Bar Association, as the record of the hearings will show, testified before the subcommittee. But the recommendation of the witnesses of the American Bar Association were not approved by the subcommittee.

Mr. LUCAS. What I was wondering was whether these specific amendments were offered to the committee as a whole, and whether the amendments were voted up or down in the committee room.

Mr. MORSE. The committee did not vote on them in their present form. But the record will show clearly that the objectives and principles of these amendments were before the committee for debate and consideration.

Mr. SALTONSTALL. Mr. President—

Mr. MORSE. I yield to the Senator from Massachusetts.

Mr. SALTONSTALL. I should like to have the floor in my own right.

Mr. MORSE. Mr. President, I think I have made clear the position I shall take on the motion made by the Senator from Nevada to refer the bill to the Committee on the Judiciary, and on the amendments, if that motion should fail.

Mr. SALTONSTALL. Mr. President, without delaying the Senate tonight, I wish to say to the Senator from Illinois, in response to his inquiry, that I, too, was a member of the subcommittee, and it is my feeling that if the Senator from Illinois will read in tomorrow's RECORD the speech of the Senator from Tennessee (Mr. Kefauver), he will find the substance of the proposed amendments of the Senator from Oregon discussed, with their background. Although I agree with the Senator from Oregon that the amendments were not offered as such, the subject matter of the amendments, in general, if I understand what he intends to offer, was considered.

I should like to say in reply to the Senator from Oregon—and I do this because I too was a member of the subcommittee—that I hope the motion of the Senator from Nevada to refer the bill to the Judiciary Committee will not prevail. I shall give my reasons in three sentences, so that the Senator from Oregon may have the answer very briefly in the RECORD.

Mr. President, the subject of military justice is one which falls wholly within the jurisdiction of the Committee on Armed Services. This opinion is based on my interpretation of the jurisdictions of the Committee on Armed Services and the Committee on the Judiciary as set forth in the Legislative Reorganization Act, and based on long-standing precedents. It will be found that in the past 50 years all questions on this subject have been considered as falling within the jurisdiction of the Committees on Armed Services or their predecessor committees. In the Eightieth Congress, the Committee on Armed Services had jurisdiction over the bill which ultimately became Public Law 759, and also over proposed amendments to the Articles for the Government of the Navy. Legislation on military justice was before the Military Affairs Committees in 1912, 1913, 1916, 1919, 1937, and 1942.

For those reasons, very briefly, Mr. President, I shall vote against any motion to refer the bill to the Judiciary Committee.

Mr. MORSE. Mr. President, I should like to make a very brief reply to my good friend from Massachusetts. I do not quarrel with the citation of precedents. I quarrel with the advisability of following those precedents, in view of the problems which have existed for decades with respect to military justice.

Mr. President, the very fact that in the past so-called military justice legislation has been considered by the Armed Services Committees of the Congress, instead of by the Judiciary Committees, is one of the reasons, in my opinion, I say most respectfully, why there have developed in this country really two sets of justice, so-called—one for civilian and another for military personnel.

From 1936 to 1939, as director and administrator I conducted a nationwide prison survey for the United States Department of Justice. I know, as a result of my experience in connection with that survey that it is high time—in fact, it is long overdue—that we bring about a uniformity of principle in the administration of criminal justice, covering both civilians and military personnel.

In my judgement some shocking conditions exist as the result of the two-system administration of justice in America. We should have great interest in a civilian who goes into uniform and is subject to the rules of military justice. The experiences which we developed in the last war were so shocking in some respects that we had to establish special clemency boards at the close of the war to rectify some of the grave injustices which developed in connection with the administration of military justice during the war.

As I shall say at much greater length when the debate proceeds, whether a man wears a uniform or a business suit, he is entitled to the protection afforded by the fundamental principles of American justice which I believe were contemplated when the Constitution was adopted.

Some of the excesses of the military in the administration of military justice in the history of this country are simply shocking. As a Member of the Senate I shall raise my voice in doing what I can to see to it that the basic principles of justice advocated by the American Bar Association are written into any court-martial bill passed by the Congress.

Mr. LUCAS. Mr. President, when the Senator from Illinois had this bill made the unfinished business, he was hopeful, from his discussion with members of the Armed Services Committee, that we might be able to conclude consideration of the bill today. It now seems, as the result of what my distinguished friend from Oregon has said, that we may not be able to finish the bill tomorrow. However, I hope that we can vote tomorrow at the earliest possible moment upon the motion which will be made by the Senator from Nevada, in order that we may ascertain what action the Senate will take upon the motion. If the motion should be defeated—and I am hopeful that it will be—we can then proceed to debate the amendments and the bill itself. I sincerely hope that we may be able to conclude the debate tomorrow. I do not like to hold the Senate in session late in the evening during the early part of the session, but I had what I thought was an almost absolute assurance that we could conclude consideration of the bill in not to exceed 2 days, or perhaps 1 day. However, I am not complaining about that, because I well recognize that every Senator has the right to speak as long as he desires upon any amendment or the bill itself.

I hope that my good friend from Oregon will debate his amendments as expeditiously as possible, with a view to attempting to finish tomorrow afternoon, or perhaps some time in the evening. I do not want to hold a night session, but I should like to see the bill passed, if possible, tomorrow. If we cannot, of course, we shall have to continue over until another day.

I have made an agreement with the Senators from California (Mr. Downey and Mr. Knowland) and the Senators from Arizona (Mr. Hayden and Mr. McFarland) that we would take up on Monday a bill in which those Senators are very much interested. I am sure that they would not object to delaying that bill a short while so that we may conclude consideration of the pending bill if we must finish it on Monday. However, it is my sincere hope that we may be able to complete it tomorrow.

Recess.

United States SENATE

February 3, 1950

(Cong. Record, Vol. 96, Pt. 2, 1412-1417)

CODIFICATION OF THE ARTICLES OF WAR

The Senate resumed the consideration of the bill (H. R. 4080) 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.

The VICE PRESIDENT. The question is on agreeing to the committee amendment in the nature of a substitute.

Mr. LUCAS. Mr President, yesterday the able Senator from Nevada [Mr. McCarran] gave notice that he would make a motion to refer the pending measure to the Committee on the Judiciary, and the able Senator from Oregon [Mr Morse] submitted certain amendments to the bill, I made a brief statement last evening before the Senate took a recess, in the hope that we might be able to finish consideration of the bill this afternoon. I wish to advise Senators that the session will run rather late. I do not wish to hold a night session. I hope that later perhaps we may be able to obtain an agreement to vote at a certain hour on the pending measure and all amendments thereto. I merely make that statement so as to advise the Senate that probably we shall vote late this afternoon.

The VICE PRESIDENT. There is no motion or amendment now pending except the committee amendment, which is in the nature of a substitute, to which amendments may be offered.

Mr. LUCAS. I understand that, but the Senator from Nevada advised the Senate last night that at the appropriate moment he would make a motion to refer the bill to the Committee on the Judiciary.

Mr. McCARRAN. Mr. President, in order that there may be no charge of delay or waste of time on this bill, I now move that the bill be referred to the Committee on the Judiciary.

The VICE PRESIDENT. The question is on agreeing to the motion of the Senator from Nevada.

Mr. McCARRAN. Mr. President, in order that it may be fully understood by the Senate that this is not a motion made in haste, nor for the purpose of delaying the consideration of a bill of grave importance, I desire to read to the Senate a copy of a letter which was published in the CONGRESSIONAL RECORD of yesterday, and which was written by myself to the able chairman of the Committee on Armed Services [Mr. Tydings] on July 1, 1949:

United States Senate,
Committee on The Judiciary,
July 1, 1949.

Hon. Millard E. Tydings,
United States Senate,
Washington, D. C.

My Dear Senator: H. R. 4080, the so-called Code of Military Justice, was reported to the Senate from the Committee on Armed Services on June 10, 1949.

In many of its provisions this bill deals with matters which I believe to be properly within the jurisdiction of the Committee on the Judiciary; therefore, I believe it to be my duty to attempt to enforce what I consider to be the jurisdiction of the committee of which I have the honor to be the chairman. Therefore, I intend to move that the bill (H. R. 4080) be taken from the Senate Calendar and referred to the Committee on the Judiciary.

I hope you may feel it will not be necessary to oppose my motion, for I should like to have your cooperation in this matter.

I do not wish to burden you now with a detailed discussion of this question, but let me cite some of the more compelling instances of provisions in the bill which I feel should have the scrutiny of the Committee on the Judiciary.

Article 2 of the proposed new Code of Military Justice makes it clear that those to whom the code applies (in addition to Regular and Volunteer personnel) include:

"(1) * * * all inductees from the time of their actual induction into the armed forces of the United States, and all other persons lawfully called 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 or order to obey the same; * * *

(2) Reserve personnel while they are on inactive-duty training authorized by written orders which are voluntarily accepted by them, which orders specify that they are subject to this code; * * * (10) in time of war, all persons serving with or accompanying an armed force in the field; (11) subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and the following Territories; That part of Alaska * * *, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands."

The above provisions greatly broaden the scope of authority and jurisdiction of military courts. In fact, those civilians who would thus be brought within the jurisdiction of military justice appear to include Mr. McCloy and all personnel of the Allied Military Government, as

well as, no one knows how many, persons in Hawaii, since article 5 provides that this code shall be applicable in all places.

Article 3 of the proposed code lays the jurisdiction to try former personnel for offenses committed while subject to the code, if they cannot be tried in the United States courts and if the sentence could be 5 years or more.

This provision, like the provision above referred to, is extremely important when it is realized the code does not provide for bond, assignment, or any of the usual rights accorded to even the worst type of civilian defendant.

Article 76 of the proposed code seeks to make the administrative action taken final and binding upon all departments, courts, agencies, and officers of the United States.

This seems to me an extremely dangerous provision and subject to serious question on constitutional grounds. It is questionable whether an act of Congress could thus rob the Supreme Court of appellate jurisdiction. I do not believe all civilian courts should be closed to anyone with respect to all matters which may have been tried before a military tribunal or administratively determined by the military. I question the wisdom of conferring absolute finality upon the decisions of an alleged court, the members of which are subject to removal by an administrative officer.

I believe the above is sufficient to show the reasons for my conviction that this bill should have the most serious consideration of the Committee on the Judiciary before being enacted into law.

kindest personal regards.

Sincerely,
Pat McCarran,
Chairman

There was a reply to that letter by the able Senator from Maryland, the chairman of the committee, to which I replied in July 19, 1949, as follows:

July 19, 1949.

Hon. Millard E. Tydings,
Chairman, Committee on Armed Services,
United States Senate,
Washington, D. C.

My dear Senator Tydings:

I have your letter of July 13, with regard to the motion which I have advised you I intend to offer, to refer the bill H. R. 4080 to the Committee on the Judiciary.

I do, indeed, recall our earlier conversations on this subject. They began with discussion of resolutions pending before the Committee on the Judiciary

for the investigation of military justice. You pointed out that similar resolutions were pending before the Committee on Armed Services, and that the committee was also working on a new code of military justice; and, as I recall it, you suggested that I allow the matter to rest with the Committee on Armed Services until you had concluded your deliberations on this bill, with the thought that then we could discuss the matter further.

In conformation with this agreement, the Judiciary Committee has taken no action on the resolutions pending before it for the investigation of military justice, and the jurisdiction of the Committee on Armed Services to consider and deal with the bill H. R. 4080 has not been challenged. I am not challenging that jurisdiction now, and I have no intention of challenging it. All I am doing is asserting that the bill includes subject matter clearly within the jurisdiction of the Committee on the Judiciary, and asking that now, after the Committee on Armed Services has had its say, the bill may be referred to the Committee on the Judiciary for consideration of those matters which do lie within the jurisdiction of the Committee on the Judiciary.

While it is true that, in a spirit of cooperation, I submitted to you, as chairman of the Committee on Armed Services, a very lengthy letter expressing some of my personal views with regard to the bill H. R. 4080, it must be clear that this did not amount to action or consideration by the Committee on the Judiciary, and I cannot feel that the opportunity given me personally to express my view, and the consideration given by the Committee on Armed Services to the views so expressed, should operate to divest the Committee on the Judiciary of its jurisdiction.

Because I know there is not and will not be any acrimony between us with respect to this matter, I do wish to attempt a point-by-point traverse of your letter. However, in fairness, I believe I should make one or two comments.

Article 2, subdivision (3), may be a "restricted version of the authority heretofore provided for the Navy" but it cannot be denied that it expands jurisdiction to members of the Army and Air Force Reserve. Furthermore, one must bear in mind that, under article 3, such personnel may be recalled to duty without their consent for trial of offenses committed while on such duty with a questionable statute of limitations applicable and limited only (as to military offenses) by the 5-year sentence proviso. This latter limitation is in turn limited only by article 56 which grants the President authority (which he may delegate under art. 140) to prescribe limits.

In arriving at your conclusions with respect to subdivisions (10) and (11) of article 3, you have evidently not considered the decision rendered in *McCune v. Kilpatrick* (53 Fed. Supp. 80), where a civilian cook, hired to provide meals for a merchant-marine crew and armed guard, was held amenable to trial by court martial on charges of desertion, when he quit his job after learning that he was also supposed to cook for about 500 Army troops being transported overseas.

As to the Hirshberg and Durant cases, it can just as reasonably be argued that Congress should confer jurisdiction on civilian courts to try such cases as that we should further expand the authority of military tribunals.

The fact that extant laws provide or do not provide remedies for certain offenses is not the basic question here. It is rather the limit to which we have permitted or will expand the jurisdiction of military courts over the lives and fortunes of our ordinary citizens and nationals. There can be no denial of the power of Congress to confer jurisdiction on our inferior courts to consider all matters relating to military offenses. The pattern to be followed by military courts in times of emergency was set in Hawaii following December 7, 1941.

I do not doubt that careful consideration was given to every word of the bill by both the Senate and House committee, but I submit that the viewpoint from which the consideration is given is most important. Although the committee reports state that it was not the intention to foreclose petitions for writs of habeas corpus, I believe you will agree that the proposed language of the bill is clear and unambiguous and would, therefore, never be required to be interpreted by reference to the committee report. Under this language, even if it should be held that the writ might lie—which is doubtful—the action of a military court would not be subject to challenge, and therefore the writ could provide no real relief.

I cannot agree that "the whole subject of military justice is one which falls wholly within the jurisdiction of the Committee on Armed Services." The Legislative Reorganization Act specifically commits to the Committee on the Judiciary jurisdiction over "judiciary proceedings, civil and criminal, generally," and over "civil liberties." Where the rights and liberties of civilians are concerned, I believe the jurisdiction of the Committee on the Judiciary should stand unquestioned; and there is no doubt such rights are involved in the bill H. R. 4080.

I certainly do not wish to enter into a controversy with you over this matter; and I assure you that if the bill is referred to the Committee on the Judiciary it will be considered most promptly, and most promptly reported back to the Senate.

Kindest personal regards.

Sincerely,

Pat McCarran,

Chairman.

Mr. President, there is involved in this bill so much that impinges upon human liberties and human rights that it certainly could not be objectionable to have the bill considered by the Senate Committee on the Judiciary, when, as a matter of fact, human rights and human liberties are involved in the law which is the subject matter of the jurisdiction of that committee.

What harm could there come by referring the bill to the committee on the Judiciary? I wish to assure the Senate here and now that it is my fervent

desire to vote for the bill if it can be brought in line with what I consider to be the proper procedure. I think a bill of this kind has a proper place and should be considered by the legislative department of the Government. Although the bill undoubtedly has received the diligent attention of the Armed Services Committees of both Houses, it can do no harm to have the bill reviewed by the Committee on the Judiciary, with a view to determining whether human rights or human liberties are so affected that some changes should be written into the bill.

Again I assure the Senate that I do not make the motion to refer the bill to the Committee on the Judiciary for the purpose of delaying action on the bill or for the purpose of defeating the bill. If that had been the case, I certainly would not have called the matter to the attention of the able chairman of the committee having the bill in charge, nor would I have drawn his attention to matters which I think are vital to the whole situation.

Mr. President, House bill 4080, a bill to unify, consolidate, revise, and codify the Articles of War and the Articles for the Government of the Navy, and to establish a Uniform Code of Military Justice, was reported to the Senate from the Committee on Armed Services on June 10, 1949, and the bill is now the unfinished business before this body. I wish to call attention to the fact that my communication with the able Senator from Maryland was on the 1st of July, following the reporting of the bill by the Committee on Armed Services, and when it was pending on the calendar.

Many of the provisions of the bill deal with matters which I believe to be properly within the jurisdiction of the Committee on the Judiciary. By way of illustration, the code provides, among other things, that the jurisdiction of the military courts shall be extended to a great many civilians who may be "serving with, employed by, or accompanying the armed forces without the continental limits of the United States." as well as civilians in the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands. It is obvious that all civilian employees of the War and Navy Department who happen to be stationed overseas, as well as all employees of the allied military government, would be included within the new jurisdictional boundaries. The bill further provides, in article 5, that the code shall be applicable in all places.

The caution with which such an expansion of jurisdiction to civilians should be approached is indicated by regulations issued by the Department of the Army on March 8, 1949, pertaining to the practice of law by United States lawyers in the United States area of control of Germany, which appear in the Federal Register issued Friday, May 20, 1949, at page 2662. These regulations indicate that the Army desires to exercise a strict control over the terms and conditions under which counsel may represent both military and civilian personnel as well as foreign nationals in the occupied area. Admission to practice and expulsion therefrom are absolutely in the hands of an attorneys supervisory board, composed entirely of either military personnel or civilians subject to military orders.

Article 3 of the proposed code establishes the jurisdiction to try former armed forces personnel for offenses committed while subject to the code. It will be noted that this provision of the bill directly affects the civil rights of our citizens, when it is realized that persons arrested by the armed forces cannot be admitted to bond, arraigned, or brought before the grand jury. The hardships that can be the result of such action may be illustrated by three incidents which have been brought to the attention of Congress comparatively recently.

The first is a case of an honorably discharged sailor who was arrested by Naval authorities at his home in Los Angeles and taken 6,000 miles to the Phillippine Islands where, bereft of friends and funds, he was held for about 6 months awaiting trial on charges, which were finally nolle prossed, and was then returned by the Navy to San Francisco and left to make his return to Los Angeles and his ruined business as best he could under his own power.

We recently read in the newspapers of the case of the ex-soldier from Indiana who was arrested in his home at night by Army authorities and immediately flown to Berlin, Germany, to face charges brought against him there.

A third incident was the subject of a private relief bill recently approved by the Senate, involving an honorably discharged soldier who was arrested at his home in Georgia on a warrant issued by Army authorities and taken to Fort McClellan, Ala., to face charges of desertion, even though he had in his possession and exhibited to Army authorities an honorable-discharge certificate. He was thrown into the stockade and held there for about two weeks, during which time he was not permitted to consult counsel, while the responsible Army officers groped through their files to determine whether or not the charges brought against him were, in fact, based on sound grounds.

Most important of all, the proposed code provides that the quondam court of military appeals—in fact, an administrative body—in its decisions shall bind “all departments, courts, agencies, and officers of the United States.” When it is noted that the only absolute right of appeal to this supreme court is granted to admirals and generals alone, very careful scrutiny should be given the bill to determine whether or not an administrative agency can thus rob the Supreme Court of its appellate jurisdiction.

Based on these considerations, and mindful of the jurisdiction of the Judiciary Committee with respect to civil rights I now move that the bill, H. R. 4080, be taken from the Senate Calendar and referred to the Committee on the Judiciary.

Mr. SALTONSTALL. Mr. President, will the Senator yield for a question?

The PRESIDENT pro tempore. Does the Senator from Nevada yield to the Senator from Massachusetts?

Mr. McCARRAN. I yield.

Mr. SALTONSTALL. Has the Senator read the record to the Committee on Armed Services submitted by the Senator from Tennessee [Mr. Kefauver], on the pending bill which establishes a Uniform Code of Military Justice? If he has, he will note on page 32 a discussion of article 76, which the Senator from Nevada has just been discussing. It very clearly says the Committee's idea is that—

Subject only to a petition for a writ of habeas corpus in Federal court, it provides for the finality of court-martial proceedings and judgments.

So the question was directly considered by the committee, and the committee believes the point is covered, particularly in view of the decision by Mr. Justice Black in the case of Humphrey against Smith, decided April 25, 1949.

Mr. McCARRAN. That is in the report, but why is it not in the bill?

Mr. KEFAUVER. Mr. President, will the distinguished Senator yield?

The PRESIDENT pro tempore. Does the Senator from Nevada yield to the Senator from Tennessee?

Mr. McCARRAN. I yield.

Mr. KEFAUVER. I call the Senator's attention to the fact that the language about the finality of the finding of the court martial is identically the same as the language which has been in the law previously. It was in the Kem amendment to the bill passed by Congress in 1948; so that there is nothing new about the language in the proposed Uniform Code.

Mr. McCARRAN. Assuming for the sake of argument that the Senator's statement is correct—which I must assume, but only for the sake of argument—it does not militate against the motion I am now making. It is a matter for review by the committee which has jurisdiction over that phase of the law.

Mr. KEFAUVER. The point I am trying to make is that the pending bill adds nothing new in the matter of the finality of court-martial proceeding. As the distinguished Senator from Massachusetts stated yesterday, in the case of Humphrey against Smith, decided April 25, 1949, it was held that the language did not take away the right of review by the Supreme Court of habeas-corpus matters, but that the Court could still review the jurisdiction of the court-martial proceedings.

Mr. McCARRAN. What does the bill mean when it says "binding on all departments, courts, agencies, and officers of the United States"? Does not that attempt to bind the courts?

Mr. KEFAUVER. As I said, it is the same language as that which was in the Kem amendment in 1948. It attempts to bind the courts on all matters except jurisdictional matters.

Mr. McCARRAN. Why does it not say "all matters except jurisdictional matters"?

Mr. KEFAUVER. The Humphrey case, of course, decided that the Congress, through its enactment, did not, and could not, under the ninth amendment to the Constitution, intend to take away the jurisdiction of the Supreme Court or of other courts in habeas corpus matters. It was the decision in the Humphrey case that the courts still have jurisdiction, and that the law does not take away the jurisdiction of the courts in habeas corpus proceedings.

