Congressional
Hearings, Prints and Reports

# CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL

## HEARINGS

BEFORE THE

## SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

U.S. Congress. Senate.

OF THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

PURSUANT TO

## S. RES. 260

EIGHTY-SEVENTH CONGRESS

SECOND SESSION

ON

CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL

FEBRUARY 20 AND 21 AND MARCH 1, 2, 6, 9, AND 12, 1962

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

84154 WASHINGTON : 1962

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington 25, D.C. - Price $2.75

KF26
.J837
1962
COPY 2

## COMMITTEE ON THE JUDICIARY

JAMES O. EASTLAND, Mississippi, *Chairman*

ESTES KEFAUVER, Tennessee
OLIN D. JOHNSTON, South Carolina
JOHN L. McCLELLAN, Arkansas
SAM J. ERVIN, Jr., North Carolina
JOHN A. CARROLL, Colorado
THOMAS J. DODD, Connecticut
PHILIP A. HART, Michigan
EDWARD V. LONG, Missouri
ALEXANDER WILEY, Wisconsin
EVERETT McKINLEY DIRKSEN, Illinois
ROMAN L. HRUSKA, Nebraska
KENNETH B. KEATING, New York
HIRAM L. FONG, Hawaii
HUGH SCOTT, Pennsylvania

---

## Subcommittee on Constitutional Rights

SAM J. ERVIN, Jr., North Carolina, *Chairman*

OLIN D. JOHNSTON, South Carolina
JOHN L. McCLELLAN, Arkansas
JOHN A. CARROLL, Colorado
EDWARD V. LONG, Missouri
ROMAN L. HRUSKA, Nebraska
ALEXANDER WILEY, Wisconsin
KENNETH B. KEATING, New York

William A. Creech, *Chief Counsel and Staff Director*
Robinson O. Everett, *Counsel*
Bernard Waters, *Minority Counsel*

# CONTENTS


Opening statement of—

Page

Ervin, Hon. Sam J., U.S. Senator from the State of North Carolina, chairman of the Subcommittee on Constitutional Rights ..... 1

Keating, Hon. Kenneth B., U.S. Senator from the State of New York ..... 5

Statements:

Department of Defense: Runge, Hon. Carlisle P., Assistant Secretary of Defense for Manpower, accompanied by Rear Adm. Bernard A. Clary, USN, Director for Military Personnel, Office of Secretary of Defense, and Frank A. Bartimo, Assistant General Counsel (Manpower), Office of Secretary of Defense ..... 8

Department of the Army: Fitt, Hon. Alfred B., Deputy Under Secretary of the Army (Management), and Brig. Gen. Alan B. Todd, USA, Judge Advocate General Corps; accompanied by Maj. Gen. Bruce Easley, Director, Army Council of Review Boards; Maj. Gen. Robert A. Hewitt, Executive Secretary, Army Board for Correction of Military Records; Col. Alvin D. Robbins, Executive, Army Council of Review Boards; Raymond Williams, Executive Secretary, Army Board for Correction of Military Records ..... 62

Department of the Navy: Fay, Hon. Paul B., Jr., Under Secretary of the Navy; accompanied by Rear Adm. William C. Mott, USN, Judge Advocate General of the Navy; Rear Adm. B. J. Semmes, USN, Bureau of Personnel; Brig. Gen. R. M. Tompkins, USMC; Capt. John Connolly, Bureau of Personnel; Capt. Dale Mayberry, Bureau of Personnel ..... 48

Department of the Air Force: Fridge, Hon. Benjamin W., Special Assistant to Secretary of the Air Force for Manpower, Personnel and Reserve Forces, and Maj. Gen. A. M. Kuhfeld, USAF, Judge Advocate General of Air Force; accompanied by Col. Arnold LeBell, Chief, Military Justice Division, Office of the Judge Advocate General; Col. V. J. Lozito, Promotions and Separations Division, Directorate of Military Personnel; Leroy J. Spence, Directorate of Personnel Planning; Lt. Col. John H. Thompson, Personnel Council; Col. Harold R. Vogue, Chief, Legislative Division, Office of Judge Advocate General ..... 128

Doyle, Hon. Clyde, U.S. Congressman from the State of California ..... 313

Elliott, Sheldon D., professor of law, New York University, representing the American Bar Association ..... 347

Evans, Lewis, attorney, Washington, D.C ..... 497

Ferguson, Hon. Homer, judge, U.S. Court of Military Appeals ..... 191

Finn, John J., Chairman, Special Committee on the Uniform Code of Military Justice and Court of Military Appeals of the American Legion, accompanied by John S. Mears, legislative representative, American Legion ..... 403

Frohlich, Everett A., chairman, Special Committee on Military Justice, Association of the Bar of the City of New York, accompanied by Arnold I. Burns and Donald Rapson ..... 244

Harmon, Maj. Gen. Reginald C., USAF, ret ..... 164

Kabatchnick, Neil B., secretary, Military Law Committee, District of Columbia Bar Association ..... 508, 802

Kendrick, John, chairman, Military Law Committee, District of Columbia Bar Association ..... 529

Kilday, Hon. Paul, judge, U.S. Court of Military Appeals ..... 199

Mayer, Charles H., attorney, Washington, D.C ..... 330

Mott, R. Adm. William C., USN, Judge Advocate General of the Navy, accompanied by Capt. Mack K. Greenberg and Capt. John M. Connolly ..... 387

Neff, Zeigel W., civilian member, Navy Board of Review ..... 297

Statements—Continued

| | Page |
|---|---|
| Paston, D. George, chairman, Committee on Military Justice, New York County Lawyer's Association, accompanied by Harold Nordlicht | 210 |
| Peckarski, Charles, assistant director, policy and planning, Department of Veterans' Benefits, Veterans' Administration; accompanied by O. B. Callaway, legal consultant, policy and planning, Department of Veterans' Benefits, Veterans' Administration; Timothy F. Daley, assistant general counsel; Harry Lerner, staff attorney, office of general counsel | 354 |
| Pye, A. Kenneth, associate dean and professor of law, Georgetown University Law Center | 547 |
| Quinn, Hon. Robert, chief judge, U.S. Court of Military Appeals | 178 |
| Reiter, Robert H., attorney, Washington, D.C | 823 |
| Shields, Fred, attorney, Washington, D.C | 265 |
| Speiser, Lawrence, director, Washington office, American Civil Liberties Union | 281 |
| Stover, Francis, director, national legislative service, Veterans of Foreign Wars of the United States; accompanied by Norman D. Jones, director of national rehabilitation service; Ben Lloyd, chief, Armed Forces claims; George S. Parrish, legal consultant | 365 |
| Weil, Frank E. G., member, National Board, American Veterans Committee | 813 |
| Weiner, Frederick B., attorney, Washington, D.C | 575 |


APPENDIX

| | |
|---|---|
| Army responses to questionnaire | 827 |
| Navy responses to questionnaire | 886 |
| Air Force responses to questionnaire | 927 |
| Aide memoire from subcommittee to Departments of the Army, Navy, and Air Force | |
| Army responses to aide memoire | 852 |
| Navy responses to aide memoire | 910 |
| Air Force responses to aide memoire | 947 |
| Army–Summary of Facts and Legal Issues | 886 |
| Navy–Summary of Facts and Legal Issues | 925 |
| Air Force–Summary of Facts and Legal Issues | 961 |
| Letter of April 25, 1962, from Maj. Gen. D. W. McGowan, Chief, National Guard Bureau to U.S. Senator Kenneth B. Keating | 965 |
| Letter of April 9, 1962, from Hon. Carlisle P. Runge, Assistant Secretary of Defense (Manpower) to U.S. Senator Kenneth B. Keating | 966 |

# CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL

---

TUESDAY, FEBRUARY 20, 1962

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10:20 a.m., in room 457, Old Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee), presiding.

Present: Senators Ervin, Carroll, and Keating.

Also present: William A. Creech, chief counsel and staff director; Robinson O. Everett, counsel; and Bernard Waters, of minority counsel.

(Present at this point: Senators Ervin and Keating.)

Senator ERVIN. The subcommittee will come to order.

I want to apologize to all present, but I stayed to see the takeoff.

Before proceeding with the hearings, I should like to express to the Department of Defense and the representatives of the three services the subcommittee's appreciation for the cooperation which they have given us in our preparation for these hearings.

Specifically, we are appreciative of the detailed information which the services provided in response to a questionnaire which I sent to the Department in December, and for the additional information which they recently furnished the subcommittee in response to questions which I posed in an aide memoire.

It is my feeling that, by obtaining this information in advance, the subcommittee's hearings will be more meaningful and that they can proceed with dispatch.

Inasmuch as several of our witnesses have made reference to the information which the Department has provided the subcommittee, I shall have it inserted at the appropriate place in the record.

Beginning today the subcommittee will hold 5 days of hearings on the constitutional rights of military personnel. This is a subject with which the subcommittee has been concerned for several years.

The special problems of the rights of the several classes of persons subject to military jurisdiction—servicemen, dependents, and civilian employees—have been examined in the course of staff studies. In 1957, for instance, the subcommittee investigated the extent to which Americans abroad enjoy basic rights when they are accused of violating Armed Forces regulations, or the criminal laws of this country or of the country where they are stationed. In connection with that study, a subcommittee observer attended the Japanese criminal trial of a United States soldier, William Girard. Cases similar to his in other countries were carefully monitored to learn whether rights were denied

to U.S. personnel. Since that time, we have become increasingly aware of a number of constitutional problems in the administration of military justice.

I recall that when Blackstone wrote his famous commentaries, he referred to soldiers as occupying a "state of servitude in the midst of a nation of freemen," and added that the soldier's position was "the only state of servitude" in England. However, a contemporary jurist, Chief Judge Quinn of the Court of Military Appeals, has written in a judicial opinion that:

> Persons in the miltary service are neither puppets nor robots. They are not subject to the willy-nilly push or pull of a capricious superior, at least as far as trial and punishment by court-martial is concerned. In that area they are human beings endowed with legal and personal rights which are not subject to military order. (See *U.S.* v. *Millebrandt*, 8 U.S.C.M.A. 635; 25 C.M.R. 139 (*concurring opinion*).)

In an earlier opinion, when dealing with a serviceman's right of privacy in his abode, Chief Judge Quinn commented:

> No reason in law, logic, or military necessity, justifies depriving the men and women in the Armed Forces of a fundamental right to which they would be entitled as civilians (*U.S.* v. *Adams*, 5 U.S.C.M.A. 563; 18 C.M.R. 187).

Obviously, there has been a change over the years in the prevailing attitude toward the rights of the serviceman, but how far has this change gone? What are the constitutional rights of a serviceman and how are they being preserved in the issuance of discharges from the Armed Forces and in the administration of military justice? These are the matters with which this subcommittee is presently concerned.

The impetus for the present hearings was provided chiefly by complaints concerning military discharges. The subcommittee was especially mindful of the statement in the Annual Report of the Court of Military Appeals for 1960 that:

> The unusual increase in the use of the administrative discharge since the code became a fixture has led to the suspicion that the services were resorting to that means of circumventing the requirements of the code. The validity of that suspicion was confirmed by Maj. Gen. Reginald C. Harmon, then Judge Advocate General of the Air Force, at the annual meeting of the Judge Advocates Association held at Los Angeles, Calif., August 26, 1958. He there declared that the tremendous increase in undesirable discharges by administrative proceedings was the result of efforts of military commanders to avoid the requirements of the Uniform Code. Although he acknowledged that men thereby affected were deprived of the protections afforded by the code, no action to curtail the practice was initiated.

On the basis of its studies, the subcommittee is aware that an undesirable discharge, in addition to its effect on veterans' benefits, creates a stigma which often blocks employment and might have consequences far worse than those of confinement in a guardhouse or prison. Thus, it seems important to determine under what circumstances these discharges are being issued and whether safeguards afforded by courts-martial might be bypassed through the use of the administrative discharge. At the same time, the subcommittee feels it well to determine whether other means are being employed to circumvent the safeguards and rights provided in the Uniform Code. Furthermore, other information has come to our attention which makes it clear that a broad and thorough examination of the constitutional rights of military personnel in the administration of military justice is in order.

In this examination let us look first at some pages of history—perhaps worth volumes of logic. In the first years of our Republic, the Army consisted of a small band of volunteers. These soldiers did not enjoy the highest regard of many of their fellow citizens; and military pay at the time, even when due allowance is made for the much lower price scale in those days, did not attract the outstanding young men into the Army. For instance, in 1785 an Army private received only $4 a month in pay; in 1790, it was only $3 a month; by 1795, the pay was up to $7; but by 1802, it was back to $5. A sailor seems to have done only a little better. Enlistments were not encouraged by the severe, and occasionally brutal, punishments meted out to military offenders: such as flogging, shaving of hair and eyebrows, and branding. However, since the soldier had enlisted of his own free will, had voluntarily indentured himself into his "servitude," there was little worry by others about any loss of rights on his part. Strict discipline was part of the tradition of professional armies at that time, and was considered to be necessary for military success.

In the present century there were sown the seeds of a change in view. Certain incidents connected with the administration of military justice led to demands for reform. For instance, a few years before World War I the trial of several soldiers by a court-martial at Brownsville and their almost immediate execution led to severe criticism of the administration of military justice. Criticism also was directed against the revision procedures used during World War I whereby acquittals by a court-martial could be set aside and light sentences could be revised upwards. Most important, during both World War I and World War II large armies were mobilized from the regular civilian population; the citizen-soldier, rather than the professional soldier, became a mainstay of the Armed Forces. These men had not bargained away their constitutional rights for the privilege of military service; they were simply performing one of the obligations of citizenship. Not surprisingly, these citizen-soldiers did not feel that their military service should relegate them to second-class constitutional status. And while they realized that discipline was essential to military efficiency, they did not concede that justice and discipline were incompatible.

Certain other factors have probably had an impact on present-day attitudes toward constitutional limitations on the administration of military justice. In the first place, the expanding scope granted in the civilian courts to certain constitutional rights, like the right to "due process of law," has undoubtedly had an impact on military justice. Interestingly, only in recent years has there been recognition that courts-martial are subject to requirements of "due process;" and, in light of the Supreme Court's decision in *Burns* v. *Wilson*, (346 U.S. 137), it appears that court-martial convictions are even today more insulated from attack on "due process" grounds than are State court convictions.

Secondly, as several scholars have recently pointed out, trial by court-martial is now used in cases that a century ago would only have been tried in a State or Federal civil court. Thus, the rights available to a serviceman today will sometimes depend on whether civil authorities prosecute him, or whether he is tried by court-martial, where, as is often the case, concurrent jurisdiction exists. Accordingly, there has

been considerable interest in assuring that the serviceman's constitutional rights will not be lost because of a decision to try him by court-martial instead of in a civilian court. Often, however, he may be subject to trial in both a court-martial and a State court, but generally only one trial occurs.

The hearings that preceded enactment of the Uniform Code of Military Justice indicate that Congress had in mind a number of fundamental rights which it wished to protect for the serviceman. Federal civil courts are subject to the sixth amendment requirement that the accused shall be tried "by an impartial jury" and State courts are subject to a similar requirement under the "due process" requirement of the 14th amendment. In an effort to assure the impartiality of the members of a court-martial, Congress prohibited the exercise of command control by a commanding officer and prohibited the appointment of a special or general court-martial by a commander who had a "personal interest" in a case.

The sixth amendment grants an accused in criminal cases the right to the assistance of counsel. This subcommittee already has studied in detail the implementation of this constitutional right in civilian courts, and now we shall review the requirement in the Uniform Code of Military Justice that a serviceman also be provided competent counsel to defend him in serious cases.