Mr. McCARRAN. But the Congress, when it enacts a law, makes the law. The Supreme Court may reverse a decision the next day, or the next week, as a matter of fact, but Congress, when it enacts a statute, makes the law. The points which are raised here relate to matters which brought courts-martial proceeding into such disrepute in times past that there has been pending before the Committee on the Judiciary for many months a resolution to investigate the administration of military justice.

Mr. President, there are many things in the bill which are meritorious, and I am not standing here to argue against the principle of the bill. What I am arguing for is that Congress within its power shall take the most necessary steps to see to it that no bill is passed which has not been reviewed by a committee which claims jurisdiction of the subject matter. In behalf of the Committee on the Judiciary of the Senate, and under the Legislative Reorganization Act as it is now binding upon us, I certainly claim that the Committee on the Judiciary has jurisdiction over certain phases of the pending bill.

I do not propose to vote to deny the right of review by a committee which, under the law creating the committee, has jurisdiction. Why deny that committee jurisdiction? Are Senators afraid of the 13 men of whom the able Senator from Tennessee is one?

Mr. KEFAUVER. Mr. President, will the Senator yield?

Mr. McCARRAN. Certainly. I am happy to yield to the Senator from Tennessee.

Mr. KEFAUVER. Mr. President, answering the last statement of the distinguished Senator from Nevada, the chairman of the Judiciary Committee, I wish to point out that over a period of more than 2 years the Armed Services Committee of the House of Representatives and the Armed Services Committee of the Senate have been wrestling with this problem. They have held very extensive hearings. Those committees have always had jurisdiction of every question encompassed in this bill. The distinguished chairman of the Judiciary Committee, 3 months after the bill was introduced by the chairman of the Armed Services Committee [Mr. Tydings], wrote to the chairman of the Armed Services Committee on April 30, 1949, a 36-page letter suggesting certain matters which the committee thought should be incorporated in the bill, and the committee, after lengthy hearings, considered carefully all the recommendations made. The bill is now before the Senate with really only two or three points of dispute to be settled by the Members of the Senate. I assume those points of dispute would be present, no matter how many committees had

worked on the bill. We are fearful that unless some action is taken at this time, the great accomplishments in the matter of unification and codification of two complicated military acts may go by the board.

Mr. KEM. Mr. President, will the Senator yield?

Mr. McCARRAN. The Senator from Nevada has the floor. If the Senator from Tennessee has concluded his statement, I shall be glad to yield. I should like to say, before I yield, that human rights and human liberties are the foundation stone of this Government, no matter where the human being may be, whether in military forces or in the civil life of the Nation. Regardless of whether the bill may have been held for 3 years, or how long it may have been held, or how much study may have been devoted to it, still, if a committee, to which, by law, is assigned the jurisdiction of certain subject matters embraced within the bill, request the right to review the bill, that it may give its views or perhaps its sanction to the provisions of the bill, what harm can result by referring the bill to the Committee on the Judiciary? If the Senate wants to limit the time within which it will consider the bill and require the Committee on the Judiciary to report within a given period, we shall do the best we can. But the jurisdiction is, by the Reorganization Act, conferred upon the Judiciary Committee, and I certainly cannot remain silent when I feel that the jurisdiction rests in that committee.

Mr. SALTONSTALL. Mr. President, will the Senator yield?

Mr. McCARRAN. I shall first yield to the Senator from Missouri.

Mr. KEM. Mr. President, I should like to inquire if this measure has not been pending in the Congress for some time, and why it becomes a matter of the utmost urgency at this time, when it has been pending for months and when no effort has been made on the part of the Senator from Tennessee or on the part of the majority to bring it to the attention of the Senate.

Mr. KEFAUVER. Mr. President, will the Senator yield at this point?

The PRESIDING OFFICER (Mr. Lehman in the chair). Does the Senator from Nevada yield to the Senator from Tennessee?

Mr. McCARRAN. I yield in order that the Senator from Tennessee may answer that question, if, by so doing, I do not lose the floor.

Mr. KEFAUVER. If the Senator from Missouri means that the committee has not been diligent— — —

Mr. KEM. I did not mean that. I wondered why the urgency had become so great.

Mr. KEFAUVER. The Senator did make that inference, and I want respectfully to answer the Senator on that point. It was agreed that the subject would first be considered in the House of Representatives. A House bill was passed and sent to the Senate on May 5, 1949. Even anticipating the House bill coming over to the Senate, a subcommittee of the Committee

on Armed Services held a hearing on April 27, 1949; also on May 4, 1949, one day before the House bill was passed, and on May 9, and on May 27. Then, with reasonable dispatch and as quickly as possible, the matter was referred to the full Committee on Armed Services, and on June 10, within 13 days after the subcommittee had completed its hearings, the full Armed Services Committee acted upon the bill and a clean bill in the nature of an amendment was reported to the Senate which had also taken into account the 36-page memorandum, a very useful one, which the distinguished Senator from Nevada had submitted to the committee. Since that time, the chairman of the Committee on Armed Services and the chairman of the subcommittee have written a number of letters and have spoken very frequently to the majority leader with regard to bringing the bill up for consideration by the Senate. We have certainly not acted without diligence. I think we have shown unusual diligence in the matter.

Mr. KEM. Mr. President, will the Senator yield?

Mr. McCARRAN. I should like to conclude my remarks, but I yield to the Senator from Missouri.

Mr. KEM. I should like to say, Mr. President, that I did not mean to infer that there had been any lack of diligence on the part of the Senator from Tennessee, for he is diligent about everything he undertakes. But it is difficult for me to understand the necessity for immediate action on the bill, and why it has become a matter of such great urgency just at this time. It has been pending for many months, and it is difficult for me to understand why any harm can be done to the public interest by having the subject deliberately considered by the Senate Committee on the Judiciary.

Mr. McCARRAN. Mr. President, my motion is not for the purpose of delay, I believe in the principle of the bill. My motion is not meant to delay consideration of the bill. It is made in good faith, so that the Committee on the Judiciary may give consideration to certain phases of the bill. Nothing emphasizes my position more than does the reference made by the able Senator from Tennessee to a Supreme Court decision. Undoubtedly, in the case to which he has referred, the Army was arguing that a writ of habeas corpus would not lie. There was no question about that. If they argued it at that time, they will argue it again. Are we going to enact laws which will set aside the rights of civilians in the armed services, rights which are fundamental to the democracies of the world? It seems to me that we would be placing those rights in jeopardy. It seems to me that that question should be considered from a viewpoint other than the military viewpoint. It should be considered from the civilian viewpoint as well.

That is one of the reasons why I say the bill should go to a committee which is not charged strictly with military thoughts and military ideas, because human liberties run through all life.

Mr. SALTONSTALL. Mr. President, will the Senator yield?

Mr. McCARRAN. I yield.

Mr. SALTONSTALL. Mr. President, I would say, most respectfully, to the Senator from Nevada that our effort—and I was a member of the subcommittee which considered this matter—was to protect the liberty of the individual within the armed services and to accord him greatest possible justice as a soldier, and, at the same time, to have regard for the purpose of our armed services—to fight and to win wars and to protect the national security. This is not an emergency measure. Any bill which comes to the floor of the Senate must at some time or other be debated.

This bill has been delayed because of the desire to make it as nearly perfect as possible. It is now before the Senate for consideration and debate. I say to the Senator that I would not argue to him for a moment the question of there being an emergency, but I do argue to him most sincerely that the bill has been carefully considered for more than 2 years by the Committees on Armed Services of the House of Representatives and the Senate. Except in a few instances, which I should be glad to point out to the Senator, there is no extension of authority over the jurisdiction of courts martial as it has existed over the period of years. There are a few exceptions, as I have said.

I do not wish to give the Senator the impression that there are no changes, but I say that such as there are have been considered carefully and we believe the rules and regulations of the Army and the Navy, under the Constitution, are within the questions that are to be considered by the Committee on Armed Services. We have carefully considered the bill. There is no effort to take away any of the responsibility of the Committee on the Judiciary, but I most respectfully say that I do not think the bill belongs in that committee, any more than do many other subjects. When one committee which has jurisdiction has considered and reported a bill, it should come before the Senate and be either voted up or voted down.

Mr. McCARRAN. Mr. President, in reply let me say that if the principle which the able Senator from Massachusetts advocates were adhered to in this body, there would be no occasion for the Committee on Banking and Currency to seek now to discharge itself from the consideration of a bill pending in that committee because there is a certain phase of the bill which belongs to the jurisdiction of the Committee on the Judiciary. That is one question which is pending here now. When the Committee on Interstate and Foreign Commerce passed upon the basing-point measure and brought back its report to the Senate, it asked, on the request of the Committee on the Judiciary, that the bill be referred to the Committee on the Judiciary, and this body did not hesitate to do that.

Both those measures were important. The one now pending before the Committee on Banking and Currency, which the committee is about to ask the Senate to refer to the Committee on the Judiciary, is an important bill. The bill that involved the basing-point question was certainly an important bill. It has taken the time of the Senate for many, many days. All these bills were important measures. The bill which came from the Committee on Interstate and Foreign Commerce, and which was referred

to the Committee on the Judiciary, is an emergency bill. The country is calling for legislation on the subject it covers. If the principle advocated by the able Senator from Massachusetts were to be adopted by the Senate, then some committees would be entirely shorn of jurisdiction because a certain bill had been assigned to another committee.

However, Mr. President, this argument is likely to lead us into a wrong channel. I am not arguing regarding the diligence exercised in the consideration of the pending bill by the committee which handled it. I think they have done a fine piece of work. But there are matters in the bill which they looked upon with a certain slant and in a certain light, which I believe should have the impartial consideration of those who looked upon it from a different viewpoint. The military is one thing, and the train of thought of the members of the military is along a certain line, and that is fine. But civilian life and civilian law are another thing.

In all fairness, I say to the Senate that it cannot afford not to refer this bill to the Judiciary Committee, in view of the contention which has arisen, in view of the voluminous correspondence we have received in the Committee on the Judiciary, not with reference to this bill alone, but with reference to injustice practiced by military courts. They are reeking with injustice, if we are to believe the charges which have been made. I do not make them, because I have no right to, but I say that if we believe the charges which have been filed with my committee, military justice has gone far afield from real justice.

If that be true, Mr. President, or if there is a group in this country which suspects it to be true, can there be any argument to the effect that the Judiciary Committee of the Senate cannot have the bill; they cannot consider it.

Is it desired that Senators who, like myself, favor something of the kind designed by the bill shall vote against the bill? I certainly shall vote against it if it comes to a vote and my committee is denied the right of review.

Mr. LUCAS. Mr. President, will the Senator from Nevada yield?

Mr. McCARRAN. I yield to the Senator from Illinois.

Mr. LUCAS. The statement made a moment ago by the distinguished Senator from Missouri (Mr. KEM) causes me to ask the Senator from Nevada to yield in order that I might try to answer his inquiry with respect to the speed with which the pending bill has been brought up.

Mr. McCARRAN. I hope that will not be brought into this argument.

Mr. LUCAS. Very well.

Mr. McCARRAN. But the Senator may proceed if he desires.

Mr. LUCAS. I should like to make a short statement in the Senator's time, if I may.

Mr. McCARRAN. I yield.

Mr. LUCAS. On June 10 last year the Committee on Armed Services reported the pending bill. I may say to the Senator from Missouri that thereafter during the last session, the distinguished Senator from Maryland (Mr Tydings), the chairman of the committee, asked me several times if he could not bring it up for consideration. We were unable to do that. He also has asked the Democratic policy committee during this session to arrange to have the bill considered as soon as possible, and the Democratic policy committee, after considering a number of bills, believed that it was proper to bring this bill to the floor of the Senate.

I knew nothing about the fact that the Senator from Nevada would make a motion to refer the bill to the Committee on the Judiciary. That was not suggested to the policy committee, and I knew nothing about it. I believed the bill would be debated on its merits and be voted up or down without a motion to refer it to another committee.

Mr. KEM. Mr. President, I should like to say, in that connection, as I said to the Senator from Tennessee, that I am sure there has been no lack of diligence on his part, and I am sure there has been no lack of diligence on the part of the able majority leader, the Senator from Illinois. But the fact is that the bill has already been pending on the calendar for many months, and it is passing strange that it should be argued now that there will be such great public harm if it is considered deliberately for a few weeks, let us say, by the Committee on the Judiciary.

Mr. LUCAS. I am not arguing that question. This is a House bill.

Mr KEM. It is unnecessary for the Senator to argue anything else in that connection, because I am sure he has been as diligent as he could be.

Mr. McCARRAN. Mr. President, again I wish to emphasize that this motion is not made for the purpose of delay, but is made for the purpose of affording an opportunity for careful study. I again say that if the Senate wishes to limit the time which the Committee on the Judiciary shall have to consider the bill, I am entirely content, but I certainly cannot without protest see this bill go through, after the history of the bill as made on the floor here this morning, showing that as early as July 1, 1949, the chairman of the Committee on the Judiciary drew the attention of the chairman of the Committee on Armed Services to certain phases of the bill and told him he would make this motion; that reply was made to my letter, and my answer again emphasized the fact that I would make the motion. All of that drew the attention of the Committee on Armed Services to the vital questions involved in the bill. There are at least eight points in the bill which should be reviewed by the Committee on the Judiciary.

Mr. President, if it be the will of the Senate that one of its standing committees which has jurisdiction, under the law governing, shall be deprived of jurisdiction, then I have nothing further to say, and I shall have done my duty so far as I have been able to see it. I shall certainly

vote against the bill, and I shall ask for a record vote on it, if our committee is not permitted to have jurisdiction. I again say that if the Senate desires to limit the time within which the Judiciary Committee may consider the bill, I shall agree to such an amendment to my motion.

Mr. President, I ask for a quorum at this time.

The PRESIDING OFFICER. The clerk will call the roll.

The roll was called, and the following Senators answered to their names:

Anderson	Hoey	
Brewster	Holland	Morse
Bricker	Humphrey	Mundt
Bridges	Hunt	Murray
Butler	Ives	Neely
Byrd	Jenner	O'Connor
Cain	Johnson, Colo.	O'Mahoney
Capehart	Johnson, Tex.	Pepper
Chapman	Johnston, S. C.	Robertson
Chavez	Kefauver	Russell
Connally	Kem	Saltonstall
Cordon	Kerr	Schoeppel
Donnell	Knowland	Smith, N. J.
Douglas	Lehman	Sparkman
Dworshak	Lodge	Stennis
Ecton	Lucas	Taft
Ellender	McCarran	Taylor
Ferguson	McCarthy	Thomas, Okla.
Fulbright	McClellan	Tydings
George	McFarland	Watkins
Gillette	McKellar	Wherry
Gurney	McMahon	Wiley
Hayden	Magnuson	Williams
Hendrickson	Malone	Withers
Hill	Maybank	Young
	Millikin	

The PRESIDENT pro tempore. A quorum is present.

The question is on agreeing to the motion of the Senator from Nevada (Mr. McCARRAN) to commit the bill to the Committee on the Judiciary.

Mr. McCARRAN. Mr. President, I desire to correct a misstatement of fact.

This is not a motion to recommit; it is a motion to refer. If it were a motion to recommit, the bill, if the motion carried, would go back to the committee from whence it came.

The PRESIDENT pro tempore. The Chair said "commit," which is substantially the same as to refer.

Mr. McCARRAN. I simply wish to point out that it is a motion to refer the bill to the Committee on the Judiciary.

The PRESIDENT pro tempore. That is what it is; that is true.

Mr. McCARRAN. Mr. President, let me state for the information of the Senate that should the motion to refer prevail, the bill will come back to the Senate with any changes, if any changes shall be made by the Judiciary Committee, as amendments to the bill. I wish to state emphatically that, so far as I am concerned, control of the bill will not be taken out of the hands of the Senator who now has control of it, but the bill will be reported with the action of the Judiciary Committee.

Again I say that if the Senate desires to limit the time within which the Judiciary Committee shall consider the bill and report it to the Senate, I shall have no objection.

Mr. McCLELLAN. Mr. President, will the Senator yield?

Mr. McCARRAN. I yield.

Mr. McCLELLAN. I was going to ask, when does the able chairman of the Judiciary Committee think he will be able to report the bill, with such changes as his committee might desire to make?

Mr. McCARRAN. I state this as conjecture: I say within 30 days.

Mr. McCLELLAN. I thank the Senator.

The PRESIDENT pro tempore. The question is on agreeing to the motion of the Senator from Nevada (Mr. McCARRAN).

Mr. McCARRAN asked for the yeas and nays.

The yeas and nays were ordered, and the Chief Clerk called the roll.

Mr. WHERRY. Mr. President, the junior Senator from New Hampshire (Mr. TOBEY) is absent on official business. If he were present, he would vote "yea".

Mr. LUCAS. I announce that the Senator from California (Mr. DOWNEY), the Senator from Delaware (Mr. FREAR), the Senator from North Carolina (Mr. GRAHAM), and the Senator from Utah (Mr. THOMAS) are unavoidably detained on official business.

The Senator from Mississippi (Mr. EASTLAND) is absent on official business.

The Senators from Rhode Island (Mr. GREEN and Mr. LEAHY), the Senator from West Virginia (Mr. KILGORE), the Senator from Louisiana (Mr. LONG), and the Senator from Pennsylvania (Mr. MEYERS) are absent on public business.

Mr. SALTONSTALL. I announce that the Senator from Vermont (Mr. FLANDERS), the Senator from Iowa (Mr. HICKENLOOPER),

the Senator from North Dakota (Mr. LANGER), and the Senator from Minnesota (Mr. THYE) are absent by leave of the Senate.

The Senator from Kansas (Mr. DARBY) is detained on official business.

The Senator from Michigan (Mr. VANDENBERG) is necessarily absent.

The Senator from Pennsylvania (Mr. MARTIN) is absent on official business.

The Senator from Vermont (Mr. AIKEN) who is detained on official business, is paired with the Senator from Maine (Mrs. SMITH), who is also detained on official business. If present and voting, the Senator from Vermont would vote "yea", and the Senator from Maine would vote "nay."

The result was announced—yeas 33, nays 43, as follows:

YEAS—33

Benton	Hendrickson	Morse
Brewster	Ives	Schoeppel
Bricker	Jenner	O'Connor
Butler	Johnston, S. C.	Taft
Cain	Kem	Stennis
Capehart	McCarran	Thomas, Okla.
Cordon	McCarthy	Watkins
Dworshak	McClellan	Wherry
Donnell	McKellar	Wiley
Ecton	Magnuson	Williams
Ferguson	Malone	Withers

NAYS—43

Anderson	Holland	Mundt
Bridges	Humphrey	Murray
Byrd	Hunt	Neely
Chapman	Johnson, Colo.	O'Mahoney
Chavez	Johnson, Tex.	Pepper
Connally	Kefauver	Robertson
Douglas	Kerr	Russell
Ellender	Knowland	Saltonstall
Fulbright	Lehman	Smith, N. J.
George	Lodge	Sparkman
Gillette	Lucas	Taylor
Gurney	McFarland	Tydings
Hayden	McMahon	Young
Hill	Maybank	
Hoey	Millikin	

NOT VOTING—20

Aiken	Green	Myers
Darby	Hickenlooper	Smith, Maine
Downey	Kilgore	Thomas, Utah
Eastland	Langer	Thye
Flanders	Leahy	Tobey
Frear	Long	Vandenberg
Graham	Martin	

So Mr. McCARRAN's motion was rejected.

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CODIFICATION OF THE ARTICLES OF WAR

The senate resumed the consideration of the bill (H. R. 4080) 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.

Mr. MORSE. Mr. President, the subject upon which I wish to address the Senate today is to me a painful one. It is painful because I had always thought that there was one point upon which the thinking people of this country were in accord, and that is the proposition that every man or woman charged with a crime or offense in this country is entitled to a fair trial by a free and impartial court.

I now find that that is not true. We have pending before us H. R. 4080 "An act to establish a Uniform Code of Military Justice for the Armed Services of the United States." This bill is the result of the able labors of a committee appointed by the late Secretary of Defense James E. Forrestal. The Chairman of this committee was Prof. Edmund M. Morgan, of the Harvard University Law School. The executive secretary was Felix Larkin, of the Office of the Secretary of Defense, and the three other members were representatives respectively of the Departments of the Army, the Navy, and the Air Force. H. R. 4080, as reported by the Senate Committee on the Armed Services, substantially reflects the work of the Forrestal committee, although it has been altered in several important respects, which it is my purpose to refer to at this time.

Mr. President, the junior Senator from Oregon is a member of the Committee on Armed Services and was a member of the subcommittee which conducted hearings on the pending legislation. As a member of that subcommittee and as a member of the Armed Services Committee, he dissents from the recommendations which are made in the form of the pending bill.

It is a matter of regret to the junior Senator from Oregon that this bill was not committed to the Judiciary Committee for at least the advice and consideration which that committee could give to the Armed Services Committee with respect to what I consider to be very serious defects in the pending legislation. I wish to say, however, that I have had the finest relations with my colleagues on both the subcommittee and the Armed

Services Committee. Our differences in regard to this legislation are entirely professional differences, and not personal in any way. I wish to extend to the very able chairman of the subcommittee, the Senator from Tennessee (Mr. Kefauver), my sincere compliments for the fairness he showed throughout our discussions, both in the subcommittee and in the Committee on Armed Services in regard to this particular measure.

I find to my regret that H. R. 4080 represents a compromise between justice, as I have always thought we understood it in this country, and a so-called military idea of justice advanced by many honorable and well-intentioned officers of our armed services who, however, feel that justice for the civilian is one thing but justice for a member of this country's armed services is something different. I find myself unable to agree with this rather startling thesis.

The advocates of the Military point of view start with the fundamental idea that the function of the armed services is to win wars. With that premise I heartily concur. They proceed with the unassailable statement that in order for an army to win a war it must have discipline. They further assert that the system of military justice being one of the essential aids of command in enforcing discipline, control of this system must be vested in the commanding officers who lead the forces. They further assert that the power to appoint the military courts, the prosecuting officer and even the defense counsel must be within the powers and duties of these commanding officers. It is at this point that I feel we must part company.

Throughout this debate, Mr. President, my difference with my colleagues on the Armed Services Committee is over that very premise or assumption. In order to do justice in the armed forces to those charged with offenses and brought before courts martial we must put a stop to command control. That is the heart and the essence of my argument this afternoon on this part of the bill, namely, that I do not think we can have justice in courts martial, as experience has already demonstrated, so long as we permit the commanding officer to exercise the control over courts martial which he now exercises and which this bill permits him to continue to exercise.

MR. KEFAUVER. Mr. President, will the Senator yield?

MR. MORSE. I should like to say to my good friend from Tennessee that I cannot yield to him at this time because I had made an appointment with the Secretary of State for 3:30 on a very important matter, and he has kindly postponed the appointment until later this afternoon. I should like to say that the Senator from Tennessee is well aware of my views on this subject, and I am sure that the Senator can perform a great courtesy to me if, after the conclusion of my remarks, he will take sufficient time on the floor to discuss the points I raise, and give me time to keep my appointment with the Secretary of State and return to the Senate.

So I shall continue uninterrupted, Mr. President, because I should like to get my remarks into the Record in continuity for future reference, because I am satisfied that no matter what the outcome of the vote is this after-

noon - - and I am inclined to think that once more the junior Senator from Oregon will find himself on the losing side of the issue - - the vote this afternoon will not settle this issue. We shall come back to it in the future. The particular provisions of the bill which I am going to criticize this afternoon will not work justice within the Military Establishment, and, therefore, veterans' organizations and lawyers' organizations interested in the amendments which I am offering this afternoon, will continue to carry on the fight to break the command control of commanders in respect to military justice until the fight is won. Until we break the control of commanders we jeopardize the doing of justice within the court-martial system of our Military Establishment.

Mr. President, I do not want anyone to have any doubt as to where I stand on that issue. So far as my amendment is concerned, I propose to strip the commanding officers - - as they should have been stripped years ago - - of the control they now have over the court-martial system.

Mr. President, as a background, let me sketch in a little ancient as well as modern history. Some of us may remember that following the close of World War I, a public outcry developed against the system of military justice then in effect in the Army of the United States. Cases of tyrannical oppression, arrogant miscarriages of justice, disregard of the rights of the individual, and a wholly inadequate system of review came to light. Significantly, one of the chief critics of the Army court-martial system was Maj. Gen. S. T. Ansell, who had for a period been the Acting Judge Advocate General of the Army. Opposed to him, as a defender of the existing system, was the then Judge Advocate General, Maj. Gen. E. H. Crowder. Senator Chamberlain appeared on the floor of this body as the advocate of a court-martial reform measure known as the Chamberlain bill, which sought to provide adequate representation for the accused, to insure impartiality of the courts martial by removing them from the influence of the line commanding officers, which provided for the services of enlisted men on courts martial, and which further set up an adequate system of review. Then, as now, the opponents of the bill resorted to the military maxim that "discipline is a function of command," in order to justify the retention of control over the courts by the line commanding officers. I regret to say that the efforts of these gentlemen were successful, and the Chamberlain bill was killed. Nevertheless, the force of public opinion was such that in June 1920, a new statute for the government of the Armies of the United States was enacted. That statute has governed the trial of Army personnel from 1920 until passage of the Elston Act in 1948. It did not affect the Navy, and the Articles for the Government of the Navy today exist in substantially the same form as they have existed since Civil War times.

Under the 1920 Articles of War, the basic set-up of the Army courts remained unchanged. As in World War I, and to this very moment, every officer and enlisted man, every nurse and member of the Women's Army Corps, who is charged with an offense is tried by a court appointed by a commanding officer from the personnel of his command - - the same commanding officer who has directed the trial of the accused, and in many cases the same commanding officer who has instructed his junior officer

to prefer the charges against the accused. In other words, the officer who appoints the court is in a real sense of the word the prosecutor. This same commanding officer also is charged with the duty of appointing counsel for the accused, limited only by the requirement of article 27 (b) that the defense counsel must at least be a person who is a member of the bar of a Federal court or of the highest bar of a State, and be certified as competent to perform such duties by the Judge Advocate General.

It must be remembered that the members of the court, being under the command of the appointing officer, are dependent upon him for their promotions, their efficiency ratings, their assignments of duty, and their leaves of absence. We must remember also that it is amazingly easy for a commanding officer, without ever putting his wishes into the form of a direct command to the members of the court, to make clear to them that he desires the conviction of the accused and the imposition of a severe sentence. Such a suggestion may be made as well from a sincere belief that an example must be made of the accused in order to prevent others from following his example as from any personal pique or ill will. In fact, it is well-intentioned but misdirected zeal which has most frequently led to the exertion of pressure by the commanding officer upon the members of the court appointed by him.

Would any Member of the Senate care to place the responsibility of determining the guilt or innocence of his son or his daughter in the hands of such a court, the members of which are entirely dependent for their careers and their happiness upon the good will of the officer who has indicated to them that they must convict the accused who is on trial before them?

This is no mere theoretical danger. The influencing of the courts by the appointing officer has been an abuse which has persisted through World War I and through World War II. I quote from the Congressional Record for September 15, 1919, which reports the following colloquy between Senator Norris and Senator Chamberlain:

Mr. Norris. One of the evils, as I understand it, is that all of the men, not only the members of the court but the prosecuting officer, as well as the attorney for the defense, are selected by the man who makes the charge in reality, and from whom every one of these officials, if they get a promotion, must secure it. Is that right?

Mr. Chamberlain. Absolutely.

Mr. Norris. Of course, that surrounds the young man with an air of injustice to begin with.

Mr. Chamberlain. There is no question about that. The commanding officer appoints the court, he appoints the prosecutor, he appoints the counsel for the defendant. * * * he approves or disapproves the sentence when it is rendered.

So much for the problem in 1919.

As to World War II, let me refer the Senate to the work and the conclusion of the War Department Advisory Committee on Military Justice, appointed by the then Secretary of War, Robert P. Patterson, on March 25, 1946, the chairman of which is the present chief justice of the Court of Errors and Appeals of New Jersey, Arthur T. Vanderbilt. This group held full committee hearings in Washington, and regional public hearings in New York, Philadelphia, Baltimore, Raleigh, Atlanta, Chicago, St. Louis, Denver, San Francisco, and Seattle. The testimony adduced from the witnesses filled more than 2,500 pages of transcript. The witnesses included the Secretary of War, the Under Secretary of War, the Chief of Staff of the Army, the commander of the Army Ground Forces, the Judge Advocate General, the Assistant Judge Advocate General, general officers, as well as those of lower grade, and civilian witnesses who had served as officers or enlisted men during World War II.

The War Department Advisory Committee, as its conclusion drawn from the evidence before it, found that

Although the innocent were not punished, there was such disparity and severity in the impact of the system on the guilty as to bring many military courts into disrepute, both among the law-breaking element and the law-abiding element, and a serious impairment in the morale of the troops ensued where such a situation existed.

The committee said:

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.

Mr. President, that was in World War II; that is the record the committee found in regard to the action of commanding officers in World War II, in many instances. I say it is a serious indictment of military justice, and I say also that it is the clear duty of the Senate to see to it that there cannot be a repetition of the type of undue influence which was exercised over military courts by commanding officers in World War II.

The committee further said:

It is not suggested that all commanders adopted this practice but its prevalence was not denied and, indeed, in some instances was freely admitted. * * * 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 the sentence, might fix it to suit his own ideas.

In view of this finding by the War Department committee, it cannot be argued seriously that command control of the courts is a mere phantom conjured up by the civilian mind.

Mr. President, I wish to say that the primary recommendation of the War Department's Advisory Committee was, therefore, the elimination of command control of the courts; and this recommendation has been the keystone of the court-martial reforms advocated in well-considered studies

and reports presented by the American Legion, the American Bar Association, the Association of the Bar of the City of New York, New York County Lawyers Association, the War Veteran's Bar Association, and other bar and veterans' groups. To the best of my knowledge, every member of the committees on military justice of the groups mentioned had not only military or naval experience but experience in the actual workings of the court-martial system in the field. Most of these associations stated bluntly that court-martial reform without the removal of command control would miss the major cause of the injustices perpetrated during the past two World Wars.

Mr. President, because of their findings and because the record they made satisfied the junior Senator from Oregon that they were right in their recommendations and conclusions, I have found it impossible to join in support of the pending measure.

One would think that in view of these statements, the primary reform incorporated in any legislation seeking to amend the system of military justice would be the elimination of command control by placing the power to appoint the courts in some hand other than that of the officer who is the real prosecutor and who has it within his power so successfully to dominate the court which he appoints. But the Elston bill, which was passed by both Houses of the Congress in 1948, and which included many needed reforms, among them the establishment of an independent Judge Advocate General's Corps for the Army, responsible for the performance of its duties only through its own chain of command, failed to effect the divorce of command and the Army courts. And now we have H. R. 4080 which, though it forbids any attempt to influence or coerce the courts, still leaves a system by which the courts are appointed precisely as that system has existed since prior to World War I.

I have yet to hear a single individual suggest that the accused before a military court was not entitled to an impartial trial. Yet, many respected officers of high rank, and even some individuals not in the armed services, have opposed depriving command of its power to appoint the courts. I find it impossible to understand the logic in this position. If the courts are to be impartial, then why should command insist upon its power to appoint them? If, on the other hand, command believes that it must dictate the findings and sentences of the courts in order to preserve discipline, then why not abandon the sham, abolish the court-martial system, and make each individual in the armed services subject to such punishment as his commanding officer sees fit to impose? Only in one of these alternatives may logic be found.

What, then, are the arguments of those who demand the preservation of command's right to appoint the courts?

The first argument has been that the elimination of command's power to appoint the courts would subvert discipline and interfere with the armed services' primary duty of winning wars. If this is true, it must be because granting a fair trial to an accused person will derogate from discipline. The best answer I can give is the statement of one general who testified before the War Department Advisory Committee on Military Justice that - -

Discipline is maintained by many means, outstanding of which is the proper administration of justice. There is no such thing as a choice between maintenance of discipline and proper administration of justice by the courts-martial system. Justice is administered through courts martial in the interest of maintaining proper disciplinary standards.

Those of the Members of the Senate who have served, not in the exalted ranks of the generals and admirals, but in the lower echelons of the military, naval, and air forces, know that nothing will arouse the resentment of the men and women in the services as quickly and in such degree as the feeling that one of their number is receiving a raw deal from a court martial, and they will also know, as the rest of us must realize from our human experience, that a resentful individual is an inefficient individual and one who is far less amenable to discipline than those who have faith in their superiors.

A second argument has been made that the problems of military justice are peculiar to the armed services and that civilian methods and standards of administering justice are not appropriate. The fact is that with the exception of such offenses as absence without leave, desertion, and insubordination, the great majority of cases brought before courts martial are for precisely the same offenses as civilian courts include within their jurisdiction - such offenses as drunkenness, disorderly conduct, larceny, fraud, rape, murder, and the like. And as to the so-called military offenses, what is there about them which makes inapplicable the principle that every accused person is entitled to a fair trial? Bear in mind, that I would reserve to command the right to order to trial any person whom his commanding officer believes guilty of an offense. All that I ask - - all that the bar and veterans' groups request - - is that when the man is placed on trial, he shall be tried by a free and impartial court, not under the influence or coercion of the commanding officer, either directly or indirectly. If this is not the right of every American citizen, it is time that the Senate make it the right of every American citizen.

A further argument is made that it would be impracticable to place the appointing power elsewhere than in the commanding officers. This objection has been met and disproved in testimony given at the hearings on this bill and on the Elston Act. I have proposed amendments to H. R. 4080 which represents a practicable, workable method of eliminating command control without impairing the functions of command, which I will offer at the proper time. These amendments will leave to command the power to appoint the prosecuting officer and to order the trial of any person subject to court-martial jurisdiction whom command believes should be tried. In other words, the purpose of these amendments is not to dictate to command which persons shall be tried, but only to assure the accused of a fair trial.

The fact is that we are faced with a stubborn although well-intentioned refusal of some of the military men to admit that during World War II we had a break-down in the system of military justice and that the administration of military justice should be placed in the hands of that branch of the armed services best qualified to administer it; that is, the

Judge Advocate General's Department. Each branch of the armed services is jealous of its prerogatives - - and one has but to sit on the Armed Services Committee in order to realize that, frequently - - that condition is founded in part upon the traditions of the particular branch and the very human unwillingness of its spokesman to admit its past failure. But we cannot afford to let this type of opposition, understandable though it may be, defeat such changes as may be necessary to secure justice - - as we Americans have always known justice - - for those of our fellow citizens who are serving in the armed forces.

The arguments now presented by those opposed to the divorcement of the military courts from command control have been advanced by their predecessors for some 30 years in justification for the present system, with the result that the same injustices which were perpetrated in World War I were repeated in World War II. It is the duty of the Senate to effect a change.

Mr. President, in this, as in all other debates, I try to be exceedingly fair in seeing that the record includes whatever information I have in my file on the opposite point of view from the one which I have taken. I want to say at this point that I have the highest regard for the great professor at the Harvard Law School, Eddie Morgan. It was never my pleasure or privilege to be one of his students, but I have sat at his feet at a distance, in that, as a teacher of law for a great many years, I have, may I say, eaten and tried to digest the scholarly writings of Eddie Morgan, particularly in the field of evidence. I have taught from many of his writings. In my judgment, in spite of his scholarship and his great ability, in this particular instance, the great Harvard professor, Mr. Morgan, is dead wrong in the position he has taken in regard to the command-control issue. But fairness to him, I want to insert in the Record at this point a letter which I received from him under date of June 24, 1949, in which he sets forth his point of view in regard to command control. I ask also that my reply to the letter may be inserted at this point.

There being no objection, the letters were ordered to be printed in the Record, as follows:

University of Colorado,
Boulder, Colo., June 24, 1949

Dear Wayne: The newspapers tell me that you objected to the passage of the uniform code by unanimous consent. And it has been suggested to me that you are going to urge the Spiegelbert-Farmer-Wells panel proposal as an amendment. This makes me doubly sorry that you were unable to be present at the meetings of the subcommittee of which you were a member. I think I was able to convince the other members, as well as the members of the House subcommittee of two things:

1. The plan is impracticable. Take the example which the three proponents used. An army of six divisions has an army headquarters with a staff judge advocate attached to the staff of the Army commanding officer. The commanding officer of each of the six divisions is to furnish the Army staff judge advocate with a list of officers and enlisted men as-

signable for general courts martial. Since each court must have five members, and two of these may or may not be enlisted men, and since the division commanding officer is not to choose the court in any case, he must furnish a list of at least 10 officers and 4 enlisted men. Must he set these persons aside so that they can be called at any time? If so, he cannot assign them to any other duties which cannot be dropped instantly by them. Is he going to select men of any ability for such a detail? How would you like to be a commanding officer of a division and have your officers subject to call by a staff judge advocate at Army headquarters? And how could this plan work in time of war?

2. The plan will not eliminate command control. All three of the sponsors concede that in at least 90 percent of the cases the court for a division will consist of officers and men from that division. All the complaints of "skin letters" and other interference by command have been by members of a court for their conduct on the court, and not at all in the proceedings for their selection. So long as the commanding officer wants to make it uncomfortable for one of his officers or men on account of conduct as a member of a court in his division, it won't matter a whit who selected that member. Where the Army staff judge advocate selects officers or men from division 6, for service on a court in division 1, are you so naive as to believe that the commanding officer of division 1, who is assumed to be hell-bent on convicting the accused, will not communicate with the commanding officer of division 6? And what do you think of the idea of having the Army staff judge advocate given authority to tell the commanding officer of 6 that he must detail officers and men for service in 1? And particularly since this is to prevent the commanding officer of 1 from getting convictions? It seems to me the whole idea is fantastic as a means of eliminating command control or even lessening it.

The Uniform Code has, I submit, much more effective provisions. First, the CO must always consult his staff JA as to the sufficiency of the charges and of the available evidence before a trial is ordered.

Second, when a conviction is reviewed, the staff JA must submit an opinion as its validity, which becomes a part of the record. Third, if the sentence is as severe as a year's confinement, the record must be reviewed by a board of review in the JAG office, the members of which are lawyers. They are far removed from all semblance of control of the CO of the division or army in which the court sat. They review law, facts, and sentence; and can make new findings - - but they cannot increase the sentence or make findings more detrimental to the accused than those made by the court. Finally there is review on the law by the Court of Military Appeals.

All this is in addition to the protection given the accused by requiring that the counsel at the trial be lawyers; that the court have a lawyer as a law officer who acts like a civilian judge, with the court members acting like a civilian jury. And the accused also is entitled to be represented by a defense appellate counsel before the Board of Review and before the Court of Military Appeals.

I submit that, if these in addition to the provisions which expressly forbid command interference and make it a punishable offense, do not furnish adequate protection, certainly the device of the panel won't do so.

I regret that I cannot see you personally; I trust that you will give personal attention to this letter, and not be satisfied with a word from your secretary as to its contents.

With regards and best wishes, I am,

Sincerely yours,
Eddie

Edmund M. Morgan,
Professor of Law.

July 5, 1949.

Prof. Edmund M. Morgan,
School of Law, University of Colorado, Boulder, Colo.

Dear Eddie:

Thanks a lot for your letter of June 24. Although I wasn't able to attend very many meetings of the subcommittee of the Senate Armed Services Committee, I did read every word of the hearings that were typed, and I am sure I've given the matter as conscientious study as those members of the committee who did attend the meetings.

I objected to the passage of the Uniform Code by unanimous consent for two reasons: First, because I have not completed to my own satisfaction my study and analysis of the issue; and, second, because I am satisfied that legislation as important as this should not be passed in the Senate of the United States by unanimous consent.

You may be sure, Eddie, that I not only will give your letter and all letters that come to my office on this subject my personal attention but I am going to give this entire issue the most careful study of which I am capable. Your work and views on it are certain to have tremendous influence with me because of my deep admiration for your scholarship and your deep intellectual honesty. However, I am not going to vote for the proposal until I am thoroughly convinced on it; and I hope to find the time to complete my analysis of it within the next week or 10 days.

As you well know, for weeks past I have been deeply involved in an intensive study and debate on various labor issues, and now we are taking up the North Atlantic Pact matter. Still I am reasonably certain to be able to devote my time to the military justice matter before many more days.

With kindest personal regards.

Sincerely yours,
Wayne Morse.

Mr. MORSE. Mr. President, after receiving Professor Morgan's letter, I discussed its contents with representatives of certain of the bar groups who had appeared before our committee in opposition to Professor Morgan's particular recommendation in respect to the command control issue. One of the bar representatives was Mr. Arthur E. Farmer, of the firm of Stern Reubens, of New York City. I ask unanimous consent to have inserted at this point in my remarks Mr. Farmer's letter to me under date of July 25, 1949, in which he covers point by point the matters raised in the Morgan letter to which I previously referred.

There being no objection, the letter was ordered to be printed in the Record, as follows:

New York, N. Y., July 25, 1949

Hon. Wayne Morse
United States Senate
Senate Office Building,
Washington, D. C.

Dear Senator Morse: This letter may aid you in combating the arguments as to the impracticability of the amendments to H. R. 4080 which Mr. Spiegelberg and I drew in order to eliminate command control of courts martial.

Under date March 4, 1949, Professor Morgan wrote to Mr. Spiegelberg as follows, with permission to quote him.

"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 statutory provision that the local judge advocate general will select the court for any division from officers of other divisions, you will secure much more freedom from command control of the trial court; otherwise 'I am still from Missouri.' And I have some doubts whether such a plan would be workable. whether officers on the list wouldn't become unavailable, etc."

Morgan's letter to you, which I return with this letter, shows clearly that between March 4 and June 24, he was sold a bill of goods by those who advocated retention of command control, which, of course, was only possible because he is not familiar with the practical workings of either military justice or the Army line of command. Let me take each of his objections in the same order as he states them.

1. "The plan is impracticable."

Morgan assumes that each division commanding officer must furnish a list of at least 10 officers and 4 enlisted men to serve on courts martial. From this assumption he concludes that he must set these persons aside so that they can be called at any time; that he must therefore lose the services of this personnel for other purposes; that the consequence will be that he will select men of no ability, and that it is unthinkable that the commanding officer of the division could have his officers subject to call by a staff judge advocate at Army headquarters.

The fact of the matter is that under the present system a general court martial usually consists of nine officers selected by the division commanding general. These officers perform their usual duties and are subject to call for service on courts only when there are cases ready for trial. Even in wartime, these courts generally sat not more frequently than once every 10 days to 2 weeks, and if other duties required their attention during the day, the court convened at night.

The Officers would be no less available under our plan than under the present system. The only difference would be that the cases assigned to the courts would be assigned to them by the staff judge advocate at Army level instead of by the division commanding general. Again in practice, it was generally not the commanding general who determined when the court would sit, but the staff judge advocate. If any of the officers was needed for other important duties, he was excused from service at that particular session of the court. The arrangements would be no different under the system which we propose.

Furthermore, the amendments forwarded to you by Mr. Spiegelberg add to article 25 of H. R. 4030 a new subdivision (e), the last sentence of which reads as follows:

“Such commanding officers may withdraw names from such lists and may substitute others therefor.”

In other words, not only by implication, but specifically, the power to withdraw officers and substitute others is reserved to the division commanding general, so that the argument that he will lose the services of the selected personnel, is nonsense.

2. “The plan will not eliminate command control.”

Morgan argues that inasmuch as we state that at least 90 percent of the cases will be tried by the court of the division of which the accused is a member, command control will not be eliminated. He then accuses us of being naive in assuming that the commanding officer of division 1 will not communicate with the commanding officer of division 2, if division 1's personnel is tried by a court from division 2, in order to secure a conviction. He scoffs at the idea that an Army staff judge advocate have authority to tell the commanding general of division 6 that he must detail officers and men for service in division 1. With due respect to Professor Morgan, this paragraph shows an extraordinary and lamentable failure to understand the plan proposed.

The reason why we say that in at least 90 percent of the cases tried by general courts martial, the accused will be tried by the court consisting of officers from his own division, is that unless there are indications that the commanding general of a division has been seeking to influence the decisions of his courts, the Army judge advocate, as a matter of convenience, will refer cases arising in division 1 to the panel of officers selected by the commanding general of division 1. We do not intend by the proposed amendment to require that an accused be tried by a court consisting of officers and men from a division other than the one of which he is a mem-

ber. Our purpose is to check command control by interfering only where the commanding general shows that he is intent on influencing his courts.