In an effort to provide for minimal standards of "due process" in major cases, Congress created the post of the law officer, a well-qualified lawyer and officer who serves as a "judge" for general courts-martial. While the Army and the Air Force had law members of general courts-martial before the enactment of the Code, these law members often were not in as favorable a position to protect the rights of the serviceman as the law officer would be.

Of special importance was the creation in 1951 of the Court of Military Appeals. This tribunal, composed of three eminent and well-qualified civilian judges, is empowered to reverse convictions in cases where a serviceman has been deprived of his rights. A right without a remedy is often meaningless. The establishment of direct civilian review of court-martial convictions, an innovation in American military justice, furnished the serviceman a remedy for invasions of many important constitutional rights.

Although under the 14th amendment "equal protection of the laws" is specifically made binding only on the States, the courts have interpreted "due process" under the fifth amendment as prohibiting unreasonable legislative or administrative classifications. Thus, there seems to be some constitutional basis for requiring that a serviceman enjoy the same minimum standards of military justice whether he be in the Army, Navy, or Air Force. This was one of the considerations which prompted Congress to enact the Uniform Code of Military Justice.

The present hearings will review the rights which Congress had in mind when the Uniform Code was enacted. For example, there still are complaints of command control, including allegations that in some form it has even been exerted upon defense counsel. A serviceman still may be subjected to rather dire consequences without the aid of legally trained counsel. Some indications are found that a soldier receives one brand of justice; a sailor, another; and an airman, a third. And there

have been instances where the safeguards of "due process" which Congress provided in the Uniform Code of Military Justice have not been effective.

The public has a right to expect effective performance by the Armed Forces whose primary mission is to defend this country against aggressors. Nothing can be allowed to impede performance of that primary mission. It is my conviction that by assuring our servicemen the highest standards of military justice, Congress will only improve, not impair, military discipline, morale and efficiency.

Senator Keating, I would like to give you a chance at this time to make any statements you may wish to make prior to the beginning of our investigation.

Senator KEATING. Thank you very much, Mr. Chairman, and I appreciate the opportunity to say a few words on a question that is of considerable importance.

The present critical international situation and the call-up of 120,000 men last October to strengthen our armed services certainly warrants a study of the constitutional rights of American servicemen which very properly comes under the jurisdiction of this subcommittee.

The subcommittee has done a great deal of research and is in the process of compiling much valuable information dealing particularly with the problem of discharges from the service. This is a very real problem, for undeniably present-day personnel practices make it extremely difficult, if not impossible, for a serviceman to find suitable work if he has received anything other than an honorable discharge. Although the armed services must certainly, for disciplinary and other reasons, make use of administrative discharges, it is of paramount importance that uniform standards be established and maintained by all the services.

It is a source of considerable satisfaction, I know, that the percentage of discharges which are other than honorable has been steadily reduced. Yet, at the same time, this very fact puts a greater burden upon the services to insure that each and every case in which a less than honorable discharge is granted receives the most careful attention and consideration to insure that all legal rights under the Constitution and the Uniform Code of Military Justice are fully respected.

The Special Committee on Military Justice of the Association of the Bar of the City of New York will, I understand, be bringing other problems to the attention of the subcommittee. I am referring particularly to an omnibus bill worked out by the New York Bar Association. This bill deals with a number of procedures occurring in the course of general courts-martial or special courts-martial and the boards of review, as well as administrative discharges.

Very properly, the bar association is concerned to protect the rights of the individual and to insure that he has competent counsel, and impartial judgment on any legal charges raised. No issues raise more clearly than these the intrinsic problem of protecting the rights of the individual without impairing the state of preparedness and military discipline necessary for effective national defense. The Committee on Military Justice of the Association of the Bar of the City of New York deserves great credit for its work in analyzing the problems and preparing this legislation. I am sure that the testimony which will

be submitted later for the record will be thoughtful and enlightening and I commend it to the attention of my colleagues.

Now, Mr. Chairman, I should like to raise another issue before this subcommittee, an issue which has not yet been raised in this study, yet, nevertheless, an issue which I believe has a very important bearing on the subject matter of this investigation: namely, the constitutional rights of servicemen.

Under Executive Order 9981, President Truman declared it—

to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion, or national origin.

This order was issued in the summer of 1948 and on the whole the Army, Navy, and Air Force have complied with it admirably.

Yet, despite the fact that the armed services have made a particular effort to live up to the letter and spirit of this Executive order, the fact remains that at a number of installations in some of the Southern States, Negro servicemen are, in fact, required to use segregated facilities. If there is not room for them to live on the base, they must find segregated housing facilities in the local communities. If they wish to travel anywhere in the area, they must use segregated transportation facilities. If there is not a federally operated school on the base, they must send their children to segregated schools in the neighborhood.

In the field of education, this segregation is all the more objectionable and reprehensible because the schools which take children from military bases are to a large extent subsidized by the Federal Government under the terms of Public Laws 815 and 874. It is shocking that under these laws Federal funds are often the mainstay and support of schools which operate in defiance of Federal court orders. This is an area, of course, in which the Defense Department and the Military services are not to blame. It is nevertheless a national responsibility to insure that Negro draftees and Negro reservists who are called into uniform to serve their country in its time of need are not denied their constitutional rights to equality of opportunity and treatment and are not subject to segregation and harassment while they are wearing the uniform of the armed services of the United States.

Coming even more directly under the subject and jurisdiction of this hearing, Mr. Chairman, is the issue of the civil rights of members of the National Guard. This is no less a constitutional problem than procedures for courts-martial or military discharges and I would venture to state that it directly concerns a far larger number of American servicemen. Specifically, I am particularly concerned about the present policies of the National Guard in certain States with regard to the maintenance of separate and segregated units for Negro and white servicemen. Here the Department of Defense and Federal Government are directly involved.

The United States Code (32 UCS 104(b)) provides that—

except as otherwise specifically provided in this title, the organization of the Army National Guard and the composition of its units shall be the same as those prescribed for the Army, subject, in time of peace, to such general exceptions as the Secretary of the Army may authorize; and the Air National Guard and the composition of its units shall be the same as those prescribed for the Air Force, subject, in time of peace, to such general exceptions as the Secretary of the Air Force may authorize.

The National Guard, however, has a unique status as an agency of the States. Yet, it is at the same time subject to regulations and orders issued by the President. Mr. Chairman, it was not the intent of Congress or of the President, I am sure, specifically to exempt the National Guard from the Executive order requiring equality of treatment and opportunity for all persons in the armed services.

There are National Guard units in each of the 50 States and also in Puerto Rico and in the District of Columbia. In the Army National Guard, and Air National Guard, combined, there are nearly half a million men. Virtually all of the financial support for these forces is appropriated by the Congress of the United States. Barely 5 percent comes from the local or State governments. Many, in fact, I would say, most of these National Guard units provide equal treatment and opportunity for all men without regard to race, color, religion, or national origin. Yet, there are some States in which unfortunately this is not true.

For instance, I am informed that the statute of one State relating to National Guard units reads:

> The white and colored militia shall be separately enrolled, and shall never be compelled to serve in the same organization. No organization of colored troops shall be permitted where white troops are available, and while permitted to be organized, colored troops shall be under the command of white officers.

Another State specifically directs the organization of separate Negro units. A number of other States have statutes which are highly permissive and allow the State executive to organize or reorganize the units virtually at will. There are an even larger number of States in which by custom and habit National Guard units are segregated, and as a result equal opportunity and equal access to military facilities is denied the National Guard members.

Mr. Chairman, in this era of crisis, when the men of America are called upon through the armed services or when they volunteer through their local National Guard offices to serve their country, and to fight for the idea of "equal justice under the law," it is their constitutional right to enjoy equal justice under law and equal treatment and opportunity throughout all branches of the armed services. I should, therefore, like to suggest, Mr. Chairman, that this matter be brought to the attention of the National Guard Bureau, and that a full report be made upon the procedures to be followed to bring an end to this inequality in the National Guard and to establish the National Guard with the other branches of our armed services upon the basis of equality and at equal constitutional rights for all. I can think of no line of inquiry in our consideration of the constitutional rights of servicemen which is more important than this National Guard problem.

I thank you, Mr. Chairman, for the opportunity to express these views.

Senator ERVIN. Counsel, are you ready to proceed?

Mr. CREECH. Thank you, Mr. Chairman.

The first witness this morning is Hon. Carlisle P. Runge, Assistant Secretary of Defense for Manpower.

Mr. Runge will be accompanied by Mr. Frank Bartimo, Assistant General Counsel of the Department of Defense for Manpower.

Will you please identify anyone else accompanying you, Mr. Runge?

**STATEMENT OF CARLISLE P. RUNGE, ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER; ACCOMPANIED BY REAR ADM. BERNARD A. CLAREY, U.S. NAVY, DIRECTOR FOR MILITARY PERSONNEL, OFFICE OF THE SECRETARY OF DEFENSE; AND FRANK A. BARTIMO, ASSISTANT GENERAL COUNSEL (MANPOWER), OFFICE OF THE SECRETARY OF DEFENSE**

Mr. RUNGE. Mr. Chairman, accompanying me are Frank A. Bartimo, the Assistant General Counsel for Manpower in the Office of the Secretary of Defense and the Director of Military Personnel Policy; and Rear Adm. Bernard A. Clarey of the Office of the Secretary of Defense.

Mr. Chairman and members of the committee; my name is Carlisle P. Runge. I am Assistant Secretary of Defense for Manpower. I am here at the kind invitation of this committee to present Department of Defense views on matters pertaining to the constitutional rights of members of the Armed Forces. Accompanying me is Mr. Frank A. Bartimo, the Assistant General Counsel for Manpower, and Rear Admiral Clarey. Representatives of the military departments will appear before you at your convenience to present information with respect to their specific services.

The Chairman has provided you with Department of Defense response to a series of 36 questions posed by the committee. Although not proposing to review each question and answer with you, I shall touch upon several in the course of this statement.

HISTORY OF ADMINISTRATIVE DISCHARGES

By way of historical background, the original authority to discharge enlisted members of the Army was enacted as article 2, section III, of the Articles of War of 1776. This provided merely that a discharge, prepared in writing and signed by a field officer, would be given to each enlisted man upon separation. Such discharges signified honorable and faithful service.

Beginning in 1821, the standard discharge form contained a space to show the reason for discharge and the word "honorably" was marked by an asterisk which referred to a comment specifying that the word should be stricken "when the officer commanding the company has not certified that the soldier served honestly and faithfully."

In 1893 a "discharge without honor" was introduced for use in cases of fraudulent enlistment, imprisonment as a result of sentence by a civil court, and misconduct in the military service.

Two types of administrative discharges were recognized formally in 1916. One was characterized as honorable and the other was without specification as to character of service. This latter type was known commonly as the "blue discharge" because of the color of paper upon which it was printed. The discharge without specification as to character of service was issued for misconduct such as fraudulent enlistment, desertion or protracted absence without leave, conviction by civil courts; for the convenience of the Government because of

alienage, undesirable traits of character; and for poor performance of duty. As administered, the blue discharge represented the intention to distinguish and preserve the high degree of merit represented by the honorable discharge and yet not stigmatize the recipient's service as dishonorable.

Meanwhile, the Navy and Marine Corps were issuing honorable discharges, a discharge under honorable conditions and an undesirable discharge.

After the Second World War there was mounting criticism of the Army's blue discharge from the Congress and from the general public. On 30 January 1946, a report was submitted to the House Committee on Military Affairs, pursuant to House Resolution 20 which had authorized the committee to make certain investigations of the war effort. The committee reported:

> * * * a discharge which is stated to be neither honorable nor dishonorable * * * gives the impression that there is something radically wrong with the man in question * * * (and) the VA must seek to resolve the question the Army has evaded.

The report concluded with the recommendation that four classes of discharge be considered for adoption:

(1) Honorable discharge: Substantially without change from the form in use, but somewhat more restricted to make it more meaningful.

(2) Discharge under honorable conditions: Minority, writ of habeas corpus, inadaptability, enuresis, physical disability resulting from misconduct, and parallel situations.

(3) General discharge: Special court-martial or a board of officers—continuous misconduct, aggravated absence without leave, fraudulent enlistment, and convictions by civil courts for serious offenses.

(4) Dishonorable discharges: General court-martial or a military commission.

To study the discharge situation, a Joint Armed Services Committee, comprised of representatives from each of the services, was formed. From the collective experience of each of the services, the groundwork was laid for a uniform discharge system that would best meet the needs of the separate services and the members thereof. The recommendations made by the committee culminated in the present types of administrative discharges; i.e., honorable, general, and undesirable.

Within the Army and then the Army Air Corps, the blue discharge was eliminated and the general and undesirable discharges were added.

Within the Navy and Marine Corps, the "under honorable conditions" discharge was changed to "general discharge."

Although the changes in characterization resulted in uniformity of types of discharge issued by the several services, there remained an appreciable variation in the circumstances under which specific types of discharges were issued.

The whole subject of administrative discharges became a matter of intense study within the Department of Defense in the late 1950's. This study eventually resulted in publication of Department of Defense Directive 1332.14, Administrative Discharges.

NEED FOR ADMINISTRATIVE DISCHARGES

In addition to being the means whereby members of the Armed Forces are separated upon completion of enlistment or period of obligated service, the administrative discharge provides a procedure for the separation of individuals prior to completion of contract. Among the common and undisputed reasons for early termination of enlistment or obligated service are convenience of the Government, usually incidental to a reduction of forces, disability, minority, hardship or dependency, unsuitability, and, under certain circumstances, the convenience of the individual. The overwhelming majority of discharges awarded under these conditions are "honorable," and the remainder are "under honorable conditions."

The administrative discharge also contributes to maintenance of a high degree of combat capability and overall force effectiveness through prompt elimination of a very small percentage of persons who demonstrate clearly by conduct or performance of duty that they are unfit for military service. Individuals in this category may receive an undesirable discharge, depending on the particular circumstances in specific cases, or may receive a general or even an honorable discharge.

An undesirable discharge awarded administratively is appropriate when a member of the Military Establishment has been convicted by a civil court for a serious offense. In some instances, trial by court-martial is precluded by law. In other situations, it would serve no useful purpose to try the individual by courts-martial. Surely there can be no great disagreement with the administrative separation under other than honorable conditions of the homosexual in specific cases. The court-martial of a homosexual is difficult in that speedy trial and conviction often are impossible. Meanwhile, the individual threatens the welfare of other service personnel and constitutes a security risk. Prompt elimination of the homosexual is mandatory in the interests of the military services.

Issuance of an undesirable discharge to chronic military offenders may be somewhat less clear cut than the foregoing cases. The chronic offender frequently commits a series of offenses prejudicial to good order and discipline, yet no single offense may be subject to court-martial. The field commander needs to be able to initiate board action against chronic offenders in order to maintain the discipline and esprit de corps essential to unit success. Over 97 percent of the members of the Armed Forces who were separated during fiscal year 1961 earned honorable discharges or discharges under honorable conditions. It would be manifestly unfair to the vast majority to hand out the same character of discharge certificates to the habitual shirker or the individual whose conduct is deliberately not in keeping with the standards expected of a military man.

THE DIRECTIVE

Earlier I mentioned the 1959 Department of Defense directive which prescribes standards and procedures for administrative discharges.

Since you have been furnished copies of the directive, I shall not read its contents. Nevertheless, I should like to note certain significant points therein.

The types of administrative discharges issued to members of the Armed Forces are predicated on the military record. This is the individual's military behavior and performance of duty which reflect the character of service he performed while a member of an armed service. Military behavior is the conduct of the individual during his term of service.