In saying this, I am not referring solely to a situation where there is evidence sufficient to convict the commanding general of the offense of attempting to coerce the court; I am referring more especially to the typical case in which the commanding general lets it be known that he considers a conviction necessary - - a matter which cannot escape the attention of the staff judge advocate in the command. You know as well as I do, that as a practical matter, this type of information runs through the staff - - and considerably beyond—with the speed of light. If, as happened in a case in which I sat as law member, the commanding general, instead of verbally ordering the accused officer into arrest, placed him in arrest by published special order, the staff judge advocate at division level would pass the word along directly to the Army judge advocate (under the Elston Act he has a direct line of communication with superior authority in the Judge Advocate General's Department), and the Army judge advocate would order the officer to trial before a court composed of officers of a different division.

Furthermore, the Army judge advocate would not tell the commanding officer of division 6 that he must detail officers and men for service in division 1, as Professor Morgan asserts. What he would do would be to order the case of the accused in division 1 to trial before the division 6 court. It would be the accused and the witness who would go before the division 6 court; it would not be the division 6 court which would sit in the area of division 1. Why this should cause any perturbation on the part of the Army, I don't understand. As I testified before the Senate subcommittee, during the latter part of World War II all cases pending in the Sixth Service Command were tried before a general court sitting in Chicago, the witnesses and the accused being transported to the court. As an alternative method, in the North African theater traveling teams consisting of a trial judge advocate, defense counsel, and law member covered large areas of the theater in the trying of general court-martial cases.

Finally, I am afraid it is not Colonel Spiegelbert and ex-Lieutenant Farmer who are naive in believing that the commanding general of division 1 will not communicate with the commanding general of division 2 in order to get the latter to instruct his court to convict. No commanding general, under whom either of us ever served, would have stuck his neck so far out as to ask another two-star general to aid him in violating an article of war (A. W. 37). I am sure that a commanding general would not hesitate, if he desired to secure a conviction in his own command, to drop a hint to his staff; I am equally sure that he would not care to communicate his wishes to the commanding general of another division.

Professor Morgan puts much faith in the fact that the appointing authority must always consult his staff judge advocate as to the framing of the charges and the available evidence before a trial is ordered. We do not share in this faith. Not only is the CG not bound by his staff judge advocate's recommendations, but I know numerous instances in which the CG asked his staff

judge advocate to change his recommendation, and, I am sorry to say, several instances in which the staff JA acceded to this request.

And what good does it do an accused to have the staff JA's recommendation a part of the record? What we are talking about here is the pressure which a commanding general may put upon members of a court appointed by him. I fail to see the relevance of Professor Morgan's comment respecting the staff JA's recommendation.

Professor Morgan also argues that under the system of review provided by H. R. 4080, the possibility of injustices resulting from command control is virtually eliminated. This contention simply is not true. In many cases the court might legitimately find either way, and the Board of Review could not say that its findings was against the weight of the evidence. This is because the determination of issues of fact is largely dependent upon the view which the court takes of the credibility of the witnesses. And that is precisely why the system of review does not solve the problem of command influence upon the courts. Where the evidence is conflicting and the court finds in accordance with the wishes of the commanding general, neither the Board of Review nor the Court of Military Appeals can upset the conviction.

These are the only arguments advanced by the opposition, in addition to those covered in the material which I sent you a few days ago, of which I am cognizant. If others should be presented, I will be glad to analyze them for you. You see, Senator, the Morgan letter represents the very situation that I had in mind when I wrote you some weeks ago, asking whether it would be possible to bring the proponents and the opponents of the command-control amendments before your committee. Unless a person has had sufficient military service, plus complete familiarity with the process of military justice, he is at a tremendous disadvantage when faced by the Judge Advocate General or others equally experienced.

Cordially yours,

Arthur E. Farmer

Mr. MORSE, Mr. President, I also wish to include at this point in my remarks what I consider to be an exceptionally able writing on this subject by Mr. Arthur John Keeffe and Mr. Morton Moskin, which appeared in the Cornell Law Quarterly for the fall of 1949, under the title "Codified Military Injustice." Were I in court at this moment, Mr. President, I should ask to have this particular article marked for identification purposes, and I should offer it as one of my key exhibits in support of the premises I am defending and advancing here this afternoon.

There being no objection, the article was ordered to be printed in the Record, as follows:

Codified Military Injustice - - An Analysis of the Defects in The New Uniform Code of Military Justice

When the newly inducted GI bids farewell to his family and friends, little does he realize that he is also saying good-by, in large measure, to

his rights as a citizen. It is a matter of regret that the Uniform Code of Military Justice,¹ already passed by the House of Representatives and approved by a Senate subcommittee of the Committee on Armed Services, makes no substantial change in this unhappy situation.

"If we are going to handle this court-martial business, I say," said Senator Wayne Morse, of Oregon, during the Senate hearings on the proposed Code,² "let us do a thorough job; let us not take our present system and just make a little addition or two here. If we are going to do the job, the job that I think this committee ought to do, I think we have just got to start at the beginning and go to the finish, and make changes wherever we can make a change that will bring the military system in direct line with civilian justice and, at the same time, not interfere with what we can all agree is necessary military organization in order to have an effective fighting force."

But the Senator's enlightened stand failed to sway his fellow committee members. Such, it appears, has always been the case whenever radical revision of what is paradoxically termed "military justice" has been suggested. The last real attempt at reform, the Chamberlain bill,³ an aroused public's answer to the flagrant miscarriages of justice permitted under the guise of discipline during World War I, was killed in committee. Its advocates, Maj. Gen. S. T. Ansell⁴ and Senator George Chamberlain, like Senator Morse, a dauntless legislator from Oregon, had sought to divorce military justice from command control, provide trained legal representatives for the accused, and insure adequate review procedures.

It is time the services came to realize that courts martial are more than instruments for the maintenance of discipline.⁵ They are criminal courts, enforcing a penal code, and applying highly punitive sanctions. As such, considerations of law and justice become paramount. The drafters of the new reform legislation have overlooked this underlying postulate. A scrutiny of the code's provisions will make this clear.

HOW UNIFORM IS "UNIFORM"?

The legislation professes to be uniform, yet article 1 which merely defines the terms used throughout, reveals the perpetuation of three separate and distinct Judge Advocate Generals. Upon these officers, as now constituted, rests the responsibility for the legal sufficiency of every case, because it is in their offices that the records of trial are reviewed. To achieve true uniformity of policy, and to bring about a more efficient and a more economical administration it is imperative that the three Judge Advocate General offices be merged into one department. Three individuals in three separate departments doing the work of one is ridiculous.

Furthermore, only by merging the three departments into one can we hope to have Army, Navy, and Air Force sentences approach a degree of uniformity. The fortuitous induction into one branch of service rather than another during the last war determined whether one who perpetrated a capital offense would live or die. We should not again see capital punishment present in the Army but abolished in the Navy, or have absences from boot camp in the Army punished more severely than like absences in the Navy.⁶

The arguments for combining the Judge Advocate Generals in one department are indisputable. Why then has not such action been taken? The best reasons Prof. Edmund Morgan, chairman of the committee which drafted the legislation, could offer the Senate subcommittee were:

"Well, that, of course, is very nice theoretically, after you once get the thing thoroughly unified, but there again we felt that we had to keep off that because of the different organizations of the Judge Advocate General's Office.

"For example, if you had a single Judge Advocate General, what should he be, an Army man, an Air Force man, a Navy man, or a civilian? That is the first question.

"Second, the functions of the Judge Advocate General are so different in the different services, if you had a single Judge Advocate General, how and what functions would you take away from him?"⁷

CIVILIANS IN GUAM AND OTHER POSSESSIONS

SUBJECTED TO COURTS MARTIAL

Article 2 (11) deprives the civil populations of Guam, American Samoa, and the trust territory of the Pacific of their basic civil rights by subjecting them to military justice. The article does this by implication in that it extends the code's jurisdiction to all persons under the supervision of the armed forces outside of certain designated areas. At the present time the Navy Department has control over these islands,⁸ none of which are within the territory specifically excepted by the code.

Significantly, in *Duncan V. Kahanamoku*⁹ the Supreme Court overruled the Government's contention that Hawaiian civilians were subject to the jurisdiction of military tribunals. The Court, speaking through Mr. Justice Black, said that the people of Hawaii are entitled to constitutional protection to the same extent as the inhabitants of the 48 States.

Hawaii, it must be admitted, is an incorporated Territory,¹⁰ while Guam, American Samoa, and the trust territory are not; nor should we lose sight of the fact that under article IV, section 3, clause 2, of the Constitution, Congress has "power to * * * make all needful rules and regulations respecting the Territory * * * belonging to the United States." Two Supreme Court cases have held that under this provision such rights as trial by jury in criminal cases¹¹ and indictment by a grand jury¹² are statutory matters rather than constitutional rights when applied to Territorial possessions. Nevertheless, there can be no compelling policy reason for altering the standard of justice applicable to these lesser islands if we bear in mind that the protection afforded by the due process and equal protection clauses of the fourteenth amendment is not confined to citizens, but extends to all natural persons. In *Yick Wo v. Hopkins*¹³ the Court said:

"The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China. * * * The fourteenth amendment to the Constitution is

not confined to the protection of citizens. * * * These provisions are universal in their application, to all persons within the Territorial jurisdiction, without regard to any differences of race, of color, or of nationality."

REVIVING JURISDICTION AFTER DISCHARGE

Article 3 (c) provides that "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." In theory, this is meant to apply to deserters who later reenlist in another branch of service or in the same branch under a different name, serve faithfully, and procure honorable discharges.

The provision was designed to circumvent two well-established rules of law. First, that a person is amenable to military jurisdiction only during the period of his service.¹⁴ Second, that an honorable discharge is a formal and final judgment passed by the Government on a man's entire military record.¹⁵

The danger in depriving a discharged serviceman of his rights to trial in a civilian court is pointed out by Mr. Justice Black's decision allowing habeas corpus in *United States ex rel. Hirshberg v. Cooke*.¹⁶ Chief Petty Officer Harold E. Hirshberg had been granted an honorable discharge in 1946. The very next day he reenlisted, and about a year later he was served with charges directing his trial by a general court martial for alleged offenses committed during the prior enlistment. Had the Navy been right in its contention that the subsequent reenlistment revived jurisdiction that had concededly been lost upon discharge, the "punishment of the gravest nature might be imposed on a naval volunteer or draftee which no court martial could have imposed but for such a voluntary or (in the case of subsequent draft) forced entry into the Navy. * * * Jurisdiction to punish rarely, if ever, rests upon such illogical and fortuitous circumstances."

True article 3 (c) applies only to deserters, but in light of the fact that over 75 percent of all court-martial cases involve desertion or absence without leave,¹⁷ its far-reaching effect becomes evident.

The ease with which a mere unauthorized absence can be transformed into a charge of desertion for purposes of receiving jurisdiction can be illustrated by the trial of John Jones, machinist's mate, second class, United States Naval Reserve, a case in which the accused's avowed dislike for the Navy was distorted into an intent never to return.¹⁸ This despite the fact that his testimony indicates he had worn his uniform at all times during his absence and had purchased a return bus ticket 3 or 4 days before being apprehended.

Civilians are entitled to trial in civil courts with all the constitutional safeguards, including jury trial, which the fifth and sixth amendments guarantee. The failure or inability of the services to act during that time when jurisdiction could have legitimately attached should not be allowed to change this.

PRESERVATION OF DOUBLE JEOPARDY

Under article 14, "a member of the armed forces accused of an offense against a civil authority may be delivered, upon request, to the civil authority for trial." This is well and good, but the code, despite a loosely worded prohibition against double jeopardy in article 44,¹⁹ fails to protect an individual so tried in the courts of a State or foreign country from subsequent trial by court martial for the same offense. Such subsequent trial does not legally constitute double jeopardy, inasmuch as the constitutional protection against double jeopardy²⁰ extends only to courts which derive their jurisdiction from the same source, namely, the Federal Government.²¹ Thus, only if the act or omission with which the accused is charged is prohibited both by this code and the Criminal Code of the United States, and is committed in an area within the jurisdiction of the Federal courts, is trial by either the military or civil courts a bar to trial by the other.²²

The type of manifest injustice this code condones can be readily illustrated by the case which arose during the late war.²³ The prisoner had been jailed for 125 days by a civil court for committing a battery. Upon his release he was placed in military custody and charged with and convicted of 125 days' absence over leave and scandalous conduct. The Judge Advocate General found the conviction legal.

Double jeopardy in court-martial cases may take still another form, as evidenced by the case of *Wade v. Hunter*.²⁴ There, a court martial was dissolved by the convening authority after both sides had presented their cases but before a decision was rendered, because the tactical situation had made the summoning of certain witnesses inexpedient. A conviction by a second court, subsequently convened, was upheld by the Supreme Court on the tenuous ground that this was not the type of oppressive practice at which the double-jeopardy prohibition is aimed.

Had Gen. Edwin C. McNeill, Assistant Judge Advocate General, not referred the original case back with an endorsement to the effect that tactical conditions made it impossible to proceed with the trial, Wade might well have won his double-jeopardy argument. Even under the code (article 44 c), when a proceeding is dismissed for failure of available evidence or witnesses without any fault of the accused, he cannot be tried a second time for the same offense. However, with General McNeill's endorsement the familiar legal doctrine of imperious necessity entered the case. If, for example, a courthouse burns down during the course of a trial, or a juror is disqualified under this doctrine the trial judge is permitted to stop the proceedings and order a new trial.

Gen. Franklin Riter, speaking on behalf of the American Legion, explains it thusly:

"Well, General McNeill, in his endorsement, points out that this situation with regard to the rapidly advancing Seventy-sixth Division (to which Wade belonged) and the Third Army in military justice processes produced an emergent or imperious necessity, and, therefore, the action of the commanding general of the Seventy-sixth Division in withdrawing

those charges was equivalent to the trial judge ordering a new trial when the courthouse burned down, and burned all the records."²⁵

Riter pungently decried this distortion of "imperious necessity" before the House committee, saying:

"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."²⁶

Conceivably, difficulties in proof might lead a commanding officer to dissolve three or four such courts before a finding is ultimately reached. Such practice, under the guise of emergent necessity, would not be at variance with the Uniform Code. But, as Mr. Justice Murphy pointed out in his dissenting opinion in the Wade case:

"The harassment to the defendant from being repeatedly tried is not less because the Army is advancing. The guaranty of the Constitution against double jeopardy is not to be eroded away by a tide of plausible-appearing exceptions. The command of the fifth amendment does not allow temporizing with the basic rights it declares. Adaptions of military justice to the exigencies of tactical situations is the prerogative of the commander in the field, but the price of such expediency is compliance with the Constitution."

Applicability of the prohibitions against double jeopardy ought to be broadened as a matter of express statutory policy to cover situations such as these. Civil jurisdictions have tended in this direction.²⁷ It is time the military did likewise.

NONJUDICIAL PUNISHMENT

An analogous problem is raised by article 15. Should a commanding officer's nonjudicial punishment for minor offenses operate as a bar to subsequent trial by court martial if a more serious crime grows out of the same act or omission? Subdivision (e) answers this question in the negative. Here the code is on firmer ground. While no exact parallel exists in civilian life, comparable situations are handled in much the same way.

Courts of law have long recognized that a defendant convicted of assault may, if death of the person assaulted supervenes, be prosecuted for homicide. The new fact, death, creates a different offense from the one for which the accused was put in jeopardy on the first trial.²⁸

While article 15 is not deficient in this particular it is by no means free from defects. Subdivision (a) (2) (F) permits a commanding officer to impose, as nonjudicial punishment, confinement on bread and water for 3 days. This is in conflict with the spirit of article 55 which prohibits a court martial from meting out cruel and unusual punishments. Listed in

this category are flogging, marking, branding, and tattooing. No less cruel and unusual than any of these is starvation or its near equivalent, a bread-and-water diet. No civil court can inflict such barbaric punishment on offenders. Why then should a commanding officer, who has not even afforded the accused a trial, be permitted to do so?

Top military observers regard the punishment as the only effective deterrent to unwieldy men aboard ship. Even conceding the validity of this tenuous argument, there is no reason why punishment cannot be less savage or even, on occasion, deferred until the ship docks. Brutality is not a sine qua non to effective discipline.

Subdivision (d) grants a person who deems his disciplinary punishment unjust the right of appeal to the next superior authority. In the meantime, however, he must undergo the punishment adjudged. How can a punishment such as 3 days on bread and water ever be remitted? Who, for that matter, would dare make such an appeal from punishment for a minor offense over the head of his commanding officer - - an officer under whose charge he will remain and to whom he must look for favorable fitness reports, promotions, assignments, and furloughs? None but the intrepid or the insane.

SPECIAL COURTS PERMITTED TO AWARD BAD- CONDUCT DISCHARGES

A classification of courts martial is undertaken by article 16. General courts martial are at the top of the hierarchy. The subordinate courts martial are designated "special" and "summary". The summary court martial, consisting of one officer, is relatively unimportant, inasmuch as, for all practical purposes, the right to refuse trial by such a body is made absolute by article 20. The jurisdiction granted to special courts martial by article 19 is considerably broader, such bodies being privileged to award bad-conduct discharges. The consequences flowing from a bad-conduct discharge are not substantially different from those resulting from a dishonorable discharge.²⁹ Both operate as a bar to Government employment and either may deprive a man of benefits under the Servicemen's Readjustment Act of 1944.³⁰

A body which may adjudge so serious a punishment ought certainly to be provided with rigid safeguards. Yet a great many of the protective measures required of general courts martial are not available in special courts. Article 26 makes mandatory the presence at all general courts martial of a law officer, a duly constituted member of the legal profession whose duty it is to rule on points of law. No such person is required on special courts; nor, for that matter, need the prosecutor and defense counsel on special courts be persons with any legal training,³¹ as they must be on general courts.

Either the power to award bad-conduct discharges must be taken from special courts, or the safeguards necessary to the granting of full justice must be provided.

PRETRIAL INVESTIGATION

Article 32 appears to be a very salutary section in that it gives to the accused the right to be represented at a pretrial investigation. However, subdivision (d) takes the teeth out of the provision by foreclosing any possible review by the civil courts on this point. It makes failure to comply with the article directional only.³² Such failure should be held to be jurisdictional, guaranteeing to the defendant the procedural safeguards of the fifth amendment.

But the drafters of the code state:

"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 of a reviewing authority under the code and an intentional failure to do so would be an offense under article 98.³³

In rebuttal, Senator Pat McCarran remarked:

"While failure to conduct the investigation would be an offense under article 98, it is difficult to see how this will benefit the accused who must depend upon a nebulous right of review by a whole maze of reviewing authorities and tribunals.³⁴

"To those in the military or naval service of the United States, the military law is due process.³⁵ To this might be added the logical conclusion that it is due process only when complied with."³⁶

UNDUE INFLUENCE

The avowed purpose of article 37 is to break down the domination and control exercised over courts martial by commanding officers. The article expressly interdicts such practices as reprimanding members of the court with respect to the results they reached or the manner in which they conducted the proceedings. But the article is ineffective to accomplish its purpose. The mere exercise of administrative discretion in giving of leaves or furloughs, in making recommendations for promotions, in assigning men to various jobs and details, and in preparing fitness reports gives the commanding officer ample opportunity to manifest his displeasure at the manner in which those under his control have handled a case. Such interference does not appear in the record on appeal. Consequently, it can never be detected by subsequent reviewing bodies.

Only by removing from command the power to influence the court can the prohibition of article 37 be made effectual. The American Bar Association set out to do this by suggesting that the Judge Advocate General's area representative select members of the court from rosters supplied by the commanding officers of other echelons in the vicinity.³⁷ The ill-fated Chamberlain bill had a somewhat similar provision.³⁸

An alternative theory was advanced by the American Legion.³⁹ That body proposed a strengthening of the penalty in the hope that a really severe chastisement would discourage such devious practices. The code, in article 98,

goes no further than to make violations of article 37 an offense. The Legion would substitute civil indictment with a penalty of \$5,000 fine or five years in prison.

Neither of these solutions may be the panacea we seek, but both are to be preferred to the culpable indifference the code exhibits toward the problem.

Perhaps the most vicious way to influence a court unduly presents itself in the illusory language of article 38. This article gives the accused the right to be represented by military counsel of his own selection "if reasonably available." "If available" has been recently construed by the Court of Appeals for the Second Circuit to mean if militarily available and not if physically available.⁴⁰

John J. Finn, who spent 33 months in the office of the Navy Judge Advocate General during World War II, gave the House subcommittee some insight into how this article will work in practice when he said:

"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."⁴¹

As a consequence the accused is almost invariably represented by the officer appointed by the commanding officer under article 27. The result is not always as deplorable as that in *Beets v. Hunter*,⁴² but the fact that such practices are possible under the Uniform Code speaks for itself. In granting *Beets* a writ of habeas corpus, Judge Murrah unfolded the details of the case:

"When Captain Morgan called upon him (*Beets*, the accused petitioner), as the appointed defense counsel, Captain Morgan was informed that he (*Beets*) wished to have Lieutenant Fox represent him, whereupon Captain Morgan left him and went back, leaving the impression at least that he would have Lieutenant Fox call him. Lieutenant Fox did not see this prisoner; instead Captain Morgan returned and on the day before the trial was furnished a copy of the charges. He confesses on the witness stand that he was wholly incompetent to represent him, and he also makes it plain, manifestly plain, too plain for mistake, that he did so only on orders - - acting under orders as a soldier."

Not always is the defense counsel appointed by the commanding officer so remiss in his duties. A Lieutenant Shapiro tried conscientiously to represent an American soldier of Mexican descent before a court martial during the last war. Shapiro, in order to destroy the credibility of the prosecuting witnesses' identification of their assailant, substituted for the accused another American soldier of Mexican descent. The substitute was readily identified as the culprit and was convicted.