As mentioned previously, there are three types of administrative discharge. Oldest in point of continuous usage, most meaningful and, I submit, treasured by its millions of recipients and their descendants, is the honorable discharge. The standards for issuance of the honorable discharge are proper military behavior and proficient and industrious performance of duty. In order to protect the prestige and high standing long associated with this discharge, the directive prescribes that it ordinarily will not be issued to an individual who has been convicted of an offense by a general court-martial or has been convicted by more than one special court-martial during his current enlistment or period of obligated service, or extension thereof. However, under appropriate circumstances, even after conviction by a court-martial, an individual is given an opportunity to rehabilitate himself and also to earn an honorable discharge.

With respect to proficient and industrious performance of duty, the directive specifies that due regard will be given to the individual's grade and capabilities. In other words, the service member of below-average capability can earn an honorable discharge provided he works to the best of his ability and behaves properly.

In the interest of justice "special consideration" is given to members who receive a personal decoration during their current enlistment or are being discharged as a result of disability incurred in the line of duty. Where otherwise ineligible, persons in these groups may be awarded an honorable discharge.

The general discharge is, as you know, separation under honorable conditions. This discharge is issued when the member's military record is not sufficiently meritorious to warrant an honorable discharge. Existence of the general discharge serves two very useful purposes: one, it protects the high standing associated with the honorable discharge; and, two, it gives the individual whose record is below the norm a certificate carrying no inherent prejudice.

Senator KEATING. Could I, Mr. Chairman, interrupt for one question, because I have to go to another committee meeting? You said previously on page 5 that 97 percent of the members of the Armed Forces separated during fiscal 1961 are in either honorable discharges or discharges under honorable conditions?

Mr. RUNGE. Yes, sir.

Senator KEATING. Do you have the breakdown of those figures as to how many receive actual honorable discharges?

Mr. RUNGE. Yes, Senator.

I cited 1961, but we have for the record the statistics going back for the past 5 years, but in 1961 there were 614,479 honorable dis-

charges given. There were 27,148 general discharges, or a discharge under honorable conditions. There were 14,594 undesirable discharges; 4,143 bad-conduct discharges; and 648 dishonorable discharges.

Senator KEATING. Thank you.

Mr. RUNGE. At this point, I should like to discuss briefly the discharge of persons on the grounds of unsuitability. It is unfortunately, but understandably, true that not everyone is suitable for service in our modern, highly complex and technical military forces. The early identification and elimination of persons who are unable to adjust to military life by reason of physical or mental conditions manifested by various character disorders is in the best interests of both the service and the individual. Termination of enlistment for reasons of unsuitability also is appropriate when members continue to display inaptitude or apathy despite training, conscientious supervision, and sympathetic counseling. Let me emphasize that only honorable or general discharge certificates are issued for unsuitability.

The third category of administrative discharge is the undesirable. This discharge under other than honorable conditions is issued for unfitness, misconduct, or for security reasons. The Department of Defense directive and service regulations specify that an undesirable discharge will not be issued in lieu of trial by court-martial except upon the determination by an officer exercising general court-martial jurisdiction or by higher authority that the interests of the service as well as the individual will be best served by administrative discharge.

Unless the particular circumstances in a given case warrant a general or an honorable discharge, individuals are issued an undesirable discharge by reason of unfitness such as an established pattern of shirking, continued dishonorable failure to satisfy just debts, and frequent discreditable involvement with civil or military authorities. Members also may be issued an undesirable discharge for misconduct such as conviction by civil authorities for serious offenses or for fraudulent enlistment or for prolonged absence without leave of a year or more.

The undesirable discharge is issued only by the authority of properly approved administrative action during which specific procedures and safeguards must be observed. These provisions are so important that I shall quote verbatim from the directive.

1. The individual, if subject to such discharge, will, if his whereabouts is known, be properly advised of the basis for the contemplated action and afforded an opportunity to request or waive, in writing, the following privileges:

a. To have his case heard by a board of not less than three officers. In the case of nonregular component members, all boards so convened shall include appropriate numbers from the Reserve components. In the case of female members, all boards so convened shall include at least one female officer.

b. To appear in person before such board, subject to his availability, e.g., not in civil confinement.

c. To be represented by counsel, who, if reasonably available, should be a lawyer.

d. To submit statements in his own behalf.

Except for reservists, departmental Secretaries are authorized to waive the requirements set forth above (except 1.d.)—

the submitting of a statement in his behalf—

when such action is deemed to be in the best interest of the military service.

Before discussing the trends in administrative discharges over the past few years, I want to make it a matter of record that service data furnished this committee relating to honorable and general discharges are at variance with statistics previously furnished other committees of the Congress and nongovernmental agencies. Heretofore, some of the services did not reflect retirements and discharges for immediate reenlistment in their computations. These data have been included in the tabulations furnished this committee to provide more precise information.

TRENDS

Consolidation of individual service statistics by fiscal year beginning with 1957 indicates that the percentage of honorable or under honorable conditions discharges has risen steadily from 95.17 in 1957 to 97.02 in fiscal year 1961. This reflects great credit on the character and caliber of the career members of the several services as well as the young recruits entering annually. Although there was a slight rise (0.21 percent) in undesirable discharges in fiscal year 1958; the percentage has gradually decreased to 2.20 percent of 661,012 discharges issued in fiscal year 1961. The percentage of bad conduct and dishonorable discharges also has decreased annually excepting a slight rise in bad conduct discharges in 1960.

(At this point in the proceedings, Senator Keating leaves the hearing room.)

Mr. RUNGE. In addition to the standards and safeguards promulgated in the Department directive on administrative discharges, I believe decreases in undesirable and in punitive discharges may be attributed to several factors.

The military departments have made a vigorous and continuous effort to build a body of professional, dedicated men and women who take pride in the service and in their associates. I think a great deal of progress has been made. The members of the Armed Forces today enjoy an outstanding reputation at home and abroad. Certainly part of this may be attributed to service actions to eliminate the members who fail to meet the high standards of performance and character required in our services today and whose conduct reflects discredit upon themselves and their organizations. The very existence of the undesirable discharge and the fact that it is issued for good and sufficient reasons has a salutary effect on the great majority of our people. Further, it offers assurance to parents, relatives, and friends that the services endeavor to protect the welfare of the majority from the derelictions or character weaknesses of the exceedingly small minority. Higher prerequisites for enlistment, qualitative selections for reenlistment, vigorous moral leadership programs, and improved management techniques also contribute to percentage decreases in the other than honorable discharge categories.

To summarize, we are all proud of the millions of Americans who have served or are serving their country selflessly, honorably, and to the best of their ability. To preserve the meaning of their service and to keep faith with those who sacrificed their lives in times of actual

conflict the distinctions in the character of administrative discharges should be preserved.

This concludes my formal presentation. Thank you for your attention and interest.

If there are any questions, I shall be pleased to answer.

Mr. CREECH. Mr. Secretary, you have provided the subcommittee with a great deal of information, and I shall endeavor to avoid repetitive questioning, but there are a number of questions which I would like to ask.

Mr. RUNGE. Yes, sir.

Mr. CREECH. On page 2 of your statement you refer to the report of the House Committee on Military Affairs, which you quote, among other things, to the effect that the VA must seek to resolve the question the Army has evaded with regard to the "blue discharge," which was neither honorable nor dishonorable.

Then you go on to discuss the subsequent committees which were appointed and which made various recommendations.

You say on page 3 that:

> Although changes in characterization result in uniformity of types of discharge issued by the several services, there remained an appreciable variation in the circumstances under which specific types of discharges were issued.

Mr. RUNGE. Yes, sir.

Mr. CREECH. My question, sir, is:

Does the Defense Department or the various services have a program of coordination with the Veterans' Administration in ascertaining what type of emphasis should be placed on the various discharges?

Mr. RUNGE. Sir, I think I may answer your question in two parts.

I went on in the statement to point out that the appreciable variation in the circumstances under which types of discharge were issued, cause the Department's effort in 1959 to spell out to the services the grounds, and the basis for, the issuance of various types of discharge.

I think that we have brought about a substantial degree of likeness among the services with respect to this matter, sir.

Now, so far as the Veterans' Administration is concerned, there is working liaison between the departments and the Office of the Secretary of Defense and the Veterans' Administration as to the rights and benefits that a person may acquire in relationship to the type of discharge. The honorable and the general discharge give the individual all of the rights that are provided to veterans. We can provide for the record, I think we have it in a tabular form, the veterans rights that are affected, and to what extent, by the other two types of discharge.

It is a very complicated matter, but we will be happy to provide this for the record, Senator.

Mr. CREECH. I think that would be very helpful, because this is the basis for many of the complaints which the subcommittee has received.

I think it will be very helpful to us to have that for the record.

Mr. Chairman, may that be inserted at this point?

Senator ERVIN. Yes. Let the record show that the information to be supplied will be inserted in the record at this point.

(The information to be supplied is as follows:)

EXHIBIT 1

*Incidents of discharge*

| | Honorable | General | Undesirable [1] | Discharge [2] (under other than honorable conditions) | Bad-conduct discharge | | Dishonorable | Resignation for the good of the service AR 635-89 (officers), homosexuality in lieu of courts-martial | Authorization for benefit |
|---|---|---|---|---|---|---|---|---|---|
| Authority for discharge | AR 635-200 (enlisted men), AR 635-5 (officers). | AR 635-200 (enlisted men), AR 635-5 (officers). | AR 635-200 (enlisted men). | AR 635-5 (officers). | Sentence of a special court-martial. | Sentence of a general court-martial. | Sentence of a general court-martial. | AR 635-120 (officers) AR 635-5 (officers). | |
| Conditions under which issued | Convenience of the Government; expiration of enlistment; minority; resignation; dependency or hardship; disability; revocation or termination of appointment; discharge to accept appointment. | Convenience of the Government; disability, disloyal or subversive; expiration of enlistment; minority; resignation, unsuitability; homosexuality. | Misconduct; homosexuality; qualified resignation, unfitness; disloyal and subversive; a.w.o.l. or desertion. | Conviction of felony by civil authorities; security violation. | | | (Dismissal by sentence of general court-martial is equivalent to dishonorable discharge.) | (The provisions of AR 635-5 apply to all officers of the Army; AR 146-175 provides that Reserve officers being separated will be furnished discharge certificates in accordance with AR 635-5.) | |
| BENEFITS ADMINISTERED BY THE ARMY [3] | | | | | | | | | |
| Death gratuity | Eligible | Eligible | Eligible [4] | Eligible [4] | Eligible [4] | Not eligible | Not eligible | Not eligible | 10 U.S.C. 1475 et seq. |
| Headstone marker | do | do | Not eligible | Not eligible | Not eligible | do | do | do | Sec. 1, act of July 1, 1948 (62 Stat. 1215), as amended (24 U.S.C. 279a). |

See footnotes at end of table, p. 18.

*Incidents of discharge*—Continued

| | Honorable | General | Undesirable [1] | Discharge [2] (under other than honorable conditions) | Bad-conduct discharge | | Dishonorable | Resignation for the good of the service AR 635-89 (officers), homosexuality in lieu of courts-martial | Authorization for benefit |
|---|---|---|---|---|---|---|---|---|---|
| Mustering-out payments | Eligible | Eligible | Not eligible | Not eligible | Not eligible | Not eligible | Not eligible | Not eligible | 38 U.S.C. 2101 et seq. |
| Payment for accrued leave | do | do | do | do | do | do | do | do | Armed Forces Leave Act of 1946 (60 Stat. 963), as amended (37 U.S.C. 32 et seq.). |
| Retirement pay for non-Regular service. | do | do | Eligible | Eligible | Eligible | Eligible | Eligible | Eligible | 10 U.S.C. 1331 et seq. |
| Transportation allowance for dependents and shipment of household goods. | do | do | Not eligible | Not eligible | Not eligible | Not eligible | Not eligible | Not eligible | Pars. 7011-5, 8009-4, Joint Travel Regulations. |
| Transportation in kind | do | do | Eligible | Eligible | Eligible | Eligible | Eligible | Eligible | Par. 5300 et seq., Joint Travel Regulations. |
| Burial in national cemetery | do | do | Not eligible | Not eligible | Not eligible | Not eligible | Not eligible | Not eligible | Sec. 1, act of May 14, 1948 (62 Stat. 234; 24 U.S.C. 281). |
| Use of wartime title; wear uniform of wartime grade when authorized by Presidential regulations. | do | do | do | do | do | do | do | do | 10 U.S.C. 772(e). |
| Admission to Soldiers' Home [5] | | | | | | | | | |
| BENEFITS ADMINISTERED BY THE VETERANS' ADMINISTRATION [6] | | | | | | | | | |
| Dependency and indemnity compensation. | do | do | Eligible [4] | Eligible [4] | Eligible [4] | do | do | do | 38 U.S.C. 410 et seq. |
| Compensation for service-connected disability. | do | do | do [4] | do [4] | do [4] | do | do | do | 38 U.S.C. 301 et seq. |
| Pension for non-service-connected disability.[7] | do | do | do [4] | do [4] | do [4] | do | do | do | 38 U.S.C. 501 et seq. |
| Vocational rehabilitation [7] | do | do | do [4] | do [4] | do [4] | do | do | do | 38 U.S.C. 1501 et seq. |
| Education and training [7] | do | do | do [4] | do [4] | do [4] | do | do | do | 38 U.S.C. 1601 et seq. |
| Loans [7] | do | do | do [4] | do [4] | do [4] | do | do | do | 38 U.S.C. 1801 et seq. |
| Unemployment compensation | do | do | do [4] | do [4] | do [4] | do | do | do | 38 U.S.C. 2001 et seq. |
| Special housing | do | do | do [4] | do [4] | do [4] | do | do | do | 38 U.S.C. 801 et seq. |
| Hospitalization [8] | do | do | do [4] | do [4] | do [4] | do | do | do | 38 U.S.C. 601 et seq. |
| Domiciliary care [8] | do | do | do [4] | do [4] | do [4] | do | do | do | 38 U.S.C. 601 et seq. |
| Outpatient medical treatment [8] | do | do | do [4] | do [4] | do [4] | do | do | do | 38 U.S.C. 601 et seq. |
| Outpatient dental treatment [8] | do | do | do [4] | do [4] | do [4] | do | do | do | 38 U.S.C. 601 et seq. |
| Prosthetic appliances | do | do | do [4] | do [4] | do [4] | do | do | do | 38 U.S.C. 613 |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Seeing-eye dogs and mechanical electronic equipment. | (9) | (9) | (9) | (9) | (9) | do | do | do | 38 U.S.C. 614. |
| Automobiles [10] | (11) | (11) | (11) | (11) | (11) | do | do | do | 38 U.S.C. 1901 et seq. |
| Compensation for service-connected death.[12] | Eligible | Eligible | Eligible [4] | Eligible [4] | Eligible [4] | do | do | do | 38 U.S.C. 301 et seq. |
| Pension for non-service-connected death.[13] | do | do | do [4] | do [4] | do [4] | do | do | do | 38 U.S.C. 501 et seq. |
| Burial expenses [8] | do | do | do [4] | do [4] | do [4] | do | do | do | 38 U.S.C. 902 et seq. |
| Burial flags [8] | do | do | do [4] | do [4] | do [4] | do | do | do | 38 U.S.C. 901. |
| BENEFITS ADMINISTERED BY OTHER FEDERAL AGENCIES | | | | | | | | | |
| Farm loans and preference for such loans (Department of Agriculture). | do | do | do | do | do | do | do | do | Bankhead-Jones Farm Tenant Act (50 Stat. 522), as amended (7 U.S.C. 1001 et seq.). |
| Preference for farm housing loans (Department of Agriculture). | do | do | do | do | do | do | do | do | Sec. 507, Housing Act of 1949 (63 Stat. 436), as amended (42 U.S.C. 1477). |
| Homestead preference (Department of Interior). | do | do | Not eligible | Not eligible | Not eligible | Not eligible | do | do | Sec. 1, act of Mar. 1, 1921 (41 Stat. 1202), as amended (43 U.S.C. 238); sec. 1, act of Sept. 27, 1944 (ch. 421, 58 Stat. 747), as amended (43 U.S.C. 279). |
| Desert land preference (Department of Interior). | do | do | do | do | do | do | do | do | Sec. 1, act of Mar. 1, 1921 (41 Stat. 1202), as amended (43 U.S.C. 238); sec. 2, act of Dec. 15, 1921 (42 Stat. 348; 43 U.S.C. 331). |
| Civil service preference (Civil Service Commission). | do | do | do | do | do | do | do | do | Sec. 2, Veterans' Preference Act of 1944 (58 Stat. 387), as amended (5 U.S.C. 851). |
| Reemployment benefits, Federal or private (Civil Service Commission or Department of Labor). | do | do | do | do | do | do | do | do | Sec. 9, Univeral Military Training and Service Act (62 Stat. 614), as amended (50 U.S.C. App. 459); pt. 35, Civil Service Commission Regulations. |
| Job counseling and employment placement (Department of Labor). | do | do | Eligible [4] | Eligible [4] | Eligible [4] | do | do | do | 38 U.S.C. 2010 et seq. |
| Unemployment compensation, veterans of service after June 26, 1950 (Department of Labor). | do | do | do [4] | do [4] | do [4] | do | do | do | 38 U.S.C. 2001 et seq. |
| Naturalization benefits (Department of Justice). | do | do | Not eligible | Not eligible | Not eligible | do | do | do | Sec. 329, Immigration and Nationality Act (66 Stat. 250), as amended (8 U.S.C. 1440). |

See footnotes at end of table, p. 18.

*Incidents of discharge*—Continued

| | Honorable | General | Undesirable [1] | Discharge [2] (under other than honorable conditions) | Bad-conduct discharge | | Dishonorable | Resignation for the good of the service AR 635-89 (officers), homosexuality in lieu of courts-martial | Authorization for benefit |
|---|---|---|---|---|---|---|---|---|---|
| Social Security (Social Security Administration). | Eligible | Eligible | Eligible [4] | Eligible [4] | Eligible [4] | Not eligible | Not eligible | Not eligible | Sec. 217, Social Security Act, as added by sec. 105, Social Security Act Amendments of 1950 (64 Stat. 512) as amended (42 U.S.C. 417); title IV, act of Aug. 1, 1956 (Public Law 881, 84th Cong., 70 Stat. 869 et seq.). |

[1] Title 10, United States Code, secs. 1161 and 6408, provides for the dropping from the rolls of an officer absent without leave more than 3 months or who has been convicted by civilian authorities and sentenced to confinement in a Federal or State penitentiary or correctional insitution. This office has previously stated that such separation will usually be characterized as under other than honorable conditions.

[2] Resignations for the good of the service are normally accepted as under other than honorable conditions and a discharge (under other than honorable conditions) is issued. Subparagraph 4d, Army Regulations 635-120, dated Nov. 25, 1955, provides however, that if the Department of the Army determines that the resignation be accepted under honorable conditions, an honorable or general discharge may be furnished. As a matter of policy if it is determined that the resignation is under honorable conditions it is no longer considered a resignation for the good of the service but as a resignation under honorable conditions.

[3] Paid by the Army, determination of conditions of discharge by the Veterans' Administration.

[4] Subject to a review of the facts surrounding the discharge by the agency administering the benefit except in the case of death gratuities by the Administrator of Veterans' Affairs.

[5] Sec. 4821, Revised Statutes (24 U.S.C. 49) provides that certain soldiers with service in the Army of the United States are eligible for admission to the Soldiers' Home. Sec. 4822; Revised Statutes (24 U.S.C. 50) provides "the benefits of the Soldiers' Home shall not be extended to any soldier in the Regular of volunteer service, convicted of felony or other disgraceful or infamous crimes of a civil nature after his admission into the service of the United States; nor shall anyone who has been a deserter, mutineer, or habitual drunkard be received without such evidence of subsequent service, good conduct, and reformation of character as is satisfactory to the commissioners."

[6] 38 U.S.C. 3103 provides in substance that discharge or dismissal by reason of sentence of GCM and other discharges and dismissals specified, shall bar all rights based upon the period of service from which discharged or dismissed, under any laws administered by the Veterans' Administration.

[7] Applicable only in the case of veterans who served during a period of war.

[8] Available only under certain conditions.

[9] Eligibility dependent upon entitlement to disability compensation.

[10] Available only to veterans of World War II and Korean war who had war disabilities.

[11] Eligibility dependent upon entitlement to disability compensation for 1 of specified disabilities.

[12] Death must have occurred prior to Jan. 1, 1957.

[13] Applicable only to widow or children of deceased veteran who served during period of war.

NOTE.—State benefits: The States provide a varying number of veterans' benefits which include bonuses, burial rights, employment preferences, and tax benefits. No general rule can be stated as to eligibility requirements for such benefits. Some States require an honorable discharge; others require discharge under conditions other than dishonorable, service with honor, or satisfactory service.

Source: Prepared in the Military Affairs Division, Office of the Judge Advocate General of the Army (revised Oct. 1, 1960).

Mr. CREECH. In discussing the need for military discharges, you stated that:

> Among the common and undisputed reasons for early termination of enlistment or obligated service are convenience of the Government, usually incidental to a reduction of forces, disability, minority, hardship or dependency, unsuitability, and, under certain circumstances, the convenience of the individual.

I should like to ask, sir, how specific or, rather, what are the specifications with regard to the term "unsuitability," or is this a broadly construed term?

Mr. RUNGE. With respect to unsuitability, the Department of Defense directive, the 1959 directive, goes into some degree of detail with respect to that point. The actual section is VII(g), "Unsuitability."

> Such discharges will be effected when it has been determined that an individual is unsuitable for further military service because of—

and then we list inaptitude, and these are spelled out in some detail, character and behavior disorders, apathy, defective attitudes, inability to expend effort constructively, alcoholism, homosexual tendencies, and then a general provision of special considerations, so that we have attempted to get this degree of uniformity, some definitions and criteria with respect to unsuitability.

Mr. CREECH. So I gather from what you say, sir, that this is a very broad area?

Mr. RUNGE. Yes.

Mr. CREECH. And it is left largely to the discretion of the officers who are reviewing the various cases which come before them?

Mr. RUNGE. Almost by definition, in this area there must be broad discretion with the commanding officer concerned. But this is given some further degree of definition.

I have just read the headings off of these. For example, with respect to behavioral disorders, we say:

> character and behavioral disorders, disorders of intelligence, and transient personality disorders due to acute or special stress, as defined with reference to the joint Armed Forces Nomenclature and Methods of Recording Psychiatric Conditions.

We have attempted to give some degree of guidance to the commander concerned.

Mr. CREECH. Mr. Secretary, would a man who, for instance, was indebted and whose debts had been brought to the attention of his commanding officer be included under this category as undesirable?

We have got a number of cases in which servicemen tell us that they have received administrative discharges for various reasons, and in some instances it has been indicated that indebtedness was one of them.

Mr. RUNGE. Yes, sir.

Mr. CREECH. Is my understanding correct that that would fall within that category?

Mr. RUNGE. If I may suggest, I think we have shifted, at least in terms of our definitions, from unsuitability to what we term unfitness. But in the matter of debts I will attempt to give a general answer on this point by saying that the Department and the services do not view our establishment as a collection agency, and I think our commanders, and properly so, resist the creditors who attempt to use command control to enforce payments.

On the other hand, due recognition is given to the difficulties that can come to any man, whether he be in military or civilian life, of illness in the family—fortunately, on the military side we take, I suggest, reasonably good care of our people, so that this is not a cause, but things can happen to an individual in which debts pile up. If a man is doing his best under the circumstances to work his way out of an accumulation of debts, I suggest that a responsible commander is not going to discharge the man for this. But we put it in this language:

"An established pattern showing dishonorable failure to pay just debts," in the sense that the individual could care less whether he is paying them to the point where it is bringing discredit on himself and on the command. That is, in general terms, our position.

I think the service representatives can perhaps refine that or give specific examples.

Mr. CREECH. Thank you.

Now, on the same page, the second paragraph, you mention the elimination of a very small percentage of persons who demonstrate clearly by conduct or performance of duty that they are unfit for military service.

Is there any specification with regard to this performance factor?

Mr. RUNGE. I would say that, so far as we are concerned in the Office of the Secretary of Defense, that we spell this out in terms of the general headings of unfitness, misconduct, or for security reasons, and we give under each of these headings the sort of criteria that I was talking about in terms of the failure for the payment of debts.

It is general but we think that it gives a guidepost for a commander or for the board to follow in reviewing the facts. Actually, those are set forth in the 1959 directive under "security, unfitness, and misconduct," and I should say that this directive makes a cross reference to the security directive.

I think it would be appropriate for us to file with the committee, if the staff does not already have it, the basic security directive of the Department, which complements this directive on administrative discharges. Those are the three areas.

Mr. CREECH. All right, sir.

It may be that that directive will clarify some of the other questions which I have.

The next question which I would like to pose comes from the last paragraph on that page of your statement, where you discuss the administrative separation under other than honorable conditions and the homosexual in specific cases.

I would like to ask you, sir, if it is not frequently the case that the major question involved in these cases is whether or not the man is a homosexual.

Now, this has been the basis for many complaints which have been brought to the committee's attention. Is that not usually the question involved: That the man frequently denied that he is a homosexual?

Mr. RUNGE. I think this may be the situation in which there is a denial. Again, I think that the responsible commander will have enough evidence of the behavior on which to proceed, and, as is indicated under these circumstances, to establish enough of a record to satisfy the board that would be involved.

Mr. CREECH. Sir, you go on to say that:

The court-martial of a homosexual is difficult in that speedy trial and conviction often are impossible.

I should like to inquire, why is this the case?

Mr. RUNGE. I think the problem in this area is the question of building an adequate case, admissible evidence, because of the very nature of the offense. I appreciate the basis for your question, and I am suggesting that the board under these circumstances can make a reasonable determination to satisfy it that the offense, in fact, has occurred and that there is a basis for discharge, whereas you may not, in fact, be able to establish the case in terms of submission of evidence in a court.

Senator ERVIN. The offenses of a homosexual are committed in secret almost invariably; are they not?

Mr. RUNGE. Yes, sir.

Senator ERVIN. And he usually has an accomplice with which he participates. Normally, he and the accomplice are the only ones who have personal knowledge of the act.

Mr. RUNGE. And it becomes very difficult for the other party, usually, by the very nature of the offense, who declines, as I understand the situation from our people, in fact, to testify to the acts.

Mr. CREECH. So when a man is accused of homosexuality, in such instances he requests a court-martial, that is denied; is that correct?

Mr. RUNGE. It could be.

Let me see if I understand your question. Where the person accused demands a trial, that it may be denied.

If I may, I would like to turn to Mr. Bartimo on this question of denial of trial.

Mr. BARTIMO. I think, generally, to answer your question, there is no right to a trial. But, as the Secretary has indicated, here we are dealing with an extremely delicate type of an offense. I want to add a footnote. I think the chairman has put his finger on probably the crucial issue in this particular type of offense.

However, I think for the record we should state that the commanding officers in the field are guided by psychiatric and psychological advice. This is very significant. They certainly do not want to label an individual who is not a homosexual as one.

Furthermore, as you well know, because we are human, mistakes are made, but they have, and we do have, recourse to straighten out any of these errors. Our boards of correction of military records have reviewed, to my own knowledge, some rather dramatic cases where a man was accused of being a homosexual, when, as a psychologist, as a psychiatrist says, it was an experimental, one-time affair.

Such cases are reviewed. They are very carefully looked into, and the records are straightened out.

Senator ERVIN. Of course, you do have, as you say, a very delicate field, and you also have an organization where a very strong suspicion may develop that someone in the organization is a homosexual; and you not only have a delicate thing with reference to the rights of the homosexual, but there is a feeling or a strong suspicion in the unit; there is a great resentment on the part of the other members of the unit in having a forced association with a man whom they strongly suspect of being a homosexual.

This is a most difficult field, is it not?

Mr. BARTIMO. This is very true, Mr. Chairman, and, if I may, just to supplement what you have said, we had an experience when I was in the Navy during World War II, where on my particular ship, a heavy cruiser, such an incident just as you indicated came about.

The commanding officer of that ship was very concerned that morale might be affected seriously. His first concern was to get this man off that ship and put him in the hands of proper authorities to determine whether or not he was such an individual. This is an attitude which I think prevails even today.

Mr. CREECH. Mr. Secretary, on page 5 you speak of the chronic offender. You say he is one who "commits a series of offenses prejudicial to good order and discipline."

I wonder, sir, if you would indicate to us the specification with regard to the seriousness of offenses which you have in mind and also how many, if there is any rule of thumb.

Mr. RUNGE. I do not think that I can give you a rule of thumb in terms of how many offenses. I suggest that the chronic military offender that I speak of here is the sort of individual that every company commander understands exactly of whom you speak. This is the person who does not break the line; he does not necessarily go a.w.o.l., you see; he does not necessarily steal or refuse to obey.

It is just a repetition, a constant disciplinary problem, not reaching the point of trial, but who is frankly of no value to the command, a constant sort of difficulty to the command, and this is what I described as the chronic military offender.

Mr. CREECH. Senator Keating posed the question with regard to the percentage breakdown you have here of the 97 percent of the members of the armed services who were separated during fiscal year 1961—who earned honorable discharges or discharges under honorable conditions.

You gave us there a breakdown for 1961. You indicated that you have a similar breakdown for the previous 5 years. I should like to ask, sir, if you would insert that also in the record.

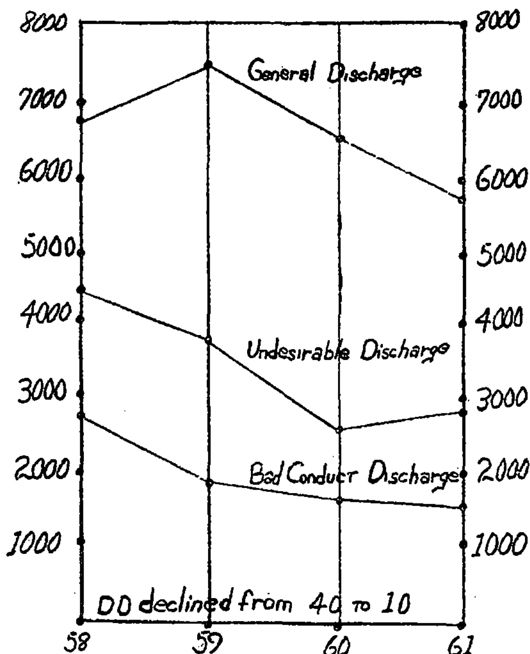
Mr. RUNGE. Yes, indeed.

(The information to be supplied is as follows:)

EXHIBIT 2

*Percentage recapitulation—Department of Defense discharges/separations, enlisted personnel*

| Fiscal year | Honorable or under honorable conditions (general) | Undesirable | Bad conduct | Dishonorable |
|---|---|---|---|---|
| 1957 | 95.17 | 3.42 | 0.98 | 0.44 |
| 1958 | 95.23 | 3.63 | .89 | .25 |
| 1959 | 96.00 | 3.09 | .75 | .15 |
| 1960 | 96.43 | 2.64 | .79 | .14 |
| 1961 | 97.02 | 2.20 | .69 | .09 |




NOTE.—Chart applies to Navy Department only.