Satisfied that he had destroyed the prosecution's case, Shapiro informed the court of the ruse he had employed. These vertiginous repercussions followed. The real defendant was brought to trial, also identified as the

guilty party and convicted. Lieutenant Shapiro was arrested. Upon arrest he asked to be represented by a Captain Mayfield. A day or two thereafter he was charged with effecting a delay in the orderly progress of the general court martial and was ordered to stand trial that afternoon. At the same time he was informed that Captain Mayfield was no longer available, having been named as the trial judge advocate. Thereupon, the Lieutenant hastily selected as his defense counsel two lieutenants, neither of whom were lawyers. When the court martial convened 80 minutes later Shapiro moved for a continuance of 7 days on the ground that his counsel had not had sufficient time to prepare his defense. Needless to say, this motion was denied. Three and one-half hours later, Lieutenant Shapiro was sentenced to be dismissed from the service. Less than 5 hours had elapsed from the time charges were served to the time sentence was pronounced.

Subsequently, Shapiro brought suit in the Court of Claims⁴³ for his back pay, contending that his conviction was void and his dismissal illegal. He won - scant compensation to the former officer for the disgrace and chagrin he had suffered.

SENTENCES NOT PREDATED

Article 57 (b) reads: "Any period of confinement included in a sentence of a court martial shall begin to run from the date the sentence is adjudged by the court martial." This provision gives no credit for time the accused may have spent in confinement before sentence. On the other hand, civil penal codes often require that time so spent before sentence is pronounced be deducted from the term of sentence imposed.⁴⁴ It would seem no more than right that the military likewise give credit in whole or in part from the date of arrest depending upon whether the defendant was confined to quarters or the post or imprisoned in the brig or guardhouse. The point is important, because in many cases delay of trial for proper preparation is in the defendant's interest. An adequate defense cannot be assured if the accused must regard delay as added punishment.

REVIEW PROCEDURES

Articles 59 through 76 concern themselves with the procedure for reviews of courts martial.

Review begins in every case with the convening authority's initial action on the record. When the convening authority has taken final action in a general court-martial case, he forwards the entire record to the appropriate Judge Advocate General. The Judge Advocate General is required to refer certain cases to a board of review and ultimately to a judicial council. Other cases are reviewed in the office of the Judge Advocate General and then, if necessary, by a board of review.

It has been suggested that the two most serious difficulties with the court-martial system are the method of review and the control by commanding officer over court proceedings.⁴⁵ It is at the stage of initial review by the convening authority, as provided in articles 60-64, that these two difficulties come most sharply in focus.

There appears to be a basic inconsistency between these articles and article 6 that the simple expedient of placing fifty-some-odd other provisions between them cannot resolve. The purpose of article 6 (a) is to place judge advocates and law specialists under the control of the Judge Advocate General. To make these law officers independent of the convening authority in this manner, and then to subject the court's proceedings to review by the convening authority is incongruous, to say the very least.

Indeed, there are such serious objections to this system of initial review by the convening authority that several of the committees appointed in the past few years to study existing court-martial systems have recommended either complete elimination or severe limitation of the power.⁴⁶ The French have entirely eliminated such review from their court-martial procedure and have made the sentence of the court self-executory, subject, however, to higher departmental review.⁴⁷

The Navy General Court Martial Sentence Review Board report summarizes the objections to the old system, none of which have been rectified by the code, as follows:⁴⁸

"(i) The reviewing authority is usually the same officer who convened the court and referred the case to trial. There is a certain anomaly in having the same officer review a case which he has considered at some length before it went to trial. It is humanly impossible for a person, no matter how high his purpose, to dissociate himself from his prior actions and opinions on a particular matter and to view it later as though he were seeing it for the first time. This is recognized in the rules which prescribe the qualifications for members of courts martial, and in the rules followed everywhere with respect to disqualification of judges in civilian appellate courts. It is anomalous not to recognize it in the single case of the authority who reviews court-martial cases. * * *

"The difficulty is not cured by requiring that the case be referred to a legal officer for his opinion. For exactly the same problem presents itself. The legal officer who reviews the case is usually the same officer who studied the case beforehand, drafted the charges, and recommended trial in the first place.

"(ii) The review of a court-martial case is not really analogous to an appeal. Although counsel for the accused has the privilege of submitting a brief, he does not often do so, and rarely, if ever, resorts to oral presentation of the case to the convening authority or his legal officer. Although theoretically each objection to evidence and rulings of the court is weighed as though on appeal, and the record is carefully scrutinized for jurisdictional or other error, it is difficult, on such a procedure, to detect all the errors which may exist, sometimes serious ones.

"(iii) The practical result of the present system is that the reviewing authority, rather than the court, fixes the sentence. Theoretically, the court can impose whatever sentence it deems fit. But it is directed to impose a sentence 'commensurate with the offense' and to leave matters of clemency to the reviewing authority. Of course the members of the court

may, and frequently do, recommend clemency. Occasionally a court invades the reviewing authority's prerogative of clemency. But in the vast majority of cases the court merely fixes a maximum limit to the sentence, and the sentence is actually set by the reviewing authority, within that maximum. The clemency extended by the reviewing authority in most cases consists merely in reducing the sentence to something approaching what it should have been in the first place. * * *

"(iv) The convening authority's power of review carries with it a large measure of indirect control over the court and its actions. If the convening authority does not agree with the findings of the court, or believes that the sentence is inadequate, even though he may be powerless to change the result in the particular case, he can express his opinion in his action or in a letter to the court. This cannot but have its effect on subsequent cases. The mere knowledge that it can take place is apt to influence a court, without any expression of disapproval or nonconcurrence ever being made by the convening authority.

"(v) Finally, difficult law points in court-martial cases are practically nonexistent. If the judges of the Military Court of Appeals are to receive the pay of circuit judges they should do the work of circuit judges. There should be no difficulty at the present time in their reviewing all court-martial convictions. And in time of war, their number could always be temporarily increased."

The code not only provides for such review by the convening authority but after the case has passed him, under article 66, it may be reviewed by boards of review in the offices of the three Judge Advocate Generals. Yet the defects are not such that they can be cured by higher appellate review, for any subsequent reviewing body must, of necessity, rely heavily on the action of the court and the initial reviewing authority. "They are the parties closest to the accused, the offense, and the scene."⁴⁹

In any event, review by boards of review as constituted by this code seems to be an unnecessary step and a waste of time and money. It cannot be expected that such boards, appointed by the Judge Advocate General, will give the disinterested impartial review necessary. Just as the trial court has been shown to be under the domination of the convening authority, so too will the boards of review come under the domination of the Judge Advocate General. The Judge Advocate General is not, and by the nature of his office and appointment cannot be, an impartial judicial officer. He is to enforce discipline and he is to give defense.

In an effort to resolve this conflict the English have separated the prosecution and defense sides of the office of their Judge Advocate General. They have further provided that the Judge Advocate be a civilian appointed on the recommendation of the Lord Chancellor and be responsible to him.⁵⁰ Thus, the English reforms have freed the Judge Advocate General from the control of the Secretaries for State and Air. This is in sharp contrast to the American reforms which have served only to compound the inherent infirmity in the Department.

Still another opportunity for the Judge Advocate to exert his influence suggests itself in article 67. This article admirably creates a Court of

Military Appeals, a civilian body of three attorneys appointed by the President for 8-year terms, each to receive compensation and allowances equal to those paid to a United States Court of Appeals judge. This court is, in a limited number of cases, to be the final reviewing authority of courts martial.

As has been suggested above, 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, subdivision (b) (2) provides that the Judge Advocate General may order forward to the Court of Military Appeals for review such cases as he pleases. Under this provision, only if your case interests the Judge Advocate General can you hope to have an appeal.

But there is another way. If you have been sentenced to death or are an admiral or a general, subdivision (b) (1) gives you an unqualified right to bring your case before the Court of Military Appeals. To state this provision is to show its injustice. Everyone regardless of rank, should have his case automatically heard before this top civilian court.

There is a third way in which a case can be reviewed by the Court of Military Appeals. Subdivision (b) (3) provides that upon petition of the accused and on good cause shown, the Court of Military Appeals can grant a review. The code significantly does not tell us who is to make this petition. Experience has shown that the great majority of defendants in court-martial cases are far from mental giants. They are primarily very young men, and in most cases very poorly educated men. They are men who are in trouble largely because of bad home environment. They are the children of divorced parents, and the real poor and neglected in America. These men, if they are to exercise the right to file such a petition, 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 Court of Military Appeals and the right kind being buried in the board of review in the office of the Judge Advocate General.⁵¹

Another defect in article 67 is that it limits the Court of Military Appeals to review of questions of law and chains this body to the facts as found by command. Not even busy civil courts are limited to a review of the law in criminal cases.⁵² If the task of reweighing the evidence should become too arduous, the court can always be expanded. It is worth the added expense if as a result even one innocent American boy is spared the vilification of an unjust sentence.

Nor is it ever desirable to throw any court's jurisdiction into the controversy inherent in the metaphysical distinctions between fact and law. For example, is the obtaining of a confession by torture 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 Court of Military Appeals has an unlimited right to review questions of fact as well as questions of law.⁵³ Can we be sure that the code, as it is now written, guarantees review of tragedies like the Sugar Cane Rape Cases?⁵⁴

Early in 1944 the rapes in Hawaii of several civilian women resulted in a public clamor for retribution. The Navy responded to these remonstrations by herding some 40 to 50 Negro sailors into confinement. No charges were pressed. No counsel was provided. Once incarcerated, marine guards "convinced" six of the unfortunates that they should confess to the crimes. Beatings with billy clubs and blackjacks, threats of death, deprivation of sleep, the application of lighted cigarettes to bare flesh, and the pushing of broom straws under fingernails were among the most cogent arguments employed. So persuasive were these appeals to reason that the Navy found itself with one more confession than there had been crimes. The extra confession was discarded. Undaunted, the general court martial found these specious admissions of guilt, coupled with the most equivocal of identifications, sufficient evidence upon which to sustain the prisoners' pleas of guilty. Dishonorable discharges and confinement in Federal penitentiaries followed.

It is well settled that Federal courts will review court-martial records to see if basic constitutional guaranties have been denied petitioners.⁵⁵ If such is found to be the case, the court will grant a writ of habeas corpus on jurisdictional grounds. The reasoning seems to be that in a case where constitutional guaranties have been flouted, jurisdiction was defective ab initio.⁵⁶ But this is no help to unfortunates like these who have neither the intelligence nor the knowledge nor the money to pursue such a course.

Before the advent of the Uniform Code there was no way that their convictions could be reviewed. There is still no effectual way. Could Mr. Justice Black have been mistaken when he wrote:

"The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy; governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government."⁵⁷

WHY NO CHIEF DEFENSE COUNSEL?

To be sure that every case is presented to the Court of Military Appeals, it was the suggestion of the General Court Martial Sentence Review Board, based on their experience in reviewing court-martial cases, that there should be created a chief defense counsel.⁵⁸ Such an officer, and not the Judge Advocate General, would have the responsibility of appealing cases to the top appeals court. Instead of following this suggestion, the drafters of the code have required, in article 70, that the Judge Advocate General appoint appellate counsel. It is too much to expect any Judge Advocate General, no matter how well intentioned and capable, to act in two such conflicting capacities like Pooh Bah. It is like asking the district attorney to appeal the case of a defendant that he has convicted.

COLLATERAL ATTACK

Article 76 restates the existing law as to finality of court-martial judgments.⁵⁹ Following such review as the code provides, court-martial judgments "shall be final and conclusive."

Presumably they will still be open to collateral attack, either by petition to a Federal district court for a writ of habeas corpus or by suit in the Court of Claims to recover such back pay as may have been withheld by way of punishment. To carry such appeals to the top of the Federal hierarchy of courts is so slow and cumbersome a process as to be of little practical value.

The remedy of habeas corpus is of doubtful utility in any event. Only last April⁶⁰ the Supreme Court reiterated its earlier holding in *Carter v. McClaughry*,⁶¹ that such proceedings do not permit the reviewing court to pass on the guilt or innocence of persons convicted by courts martial.

There are only four traditional grounds for review by the civil courts. Such courts may inquire whether the military court was properly convened and constituted,⁶² whether it had jurisdiction over the person,⁶³ whether it had jurisdiction to try the offense charged,⁶⁴ and whether it imposed a sentence in excess of its power.⁶⁵ The recent tendency, however, has been to go further and to grant habeas corpus on jurisdictional grounds if basic constitutional guaranties have been violated.⁶⁶ At least two Federal courts have gone over the entire record in making this determination.⁶⁷

This trend toward increased civil review poses a problem. Is such practice advisable? The answer must depend on the extent to which full justice can be dispensed in military courts. The reforms made by this Uniform Code are so negligible that the question must, of necessity, be answered in the affirmative. With the coming of adequate reform, however, such broad appeal to a civil judicial tribunal will be neither desirable nor practicable, except in those cases where difficult judicial points are involved. Most court-martial cases involve offenses against discipline, and these are better handled by persons thoroughly familiar with service discipline and its ramifications.

In the final analysis, all substantial questions of jurisdiction and due process must, of course, be answered by the United States Supreme Court. Collateral attack can never accomplish this. During the last war there were no cases appealed to the Supreme Court of the United States with respect to any American serviceman. It was not until 1949 that the first such case was heard by the High Court. The privilege apparently exists, but to insure appeal to the Supreme Court a more swift and effective procedure must be provided. There was no delay in passing on the validity of the military convictions of Japanese Generals Homma and Yamashita. Likewise, immediate action was taken by the Supreme Court in testing the jurisdiction of the military commission which tried the German saboteurs who disembarked on our shores in 1942. Should we be less willing to grant effective civil appeal to our own service personnel than to our enemies?

PUNISHABLE OFFENSES

Article 88 makes the use of contemptuous language against the President, Vice President, legislators, Cabinet members, governors, and certain other officials a court-martial offense.

In the light of the unfavorable public reaction to the recent "Dierdorff incident,"⁷² the wisdom of such a provision, at least without some qualification limiting it to time of war and degree of disrespect, is questionable.

Last February, Naval Capt. Ross A. Dierdorff replied to Senator Harley M. Kilgore's slur on the captain's superior officer by calling the Senator "a politician" not fit for an admiral "to wipe his shoes on." Almost immediately, the captain was relieved of his duties and transferred pending retirement. In an effort to forestall the more serious punishment of official reprimand which nevertheless followed, Senator Morse remarked:

"I wonder how many people in Government service, in and out of the armed forces, would be free of disciplinary action by their superiors if we ever started to adopt the policy of disciplining Government officials, including Cabinet officers and Assistant Secretaries, for every bit of critical figurative language they have spoken about Members of Congress in what they thought was private conversation."⁷³

Another serious failure of the code is in the matter of definitions.

Article 106 subjects spies to court-martial jurisdiction. Unfortunately, "spy" is not clearly defined, so that the article applies by its terms to "any person" who in time of war is "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." During the last war it would have been difficult to find anyone in the United States not subject to this broad and dangerous language. With double jeopardy the vogue under this code, most civilians in wartime appear to be subject to both civil trial and court martial.

Article 120 defines "rape" in such a way that many types of rape are not offenses under the code at all. For instance, carnal connection without force with a woman of unsound mind,⁷⁴ or with a woman intoxicated to insensibility,⁷⁵ or penetration by surprise or after the victim has been rendered unconscious by the blow of a third person,⁷⁶ or submission by the victim under the belief that the act was a surgical operation,⁷⁷ are examples of the crime of rape in civil jurisdictions. Yet none of these acts conform to the code's definition of rape as an act of sexual intercourse with a female other than the wife of the actor "by force and without her consent." To obviate the difficulties set forth above, the word "or" should be substituted for "and".

CONCLUSION

From our study of this Uniform Code of Military Justice, we draw the following conclusions:

1. The code creates three Judge Advocate Departments where we formerly had two. There should only be one. A requirement that the three Judge Advocates General follow the same procedure is not enough. One could operate with less expense and more efficiency. What price must we pay for the interservice jealousy of military lawyers?

2. There is no excuse for article 2 (11) of the new code which subjects the entire civilian population of Guam, American Samoa, and the trust territory of the Pacific to court martial. The provision is both unnecessary and undesirable.

3. The decision of the Supreme Court of the United States in the *Hirshberg* case was desirable. Article 3 (c) of the code, in effect reversing that decision, is undesirable. It permits the services to withdraw honorable discharges. Yet at this stage the considerations of discipline are no longer controlling. There is therefore no excuse for military jurisdiction. If a service gives an honorable discharge it should be forced to a civil court to void it.

4. When a serviceman has been tried by a civil court, the service to which he is attached should be made to accept the result. Accordingly, articles 14 and 44 of the Uniform Code should be changed. The changes should be broad enough to reverse the *Wade* decision. The Congress should not subject a citizens' army to double jeopardy, legally or illegally. Double jeopardy is nonetheless double jeopardy even though to date the Supreme Court of the United States has not struck it down, as some day it surely will.

5. Whether on land or sea, no provision such as article 15 which approves a bread and water diet as a form of punishment should stand. It is cruelty, and as such has no place in our American way of life.

6. Article 19 should be changed so as to rob special courts of the power to give a discharge. The protection of counsel and the new law officer established by the code makes trial by general courts martial a valuable right. It is not sufficient protection that a stenographic record is to be made of the proceedings of a special court that gives a bad-conduct discharge. If a special court has to use some of the procedures of a general court to give a bad-conduct discharge it is much more sensible to take power away from special courts entirely.

7. Article 32, requiring a pretrial investigation, should either make such investigation a jurisdictional requirement or be eliminated. As article 32 is drawn, if the services do not hold a pretrial investigation as 32 purports to require, it is their own affair and not a subject into which our civil courts can inquire by habeas corpus.

8. The pious protests of article 37 against improper command influence in the selection of court and counsel avail nothing. The code should be amended to require the establishment of panels from which the court is to be selected. The Chamberlain bill yesterday so provided and the American Bar Association today urges the same provision. There should be a trial judge advocate who is a judge and not an advocate, and he should

be given the sole right to select the members of the court from the established panels and the sole right to select counsel. In addition, the civil penalties asked by the American Legion should be written into the bill.

9. Sentences under the new Uniform Code are to run from the date of sentence. This is a vicious provision under which a man is denied credit in whole or in part for time spent in the brig or guardhouse or confined to quarters.

10. It is not so much that innocent men are convicted by military courts as that outrageously long sentences are given by trial courts. There will never be any correction of this practice until the review power of the convening authority is eliminated as was proposed in the Chamberlain bill and as was recommended by the General Court Martial Sentence Review Board of the Navy. Only if the members of a court martial know that the convening authority will not review their sentence can the court be depended upon to do its duty by fixing the sentence at the proper length.

11. More cumbersome even than having three Judge Advocate Generals instead of one is the provision in article 66 requiring that boards of review in the office of each Judge Advocate General shall review every case. This is not only an unnecessary step, but, since the Judge Advocate on appeal is like the district attorney, it fails to provide disinterested review.

12. While a Court of Military Appeals consisting of three civilian lawyers is an excellent contribution by the new code, the court parallels the similar court proposed in the Chamberlain bill in name only. Unlike the Court of Appeals in the Chamberlain bill, this court cannot hear every case. The provision permitting a man to petition for an appeal does not cure the evil, because it presupposes an intelligence that most prisoners do not have. Letting you appeal only if sentenced to be shot is small comfort. Letting generals and admirals appeal as of right is an outrage. Since no one knows what is law and what is fact, confining the Court of Military Appeals to questions of law only robs them of power to decide the very cases they are created to hear.

13. Because of the basic conflict in the duties of the Judge Advocate General on appeal, provision should be made to lodge defense on appeal with a chief defense counsel. The new code leaves the Judge Advocate General to protect the accused as well as to present the Government's case.

14. There is still no effective way to appeal a court-martial sentence to the Supreme Court of the United States. Not only is the present habeas corpus procedure through the Federal hierarchy cumbersome, but worse, when the Supreme Court finally does hear a case it is limited to an inquiry as to a deprivation of constitutional rights. It still cannot inquire as to guilt or innocence.

15. Article 88, permitting conviction for use of contemptuous language, should be eliminated as an unjustifiable limitation on free speech.

16. The code is careless as to its definitions. The definition of "spy" in article 106 should be torn out by the roots as a danger to our whole civil

population. The definition of "rape" in article 120 condones more varieties of the act than it includes as punishable.

PER ORATIO

From the above analysis we submit that the new Uniform Code of Military Justice retains and compounds flagrant errors of commission and omission.

If time permits, the Senate of the United States should make the corrections before the bill is enacted into law. If not, the chances are good that the corrections will never be made.

The only hope in the code, itself, lies in article 67 (b) which provides:

"The Court of Military Appeals and the Judge Advocates General of the armed forces shall meet annually to make a comprehensive survey of the operation of this code and report to the Committees on Armed Services of the Senate and of the House of Representatives and to the Secretary of Defense and the Secretaries of the Departments the number and status of pending cases and any recommendations relating to uniformity of sentence, policies, amendments to this code, and any other matters deemed appropriate."

In our judgment there is little likelihood that these three powerless, buried judges in the Department of Defense will correct the obvious defects outlined above. Nor can we expect these judges and Judge Advocate Generals to supply omissions such as investigation of treatment of prisoners, equality of treatment of men and officers, consolidation of the offices of the three Judge Advocate Generals into one, establishing court-martial rules in lieu of this primitive code.

In the first place, though receiving the pay of Judges of the United States courts of appeals, the civilian judges to be appointed to the Court of Military Appeals will not, like their civil-court counterparts, be appointed for life. At the ends of their 8-year terms they will need the good will of admirals and generals to be reappointed. In the second place, the history of many administrative agencies is that, beginning zealously alive to the public interest, they quickly begin to think of the public only in terms of the litigants who appear before them. We have seen the best of administrative agencies disintegrate for lack of disinterested civilian criticism. In courts-martial procedure governing civilian soldiers and sailors the armed services should welcome the creation of a strong civilian advisory council. Wasn't it Roscoe Pound who long ago pointed out that codes are rigid, codify errors, and make changes more difficult? The only hope for improvement is to condition passage of the code upon the appointment of an advisory council - - and this is what was suggested by the Navy's General Court Martial Sentence Review Board in 1947.⁷⁶

Such a body can be relied upon to follow this court-martial reform to the bitter end. In its permanent advisory capacity it can do all the things article 67 (g) only hints at, and considerably more.

The opponents of reform rely upon the present pressure easing and civilian lawyers losing interest. The stakes are too high. Let us hope that the Senate will establish such a council. True reform lies that way.

Arthur John Keeffe ⁷⁹

Morton Moskin

Mr. MORSE. While I am on this subject, Mr. President, I want to point out that not all military men, even in active service today, disagree with the junior Senator from Oregon on this point, because I refer to the hearings on the bill, to the testimony of General Harmon, Judge Advocate General of the Air Force, appearing at page 290 of the hearings. Listen to what he says:

Well, you have the two extremes. You have the preservation of discipline on the one hand and the elimination of command influence on the other, and you do not want to sacrifice discipline to accomplish this other. I do not go as far as some articles I have read, where they go to the nth degree to eliminate all control. I do not go that far at all.

I think, however——

This is the Judge Advocate General of the Air Force testifying, Mr. President——

I think, however, that the administration of military justice generally should be completely taken away from command so that the Judge Advocate General and his office does have the sole right to administer justice after the man has committed the offense and the commanding officer has decided that he is to be investigated for it and various steps going up to court martial after that.

I think the Judge Advocate General of the Air Force is to be commended for the testimony he gave on that subject, not because it happens to coincide with the point of view of the junior Senator from Oregon, but because the point of view which he expressed was not shared in the testimony of other officers of the Military Establishment in regard to the desirability of breaking command control in respect to the administration of military justice. I am inclined to believe, as I previously indicated, that in the years to come the position taken by General Harmon in the hearings will be sustained on the basis of experience and future action which I think the Senate and the House of Representatives will necessarily have to come to in respect to this issue.

I turn now, Mr. President, to another feature of the bill.

The purpose of House bill 4080 which is now before the Senate is, of course, to create a Uniform Code of Military Justice for all the services. While there is common agreement upon the need for uniformity in the administration of the judicial system of the armed forces, there is considerable divergence of opinion concerning the propriety of bringing to military justice certain of the concepts of civilian justice, and an even greater difference of opinion as to the advisability of creating a court of appeals for the Military Establishment, the members of which shall be ap-

pointed from civilian life. I refer, of course, to article 67 of the pending bill which creates a Court of Military Appeals consisting of three judges appointed from civilian life by the President, by and with the consent of the Senate, located for administrative purposes in the National Military Establishment.

This court is a direct outgrowth of the Judicial Council constituted by section 226 of the Elston Act, Public Law 759, in Office of the Judge Advocate General of the Army. By amendment to article 50 of the Articles of War, which apply only to the Army, the Judicial Council is composed of three general officers of the Judge Advocate General's Department. It performs the function of a supreme court of the Army, but being composed of officers under the command of the Judge Advocate General it lacks those elements of independence which any court with its powers should have. The Judicial Council has the power to review only such cases as require action by the President, or where a board of review or the Judge Advocate General deems that a finding of guilty or sentence should be modified, or the Judge Advocate General and the Board of Review disagree. It has no power to order a new trial, that power being vested in the Judge Advocate General. The Uniform Code takes this power from the Judge Advocate General and vests it in the Court of Military Appeals. It has no power to accept jurisdiction of an appeal upon petition of the accused. The Uniform Code specifically provides that in all cases reviewed by a board of review, the court of appeals may grant a review upon petition of the accused on good cause shown. Needless to say, the Judicial Council, being a creature of the Judge Advocate General, has no authority to investigate his administration of military justice or to recommend to the Congress necessary revisions affecting military justice. Subdivision (g) of article 67 of the Uniform Code charges the Court of Military Appeals and the Judge Advocate General of the armed forces with the duty of making a comprehensive survey of the Uniform Code of Military Justice annually, and to report to the Committee on Armed Services of the Senate and the House and to the Secretary of Defense and Secretaries of the Departments the number and status of pending cases and recommendations relating to uniformity of sentence, policies, amendments to the code, and any other matters deemed appropriate.

It is obvious that article 67 represents a drastic reallocation of the power to review the findings and sentences of military courts, not only in the Army but in the Navy and Air Force as well, and for the first time creates a method whereby injustices and weaknesses in the system may be explored and reported to the Congress and to the responsible heads of the Department of Defense for necessary action.

As might be expected, these concepts are not wholly palatable either to those officers who do not like civilian checks being exercised on the military, or to the Judge Advocate General of the Army, who understandably is opposed to limitations upon his judicial powers and the creation of a Military Court of Appeals, which not only is not responsible to him, but which is in a measure clothed with the responsibility of examining the conduct of his corps insofar as it relates to military justice. It is to the credit of the Judge Advocate General of the Air Force that he has welcomed the salutary changes embodied in the proposed Uniform Code.

Two objections have been interposed to the enactment of article 67. The first is that it places final appellate power of cases tried by military courts in a civilian body, the members of which are not familiar with problems peculiar to the maintenance of discipline in the armed services. The powers of review of the proposed Court of Military Appeals are limited to matters of law. It would seem, therefore, that the court would not be required to pass upon questions which involve technical military knowledge. But the Judge Advocate General of the Army in his statement before the Senate Armed Services Committee insisted that many questions which must necessarily come before the court would involve mixed questions of fact and of military law and, indeed, cited several examples of such questions. However, the answer to this argument is implicit in the contention itself. If the question is not a pure question of law, then by the express provisions of article 67 (d) the Court of Military Appeals has no power to pass upon it. If it were argued that the provisions of article 67 (d) deprive the Court of Military Appeals of jurisdiction necessary to the best functioning of the court by limiting its power of review to legal questions only, there might be validity to the argument, but to contend that a court which has jurisdiction only to decide questions of law might be required to decide mixed questions of fact and law is an absurdity.

The Judge Advocate General asserted in his statement that there is no need to change the present system of review, but, on the contrary, "the remarkable success of the military-appeals system is attested to by the fact that of more than 200 habeas corpus cases arising since World War II only one accused has been released from confinement as the result of final court action on his petition."

This is, indeed, a specious argument. The fact of the matter is, as the Army's Judge Advocate General should well know, that under the decisions of the Supreme Court of the United States the Federal courts have no power to free an accused in a habeas corpus proceeding if the tribunal which convicted him in the first instance had jurisdiction of the accused and of the offense, unless it could be said that there was an abuse of due process. No matter how great the miscarriage of justice, no matter how inordinate the sentence, no matter how contrary to conscience the action of the military tribunal may have been, the Federal courts are powerless to intervene unless the military court either acted without jurisdiction or without due process.

Mark this, Mr. President, the fact that the clemency boards appointed by the Secretary of War found it necessary to reduce or remit sentences in 27,500 cases, or 85 percent of all the cases reviewed by them, is in itself a complete refutation of the claim of the effectiveness of the present military-appeals system. The record is a sorry record, and it stands on its face in complete rebuttal to the Judge Advocate General of the Military Establishment.

I certainly do not mean to imply that all cases tried by the military courts resulted in injustice, but I believe that it is fairly obvious that any system of justice which can result in such miscarriages of justice requires revision. In justice to the Army's boards of review, I should like to make

the point which the Judge Advocate General did not make, namely, that until the passage of the Elston Act, which became effective on February 1, 1949, the boards of review had no power to pass upon the weight of evidence, so that if there was any evidence in the record sufficient to support a finding of guilty, the board of review was compelled to affirm the conviction. The Elston Act for the first time gave the boards of review the power to set aside a finding of guilty if they felt it was contrary to the weight of evidence.

I wish to say, although he is not on the floor at the present time, that I think the country is indebted to the junior Senator from Missouri (Mr. Kem) for the fight he put up on the floor of the Senate at the time these amendments with respect to the Elston Act were adopted by this body.

What was done through the Elston Act does not, however, remove the need for a court which can function independently as a court of appeals for all the services. The suggestion made by the Judge Advocate General of the Army that a Court of Military Appeals composed of the Judge Advocate Generals of all the services should be established does not fill the need. What we need is a court which will be concerned primarily with justice and not a court which will merely reflect the individual views of the Judge Advocate Generals as to the requirements of the services. The opportunity for give and take among the services in a court composed of the three Judge Advocate Generals - - and I say this without any intention of impugning the present Judge Advocate General - - is too great to assure public confidence in its decisions.

It must be remembered, Mr. President, that it is as important for the personnel of the armed services and those at home who are dear to them to feel that their rights as American citizens are not lost when they enter their country's service as for these rights to be preserved in actuality. I can think of no greater assurance of justice to them than a supreme appellate court comprised of civilians appointed by the President with the advice and consent of the Senate--a court to which they will have the right of appeal - - a court which will function outside the particular branch of the service by which they were convicted.

But to maintain public confidence such a court must be free of the slightest imputation of political or military pressure. For this reason, I believe that the Senate amendments to H. R. 4080, by which the terms of the members of the court are reduced from life during good behavior to 8 years, are inadvisable. Under article 67 of the Senate version of H. R. 4080 not only are the terms of the judges limited to 8 years but their pension rights do not accrue until they have served at least 10 years - - in other words, unless they have been reappointed. This provision permits pressure to be placed upon the judges during their initial term of office.

By reason of the limitation upon the tenure of the judges, individuals with outstanding qualifications may be unwilling to give up larger incomes in order to accept appointment to the court. Further, this limitation destroys the standing of the Court of Military Appeals as "a court of the United States" as defined in section 451 of the Judicial Code (U. S. C. title 18).

Finally, as it would seem from the general provisions of article 67 that it was the intendment of the Senate to place the Court of Military Appeals on a parity with the United States Courts of Appeals, the judges of which serve for life or during good behavior, the Senate amendment is inconsistent with this primary purpose.

While I am on the subject of the qualifications for personnel of the Court of Military Appeals, I should like to advert to a section of the Senate version of H. R. 4080 which deals with the qualifications of the Judge Advocate Generals of the services. The House version of section 13 of article 140 provides that the Judge Advocate Generals exclusive of the present incumbents "shall have at least 8 years' cumulative experience in a Judge Advocate's Corps, Department, or Office, the last 3 years of which, prior to appointment shall be consecutive." The Senate version omits this requirement limiting the requirement of service to "not less than a total of 8 years' experience in legal duties as commissioned officers."

The omission of this provision would make eligible for appointment as Judge Advocate General an officer who had never been a member of a Judge Advocate's Corps so long as he had had 8 years' experience in legal duties - - even though his experience had been obtained early in his career in the performance of limited and relatively unimportant duties wholly unrelated to the courts-martial system, and the officer had had no contact with the work of a judge advocate for a score of years or more. Surely such an officer should not be vested with the powers reposed in the Judge Advocate General of the Army or of the Navy or of the Air Force.

If we now consider the matter of eligibility for service on the Court of Military Appeals in connection with eligibility for service as a Judge Advocate General, we find this startling result: The Judge Advocate General shall be required to have but 8 years of legal experience in the services, of a nature unspecified. The Court of Military Appeals, it is urged by the Army's Judge Advocate General, should be composed of the Judge Advocate Generals of the three services. Therefore, the Court of Military Appeals if this point of view were to be heeded, could consist of three officers none of whom need have had more than 8 years' military experience, so long as they had been admitted to practice in a Federal court or the highest court of a State or Territory. If this is the type of court which is to have the final word in disposing of the cases of our fellow citizens in the armed services, we had best abandon any pretense to competent military justice.

I strongly urge the retention of article 67, amended to provide life tenure for the judges of the Court of Military Appeals, and the amendment of article 140 (13) so as to restore the House version of this article.

Mr. President, I have sought in this brief time this afternoon to set out my major reasons for dissenting from the report of the Armed Services Committee in respect to the pending bill. It will be most unfortunate if the Senate of the United States this afternoon hastens to take a vote on this measure before Senators have had ample opportunity to study and consider the objections I have raised this afternoon. I say that not because of any pride of authorship in these objections, Mr. President, because in the first instance the objections were not mine. They are objections which

I came to adopt after I heard the able representatives of the bar groups and veterans' groups point out to me in testimony and in letter and in memoranda the weakness of the bill in its present form.

The amendments which are on the desk which I have presented are not my amendments in the sense that I, in the first place, proposed those amendments. Those amendments, I repeat, were proposed by the veterans' organizations, by the veterans' groups, by the bar-association groups, to which I have referred, who are very much concerned about what they consider to be some serious defects in this particular bill.

The chairman of the Senate Committee of the Judiciary wants to have the bill referred to his committee for the purpose only of affording that committee the opportunity of going over the bill so it can give its advice and opinions to the Armed Services Committee in respect to the objections. The reason for this position is, I understand, that the chairman of the Committee on the Judiciary also has come to the conclusion that at least a prima facie case exists in favor of the objections and the proposed amendments which I am offering here this afternoon.

Therefore, Mr. President, I sincerely hope that the Senate of the United States will not rush into a vote on the bill this afternoon. I sincerely hope that the majority leader will at least permit the bill to go over until next week for a vote so that the Members of the Senate over the week end will have the opportunity to study and analyze the objections of the committee of the American Bar Association, of the group in the New York Bar Association previously referred to in my remarks, and the objections of the veterans' organizations. I think they are entitled to a much more careful consideration than can possibly come to them in the short few minutes they will receive this afternoon if the Senate now rushes into a vote.

Mr. President, as I said at the beginning of my remarks it is necessary for me to hasten immediately to a conference with the Secretary of State. I am sure I will be back in the Senate Chamber by 5 o'clock. I sincerely hope that if a vote is to be taken this afternoon, I be extended the courtesy of a postponement of a vote until 5 o'clock, so that I can get back here and call up my amendments for a vote on them.

Mr. President, I wish to repeat that I desire very much, in behalf of the various veterans' organizations and bar groups who are behind the amendments I have offered this afternoon, to have a record vote on the amendments. It is only fair that Members of the Senate stand up and be counted on the record as to whether they want to go on record as supporting a continuation of command control over the military courts of justice within the Military Establishment.

Mr. KEFAUVER. Mr. President, before the Senator from Oregon leaves the Chamber, I wish to ask him a question.

Mr. MORSE. I shall be very happy to have the Senate do so.

Mr. KEFAUVER. I shall speak briefly in response to the very able presentation by the Senator from Oregon, but if no other Senator wishes to speak, and the Senator shall proceed to vote, does the Senator from Oregon desire that I offer, on his behalf, the amendments he has presented?

Mr. MORSE. Mr. President, I shall appreciate it very much if the chairman of the subcommittee of which I am a member will offer the amendments in my absence, if the Senate comes to the point of voting in my absence. Mr. President, it is a matter of very much embarrassment to me that I have an appointment which conflicts with consideration of the bill on the floor of the Senate, and which may cause me to be off the floor at a time when a vote may be taken on the amendments I have presented. However, I assure the Senate that the conference I have spoken of with the Secretary of State at 4:30 o'clock is of such vital importance that I must keep the appointment, even if it means that I shall miss the opportunity to vote on my amendments.

Mr. KEFAUVER. Mr. President, I appreciate the situation of the Senator from Oregon (Mr. Morse) and the necessity for him to keep his appointment for a conference, and I shall offer the amendments on his behalf when the time comes, if the Senator is not then present.

Mr. President, most of the matters which have been discussed by the distinguished Senator from Oregon have been thoroughly considered and gone over time after time in the history of this proposed legislation. First the whole question was considered at great length by the Committee on Armed Services of the House of Representatives, where hearings were had over a period of 5 weeks. That committee received expert advice from various bar associations, service associations, and representatives of the armed services themselves.

The matter of command control was fully presented to the members of the House Committee. The House Committee, after considering the subject fully, by unanimous vote determined against the proposal of the American Bar Association which is incorporated in one of the amendments of the distinguished Senator from Oregon.

Very briefly, Mr. President, this is the issue in that connection. The present system and the system provided for in the bill under consideration, House bill 4080, provide that a commanding officer shall have the right to convene a court martial. That has been the law for a long time. Then the accused has a right of one peremptory challenge. The accused has the right to legal counsel to represent him. Under the provisions of the pending bill the legal counsel must be a lawyer.

After the case has been determined, if the accused has been convicted, then the case must be judged by the commanding officer as to legal sufficiency. Then under the provisions of the bill there is an automatic appeal to a board of review, where the case must be dismissed if the board finds that legal evidence is not sufficient.

Mr. President, the bill gives a great many more rights and protections to the accused than he has at the present time. For instance, the Kem amendment to the Selective Service Act of the Eightieth Congress provides that the accused shall have legal counsel to represent him only if available, and on many occasions legal counsel has not been found available to represent him. The bill makes it mandatory that his counsel be a lawyer.

Furthermore, Mr. President, in that portion of the Kem amendment which is included in House bill 4080 as article 37, it is provided that it shall be unlawful for the commanding officer to try to influence the outcome of a case, or to reprimand a court for its action.

In article 98, we have included another protection to prevent interference by the commanding officer in court proceedings. Under that article it is not only improper and illegal for him to try to influence the decision of the court, but article 98 makes it an offense which would make the officer subject to court martial. That is an added protection.

The difficulty in trying to have a panel to try anyone accused in military proceedings comes about in this way: If there should be a panel, it would mean that a large number would be immobilized for any other purposes. If selection is to be made of someone from a panel, the panel will have to remain and be unavailable for other military service, because an accused will have the right to select someone from that panel. That would not be so bad in the case of the Army. But in the case of the Navy it would, according to the naval authorities who testified before the House committee and the Senate committee, be absolutely unworkable.

Let us consider a case which is to be tried on shipboard. The law provides, and correctly so, that the service members of a court must not be in the same unit with the accused, so that they would not be particularly buddies of his. If a panel were required for a court martial to try someone who might be accused of an offense, I do not know where it would come from. An accused would have to be incarcerated perhaps over a period of many weeks and, in some cases, many months, before he could be brought back to shore, where a panel would be available to try him.

The amendments suggested by the American Bar Association and proposed by the Senator from Oregon (Mr. Morse) provide that the commanding officer shall select the panel and that from the panel so selected and immobilized from other service during the time the members of the panel are waiting to try a court-martial case the judge advocate shall select the particular court to try an accused. It does not seem to me and to the services - - and most of the witnesses took the same position - - that there is very much difference between having an accused tried by a panel selected by the commanding officer and having a commanding officer select the particular court which is to try the accused.

Under the provisions of the Articles for the Government of the Navy an accused has no peremptory challenge. That privilege would be extended to the accused by the bill. So taking it all in all and considering the advice of those who have intimate knowledge of military service, the fact that there would be a considerable burden in having a large number of persons immobilized and kept from other duty during the time they constitute a panel to try infractions, and the difficulty of applying this system to the Navy, in view of the other protections which are provided in H. R. 4080, the committee came to the conclusion that it should not upset the present situation with respect to command control, but that we should give the added protections provided in the pending bill. I am certain that the out-

come will be a great deal better and more satisfactory than it has been in the past.

Mr. TYDINGS. Mr. President, will the Senator yield?

Mr. KEFAUVER. I yield.

Mr. TYDINGS. I should like to ask the distinguished Senator in charge of the bill if it is not conceded by everyone who has gone to any trouble to investigate the provisions of this bill, as they were investigated by the House of Representatives and by the Armed Services Committee, and others who are interested in the measure, that from beginning to end the bill is an attempt to liberalize the provisions of the old Articles of War and the Articles for the Government of the Navy dealing with courts martial and to protect to a degree never before written into the law individuals who may be charged with infractions.

Mr. KEFAUVER. That is definitely correct. The bill contains at least 10 improvements in the law which give additional protection to a serviceman who is accused of a violation of the code.

Mr. TYDINGS. Mr. President, will the Senator yield further?

Mr. KEFAUVER. I yield.

Mr. TYDINGS. The improvement flows from an investigation and examination into alleged complaints against the old system, the cause for which complaints the bill attempts to correct, so that they will not arise in the future.

Mr. KEFAUVER. That is exactly correct. That is the sentiment of everyone.

Mr. TYDINGS. The only reason the system was not put on a completely civilian basis similar to that prevailing in civilian courts was that the peculiar circumstances of some of the cases, particularly cases involving persons who wear the uniform, would not permit it, because it would be so foreign to the whole theory of discipline that it would not be feasible to carry the system to the point where accused servicemen would be tried in civilian courts. Obviously there would have to be military courts to try many of these offenses.

Mr. KEFAUVER. I agree with the distinguished chairman of the committee. I believe the Senator from Oregon (Mr. Morse) admitted that we must have a different system for the trial of military offenders.

Mr. TYDINGS. I think it fair to state also to the Senate that the Senator from Oregon (Mr. Morse) has stated to the committee, and perhaps to the Senate, that the bill is a distinct improvement on the existing system, and that there are only certain phases with respect to which he would like to amend it. Basically he is not opposed to much of the bill and approves much of the bill as it has come from the committee. Is that correct?

Mr. KEFAUVER. Yes; that is correct. The Senator from Oregon believes that there are about 10 or 12 points which represent great improve-

ments in courts martial, and there are only two or three respects in which he disagrees. He thinks the committee should have gone further. Those two or three points are not backward steps. They represent largely a retention of what is already in the law.

The Senator from Oregon was most complimentary with respect to the provision for a Court of Military Appeals, by which, on matters of law and on matters referred to the court by the Judge Advocate General uniformity will be brought about among all the services and in all the theaters of activity in court-martial procedure and in the punishments which may be imposed. It is true, as was stated by the Senator from Oregon, that in 27,500 cases since the end of World War II various boards changed the decisions. That would be impossible under the proposed procedure because the general supervision, unification, and direction of the cases from all the services will be in the Court of Military Appeals, which is a great step toward civilian influence in our military justice. So we have gone all the way with the distinguished Senator from Oregon except with respect to the removal of military control. We have made it a court-martial offense for a commanding officer to attempt to influence the court or to reprimand the members of a court for their actions. We have given a great many protections to the accused. In the light of the testimony of representatives of the services, representatives of most of the service associations, and of the Judge Advocate Generals who have testified, and in the light of the studies of the Morgan committee, as well as the unanimous conclusion reached by the House Committee, the committee did not feel justified at this time in abandoning provision for the selection of the court by the commanding officer.

Mr. President, while the American Bar Association recommended a panel from which the court would be selected, the New York State Bar Association made exactly the opposite recommendation. So even the bar associations are not unanimous on this point.

I hope that the amendments of the Senator from Oregon will be voted down.

In line with my agreement with the Senator from Oregon I now offer the various amendments which he has submitted.

The PRESIDING OFFICER. Does the Senator desire that the amendments be read at this point or only printed in the Record?

Mr. KEFAUVER. I do not think the Senator from Oregon would want all the amendments read. I ask unanimous consent to have them printed in the Record at this point.