Mr. CREECH. Now, going on with your statement, the Department of Defense directive which you mentioned, that is being inserted in the record; is it not?

Mr. RUNGE. Yes, counsel.

(The Directive referred to follows:)

JANUARY 14, 1959.
No. 1332.14
ASD (MP&R)

DEPARTMENT OF DEFENSE DIRECTIVE

Subject: Administrative Discharges.
References:
(a) SecDef memorandum to Secretaries of Army, Navy and Air Force, August 2, 1948, as amended (cancelled herein)
(b) OSD memorandum, "Discharge of Homosexuals from the Armed Services," (M–46), October 11, 1949 (cancelled herein)

I. PURPOSE AND CANCELLATIONS

This directive revises the standards and procedures governing the administrative discharge of enlisted persons from the Armed Forces. The referenced memoranda and any other existing regulations in conflict with the provisions of this Directive are superseded and cancelled ninety days after date of issue of this Directive.

II. APPLICABILITY

The policies and regulations set forth herein are applicable to the Army, the Navy, the Air Force, the Marine Corps, and, by agreement with the Secretary of the Treasury, to the Coast Guard, and to all Reserve components thereof.

III. ADMINISTRATION

Each of the Armed Forces to which these policies and regulations are applicable will, prior to the cancellation date of the referenced memoranda, issue appropriate regulations under this Directive.

### IV. DEFINITIONS

A. *Military behavior* as used herein refers to the conduct of the individual while a member of an Armed Service.

B. *Military record* as used herein includes an individual's military behavior and performance of duty, and reflects the character of the service he has rendered while a member of an Armed Service.

C. *Honorable discharge.*—An Honorable Discharge is a separation from an Armed Service with honor.

D. *General discharge.*—A General Discharge is a separation from an Armed Service under honorable conditions of an individual whose military record is not sufficiently meritorious to warrant an Honorable Discharge.

### V. PRE-SERVICE ACTIVITIES

Except for misrepresentations (including omissions) made in connection with his enlistment or induction, activities that a member of the Armed Forces engaged in before he acquired status in the Armed Forces may not be considered in determining the type and character of discharge or separation to be issued. The type and character of the discharge will be determined solely by the member's military record.

### VI. STANDARDS FOR DISCHARGE

The type and character of discharge or separation and the reasons therefor will be determined in accordance with the following standards:

A. *Honorable discharge.*—Issuance of an Honorable Discharge is conditioned upon:

1. Proper military behavior. Ordinarily, an Honorable Discharge will not be issued if an individual has been convicted of an offense by General Court-Martial or has been convicted by more than one Special Court-Martial in the current enlistment, period of obligated service, or any extensions thereof.

2. Proficient and industrious performance of duty having due regard to the rate, rank or grade held and the capabilities of the individual concerned.

3. Eligibility for discharge by virtue of one of the following reasons:

   a. Expiration of enlistment or fulfillment of service obligation, as applicable.
   b. Convenience of the Government.
   c. Hardship or dependency.
   d. Minority.
   e. Disability.
   f. Unsuitability.
   g. Security.
   h. When directed by the Secretary of the Department concerned.
   i. Resignation—own convenience.

*Special considerations.*—An individual may, where otherwise ineligible, receive an Honorable Discharge if he has, during his current enlistment, period of obligated service, or any extensions thereof, received a personal decoration as defined by the respective services, or is discharged as a result of a disability incurred in line of duty. In each of the above situations, the individual's military record should form the basis for the action taken.

B. *General discharge.*—Issuance of a General Discharge is conditioned upon:

1. Military record not sufficiently meritorious to warrant an Honorable Discharge.

2. Eligibility for discharge by virtue of one of the reasons listed in VI. A. 3.

C. *Undesirable discharge.*—An Undesirable Discharge is an administrative separation from the service "Under Conditions Other than Honorable." It is issued for unfitness, misconduct or for security reasons. It will not be issued in lieu of trial by court-martial except upon the determination by an officer exercising General Court-Martial jurisdiction or by higher authority that the interests of the service as well as the individual will best be served by administrative discharge.

*Special considerations.*—Notwithstanding the foregoing, whenever the particular circumstances in a given case so warrant, an administrative discharge other than an Undesirable Discharge may be issued.

## VII. REASONS FOR DISCHARGE

A. *Expiration of enlistment or fulfillment of service obligation (as applicable).*—Discharge with an Honorable or a General Discharge as warranted by the individual's military record (Par VI A or B, as applicable).

B. *Convenience of the Government.*—Discharge with an Honorable or a General Discharge as warranted by the individual's military record, for the following reasons:

1. General demobilization, reduction in authorized strength or by an order applicable to all members of a class of personnel specified in the order.
2. Acceptance of a commission or appointment in any branch of the Armed Services, for active duty only.
3. National health, safety or interest.
4. To permit immediate enlistment or reenlistment.
5. Erroneous induction or enlistment.
6. To provide for the discharge of individuals serving in unspecified enlistment.
7. In the case of women, marriage, pregnancy, parenthood, or custody of children under age 18.
8. For other good and sufficient reasons when determined by the Secretary of the Department concerned.

C. *Resignation—Own convenience.*—Discharge with an Honorable or a General Discharge as warranted by the individual's military record, on an individual basis, in accordance with regulations of the Service concerned. Such discharge may be effected as early release for the convenience of the Government.

D. *Dependency or hardship.*—Discharge or separation or release by reason of dependency or hardship with an Honorable or a General Discharge, as warranted by the individual's military record. Discharge may be directed when it is considered that undue and genuine dependency or hardship exists, that the hardship or dependency is not of a temporary nature, and that conditions have arisen or been aggravated to an excessive degree since entry into the Service and the member has made every reasonable effort by means of application for Family Allowance and voluntary contributions which have proven inadequate; that the discharge of the individual will result in the elimination of, or will materially alleviate the condition and that there are no means of alleviation readily available other than by such discharge.

Undue hardship does not necessarily exist solely because of altered present or expected income or because the individual is separated from his family or must suffer the inconveniences normally incident to military service.

E. *Minority.*—Discharge by reason of minority with an Honorable or General Discharge as warranted by the individual's military record, or release by voidance of enlistment upon determination that the individual's age was misrepresented upon enlistment or induction as follows:

1. Males, if enlisted and under 17 years of age, or inducted and under 18 years and six months of age, when verified, release from military control by discharge, release or voidance of enlistment.
2. If an enlisted man, enlisted without proper consent and having passed his 17th birthday, but not his 18th birthday, discharge upon application of parent or legal guardian as prescribed by law.
3. If an enlisted man having passed his 18th birthday when verified—retain if otherwise qualified.
4. Females, if enlisted and under 18 years of age, or inducted and under the age prescribed by law for such induction, release from military control by discharge, release or voidance of enlistment.
5. If an enlisted woman enlisted without proper consent, having passed her 18th birthday, but not her 21st birthday, when verified—discharge upon application of parent or legal guardian as prescribed by law.

NOTE.—The enlistment of a minor with false representation as to age without proper consent will not in itself be considered as fraudulent enlistment.

F. *Disability.*—Discharge by reason of physical disability, with an Honorable or General Discharge as warranted by the individual's military record, when it has been determined as a result of medical findings that the individual is physically unfit to perform the duties of his office, rank, grade or rating.

G. *Unsuitability.*—Discharge by reason of unsuitability, with an Honorable or General Discharge as warranted by the individual's military record. Such

discharge will be effected when it has been determined that an individual is unsuitable for further military service because of:

1. Inaptitude: Applicable to those persons who are best described as *inapt*, due to lack of general adaptability, want or readiness of skill, unhandiness, or inability to learn.

2. Character and behavior disorders: Character and behavior disorders, disorders of intelligence, and transient personality disorders due to acute or special stress as defined in "Joint Armed Forces Nomenclature and Method of Recording Psychiatric Conditions—1949" (SR 40-1025-2; NavMed P-1303; AFR 160-13A).

3. Apathy, defective attitudes and inability to expend effort constructively: As a significant observable defect, apparently beyond the control of the individual, elsewhere not readily describable.

4. Enuresis.

5. Alcoholism: Chronic, or addiction to alcohol.

6. Homosexual tendencies.

7. Special considerations: For other good and sufficient reasons when determined by the Secretary of the Department concerned.

H. *Security.*—Discharge with the character of discharge and under conditions stipulated by the Secretary of Defense in directives which deal explicitly with this matter when retention is not clearly consistent with the interest of national security.

I. *Unfitness.*—Discharge by reason of unfitness, with an Undesirable Discharge, unless the particular circumstances in a given case warrant a general or honorable discharge, when it has been determined that an individual's military record is characterized by one or more of the following:

1. Frequent involvement of a discreditable nature with civil or military authorities.

2. Sexual perversion including but not limited ot (1) lewd and lascivious acts, (2) homosexual acts, (3) sodomy, (4) indecent exposure, (5) indecent acts with or assault upon a child, or (6) other indecent acts or offenses.

3. Drug addiction or the unauthorized use or possession or habit-forming narcotic drugs or marijuana.

4. An established pattern for shirking.

5. An established pattern showing dishonorable failure to pay just debts.

6. For other good and sufficient reasons when determined by the Secretary concerned.

J. *Misconduct.*—Discharge by reason of misconduct, with an Undesirable discharge, unless the particular circumstances in a given case warrant a general or honorable discharge, when one or more of the following conditions have been determined:

1. Conviction by civil authorities (foreign or domestic) or action taken which is tantamount to a finding of guilty of an offense for which the maximum penalty under the UCMJ is death or confinement in excess of one year; or which involves moral turpitude; or where the offender is adjudged a juvenile delinquent, wayward minor, or youthful offender as a result of an offense involving moral turpitude. If the offense is not listed in the MCM Table of Maximum Punishments or is not closely related to an offense listed therein, the maximum punishment authorized by the U.S. Code or the District of Columbia Code, whichever is lesser, applies. For the purpose of this subparagraph only, an individual shall be considered as having been convicted even though an appeal is pending or is subsequently filed.

2. Procurement of a fraudulent enlistment, induction or period of obligated service through any deliberate material misrepresentation or concealment which, except for such misrepresentation or concealment, may have resulted in rejection.

3. Prolonged unauthorized absence. When unauthorized continuous absence of one year or more has been established but punitive discharge has not been authorized by competent authority.

## VIII. PROCEDURES FOR DISCHARGE

In accordance with the standards hereinbefore outlined, the following procedures will be adhered to in effecting administrative discharges:

A. *Honorable discharge.*—A separation with an Honorable Discharge may be effected by the individual's commanding officer or higher authority when the individual is eligible for or subject to discharge and it has been determined that he merits an Honorable Discharge under the prescribed standards.

B. *General discharge.*—A separation with a General Discharge may be effected by the individual's commanding officer or higher authority when the individual is eligible for or is subject to discharge and it has been determined under the prescribed standards and in accordance with any prescribed administrative procedures that a General Discharge is warranted.

C. *Discharge for unsuitability.*—An individual recommended for an honorable or general discharge for reason of unsuitability shall be afforded the opportunity to make a statement in his own behalf.

D. *Undesirable discharge.*—An Undesirable Discharge will be effected only by authority of a properly approved administrative action conforming to the prescribed standards, during which the following procedures and safeguards have been observed:

1. The individual if subject to such discharge *will,* if his whereabouts is known, be properly advised of the basis for the contemplated action and afforded an opportunity to request or waive, in writing, the following privileges:

   a. To have his case heard by a Board of not less than three officers. In the case of non-regular component members, all boards so convened shall include appropriate numbers from the Reserve components. In the case of female members, all boards so convened shall include at least one female officer.

   b. To appear in person before such board, subject to his availability, e.g., not in civil confinement.

   c. To be represented by counsel, who, if reasonably available, should be a lawyer.

   d. To submit statements in his own behalf.

2. Separation with an Undesirable Discharge may be effected by an officer exercising general court-martial jurisdiction or by higher authority (including departmental headquarters) after review of the findings and recommendations made by any board which was convened to consider the case.

3. Except for Reservists, Departmental Secretaries are authorized to waive the requirements set forth in paragraph 1, above (except 1d) when such action is deemed in the best interest of the military service. Departmental Secretaries will advise the Assistant Secretary of Defense (Manpower, Personnel, and Reserve) by memorandum not later than 15 July each year of any such actions taken during the preceding fiscal year, and the reasons therefor. The reporting requirement of this paragraph has been assigned Report Control Symbol DD–MP&R(A)370.

IX. IMPLEMENTATION

Each Military Department will forward copies of implementing instructions to the Assistant Secretary of Defense (Manpower, Personnel and Reserve) within ninety days after date of this Directive.

NEIL H. MCELROY,
*Secretary of Defense.*

Mr. CREECH. Sir, later in your statement you speak of the standards for issuance of the honorable discharge, and you mention "proficient and industrious performance of duty" is one of the criteria.

There again is an area in which we have received many complaints, servicemen citing their performance records and various citations they have received from previous commanders and what have you.

I wonder if you would indicate to us the guidelines that are used with regard to proficient, industrious performance of duty.

Mr. RUNGE. From the Office of the Secretary of Defense, again with respect to our basic directive, it is in this language:

> The honorable discharge is conditioned upon proper military behavior. Ordinarily, an honorable discharge will not be issued if an individual has been convicted of an offense by general court or has been convicted by more than one special court in the current enlisted period for obligated service or any exten-

sions thereof. Secondly, proficient and industrious performance of duty, having due regard for the rate, rank, and grade held and the capabilities of the individual concerned.

Now, we do not give this standard for honorable discharge any further definition, because I am suggesting that the presumption is that a man gets an honorable discharge unless he falls into a category for one of the lesser discharges which we go into greater detail to specify.

But we do point out that even though, and, as I have indicated in my statement, that there are special considerations—let us assume that perhaps the individual has not been, or his industry and proficiency has not been up to the standard, the commonly accepted standard of the serviceman, but, as I have pointed out, that we take into consideration the capabilities of the individual.

And if there was anything of a special nature that occurred during his period of enlistment, either a decoration or disability incurred in line of duty—in other words, we attempt to give this individual every consideration, particularly if there is something of an outstanding nature in his record to offset perhaps that which is otherwise below the norm.

Mr. CREECH. It is this standard that we are trying to arrive at, because this is the crux of some of the complaints which we receive.

The allegation is made that there is no standard; that this is a very nebulous thing. Men have written to us, attorneys have written to us, have brought cases to our attention, in which they show that their clients have had consistently high proficiency ratings, and that this standard is rather a nebulous thing.

I wonder, sir, for instance, are they standards for different grades? Are they standards for different ranks?

Mr. RUNGE. The services will take up with you the rating systems, you see, that they use, and they vary from service to service, in evaluating their troops. But, as I suggested, the presumption of the good soldier, if you please, the good airman or sailor, is that there will be an honorable discharge unless, in fact, he falls into one of these other categories. For example, unsuitability, and then, as you go down the line, misconduct, unfitness, a security situation.

And, as counsel pointed out earlier, if, in fact, a commanding officer makes a mistake and issues something less than an honorable discharge, we do have, as you know, the review proceedings or the initial proceedings, review proceedings, and eventually at the Department of Defense level the Discharge Review Boards and the Board on Correction of Military Records.

Mr. CREECH. I would like to pursue on a slightly different basis, sir. You speak of the general discharge?