The PRESIDING OFFICER. Without objection it is so ordered.

The amendments offered by Mr. Kefauver for Mr. Morse are as follows:

On page 107, between lines 5 and 6, insert two new paragraphs as follows:

“(15) ‘Appointing authority’ shall be construed to refer to a commanding officer authorized to appoint a summary court or a panel of military per-

sonnel from whom shall be designated the members of general or special courts martial.

"(16) 'Convening authority' shall be construed to refer to those persons and officers authorized to designate the military personnel to serve as members of general or special courts martial. Wherever in these articles reference is made to an officer exercising general or special court-martial jurisdiction, such reference shall be construed to mean the convening authority with power to designate the members of such court martial."

On page 112, line 4, strike out "Convening" and insert in lieu thereof "Appointing."

On page 117, beginning with line 10, strike out all down to and including line 13, and insert in lieu thereof the following:

"(C) if imposed by an officer authorized to exercise appointing authority with respect to general court martial, forfeiture of one-half of his pay per month for a period not exceeding 3 months;"

On page 118, line 3, strike out the word "or."

On page 118, line 7, strike out the period and insert; "or".

On page 118, between lines 7 and 8, insert the following:

"(G) if imposed by an officer authorized to exercise appointing authority with respect to special court martial, forfeiture of one-half of his pay for a period not exceeding 1 month."

On page 123, beginning with line 7, strike out all down to and including line 21, and insert in lieu thereof the following:

"(3) the senior member of the Judge Advocate General's Corps attached or assigned to a territorial department, an army group or an army, and such other member of the Judge Advocate General's Corps as may be designated by such senior member;

"(4) the senior legal specialist attached or assigned to a fleet or to a naval station or larger shore activity of the Navy beyond the continental limits of the United States;

"(5) the senior judge advocate attached or assigned to an air command or an air force, and such other judge advocate as may be designated by such senior judge advocate;

"(6) such other members of the Judge Advocate General's Corps, legal specialist or judge advocate as may be designated by the appropriate Secretary of a Department; or

"(7) any other member of the Judge Advocate General's Corps, legal specialist or the judge advocate in any of the armed forces when empowered by the President."

On page 123, line 22, strike out "commanding officer" and insert in lieu thereof "convening authority."

On page 124, beginning with line 12, strike out all down to and including line 15, and insert in lieu thereof the following:

"(3) the commanding officer of an army corps, a division, a brigade, a regiment, detached battalion or corresponding unit of the Army;

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

On page 126, line 3, strike out "Who may serve on courts martial" and insert in lieu thereof "Qualifications and appointment of members of courts martial."

On page 127, beginning with the word "Where" in line 1, strike out all down to and including line 5, and insert in lieu thereof the following: "Where such persons cannot be obtained the court may be convened and the trial held without them, but the appropriate commanding officer, whether the appointing authority or the convening authority, shall make a detailed written statement, to be appended to the record, stating why they could not be obtained."

On page 127, beginning with line 14, strike out all down to and including the word "temperament" in line 18, and insert in lieu thereof the following:

"(2) The President of the United States, the Secretary of a Department, and commanding officers, shall appoint as members of courts martial, and of panels from which general and special courts martial shall be designated, such persons as, in their opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."

On page 127, between lines 21 and 22, insert the following new subdivision:

"(e) The commanding officers enumerated in subdivisions (2), (3), (4), (5), and (6) of article 23 (a) shall appoint qualified military personnel in their commands available for service as members of general and special courts martial and shall forward a list of such personnel to the convening authority having general court-martial jurisdiction of their command, and such personnel shall constitute a panel from which the convening authority shall from time to time designate the members of general and special courts martial. Such commanding officers may withdraw names from such lists and may substitute others therefor, subject to the provisions of article 29 (a)."

On page 128, beginning with line 13, strike out all down to and including line 24, and insert in lieu thereof the following:

"(a) (1) For each general court martial the authority convening the court shall appoint a defense counsel together with such assistants as he deems necessary or appropriate. Each appointing authority, or if the court

be convened by the President of the United States or the Secretary of a Department, then such person shall appoint a trial counsel, together with such assistants as he deems necessary or appropriate, who shall prosecute the charges originating in his command.

"(2) For each 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.

"(3) 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 in the prosecution."

On page 134, lines 16 and 17, strike out "to the officer exercising general court-martial jurisdiction" and insert in lieu thereof "to the appointing authority for the command."

On page 134, beginning with line 21, strike out all down to and including line 2 on page 135, and insert in lieu thereof the following:

"(a) Before directing the trial of any charge by general court martial, the appointing authority for the command shall refer it to his staff judge advocate or legal officer for consideration and advice. The appointing authority shall forward the charge to the convening authority, who shall thereupon refer the charge to the trial counsel appointed by such appointing authority, for prosecution before a general court martial designated by the convening authority. 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."

On page 137, line 3, after "any", insert "appointing."

On page 153, beginning with line 14, strike out all down to and including line 3 on page 154, and insert in lieu thereof the following:

"(a) After every trial by a general court martial, and after every trial by a special court martial convened by a member of the Judge Advocate General's Corps, a legal specialist, or a judge advocate, the record shall be forwarded to the convening authority, and action thereon shall be taken by him or his successor. The convening authority shall, unless he shall disapprove the sentence or order a rehearing, forward the record, and if the record be of a trial by general court martial, then with his written opinion and review thereof, to the appointing authority who forwarded the charge to him, or to such officer's successor in command, and the latter may mitigate, remit, or suspend the whole or any part of the sentence.

"(b) After every trial by a court martial, except as specified in subdivision (a), 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."

On page 154, beginning with line 5, strike out all down to and including the period following the word "authority" in line 8.

On page 156, beginning with line 14, strike out all down to and including line 5 on page 157, and insert in lieu thereof the following:

"(a) When the convening authority and the appointing authority have taken final action in a general court-martial case, the appointing authority shall forward the entire record, including the action and the opinion and review of the convening authority, and any order which the appointing authority may have made pursuant to article 60 (a) 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, and such discharge shall not have been remitted by the appointing authority, 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."

On page 166, line 16, before "officer" insert "commanding."

On page 166, beginning with line 20, strike out all down to and including the word "probationer" in line 23, and insert in lieu thereof the following:

"(b) The record of the hearing and the recommendations of the commanding officer having special court-martial jurisdiction shall be forwarded for action to the commanding officer exercising general court-martial appointing authority for the command."

Mr. HENDRICKSON. Mr. President, I suggest the absence of a quorum.

THE PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

MR. HENDRICKSON. Mr. President, I ask unanimous consent to withdraw the suggestion of the absence of a quorum and that proceedings under the call be suspended.

THE PRESIDING OFFICER. Without objection, it is so ordered.

The question is on agreeing to the amendments offered by the Senator from Tennessee (Mr. Kefauver) on behalf of the Senator from Oregon

to the committee amendment. Without objection, they will be considered en bloc. (Putting the question.)

The amendments were rejected.

THE PRESIDING OFFICER. The committee amendment is open to amendment.

MR. KEFAUVER. Mr. President, I call up my amendment B, which comprises a group of technical amendments to the language and a slight rewording in order to make changes in the reference to statutes. I ask that the amendments be considered as having been read, and that they be considered en bloc.

THE PRESIDING OFFICER. Without objection, it is so ordered, and the amendments will be considered en bloc.

The question is on agreeing to the amendments lettered B, offered by the Senator from Tennessee.

The amendments were agreed to.

THE PRESIDING OFFICER. The question now is on agreeing to the committee amendments as amended. (Putting the question.)

MR. HENDRICKSON. Mr. President, I suggest the absence of a quorum.

MR. KEFAUVER. Mr. President, may we have a vote on the committee amendment, as amended, without having the absence of a quorum suggested?

THE PRESIDING OFFICER. The question is on the committee amendment, as amended, not on the final passage of the bill.

MR. HENDRICKSON. Then I temporarily withhold the suggestion of the absence of a quorum.

THE PRESIDING OFFICER. The question is on agreeing to the committee amendment, as amended.

The amendment, as amended, was agreed to.

THE PRESIDING OFFICER. The bill is open to further amendment. If there be no further amendment to be offered, the question is on the engrossment of the amendment and the third reading of the bill.

The amendment was ordered to be engrossed and the bill to be read a third time.

The bill was read the third time.

THE PRESIDING OFFICER. The bill having been read the third time, the question is, Shall it pass?

MR. HENDRICKSON. I suggest the absence of a quorum.

THE PRESIDING OFFICER. The Secretary will call the roll.

MR. KEFAUVER. Mr. President, I ask that we may have the vote without a quorum call. I wonder, whether the distinguished Senator will withdraw his suggestion of the absence of a quorum, and let us vote.

MR. HENDRICKSON. I should like to accommodate the distinguished Senator, but on a bill of this importance, I think a quorum should be present.

THE PRESIDING OFFICER. The absence of a quorum is suggested.

MR. SALTONSTALL. Mr. President, will the Senator yield for a question?

MR. HENDRICKSON. I yield.

MR. SALTONSTALL. Will it not be possible, in line with the request of the Senator from Tennessee, to have a show of hands on a request for the yeas and nays, in order to bring the matter to a head; then, if the yeas and the nays are ordered, a quorum will be developed on the vote.

MR. HENDRICKSON. Of course, Mr. President, that is a possible procedure, but I do not think it is well to follow it under the circumstances in the case of a bill of this importance.

THE PRESIDING OFFICER. The clerk will call the roll.

The Legislative Clerk called the roll, and the following Senators answered to their names:

Aiken	Hill	McKellar	Thomas, Utah
Brewster	Hoey	McMahon	Tobey
Bricker	Holland	Magnuson	Tydings
Bridges	Humphrey	Malone	Watkins
Butler	Hunt	Maybank	Wherry
Capehart	Ives	Morse	Wiley
Chapman	Jenner	Mundt	Williams
Connally	Johnson, Colo	Murray	Withers
Cordon	Johnson, Tex.	Neely	
Darby	Johnston, S. C.	O'Connor	
Donnell	Kefauver	O'Mahoney	
Douglas	Kem	Robertson	
Dworshak	Kerr	Russell	
Ecton	Knowland	Saltonstall	
Ellender	Lehman	Schoeppel	
Ferguson	Lodge	Smith, Maine	
Fulbright	Lucas	Smith, N. J.	
George	McCarran	Sparkman	
Gurney	McCarthy	Stennis	

Hayden	McClellan	Taft
Hendrickson	McFarland	Taylor

THE PRESIDING OFFICER. A quorum is present.

The bill having been read the third time, the question is, Shall it pass?

Mr. McCARRAN and other Senators asked for the yeas and nays.

The yeas and nays were ordered, and the legislative clerk called the roll.

MR. LUCAS. I announce that the Senators from New Mexico (Mr. Anderson and Mr. Chavez), the Senator from Virginia (Mr. Byrd), the Senator from California (Mr. Downey), the Senator from Delaware (Mr. Frear), the Senator from Iowa (Mr. Gillette), the Senator from North Carolina (Mr. Graham) the Senator from Florida (Mr. Pepper), and the Senator from Oklahoma (Mr. Thomas) are unavoidably detained on official business.

The Senator from Mississippi (Mr. Eastland) is absent on official business.

The Senator from Connecticut (Mr. Benton), the Senators from Rhode Island (Mr. Green and Mr. Leahy), the Senator from West Virginia (Mr. Kilgore), the Senator from Louisiana (Mr. Long), and the Senator from Pennsylvania (Mr. Myers) are absent on public business.

I announce further that if present and voting, the Senators from New Mexico (Mr. Anderson and Mr. Chavez), the Senator from Virginia (Mr. Byrd), the Senator from Connecticut (Mr. Benton), the Senator from California (Mr. Downey), the Senator from Iowa (Mr. Gillette), the Senator from North Carolina (Mr. Graham), the Senators from Rhode Island (Mr. Green and Mr. Leahy), the Senator from West Virginia (Mr. Kilgore), the Senator from Pennsylvania (Mr. Myers), the Senator from Florida (Mr. Pepper), and the Senator from Oklahoma (Mr. Thomas) would vote "yea".

MR. SALTONSTALL. I announce that the Senator from Vermont (Mr. Flanders), the Senator from Iowa (Mr. Hickenlooper), the Senator from North Dakota (Mr. Langer), the Senator from Colorado (Mr. Millikin), and the Senator from Minnesota (Mr. Thye) are absent by leave of the Senate.

The Senator from Michigan (Mr. Vandenberg) is necessarily absent.

The Senator from Pennsylvania (Mr. Martin) is absent on official business.

The Senator from Washington (Mr. Cain) and the Senator from North Dakota (Mr. Young) are detained on official business.

The result was announced - - yeas 62, nays 9, as follows:

YEAS—62

Aiken	Donnell	Hill	Kem	McMahon
Brewster	Douglas	Hoey	Kerr	Magnuson

Bricker	Dworshak	Holland	Knowland	Maybank
Bridges	Ecton	Humphrey	Lehman	Mundt
Butler	Ellender	Hunt	Lodge	Murray
Capehart	Ferguson	Jenner	Lucas	Neely
Chapman	Fulbright	Johnson, Colo.	McCarthy	O'Connor
Connally	George	Johnson, Tex.	McClellan	O'Mahoney
Cordon	Gurney	Johnston, S. C.	McFarland	Robertson
Darby	Hayden	Kefauver	McKellar	Russell

Saltonstall	Stennis	Watkins
Smith, Maine	Taft	Wherry
Smith, N. J.	Taylor	Wiley
Sparkman	Tydings	Withers

NAYS - - 9

Hendrickson	Malone	Thomas, Utah
Ives	Morse	Tobey
McCarran	Schoeppel	Williams

NOT VOTING - - 25

Anderson	Gillette	Millikin
Benton	Graham	Myers
Byrd	Green	Pepper
Cain	Hickenlooper	Thomas, Okla.
Chavez	Kilgore	Thye
Downey	Langer	Vandenberg
Eastland	Leahy	Young
Flanders	Long	
Frear	Martin	

So the bill H. R. 4080 was passed.

MR. KEFAUVER. Mr. President, I move that the vote by which the bill was passed be reconsidered.

MR. SALTONSTALL. I move that the motion of the Senator from Tennessee be laid on the table.

The motion to lay on the table was agreed to.

United States HOUSE OF REPRESENTATIVES

(Cong. Record, Vol. 96, Pt. 3, p. 3885)

March 22, 1950

UNIFORM CODE OF MILITARY JUSTICE

Mr. Brooks: Mr. Speaker, I ask unanimous consent to take from the Speaker's table the bill (H.R. 4080) 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, with Senate amendments thereto, disagree

to the Senate amendments, and ask for a conference with the Senate on the disagreeing votes of the two Houses.

Mr. Canfield: Mr. Speaker, reserving the right to object, may I inquire of the gentleman from Louisiana if he has cleared his request with the minority members and the leaders?

Mr. Brooks: Yes, I have cleared it.

The Speaker: Is there objection to the request of the gentleman from Louisiana? (After a pause.) The Chair hears none and appoints the following conferees: Messrs. Brooks, Philbin, DeGraffenried, Shafer, and Elston.

United States SENATE
(Cong. Record, Vol. 96, Pt. 3, p. 3902)
March 23, 1950

CODIFICATION OF ARTICLES OF WAR

The Vice President laid before the Senate a message from the House of Representatives announcing its disagreement to the amendments of the Senate to the bill (H.R. 4080) 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, and requesting a conference with the Senate on the disagreeing votes of the two houses thereon.

Mr. Tydings: I move the Senate insist upon its amendments, agree to the request of the House for a conference, and that the Chair appoint the conferees on the part of the Senate.

Mr. Wherry: What is the subject of the conference?

Mr. Tydings: It is on the disagreeing votes of the two houses on the amendments of the Senate to the bill providing a Uniform Code of Military Justice.

The Vice President: The question is on the motion of the Senator from Maryland.

The motion was agreed to; and the Vice President appointed Mr. Tydings, Mr. Russell, Mr. Kefauver, Mr. Saltonstall, and Mr. Morse conferees, on the part of the Senate.

United States SENATE
April 25, 1950
(Cong. Record, Vol 96, pt 5, 5681)

CODIFICATION OF ARTICLES OF WAR, ETC. — CONFERENCE REPORT

Mr. KEFAUVER. Mr. President, will the Senator yield so that I may submit a conference report on the Uniform Code of Military Justice, House bill 4080?

The PRESIDING OFFICER. Does the Senator from Missouri yield for that purpose?

Mr. KEM. I yield.

Mr. KEFAUVER. Mr. President, I submit the conference report on the bill (H. R. 4080) to unify, consolidate, revise, and codify the Articles of War, 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.

The PRESIDING OFFICER (Mr. Withers in the chair). The report will be read.

The Chief Clerk read the report, as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H. R. 4080) 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, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with the following amendments:

On page 9 of the Senate engrossed amendment, line 7, strike out "of supervision in" and insert in lieu thereof "in supervision of".

On page 13 of the Senate engrossed amendment, line 20, strike out "Nonjudicial" and insert in lieu thereof "Non - Judicial".

On page 13 of the Senate engrossed amendment, line 22, strike out "nonjudicial" and insert in lieu thereof "non - judicial".

On page 13 of the Senate engrossed amendment, line 23, strike out "nonjudicial" and insert in lieu thereof "non - judicial".

On page 48 of the Senate engrossed amendment, line 4, strike out "president" and insert in lieu thereof "President".

On page 56 of the Senate engrossed amendment, line 15, strike out "eight" and insert in lieu thereof "fifteen".

On page 57 of the Senate engrossed amendment, lines 6 and 7, strike out "one on March 1, 1953, one on March 1, 1955, and one on March 1, 1957" and insert in lieu thereof "one on May 1, 1956, one on May 1, 1966".

On page 57 of the Senate engrossed amendment, line 8, strike out "eight" and insert in lieu thereof "fifteen".

On page 57 of the Senate engrossed amendment, beginning with line 18, strike out all down to and including line 2 on page 58.

On page 58 of the Senate engrossed amendment, line 3, strike out "(5)" and insert in lieu thereof "(4)".

On page 89 of the Senate engrossed amendment, line 13, strike out "buildings" and insert in lieu thereof "building".

On page 92 of the Senate engrossed amendment, lines 22 and 23, strike out "National Military Establishment" and insert in lieu thereof "Department of Defense".

On page 102 of the Senate engrossed amendment, line 21, after the word "executed", insert a comma.

On page 108 of the Senate amendment, line 9, strike out "allowance" and insert in lieu thereof "allowances".

And the Senate agree to the same.

Millard E. Tydings,
Estes Kefauver,
Leverett Saltonstall,
Wayne Morse,

Managers on the Part of the Senate.

Overton Brooks,
Phillip J. Philbin,
Edward deGraffenried,
Paul W. Shafer,
Charles H. Elston,

Managers on the Part of the House.

Mr. KEFAUVER. Mr. President, if the Senator from Missouri will yield further, on the basis that there is, as I understand, no opposition to the conference report, and that there will not be any lengthy discussion, other than perhaps a very brief explanation, I have wondered whether the Senator would yield for the purpose of making a unanimous consent request for the immediate consideration of the conference report.

Mr. KEM. I yield for that purpose, with the understanding that I shall not thereby lose the floor.

The PRESIDING OFFICER. Is there objection to the present consideration of the conference report?

There being no objection, the Senate proceeded to consider the report.

Mr. KEFAUVER. Mr. President, this conference report represents the culmination, so far as the Congress is concerned, of a very important piece of legislation. This bill, H. R. 4080, combines in one code the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard. It is a piece of legislation which is the result of a great deal of study by a special committee, headed by

Prof. Edmund Morgan, aided by his capable assistant, the executive director of the committee, Felix Larkin, and by a working committee of the various services.

The House of Representatives considered the proposal at length, and did a very masterful job in the preparation and passage of the original bill. In the Senate, special commendation should go to the distinguished Senator from Missouri [Mr. KEM], who has been working on this subject for a number of years, and who, in the last Congress, presented the so-called Kem amendment, which was a step toward the final legislation which is now presented. Commendation should also go to the distinguished Senator from Massachusetts [Mr. SALTONSTALL], and to the chairman of the Armed Services Committee, the Senator from Maryland [Mr. TYDINGS], who have given much thought and very helpful attention to this proposed legislation. Many worth-while suggestions have been made by the Senator from Oregon [Mr. MORSE], who joined in the conference report, although the bill does not go so far toward giving civilian control of military justice as the Senator from Oregon would like.

I think we sometimes overlook the fact that the staffs of committees render tremendously worth-while services in connection with these matters. The staff of the House committee and the staff of the Senate Armed Services Committee deserve the thanks of the House and of the Senate for what they have done. In the Senate committee, Mr. Mark H. Galusha particularly has taken the lead in preparing this legislation on behalf of the Senate committee.

By the conference report, the House of Representatives has accepted all the amendments which were made by the Senate. There was final disagreement on one item only. The bill as passed by the House provided for a Court of Military Appeals, appointments to be for life. The Senate bill provided appointments for 8-year terms. The compromise is that the first three appointments shall be made for terms of 5, 10, and 15 years, respectively, and that thereafter the appointments will be for terms of 15 years. In all other respects the House has concurred in the bill as passed by the Senate. I think as time goes on the provisions of this will give the services a system of handling military justice which will be much more satisfactory, much more uniform, and which will assure eventually civilian consideration of all important matters.

As I have previously stated, it provides for a unified code for all the services. Considering the difficulties which have confronted us in the disparity of sentences and in the impaneling of courts-martial after World War I and World War II, I believe this is a very important and worth-while step and is one of the major pieces of legislation ever passed by the Congress.

The PRESIDING OFFICER (Mr. Withers in the chair). The question is on agreeing to the conference report.

The report was agreed to.

United States HOUSE OF REPRESENTATIVES

April 26, 1950

(Cong. Record, Vol. 96, pt. 5, 5793-5796)

UNIFORM CODE OF MILITARY JUSTICE

Mr. BROOKS. Mr. Speaker, I call up the conference report on the bill (H. R. 4080) 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, and ask unanimous consent that the statement of the managers on the part of the House be read in lieu of the report.

The Clerk read the title of the bill.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Louisiana?

There was no objection.

The Clerk read the statement.

The conference report and statement are as follows:

Conference Report (H. Rept. No. 1946)

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H. R. 4080) 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, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with the following amendments:

On page 9 of the Senate engrossed amendment, line 7, strike out "of supervision in" and insert in lieu thereof "in supervision of";

On page 13 of the Senate engrossed amendment, line 20, strike out "Nonjudicial" and insert in lieu thereof "Non - Judicial";

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On page 13 of the Senate engrossed amendment, line 23, strike out "nonjudicial" and insert in lieu thereof "non - judicial";

On page 48 of the Senate engrossed amendment, line 4, strike out "president" and insert in lieu thereof "President";

On page 56 of the Senate engrossed amendment, line 15, strike out "eight" and insert in lieu thereof "fifteen";

On page 57 of the Senate engrossed amendment, line 6 and 7, strike out "one on March 1, 1953, one on March ,1 1955, and one on March 1, 1957" and insert in lieu thereof "one on May 1, 1956, one on May 1, 1961, and one on May 1, 1966";

On page 57 of the Senate engrossed amendment, line 8, strike out "eight" and insert in lieu thereof "fifteen";

On page 57 of the Senate engrossed amendment, beginning with line 18, strike out all down to and including line 2 on page 58;

On page 58 of the Senate engrossed amendment, line 3, strike out "(5)" and insert in lieu thereof "(4)";

On page 89 of the Senate engrossed amendment, line 13, strike out "buildings" and insert in lieu thereof "building";

On page 92 of the Senate engrossed amendment, lines 22 and 23, strike out "National Military Establishment" and insert in lieu thereof "Department of Defense";

On page 102 of the Senate engrossed amendment, line 21, after the word "executed", insert a comma;

On page 108 of the Senate engrossed amendment, line 9, strike out "allowance" and insert in lieu thereof "allowances";

And the Senate agree to the same.

Overton Brooks,
Philip J. Philbin,
Edward deGraffenried,
Paul W. Shafer,
Chas. H. Elston,

Managers on the Part of the House.

Millard E. Tydings,
Estes Kefauver,
Leverett Saltonstall,
Wayne Morse,

Managers on the Part of the Senate.

Statement

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H. R. 4080) 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 the Uniform Code of Military Justice, submit the following statement in explanation of the effect of the action agreed upon by the conference and recommended in the accompanying conference report.

Legislation in Conference

The House passed H. R. 4080, relating to the enactment and establishment of a Uniform Code of Military Justice. The Senate amended H. R. 4080 by reducing the number of days that confinement on bread and water or diminished rations could be imposed as a disciplinary punishment from 5 days to 3 days; by reducing the tenure of office of the judges of the Court of Military Appeals from life tenure to a term of 8 years, and providing a type of retirement comparable to the retirement benefits of Territorial judges; by separating the provisions governing the crime of larceny into two sections, the first of which distinguishes larceny, which involves an intent to permanently deprive or defraud another person of the use or benefit of property, from wrongful appropriation which involves an intent to temporarily deprive such person of his property; by reducing the qualifications of the Judge Advocates General; and by adopting numerous amendments for the corrections of typographical errors and inadvertent use of language, which amendments were adopted for clarifying purposes only and have no substantive affect upon the provisions of the bill.

A more complete discussion of the four substantive amendments is as follows:

1. In section 1, article 15 (F), page 15, line 8, of the Senate engrossed amendment, the House had provided that a commanding officer could impose, as disciplinary punishment, confinement on bread and water or diminished rations for a period not to exceed three consecutive days, if imposed upon a person attached to or embarked in a vessel. Under existing law only the Navy and the Marine Corps administer confinement on bread and water or diminished rations, and the present limitations for such disciplinary punishment is seven consecutive days. It may also be imposed upon Naval and Marine personnel ashore as well as those embarked in or attached to a vessel. The House standardized this type of disciplinary punishment for all members of the armed services by making it equally applicable to all enlisted persons who are attached to or embarked in a vessel, which provision automatically excludes this type of disciplinary punishment to shore-based personnel. The House was of the opinion that 7 days' confinement on bread and water or reduced rations was an excessive punishment for minor disciplinary infractions. The Senate was of the opinion that even 5 days was an excessive period for such type of punishment and reduced the maximum limit to three consecutive days. The House recedes.

2. In section 1, article 67, the House had provided for the establishment of a Court of Military Appeals, consisting of three judges appointed from civilian life by the President, by and with the consent and advice of the Senate, for life tenure. The House version further provided that such judges were to receive the same compensation, allowances, perquisites, and retirement benefits as judges of the United States court of appeals. The Senate amended this provision by reducing the tenure of the judges from life to a term of 8 years, providing that the first appointees should have staggered appointments with one expiring on March 1, 1953, a second on March 1, 1955, and the third on March 1, 1957,

after which all successive appointments would be for a term of 8 years. While the Senate amendment left the salaries of these judges at \$17,500 a year, it discarded the retirement benefits accorded judges of the United States court of appeals and substituted the same retirement benefits as those provided for judges of Territorial courts.

The conference agreement provides that the judges of the Court of Military Appeals shall be appointed for a term of 15 years, the first appointees to receive staggered terms of 5, 10, and 15 years respectively, the first of which will expire on May 1, 1956, the second on May 1, 1961, and the third one on May 1, 1966, with the terms of office of all successors to be for a full 15-year term.

The conference agreement also terminated the retirement provisions provided in the Senate amendment and substituted therefore contributory civil-service retirement. It will be noted that, as a result of the conference agreement, the bill makes no reference to retirement privileges. However, it is a well-settled principle of law that employees of the executive, legislative, and judicial branches of the Government for whom no other retirement system is provided will, as a matter of law, come within the provisions of contributory civil-service retirement. It is the intent of the conferees that this be the type of retirement for the judges of the Court of Military Appeals.

The House recedes and agrees to the Senate amendment with an amendment.

3. Section 1, article 121, of the bill contains the provisions governing the crime of larceny. Those provisions in the House bill did not distinguish between the wrongful taking with the intent of permanently depriving a person of his property and the wrongful taking with the intent to temporarily deprive a person of his property. It is recognized that there have been numerous cases of the wrongful taking of property by military personnel with only the intent of temporarily depriving them of such property. Nevertheless, under existing law and under the House provisions, there was no alternative but to prosecute under a charge of larceny. A conviction of larceny is a most serious offense in the armed services and it was concluded that there should be an alternative to a prosecution to larceny when the unlawful taking did not involve an intent to permanently deprive the owner of his property. The Senate amendment makes the appropriate distinction by specifying, within the larceny statute, a separate offense of wrongful appropriation, which is a lesser and included offense under the larceny statute.

The House recedes.

4. Section 13 of the bill, which was a House amendment to the original bill provided more stringent qualifications for the Judge Advocates General. It provided that the Judge Advocate General must be members of the bar of the Federal court or the highest court of a State or Territory; and must have at least 8 years' cumulative experience in Judge Advocate Corps, department or office, the last 3 years of which, prior to appointment, shall be consecutive. These provisions were not directed at the Judge Advo-

cate General of the Army since the Army already has a separate Judge Advocates Corps from which the Judge Advocate General of the Army is appointed. The provisions were applicable to the Air Force and more particularly to the Navy. After approval of the House provisions by the House, it was determined that the provisions were so restrictive that not more than two officers in the Navy could qualify for appointment to the office of the Judge Advocate General of the Navy. This was considered to be so restrictive that it would deny the Secretary of the Navy any choice in his selection of a Judge Advocate General. It was further concluded that it will be a number of years before any appreciable number of naval personnel could meet the House qualifications and that the enactment of the House provisions was not practical at this time. As a consequence, the Senate amended the House provisions by reducing the qualifications of the Judge Advocates General so that a person will qualify for the appointment to the office of Judge Advocate General if he were a member of the bar of a Federal court of a State or a Territory and had not less than a total of 8 years' experience in legal duties as a commissioned officer.

The House recedes.

5. The remaining amendments were clarifying only and did not alter the substantive provisions of the bill. In each instance the House recedes.

**Overton Brooks,
Philip J. Philbin,
Edward deGraffenried,
Paul W. Shafer,
Chas. H. Elston,**

Managers on the part of the House.

Mr. BROOKS. Mr. Speaker, the approval by both the House and the Senate of the conference report on H. R. 4080 marks another milepost in our efforts to bring a maximum amount of justice into the military justice systems of our armed services.

I recall that a subcommittee of which I was a member began deliberations on amendments to the Articles of War on the 17th of April 1947. After extensive hearings at that time, we passed a bill which greatly improved the system of military justice in the Army. From the inception of those hearings until the studies were begun on a Uniform Code of Military Justice, I believe I am safe in saying that I was almost continuously engaged in the consideration of the subject matter.

When the late Secretary Forrestal appointed a committee to prepare legislation which would provide the Uniform Code of Military Justice for all the armed services, our committee had staff representation on the Forrestal group. Through that meeting, I was able to keep abreast of the studies of that committee, and I maintained my interest until the bill was presented to the Eighty-first Congress.

It has been a great privilege to me to have been the chairman of the subcommittee which conducted lengthy hearings and studies of this legis-

lation. The committee conducted hearings 6 days a week for almost 6 weeks, during which time a large number of witnesses testified. They included representatives of the four major veterans' organizations, four bar associations, including the American Bar Associations, the Reserve Officers Association, the National Guard Bureau, and the National Guard Association, the Under Secretary of the Navy, the Assistant Secretary of the Air Force, and numerous other well-qualified witnesses. We spared no effort in our attempt to perfect a workable and enlightened system of military justice.

I now express the hope that appropriate emphasis and proper administration by military personnel will substantiate my conviction that the new law is a great step forward for the military services.

Mr. Speaker, this act has been badly needed. It will provide for uniformity in trial and in punishment in all branches of the armed services. It will eliminate command influence and will restore confidence in the system of military justice in all of the services. It is most timely and badly needed.

Mr. Speaker, the conference report makes one change of major importance in the bill which was passed a number of months ago. The change which is made and which is of importance is as to the tenure of the judges of the military court of appeals. The House provided originally that the tenure of these judges should be during good behavior. We wanted to place this court on a high standard comparable to the Federal court of appeals. The other body, on the other hand, provided for a shorter tenure, a tenure of 8 years. It provided the initial appointment of these judges should be as follows: The first for 2 years, the second for 4 years, and the third for 6 years, so that the terms would not expire simultaneously. Following this, the judges should enjoy an 8-year term. The amendment which we agreed to provides for tenures of all judges for 15 years, the initial tenure being for 5, 10, and 15 years respectively, so that the termination of the original terms would be staggered and they would not all expire at the same identical time.

I, personally, would have liked that all terms be during good behavior as is the term of the Federal district courts and courts of appeal. It was my idea that this court would correspond as nearly as could be made to that of the Federal courts of appeal. We have to some extent fallen short of this goal; but the tenure agreed upon--namely, 15 years--is sufficiently long to insure a stability and a permanence to the court which will serve to inspire confidence in its vitality and its integrity.

Mr. Speaker, there are several other matters, one pertaining to temporary larceny. That is a minor change so as to permit in situations where the larceny is not of a permanent nature that there might be a different definition for such type of larceny. We provided also for a change in the qualifications for the Judge Advocate General of the Navy. That was agreeable to every conferee.

Those, Mr. Speaker, are most of the changes represented by the conference report.

Mr. MC CORMACK. Mr. Speaker, will the gentleman yield?

Mr. BROOKS. I yield.

Mr. MC CORMACK. I assume it is the intention that in all court-martial cases which have not been finally disposed of the provisions of this bill if it becomes law will govern, is that correct?

Mr. BROOKS. Of course, this might make the law retroactive, but the cases that are pending will come under the prevailing law at the time of the commission of the offense.

Mr. MC CORMACK. What about the cases which have not been finally disposed of?

Mr. BROOKS. They will be handled under the old law.

Mr. MC CORMACK. I would suggest that the gentleman reconsider that because in criminal cases usually where a change in the substantive law is made before the final disposition of the case the later law, if more favorable to the accused, is the one which governs. If this law is more favorable to anyone in the armed services or any enlisted man in the armed services and if court-martial proceedings are pending against such a person or if the case has actually been tried and sentence has been passed except that a final review of the case has not been made as yet then the more favorable provisions of the later law would apply.

Mr. BROOKS. May I say to my distinguished friend from Massachusetts who is the majority leader of the House and who is an eminent lawyer of great ability that there is no change in the definition of crimes contained in the conference report compared to the bill as passed by the House except with respect to one provision referring to larceny. In that particular instance we provided a definition for temporary larceny which really is what would be termed a "misappropriation" on the part of the defendant who may have the intention of returning the purloined article at some future date. In such instance the prescribed punishment may be lighter. That would be the only instance in the conference report which I can think of which would come within the sort of case that the gentleman has indicated.

Mr. ELSTON. Mr. Speaker, will the gentleman yield?

Mr. BROOKS. I yield.

Mr. ELSTON. I believe I may be able to enlighten the distinguished majority leader to some extent by calling to his attention the fact that this new law sets up a Military Court of Appeals. That court has the authority to review all cases to determine whether or not errors of law have been committed. That court would necessarily review cases which may have occurred before the passage of this law and which are still pending. So, in the final analysis I believe no injustice will result as to the men who have committed offenses before this law was passed and whose cases have not been finally disposed of. I believe it is elemental so far as procedure is concerned, if a law is passed and there is a change of procedure, the persons whose cases are pending will get the benefit of the new procedure.

Mr. MC CORMACK. That is what I had in mind, and I wanted to have that in the RECORD for whatever value it might have as to the intent. If that was the intent, I thoroughly agree with my friend.

Mr. BROOKS. What I had in mind was this, that if this military code defines a new crime not heretofore in existence, nobody is going to be punished on a state of facts already in existence prior to passage of this measure.

Mr. MC CORMACK. Oh, yes; but on the other hand, this code provides for temporary larceny. Prior to that a man would have to be charged with larceny, which we know is different from misappropriation. Larceny is intent to steal or take from another the property of another, with the intent to permanently deprive that person of his property. Misappropriation, of course, is entirely different. Sometimes the facts distinguishing them are very slight. It is a question of intent. But, you have provided here for temporary larceny, and certainly, if there are any cases that heretofore had to be charged with larceny, and they come within the purview of temporary larceny, it seems to that the intent of Congress would be, before the final disposition of those cases, that that fact be taken into consideration by a court martial or by a reviewing authority.

Mr. BROOKS. I would think this to be true.

I yield to the gentleman from North Carolina [Mr. DURHAM].

Mr. DURHAM. I want to take this opportunity to compliment this subcommittee. In my opinion, this subject has been given more careful thought than any subject that has been brought before the Armed Services committee or the old Military Affairs Committee, within the past 10 years. It is one of the most advanced steps, in my opinion, in regard to our military forces, of anything that we have done in the last 10 years on this floor. I wish to compliment the entire subcommittee.

Mr. BROOKS. I thank the distinguished gentleman from North Carolina very much.

Mr. RICH. Mr. Speaker, will the gentleman yield?

Mr. BROOKS. I yield.

Mr. RICH. I am a little confused with reference to the words "larceny" and "temporary larceny." There is not going to be such a statement now that a man in the service who takes something is going to be charged with taking it for a short period of time? It does not make any difference how long he takes it for; if he takes it, he is committing a crime, is he not?

Mr. BROOKS. Yes; and will be punished for the commission of the crime. Some States have a law defining embezzlement. You have that for instance in a great many States with reference to automobiles. This provides for that type of offense, where an accused man takes property intending to return it to the owner later.

Mr. ELSTON. Mr. Speaker, I ask unanimous consent to extend my remarks at this point in the RECORD.

The SPEAKER. Is there objection to the request of the gentleman from Ohio?

There was no objection.

Mr. ELSTON. Mr. Speaker, the adoption of this conference report and the signing of the pending bill by the President will mark the culmination of a number of years of effort to draft uniform military justice legislation.

During the course of World War II approximately 11,000,000 men saw service in the United States Army, and of that number approximately 80,000 were convicted by general courts martial. Even before the cessation of hostilities it was apparent to the War Department and to the Congress that a detailed study of the Army system of justice was appropriate, if not mandatory. Accordingly, in 1944 and 1945, the War Department sent Col. Phillip McCook, former prominent New York jurist, to various theaters of operation to conduct such studies. Additional reports were submitted to the War Department from other sources.

Within a few months after the end of hostilities the matter was brought to the attention of the American Bar Association, and on March 25, 1946, the War Department Advisory Committee on Military Justice was appointed by order of the Secretary of War. The committee, under the chairmanship of the Honorable Arthur T. Vanderbilt, and referred to as the Vanderbilt committee, consisted of nine outstanding lawyers and Federal jurists from eight States and the District of Columbia. From March 25, 1946, until December 13, 1946, a period of almost 9 months, the members of that committee engaged in studies, investigations, and hearings, and availed themselves of voluminous statistical data of the Judge Advocate General's Department and other sources.

At full committee hearings in Washington the Secretary of War and Under Secretary of War, the Chief of Staff, the Commander of the Army Ground Forces, the Judge Advocate General, the Assistant Judge Advocate General, the numerous other officers, and the representatives of five veterans' organizations were heard. There were numerous personal interviews, supplemented by letters, and the digesting of 321 answers to questionnaires from both military and nonmilitary personnel. Additional widely advertised regional public hearings were held at New York, Philadelphia, Baltimore, Raleigh, Atlanta, Chicago, St. Louis, Denver, San Francisco, and Seattle. The subsequent report of the committee was based on these extensive inquiries.

During the Seventy-ninth Congress a Military Affairs Subcommittee under the chairmanship of the gentleman from North Carolina, Mr. CARL T. DURHAM, devoted more than 1 year to detailed study of the Army system of justice.

Additional studies have been conducted by special committees of the American Legion, VFW, AMVETs, AVC, the New York County Lawyers' Association, the War Veterans' Bar Association, the Judge Advocate Generals' Association, and the Phi Alpha Delta law fraternity. The reports and recommendations of each of these groups were made available to the Armed Services Committee and representatives of each of the organizations appeared before the committee in public hearings in support of their recommendations. Other witnesses, who had particular knowledge of the subject by virtue of their service and experience in the recent war, were heard.

In our opinion, the combined efforts of these organizations and individuals represented the most comprehensive study of military justice ever conducted in the history of our country.

During the Eightieth Congress the Legal Subcommittee of the Committee on Armed Services, of which I had the honor to be chairman, conducted extensive hearings on the same subject. That subcommittee was in session from April 14, 1947, until July 15, 1947, and considered all of the studies to which I have referred. As a result of these hearings, our subcommittee presented to the full committee what is now known as title II, Public Law 759, Eightieth Congress. The report of the subcommittee was unanimously adopted by the full committee and passed the House on January 15, 1948. That bill, which pertained only to the Army, was included as an amendment to the Selective Service Act of 1948.

During the year 1948 Secretary of Defense Forrestal appointed a special committee to study a uniform code of military justice to be equally applicable to all of the armed forces. During the Eighty-first Congress further hearings were held by a subcommittee of the committee on Armed Services of which the gentleman from Louisiana [Mr. Brooks], was chairman. That committee reported a uniform code of military justice known as H. R. 4080, and it passed the House May 5, 1949. With a few exceptions the provisions of H. R. 4080 were similar to title II, Public Law 759, and the bill as passed by the House was amended only slightly by the other body.

Under the provisions of Public Law 759, Eightieth Congress, a separate Judge Advocate General's Corps was established for the Army. No such separate legal corps exists for the Navy or the Air Force. It was believed desirable to postpone the creation of a special corps for the Air Force and the Navy until further experience is available on the operation of the Corps in the Army. Later on Congress will have the benefit of the recommendations of the Court of Military Appeals on this subject.

Mr. Speaker, I shall not undertake at this time to review the provisions of the pending bill. They were fully discussed when this legislation was debated during the past 2 years.

While I would have preferred that the tenure of the judges of the

Military Court of Appeals should be for life, I consider the 15-year term agreed upon by the conferees to be reasonable, and I urge the adoption of the conference report.

Every serviceman who may hereafter be accused of any military offense is assured of a fair and impartial trial, free from command influence, and with the right to have his case reviewed upon the evidence as well as the law. His final review in the Court of Military Appeals will be before civilian judges possessing the qualifications of judges of the United States court of appeals. He shall hereafter be entitled to competent legal counsel at all stages of his hearing. If he is an enlisted man, he may have enlisted men on the court if he requests it. Officers may now be tried by special courts martial thus providing for greater equality in the treatment of officers and enlisted men. The system heretofore in effect could not guarantee equal and exact justice; the pending bill should accomplish it.

The SPEAKER pro tempore (Mr. PRIEST). The question is on agreeing to the conference report.

The conference report was agreed to.

A motion to reconsider was laid on the table.

United States SENATE

(Cong. Record, Vol. 96, Pt. 5, p. 5842)

April 27, 1950

MESSAGE FROM THE HOUSE—ENROLLED BILLS SIGNED

A message from the House of Representatives, by Mr. Swanson, one of its reading clerks, announced that the Speaker had affixed his signature to the following enrolled bills, and they were signed by the President Pro Tempore.

H.R. 4080. An act 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.

United States HOUSE OF REPRESENTATIVES

(Cong. Record, Vol. 96, Pt. 5, p. 5954)

April 27, 1950

ENROLLED BILLS SIGNED

Mrs. Norton from the Committee on House Administration, reported that that committee had examined and found truly enrolled bills of the House of the following titles, which were thereupon signed by the Speaker:

H.R. 4080. An act 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.

United States HOUSE OF REPRESENTATIVES

(Cong. Record, Vol. 96, Pt. 5, p. 5954)

April 27, 1950

BILLS PRESENTED TO THE PRESIDENT

Mrs. Norton, from the Committee on House Administration, reported that that Committee did on this day present to the President for his approval, bills of the House of the following titles:

H.R. 4080. An Act 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.

United States HOUSE OF REPRESENTATIVES

(Cong. Record, Vol. 96, Pt. 5, p. 6640)

May 8, 1950

MESSAGE FROM THE PRESIDENT

A message in writing from the President of the United States was communicated to the House by Mr. Miller, one of his secretaries, who also informed the House that on the following dates the President approved and signed bills and a joint resolution of the House of the following titles:

On May 5, 1950.

H.R. 4080. An act 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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THE UNIFORM CODE OF MILITARY JUSTICE
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