Mr. RUNGE. Yes.

Mr. CREECH. There you say that this discharge—

is issued when the member's military record is not sufficiently meritorious to warrant an honorable discharge.

This, on the basis of what you have said, I gather, is strictly a matter of review for the officer, the commanding officer, to decide whether one's conduct is sufficiently meritorious.

Is there some criteria to differentiate between the proficient and industrious performance as opposed to this?

Mr. RUNGE. It seems to me, counsel, after having staked out the general standards of behavior for the honorable discharge, and having set forth the conditions and the criteria for something less than an honorable discharge and related to the undesirable discharge, that this does form the basis and these are the criteria for making the determination.

There is no, it seems to me, statutory or directive language that can substitute for the experience of a commanding officer over a period of years in dealing with his men in terms of fixing that which is proficient and industrious in terms of the honorable and that which is not meritorious to that extent.

Mr. CREECH. Mr. Secretary, in your opinion and based on your experience, is it your feeling that these procedures are constantly adhered to?

In other words, that a man who might receive an honorable discharge in one instance, let us say during the Korean conflict or World War II, when so many people were being discharged, and, yet, during peacetime might not?

Are the standards the same?

Are the standards more or less constant, or do they seem to vary?

Mr. RUNGE. It would be presumptuous of me to suggest that the standards are uniform both as within any given service or from service to service. Certainly there are factors of judgment that shade these actions from one command to another.

But, in the same sense, in any administrative process, whether it be in the Department of Defense or elsewhere, when individuals in good conscience attempt to apply general criteria to a situation, one cannot suggest that these things are uniform.

On the other hand, when you do have the provisions for review and appeal, the extremes, it seems to me, are cut off, and you attempt to achieve a rough degree of uniformity by eliminating the extremes.

Mr. CREECH. Mr. Secretary, you say in your statement with regard to the protection of the high standards of the honorable discharge, that one whose record is below the normal and who received a general discharge gets a certificate carrying no inherent prejudice.

Has it been your experience, sir, that general discharges are treated without prejudice by the public?

Do you feel that there is any discharge other than an honorable discharge which is not prejudicial to the serviceman when he goes out to seek employment?

Mr. RUNGE. I think it would be improper to suggest that the general discharge does not carry with it the potential and the possibility of a degree of prejudice on the part of the individual with whom this serviceman may have future contact. I am suggesting that when I said "inherent prejudice," that it is given under honorable conditions.

On the other hand, I well recognize that the individual serviceman in a future situation outside the Department is not dealing with individuals that are living with this problem or that are as acquainted with it as we are. And I think that in the mores, social reaction of the country, that something less than an honorable discharge in many situations may well raise a question.

But at least, you see, as I indicated in the statement, we have gotten away from the situation of simply saying nothing, the "blue discharge" situation.

This is a general discharge under honorable conditions.

Mr. CREECH. But you would not say that it does not have an adverse effect or is not prejudicial to the veteran who goes out into the employment market with such a discharge?

Mr. RUNGE. It may have. My statement was that it does not have inherent prejudice within it.

Mr. CREECH. Mr. Secretary, you speak——

Senator ERVIN. I might be inclined to disagree with you there, Mr. Secretary.

In view of the high veneration which the American people generally have for those who receive honorable discharges, is it not inevitable that anything below an honorable discharge would tend to mark a man as not coming up to the high standards of the services?

Mr. RUNGE. Yes, sir.

Senator ERVIN. Which have caused the honorable discharge to rank so high in the estimation of the American people?

Mr. RUNGE. I think I would agree with you, Mr. Chairman. But, again, I would suggest that I think we are dealing with estimates of public reaction, and it becomes very difficult to generalize, at least generalize to the extent of saying that under all circumstances; but, as I indicated earlier, certainly the person, the employer who is acquainted with it may well have the honorable discharge himself, and that if it is something less than an honorable discharge, it may well raise a question.

Senator ERVIN. And, as I think you point out in different words in your statement fairly well, there are certain defects of attitude or defects of mentality or certain behavior reactions of individuals which render them unsuitable for military service, notwithstanding the fact that there is nothing essentially evil in either their attitudes or their mental states or their behavior.

Mr. RUNGE. This is quite right, Mr. Chairman.

The general discharge under honorable conditions indicates an inadequacy, but does not indicate that this person is dishonorable in any sense of the word.

Senator ERVIN. In other words, notwithstanding the Declaration of Independence assertion that all men are created equal, all men are not equally fitted for military service, and some of them, without any fault on their part and without any evil behavior on their part, manifest that fact when they are in service.

And your position is that those who are not able, who are unable by reason of things sometimes beyond their control, are not entitled to the highest recognition as members of the Armed Forces when they are separated from the services?

Mr. RUNGE. Yes, sir. And this is, because, as you have said, Mr. Chairman, the individual as well as the service can fall afoul of this situation. We are so much better off not to have taken this person in the first place. This is why all of us in the Military Establishment and in the Department maintain wherever possible high standards in terms of enlistment and high standards in terms of induction. I would like to point out, however, as I expressed it in my formal

statement, the basic policy is that the Service member of the low average capability can earn an honorable discharge providing he works to the best of his ability and behaves properly.

Senator ERVIN. These are things which cannot be determined prior to the entrance into service many times—until you have had an opportunity to observe the individual.

Mr. RUNGE. This is true. On the other hand, some of the categorization in terms of mental capacity form a pretty good test, at least give you a benchmark against which to predict the future.

Mr. CREECH. Did you want to make another point, Mr. Secretary?

Mr. RUNGE. I think not.

Mr. CREECH. I should like to continue, then.

You state here, sir, that termination of enlistment—

for reasons of unsuitability also is appropriate when members continue to display inaptitude or apathy, despite training, conscientious supervision, and sympathetic counseling.

This, again, is one of the areas in which we have received a number of complaints, and I wonder, sir, if you would tell the committee what you mean by "conscientious supervision and sympathetic counseling"?

Mr. RUNGE. We are speaking (1) of the commander's attention to the people in his unit, and (2) we are speaking of the services available to our people through long-established and well-recognized staff procedures.

As we all know, every military command has a chaplain, has a judge advocate, has an inspector general, it has a surgeon.

Their responsibility is to work with people and to be available to them, and I suggest that our commanders and their staffs do give sympathetic counseling to people who are having difficulties adjusting, and that our commanders work conscientiously to get the very best out of the people that come to them.

Mr. CREECH. We have received complaints indicating that the servicemen had no prior indication that their service was not acceptable; that they were showing any lack of aptitude or any apathy; and they apparently were surprised when confronted with this.

They maintain that they had received no counseling of any sort with regard to this.

Would you say that these complaints are unusual; that this is an unusual circumstance where men find themselves in this position in the service?

Mr. RUNGE. I think it would be the unusual.

Mr. CREECH. Mr. Secretary, you go on to say, with regard to the undesirable discharge, that it will not be issued in lieu of trial by court-martial—

except upon the determination by an officer exercising general court-martial jurisdiction or by higher authority that the interests of the service as well as the individual will be best served by administrative discharge.

Sir, I would like to inquire as to what type of instances the service feels that the individual is best served by administrative discharge?

Mr. RUNGE. I think there are a variety of circumstances in which it would be the judgment of the responsible commander to the effect that it would be in the best interest of the individual. The situation in which you already had a conviction in a civil court, in which there

was also jurisdiction within the Military Establishment, this person could be tried.

There seems to be little reason for thinking a court-martial would be in the individual's interest. The administrative discharge is more in his own interest than a second trial.

The Army, I know, has suggested that there are situations in which trial, possible confinement and forfeiture could cause a great deal of undue hardship on the serviceman's family. It is the sort of thing that in the civil courts judges are acquainted with and have to deal with in sentencing, the consideration of the impact, not just on the offender, but on the people that he is responsible for.

He may be better off and to the man's own interest to be given a discharge rather than proceeding with trial.

I think there are other situations in which the commander would feel that this person should be eliminated from the system because, if you please, he is a chronic military offender. That if this situation were to contiue, that the next thing that would happen might well be a triable offense, and that it is to his own interest to receive an administrative discharge. I think in terms of examples of this, the service personnel representatives and the judge advocates, I think, can provide to the committee greater detail and examples of this sort of situation.

Mr. CREECH. Mr. Secretary, with regard to convictions by civil courts——

Mr. RUNGE. Yes?

Mr. CREECH (continuing). Would administrative discharges be processed while such convictions were on appeal?

Mr. RUNGE. They might well be.

Mr. CREECH. And if subsequently the individual was successful in overturning the decision of the trial court, and he finds himself administratively discharged on the basis of an allegation which apparently was not proved, what is his remedy then?

Mr. RUNGE. I think his remedy, counsel, would be to one of the, in effect, appellate levels within the system. I believe that our directive provides that the action may be taken even though the matter is on appeal—am I right, Mr. Bartimo?

Mr. BARTIMO. That is right.

Mr. CREECH. Why is the service reductant to await a determination of the matter on appeal?

Mr. RUNGE. I suppose there are some practical considerations that come into play. It is conceivable, at least as to the time interval between the trial and appellate procedures—I think you have touched an area in the question here that raises some question in my mind, and I do not want to simply generate a defense for the record, except to say that this is what the directive now provides.

I think there may be some practical considerations, the presumption, perhaps, of an indictment, or, if not an indictment, the filing of information, the finding of guilt that indicated to the people who set the basic policy that you could act prior to the determination on appeal, taking the position that our own appellate and review procedures would cope with those relatively few situations in criminal proceedings in which you will find a conviction reversed on appeal.

But, nonetheless, I think that this raises a question worthy of further consideration.

Mr. CREECH. Do you know if this matter is being reviewed at this time by the Department?

Mr. RUNGE. It is not, to my knowledge, being formally reviewed, but I am suggesting that I think this is a matter worth our consideration.

Senator ERVIN. I want to say I agree with you in that observation.

There are quite a lot of reversals. I used to sit on the Supreme Court of North Carolina over the years. There are quite a number of reversals of convictions in the lower courts. It seems to me that something ought to be done about this, because it could be of very great interest if a man should receive an undesirable discharge on account of a conviction in a civil court, and then the appellate court would reverse the conviction, saying the case lacked evidence, as is done sometimes.

I wrote an opinion one time that reversed the case where the man was sentenced to the gas chamber. He was turned scot free where there was not sufficient evidence for conviction. I think this thing could be handled by a change in the regulations but, certainly, he ought not to be given an undesirable discharge on the basis of a civil conviction where he takes an appeal.

Some lawyers take appeals in all cases, but the great majority of lawyers do not take an appeal unless they think there is some merit in it.

Mr. RUNGE. Mr. Chairman, I think our counsel may know what our history on this particular issue has been as to whether or not we have had this sort of situation occur.

Mr. BARTIMO. Mr. Chairman, let me first say that I think where there is only one case of an injustice, certainly we ought to devote attention to it to be sure it does not multiply. I do not know of such a case. But I would like to point out that our procedures are flexible enough so that we may, with a sense of charity, reconstitute this man as a good soldier and a good citizen.

Mr. CREECH. I would just like to ask counsel if you are familiar with the case of *William Jackson, Jr.*, v. *the United States*. It was one of the cases of which a summary was supplied the subcommittee by the Air Force.

Mr. BARTIMO. I am not familiar with it by name. I may have heard of it, if I knew the facts.

Mr. CREECH. In that case the issue was whether the action of the Secretary, in refusing the plaintiff's application for change in the type of his discharge, was arbitrary and capricious, and a motion for summary judgment was granted in favor of the Government. This was in the Court of Claims.

Now, the plaintiff had been an Air Force enlisted man who had been convicted back in 1956. This judgment of the Court of Claims was rendered in 1962. The man had been convicted in 1956 in the State of Oklahoma for rape. He was sentenced to serve a term of 5 years confinement.

In 1956, November the 24th, less than 10 days later, he was discharged from the Air Force under the provisions of AFR 39–22, and furnished an undesirable discharge certificate.

On September the 20th, 1957, less than a year later, the Court of Appeals of the State of Oklahoma reversed the decision of the district court of the State on the theory that he had been deprived of the right of counsel at his trial, and remanded the case to the district court.

In May of 1958, the district court dismissed the proceedings upon the motion of the County Attorney because the prosecutor was no longer available within the jurisdiction of the court.

Then the man involved appealed to the Air Force for a correction of his military records in February of 1959, requesting a change in his type of discharge and reinstatement in the Air Force with back pay.

As I have stated, this was not done, in spite of the fact that the man's conviction was reversed.

You will be interested in knowing that the subcommittee has received within the past week a complaint involving a man with some 19 years of service, a similar type case.

Mr. BARTIMO. I think what you are bringing up here probably goes to what I would consider the heart of the matter in the Chairman's opening remarks.

To be certain that we in the Department of Defense are adhering to the constitutional prerogatives of every citizen, including the military man.

Now, take this case you have just cited. I suppose on the facts of it, the reversal was because of a legal technicality. Does the case or the fact situation indicate that he was innocent of this terrible crime of rape?

I don't know. But let us assume that it does not. It seems to me that this committee and the Congress and the American people, under a hypothetical case similar to the one you have cited—if the rape actually took place and the reversal was on a legal technicality, the military and the Department of Defense would be criticized, it seems to me, and rightly so, if we took back a man into uniform, knowing right well that he had committed this terrible crime.

How do you arrive at that fact?

It seems to me that the Board of Correction of Military Records would look at the entire record. I know from personal experience that these are very voluminous and very detailed hearings. This man is coming before that Board asking it to reverse an administrative determination. The burden is upon him to demonstrate in this particular hypothetical case we are talking about that he did not commit this crime of rape.

If the facts so indicate, as I stated previously, there is room to make this man whole again.

But let me add a footnote to what I have said, and I would hope that you would agree:

That under our system of jurisprudence we are willing to take the risk to let an accused, a guilty man go free, to be certain that we protect the innocent. I think within that philosophy we have to maneuver in the right approach, doing the right thing, when you relate it to the type of case and the duties of the Discharge Review Boards or even the Boards in the field that issue the discharges.

I hope you would agree to that.

Mr. CREECH. I would certainly feel that we in this country always presume that a man is innocent until proven guilty.

Mr. BARTINO. That is correct.

Mr. CREECH. And I would certainly hope that the Defense Department would concur in that, and so, until a man is convicted, that they would not presume to find him guilty of a crime.

Now, I cite for you the Jackson case again. In that case the man had been deprived of counsel, which was the reason the case was reversed on appeal.

But it seems to me equally compelling that if there had been a case of rape, that the prosecutrix would not have been unavailable for a retrial. This is, of course, really a moot question.

But we do receive complaints of this sort, and we have received another complaint this past week, and it certainly seems, as the Secretary said, that this is one of the regulations of the Department which certainly deserves very careful scrutiny, and perhaps immediate revision.

Mr. BARTIMO. May I, just to be sure we are clear so far as the Department of Defense is concerned, say we certainly adhere to the fundamental principle that a man is innocent until proven guilty in our criminal procedures in the Department of Defense.

Mr. CREECH. Thank you.

Mr. Secretary, in your statement, in discussing an undesirable discharge by reason of unfitness, you mention a number of types of individuals, a number of categories, pattern of shirking, continued dishonorable failure to satisfy just debts, frequent discreditable involvement with civil or military authorities. I wonder, sir, isn't a homosexual also included in that category?

Mr. RUNGE. Yes.

Mr. CREECH. Would that be a separate category to be included there?

Mr. RUNGE. If I may refer you, counsel, to that provision of our basic directive, which is section VII(g), we, of course, have the reasons or the criteria established under unsuitability, and specifically your question with respect to homosexuality is No. 6, "homosexual tendencies." Let me see—would you strike that?

At the bottom of page 7 of my statement, I am talking about undesirable discharge. The criteria there basically are unfitness, misconduct, and security. Under unfitness we have a series of points. The first is frequent involvement of discreditable nature with civil or military authorities.

No. 2, sexual perversion, including lewd and lascivious acts, homosexual acts, sodomy, indecent exposure, indecent assaults with, or upon, a child, and other acts or offenses.

Then we go on drug addiction, established pattern of shirking and so on and so forth.

So the basic statement, I am afraid, perhaps should have been amplified in detail with the several points that fall under our definition of unfitness.

Mr. CREECH. The reason I call attention to this is because this is the basis of many of the complaints which we have received, and I am certain there will be some that we will be bringing up again as we proceed.

Later in your statement you mention that:

> The undesirable discharge is issued only by the authority of properly approved administrative action during which specific procedures and safeguards must be observed.

Mr. RUNGE. Yes, sir.

Mr. CREECH. Then you quote from some of them, including notice that the individual shall be properly advised. How much notice is given to an individual that he is being considered for an undesirable discharge?

Is there any time element specified?

Mr. RUNGE. We do not. The services may in their regulations.

Admiral Clarey may be able to answer that specific point. If not, the services can.

If they do provide by regulation specific notice—I doubt it.

Admiral CLAREY. I do not know whether there is a specific time period provided in each of the four service regulations or not. I am not familiar with that.

Mr. CREECH. I see.

Admiral, I presume from that statement you would not know then whether an extension of time would be granted if requested?

Admiral CLAREY. I would only know from experience that in every instance, to my knowledge, where a man has requested an extension of time to prepare a statement or to have his case discussed or considered with his adviser or counsel, that the services are most liberal in granting that.

Mr. CREECH. Mr. Secretary, you mentioned that he is to be represented by counsel, who, if reasonably available, should be a lawyer.

Would you tell us, please, what is meant by the term "reasonably available"? When is a lawyer held to be reasonably available?

Mr. RUNGE. This may be difficult language.

What we intended and what I believe the services attempt to do is to look over the command and to see if there is available within the command a person who is qualified and, as we suggest, who is a lawyer, to assist and to represent this individual discharged before the Board.

I think that we would not, if I may use an example, if there were Army or Air Force Base in a relatively isolated area, we would probably not fly in a lawyer, an officer lawyer, to handle this particular matter.

On the other hand, when we say "reasonably available," if there was a lawyer within that complex, perhaps not within the unit but who could be assigned to this duty with due consideration to what his principal assignment may be, and his physical relationship to the command, this person would be assigned as counsel to the respondent.

Again, one can hardly define by looking at the basic words. But this is a matter for the commander to determine. If within his own command or within reasonable proximity a qualified person is available and his duties will allow, he will be assigned to represent this person or made available to him.

Mr. CREECH. And, to your knowledge, sir, this is the practice which is employed?

Mr. RUNGE. When hearings are held in which a waiver is not executed, it is my understanding that the services do make available representation.

Mr. CREECH. Now, I was interested also in the exception which you cite here in your prepared statement.

You say:

"Except for reservists, Departmental Secretaries are authorized to waive the requirements set forth above (except 1d)," which is the opportunity to submit statements in his own behalf, "when such action is deemed to be in the best interest of the military service."

I wonder, sir, if you can enlighten us as to how often Secretaries avail themselves of this authority to waive these requirements which you have indicated—these procedures which you feel are so important that you have listed them for us?

Mr. RUNGE. Counsel, the Air Force and the Navy, since the directive of 1959, have not availed themselves of this authority, the Army—Mr. Fitt, representing the Under Secretary, will speak to that during the course of your hearings—has undertaken certain revisions to put its actions on a parallel course with the Navy and the Air Force, prospectively. So that unless the individual waives the hearing or the proceedings, and if he is not in civil confinement, that he, in fact, can have, and will have, this right afforded him.

Mr. CREECH. Mr. Secretary, later in your statement you state that distinctions as to the character of administrative discharges should be reserved, and you give the reasons why you feel this is the case.

I wonder, sir, would you wish to differentiate between peacetime and wartime for the various procedures, including administrative discharge?

Mr. RUNGE. I am not sure, counsel, that I understand or appreciate the thrust of your question.

Mr. CREECH. Do you feel that there should be entirely different procedures for wartime as opposed to peacetime?

Mr. RUNGE. No, counsel, I do not see that we should have a peacetime basis for the handling of administrative discharges and a wartime basis.

The fact that you are at war, of course, makes the situation, the administration, whether it is personnel administration or anything else, a more complicated one, and there are some other factors that start entering into the picture in the individual's desire, if you please, to stay in the establishment, which may vary considerably.

But, basically, it seems to me that our standards with respect to our criteria for discharge and our procedures to the extent that actual military operations will allow should be followed.

My own experience during the war was that at least certainly on the court-martial side, that as difficult as proceedings sometimes were to administer and to hold and collect the witnesses and proceed, that, of course, we had them. The system is designed to operate under wartime conditions.

Mr. CREECH. Thank you, Mr. Secretary.

Mr. Everett has some questions which he would like to ask.

Mr. EVERETT. Mr. Secretary, with respect to the discharges for unfitness or for misconduct—administrative discharges—is there not authority in the regulations of each service to have one board consider the evidence and then, if the commanding officer does not agree with that board, to send back the case to another board which may render a less favorable finding for the respondent?

Mr. RUNGE. I am not sure, Mr. Everett, that I can accurately answer that question.

If I may, we will either attempt to provide an answer to the question, or if you would take the matter up with the services.

Mr. EVERETT. Perhaps I can rephrase the question in this way:

Assuming that such authority is provided for by the various service regulations, such as AFR 39–17, the Air Force regulation, with which I am acquainted, would you think that such authority was desirable, or would you feel that it went counter to the same type of policy that we find manifested in safeguards against double jeopardy?

Mr. RUNGE. If it were the matter of sending the exact case, this would raise some question. On the other hand, it may well be, it seems to me, there might be a finding in favor of the man concerned, and that 3 or 6 months later that, in the opinion of the commanding officer, the situation has, if you please, continued or gotten worse, and that you build up an accumulative case and that you may well send it to another board and get a different result, that it may not go to the same board because the same people may not be there to sit on the board.

Mr. EVERETT. Then I understand your answer to mean that in the absence of new or additional evidence, a case should never be remanded by a commanding officer to the same board or another board because he feels the recommendation is too favorable to the respondent?

Mr. RUNGE. Generally, Mr. Everett, I would agree with that.

Mr. EVERETT. Now, apropos of the questions earlier about the general discharge—and I believe, according to your statistics some 27,000 general discharges were given in the last year—and apropos of your apparent agreement with the comments by the chairman that anything other than an honorable discharge creates some element of stigma, would you feel it desirable to have a requirement that some sort of board hearing be held before a man could receive anything other than an honorable discharge?

Mr. RUNGE. I would have some question as to whether or not we should establish board proceedings to handle the general discharge. It is true that the number involved is substantial but not great in terms of the number of people that we process.

I also agreed with the chairman, as you indicated, that anything less than the honorable discharge raises some question, and this may vary from situation to situation.

The fact that the discharge is given under honorable conditions and for limited reasons, that this is probably a matter that can be left to the commanding officer concerned.

Mr. EVERETT. You do not feel it is necessary either to have a board or to have approval at the departmental level in that type of circumstance?

Mr. RUNGE. Certainly not approval at the departmental level, and, as I have indicated, I am not sure in my mind that a board is required to handle the general discharge situation.

Senator ERVIN. May I ask a question there?

As I understand it, under the law a person who receives a general discharge; that is, a discharge under honorable conditions——

Mr. RUNGE. Yes, sir.

Senator ERVIN (continuing). Is entitled to all the benefits which the law has created for veterans just the same as a person who receives an honorable discharge.

Mr. RUNGE. Yes, sir.

Senator ERVIN. And any lack of prestige which may result from the granting of a general discharge is something which the public and not the Department visits upon the recipient of that kind of a discharge?

Mr. RUNGE. Yes, sir; I think that is an accurate observation.

Senator ERVIN. So you are confronted with a bit of philosophy which says that it is difficult to remove by law distinctions not created by law?

Mr. RUNGE. Yes, sir.

Senator ERVIN. Of course, Mr. Everett's question is whether we can eliminate that in this respect. As I understand it, the services attempt to comply with the requirements of due process with respect to notice and opportunity to be heard in the case of undesirable discharges.

Mr. RUNGE. Yes, sir.

Senator ERVIN. In other words, he is given notice and can request, or he is given an opportunity to request, a hearing if his whereabouts are known to the services?

Mr. RUNGE. Yes, sir.

Senator ERVIN. And this hearing can be had.

Am I correct in understanding that, whether he has a hearing in the first instance or not, a person who is granted or who is tendered an undesirable discharge can appeal and have a determination made of that appeal before he is discharged from the service, by a review board.

Mr. RUNGE. Mr. Chariman, I think that he may be out of the service. The appellate procedures within the service may be after the fact. He may be out of the service. It is a question of correcting the record or getting the action on the discharge changed.

We do not necessarily hold the individual while the review procedures are in effect.

Senator ERVIN. That is due to the law, rather than the system. In other words, when a person is tendered an undesirable discharge by the service, he does have a right to appeal and have a Discharge Review Board pass on the matter?

Mr. RUNGE. Yes; and actually, though, there is some difference within the services that will be, I am sure, brought out by counsel later on, that the action has to be approved initially at the level of the officer exercising general court-martial jurisdiction, and in the Navy centrally at departmental headquarters, and then, over and above that, there is the Board for Review of Discharge Actions, and then the other statutory Board for the Correction of Military Records.

Senator ERVIN. Yes.

Now, maybe I can get what I am driving at by this question.

Here is a man who is tendered an undesirable discharge and he says:

"I want to appeal to the Review Board."

Does his appeal to the Review Board stay the carrying into effect of the undesirable discharge?

Mr. RUNGE. No, it does not, Mr. Chairman.

Senator ERVIN. It is a somewhat defective remedy, then; is it not? Going to the Review Board rather than having the military discharge reviewed before it is issued?

Mr. BARTIMO. Mr. Chairman, if I may just add one thing that might be helpful, let us take a hypothetical case where you say a man has been tendered an undesirable discharge. At this juncture it has been the determination of the military department concerned that this individual should be out of the service.

Now let us assume that there was an injustice done, which might be the case. He has two sources, as the Secretary pointed out.

One is the Discharge Review Board. He could go there first and then get a second bite of the apple by going to the Board of Correction of Military Records.

Senator ERVIN. But in most civil systems of law an appeal stays the judgment.

Mr. BARTIMO. This is true, except that I think that if we instituted that type of system in this particular type of case, we might be hamstringing a commanding officer who has a job to do, and this probably is peculiar to the military.

You realize, if we did not have to be on the ready alert, we did not live in these perilous times, we had an ordinary peacetime establishment, I think this might be considered. But I am a little concerned that, if we went that route, we might have a troublemaker, an individual who may lower morale, an individual who might be more trouble than he is worth, being retained in the Military Establishment.

Senator ERVIN. I recognize that you are dealing with a different situation, and that the military forces exist for a different purpose than does society itself. It is just a question in my mind whether things can be improved.

Mr. BARTIMO. Yes, sir, I understand.

Mr. CREECH. I would like to ask:

Is there any reason why an individual could not receive—I realize today that the procedure does not provide for it, but is there any reason why he could not receive—a discharge without any indication of what type it is, which would indicate that the matter is pending as to the type of discharge he will receive. He would not be retained in service, he would be discharged from service, but he would not have the stigma of having received an undesirable discharge if, in fact, he is later going to receive an honorable one?

Mr. RUNGE. This may or may not indicate that we have not made the system or the procedure clear. After the initial action is taken, the undesirable discharge must be approved in the Army and in the Air Force by an officer exercising general court-martial jurisdiction before it is issued and before he is put out of the service.

Now, if there were, last year, 14,000 or almost 15,000 undesirable discharges issued, one would have to relate this to the number of people that have appealed or have taken the case to the Discharge Review Board.

Where you are suggesting that the undesirable discharge not be effective, if you please, until every case as a matter of course had gone to the Board——

Mr. CREECH. No, those cases which are appealed.

If a person indicates to you that he is appealing your decision, then you would say:

"We are not keeping you in service; we are going to give you a discharge; but we will not indicate on the discharge the type of discharge until such time as a determination has been made."

Mr. RUNGE. I understand your point.

Mr. CREECH. Would you perceive objection to that type of procedure?

Mr. RUNGE. I think suggestions that develop in proceedings of this kind are well worth giving serious consideration to. Offhand, I think that it might have the effect, if you please, of elevating every case to an appeal case. Why not? I think this is one thing that might happen.

I think that you perhaps create, in effect, a three- or a two-level review in almost every situation, and perhaps this is desirable.

I am not sure that it is.

I think that this would be another thing that crosses my mind. You would have to have some sort of a document that the person would carry saying that this is a tentative discharge without qualification pending review, or something of this nature, which, in itself, may create some other problems.

So that I find it a little difficult to say categorically yes or no this is something worth doing. What I am really saying is that these suggestions are worthy of our consideration.

Mr. EVERETT. Mr. Secretary, as to the procedure for discharge of persons who have financial difficulties and whose commanding officers are receiving a number of collection letters about them, are we to understand then that there is no authority for discharging the serviceman unless it is shown that he is avoiding the payment of just debts? There is no authority to discharge him simply because he is unable to pay?

Mr. RUNGE. I think that is an accurate statement. We put it in the terms of an established pattern, which is certainly more than one situation showing dishonorable failure to pay. In other words, we attempt not to be, as I have said before, a collection agency.

Mr. EVERETT. Now, concerning uniformity, which was the subject of the chairman's comments earlier in his opening statement, what are your views with reference to the present situation under which, as we have been led to understand it, the Army does not use the special court-martial as a vehicle for the giving of a bad conduct discharge?

The Air Force uses it for the giving of bad conduct discharges, and almost regularly furnishes counsel to the accused; and the Navy uses a special court as a vehicle for a bad conduct discharge but apparently generally does not furnish counsel to the accused.

Would you comment on this situation?

Mr. RUNGE. May I say first that with respect to our four services and our three military departments, that uniformity for uniformity's sake is not necessarily desirable.

But in terms of this situation, it is my understanding that the Air Force, although using the general court, allows the special court to give a bad conduct discharge, that they are scrupulous with respect to adequate counsel in a case.

It is the Navy's position that by the nature of their deployment and operational situation, that they are obliged to avail themselves of the special court in the issuance of bad conduct discharges. This is the position of the services.

I recognize that there are operational distinctions within the services that have an effect on personnel administration, like they affect other things. As to whether or not this situation should, in fact, be uniform is again, I think something that our office and the Counsel's office becomes particularly concerned with, court-martial proceedings, and should take up with the Judge Advocates. I take it that you have two concerns:

(1) The question, if they are going to use the system, the question of counsel, and the adequacy of counsel.

Now, I would like to say this:

That again, from an operational point of view, this gets very difficult for the Navy in many cases. In other words, you simply do not have the qualified counsel easily available.

The admiral points out that the BCD is based only on a verbatim record, which means that there is a basis for giving a complete review.

I suppose your other question, or depending upon really what your consideration is, is:

(2) Why doesn't the Army use the special court?

Mr. EVERETT. This would be another aspect of the question.

Senator ERVIN. There is a live quorum.

Mr. Secretary, I wish to thank you and your aides for the enlightenment and assistance you have given the committee. I am sure that our objectives and the objectives of the Defense Department are identical. It is just a question of trying to consider whether there is any other way to arrive at our objectives.

I will ask counsel to continue questioning.

(At this point, Senator Ervin leaves the hearing room.)

Mr. EVERETT. Mr. Secretary, as to the last question, perhaps we can take it in two stages, as you seem to be indicating.

First, with reference to the Navy situation, would you see any objection to some change in policy under which, if the bad conduct discharge were to be utilized, counsel would be furnished in the special court; and then in a situation where a man had been tried at sea and counsel was not available, perhaps using the record of the special court, together with other information, in an administrative discharge procedure, based on misconduct, at which time he would be furnished counsel at some shore installation—I assume, of course, he would not be discharged at sea. He would be brought to shore ultimately and at that time some type of procedure could be utilized where he would have counsel bring up any point that might be raised?

Mr. RUNGE. They do not walk the plank.

I am afraid that your description of how you suggest the Navy handle this is a rather complicated one.

I think you are saying that if counsel were not available, that this would form the basis for a later administrative proceeding.

Was this your suggestion?

Mr. EVERETT. Yes, that in any event the man not be discharged with a discharge that would create a stigma unless in some way he had

been furnished counsel to produce at the trial level any evidence that might be favorable to him.

Mr. RUNGE. If I may, philosophically your suggestion has some appeal. But, again, this is something that we would want to consider very carefully with the Navy's Judge Advocate at the Defense level before saying yes, it should be done.

But I certainly recognize:

(1) The operational problem that the Navy has, and

(2) The committee's concern about inadequacy of defense counsel when you have a punitive discharge.

Mr. EVERETT. If we could turn to the other aspect of the question, which is the Army's practice, we gathered from some of the Army responses to questions posed earlier preliminary to these hearings that the Army apparently considered that, if a punitive discharge was to be given, it should be in a procedure which had the safeguards of a general court; namely, with a law officer and certified defense counsel.

Do you feel that this is, as it were, an overprotection of the accused, or do you think this is a desirable position that should be emulated by the other two services?

Mr. RUNGE. I think when you compare the three, that the Army has been exceedingly scrupulous on this point.

The Air Force, which uses the special court-martial, but goes the other way, you see, to insure that there is the record and also counsel.

It seems to me that there is nothing so inadequate about a special court, so that if you have proper counsel and procedures, in my own judgment there is no reason why a bad conduct disharge could not be granted.

Mr. EVERETT. Apropos of the special court in the Army, we have been given quite a bit of material about the Army's field judiciary system which, in a general court, involves having a specialized law officer present to preside over the proceedings.

Would there be some way of adapting that procedure to administrative discharges so that a qualified lawyer, certified on the basis of some standard such as those that the Army employs, would be present to preside over the proceeding and insure the fairness of what took place?

Mr. RUNGE. Mr. Everett, I suppose this would come back to me in a little different context. You see, this is a question, if you please, if we are going to provide this level of legal competence in the administrative discharge system, of simply having more judge advocates.

This relates in terms of the number of officers that the services are given, and particularly the number of judge advocates. This is why I say it comes to my office in another context. This, of course, is something that could be done. It would require, I take it, enlargement of the Judge Advocates Corps in all of the services.

Now, in many cases I am reasonably sure—and the services can testify on this point—that when, in fact, a board is constituted, even though it may not be required, that they will, in fact, if the people are available, use the staff judge advocate in this additional role. I am not specific on this point. You would have to ask the services about this.

But if it were to be a requirement and a general rule, then I think my answer in terms of enlarging the corps of legal specialists would be required.

Mr. EVERETT. As to this question of manpower, and use of legal manpower, we have been somewhat concerned with two phases of it that would come under your jurisdiction from one direction or the other.

First, the Air Force apparently adopts a policy unlike the other two services of really discouraging a guilty plea, which, we would assume, leads to additional need for manpower in a court-martial.

Yet, on the other hand, there is no procedure for providing a legal member, as it were, or a law officer, for the board proceedings, some of which are very hotly contested.

Would it not be more desirable, in that service at least, to change the emphasis and have lawyers present in the contested administrative cases and try to dispose rapidly of the uncontested court-martial cases?

Mr. RUNGE. This is an interesting projection of the situation in the Air Force. As I have read the Air Force position on this, I do not think it is quite accurate to say, although General Kuhfeld can give you a specific answer on this, that the Air Force discourages a person who, in fact, desires to plead guilty.

Mr. EVERETT. I was thinking there of the requirement which existed when I was on duty in the Air Force, and which apparently still exists, that if a plea of guilty is introduced, they still go ahead and present the evidence to establish a prima facie case.

Mr. RUNGE. This is so.

Mr. EVERETT. Just as if it were a not guilty plea?

Mr. RUNGE. This is so.

Mr. EVERETT. Which certainly has the effect of inhibiting pleas of guilty; and, of course, they do not seem to use a negotiated plea.

Mr. RUNGE. No, they do not; I am not quite sure that the fact that the trial judge advocate, the prosecutor, puts in a prima facie case, in itself, inhibits, as you suggest, the plea of guilty.

Why—well, you are questioning me.

Mr. EVERETT. My point basically was that one of the advantages frequently of a guilty plea is to avoid having the court hear all of the evidence. If you are representing a defendant, you frequently like to get the guilty plea in and get your client out as fast as possible; but certainly the Air Force does not encourage the negotiated plea, as the other services do.

Mr. RUNGE. This is quite right.

Mr. EVERETT. We wondered, if they were able to afford the luxury of no negotiated guilty pleas, whether they could not also work out some procedure for providing law members, qualified law members, to preside at some of these administrative board proceedings where a man may be stigmatized for life as a misfit, a homosexual or any one of a number of things.

Mr. RUNGE. If I may suggest, Mr. Everett, in terms of the respective workloads involved, I think the Judge Advocate of the Air Force can answer that better than I can.

Mr. EVERETT. Apropos of another personnel matter, there have been repeated proposals for a Judge Advocate General's Corps in the Navy and the Air Force to match that of the Army. Do you think that the creation of such a corps would improve the operation of military justice in the other two services?

Mr. RUNGE. I am just clarifying with counsel where we stand on some legislation that is related to this matter. I think it is accurate to say that legislation has gone forward to the Congress, from Defense to the Bureau of the Budget, and forwarded to Congress, with respect to a Judge Advocate's Corps for the Navy.

The Air Force is not included.

Mr. BARTIMO. If I may add to that, as the Secretary has pointed out, the administration's position with respect to the Navy has been to go ahead and get a corps for the Navy. The bill has been introduced. The House Armed Services Committee, unfortunately, because of a press of business or for other reasons, has not held hearings.

Now, with respect to the Air Force, I think, when you are asking why don't you have a corps in the Air Force, the simple answer is they do not want it. And why don't they want it? Well, as you know, the Air Force has a theory—I am not saying whether it is good or bad; I think it is good—they want what they sometimes call a "flexibility of approach of administration." Under this system they do not have any particular corps designated as such.

The system, I might say, has worked very well.

Mr. RUNGE. The Air Force being the last service created, as such, deliberately took the position that they would not establish statutory technical services within the Air Force officer corps.

But from what I know of the operations of the Judge Advocate General and of the people asigned to him in the Air Force, that, for all practical purposes, not in terms of insignia or in terms of statutory symbols of paraphernalia, that the Judge Advocate General of the Air Force, in terms of effectiveness of military justice, has all that is required to get the job done, even though the symbol and the statutory and administrative is not there.

Mr. EVERETT. So then you do not feel that in the other two services it would be necessary from the standpoint of improving the protection of the rights of military personnel to have such a corps?

Mr. RUNGE. I think that is not required.

Mr. EVERETT. We have received proposals, suggestions, from various sources that the undesirable discharge should in some form be subjected to review as to legal issues from the Court of Military Appeals—or at least to provide review by a civilian tribunal.

What is the reaction of your Department to that type of suggestion?

Mr. RUNGE. I read the report of the court with interest, and I must say that I did not fully comprehend or understand what they were suggesting. If they were suggesting that the undesirable discharge action be reviewed by a court and eventually by the Court of Military Appeals, then it would seem to me that, instead of mixing the systems, that you ought to start off, in the first place, and run it through the court-martial system. On the other hand, if we are talking about a high level and quasi-judicial review, it seems to me that we have it in the departmental Discharge Review Boards.

These are boards of very qualified officers that review these matters. It is true that there is not a civilian echelon in that review procedure.

On the other hand, if it is the civilian review of the action that is indicated, then if we are proceeding administratively, I think the way to solve that problem would be to change the membership of the Discharge Review Board.

In other words, I think either you have a judicial proceeding or you have an administrative proceeding. It is a question of getting civilian influence or review and then changing the administrative review.

Mr. EVERETT. With respect to the present structure and possible changes that you just referred to in the concluding portion of your answer, would you coment on proposals either to consolidate the Discharge Review Boards of each service, with the Board for Correction of Records in each service, or to consolidate on a departmental basis the boards maintained in each category by each armed service?

Mr. RUNGE. With respect to consolidating the Discharge Review Board and the Correction of Military Records Board, the latter, the Correction of Military Records Board, has a much broader responsibility than the Discharge Review Board.

I do not know that anything in particular would be accomplished by such an amalgamation.

And if, in fact, there is something wrong, in the judgment of this committee or by other students of the problem, it seems to me that it would lie in the structure, the authority and the standards, and that I see very little that can be genuinely accomplished by simply making one board where you have two, but with rather different missions.

Mr. EVERETT. Would you feel that to insure equal justice under the law, as it were, it would be desirable to consolidate the Boards for Correction of Military Records of each service, the Board for Correction of Military Records of the Army with the Naval Board and the Air Force Board?

Mr. RUNGE. In other words, this would be a Department of Defense Board?

Mr. EVERETT. Right.

Mr. RUNGE. This may be worth consideration. It would certainly give a degree of uniformity or a greater degree of uniformity.

On the other hand, by consolidating, if you please, you will end up with a series of panels. Now, the panels will have cases, whereever they come from, of the four services. Nonetheless, unless you keep mixing the panels, you may tend to get some disparity even within that system. I am not sure that we would make any substantial contribution to justice by creating a Department-wide board as opposed to three separate boards.

There is some advantage, you see, in having separate boards. These people come out of the service. They know the operational conditions, the mores, the standards. They have a feel for the situation when it comes to them, when it comes out of their own service, based on their own experience, that they might not have if they were working in other areas.

Mr. EVERETT. Do you feel, apropos of the administrative discharge system as it presently exists, that there should be a grant of subpena authority either to the correction boards or to the boards that hear the matter in the first instance, in order that they would have the authority to bring in civilian witnesses who might not otherwise be obtainable?

Mr. RUNGE. Subpena authority on the part of the board, or the defendant, if you please, to subpena, or both?

Mr. EVERETT. Or both, or either.

Mr. RUNGE. There may be circumstances in which either the right of the board to subpena or the right of the individual to present a witness might be indicated.

I think that, as we know, they do not have the authority now, but I think the boards go out of their way to develop all of the facts as best they can.

It is true that they depend upon the willingness of the individual to appear, if they are not within the establishment. There might be some advantage, although I must say that I have not seen—it has not been brought to my attention—that this authority to subpena witnesses is, in fact, required. But, again, this is a relatively new question and issue that you are putting to me.

It is again one of these things that I think we should take a considered look at.

Mr. EVERETT. I have one final question, Mr. Secretary.

One of the witnesses who will testify later has submitted a statement in which basically he takes the position that too many people are getting a discharge under honorable conditions; that, too often, the services take the line of least resistance and give a man an honorable or general discharge when he should receive an undesirable discharge or should be tried by court-martial; and that this is the reason why the rate of honorable discharges has gone from, I believe, 95 percent-plus to 97 percent-plus.

We would appreciate your views on this comment.

Mr. RUNGE. If I may suggest that this is a rather cynical view, that our people take the course of least resistance and, in effect, throw them out with a rating that they do not deserve. I hope and I trust that this is not the case. It is very difficult, on the other hand, to say categorically that this does not happen.

Commanders and staff officers concerned are human and this may happen in certain cases. On the other hand, I think it quite clear, to substantiate the services position that, in fact, we have a higher state of morale, we have better discipline in the service.

I think this can be demonstrated in other ways than looking at the discharge records and the court-martial proceedings.

Mr. EVERETT. You do not feel, then, that the formalities that are required by the Uniform Code, and otherwise, with reference to punitive discharges or administrative discharges are hampering the services ability to get the job done?

Mr. RUNGE. I do not think so, and I want to develop this other point a little further.

The services, and particularly the Army, simply because they started from a different base point, in the last 5 years have made a conscientious effort to improve the basic quality of the people in the establishment, both in terms of the people they are taking in, the selection and the scrutiny that they give to people who want to reenlist.

We have a more stable professional force, and, therefore, I think—and we know that this is the case, we know that the reenlistment rates are higher. We know that we have more people in the service who are married and have children. We have a stable, professional lot of people.

So it does not indicate to me that when the punitive discharges go down, as we can see from the statistics, that this indicates simply mal-

administration or willfulness on the part of our commanders and staff officers, because we know that there are other factors, whether there was any look at the statistics, that we would know by definition as a social group that we have a sounder, more stable force, in which morale is higher and conduct generally is of a higher order.

Mr. CREECH. Mr. Secretary, the chairman has authorized me to say that the subcommittee appreciates very much your coming here today to give us the benefit of your experience in this area of the law, and that it is the feeling of the subcommittee that you made a meaningful contribution to its inquiry and that, as the chairman has said earlier, we are appreciative of the overall cooperation which we have received from you and the various services and members of the Department of Defense in preparing for these hearings.

Mr. RUNGE. Thank you, sir.

And, as the chairman indicated, the committee and staff of our office and the people concerned in the services have the same objective. It is a question of resolving and working out the best procedures to achieve those objectives.

I appreciate being here.

Mr. CREECH. Thank you very much.

Pursuant to the instruction of the chairman, we shall recess now and reconvene at 2:30 this afternoon.

(Whereupon, at 12:50 p.m., the hearing was adjourned, to reconvene at 2:30 p.m., the same day.)

AFTERNOON SESSION

Senator ERVIN (presiding). The subcommittee will come to order.

Mr. CREECH. The first witness this afternoon will be the Honorable Paul B. Fay, Jr., Under Secretary of the Navy. Mr. Fay will be accompanied by Rear Adm. William C. Mott, USN, Judge Advocate General, Department of the Navy; Rear Adm. B. J. Semmes, Jr., USN, Assistant Chief for Plans, Bureau of Naval Personnel; Brig. Gen. Rathvon McC. Tompkins USMC, Assistant Director of Personnel, Headquarters, Marine Corps; and Col. Hamilton M. Hoyler, USMC, staff legal officer, Headquarters, Marine Corps.

## STATEMENT OF HON. PAUL B. FAY, JR., UNDER SECRETARY OF THE NAVY; ACCOMPANIED BY REAR ADM. B. J. SEMMES, U.S. NAVY, BUREAU OF PERSONNEL; REAR ADM. WILLIAM C. MOTT, U.S. NAVY, JUDGE ADVOCATE GENERAL; CAPT. JOHN CONNOLLY, U.S. NAVY, BUREAU OF PERSONNEL; CAPT. DALE MAYBERRY, U.S. NAVY, BUREAU OF PERSONNEL; CAPT. MACK K. GREENBERG, U.S. NAVY, JUDGE ADVOCATE GENERAL; AND GEN. R. M. TOMPKINS, U.S. MARINE CORPS

Mr. FAY. Mr. Chairman, I would like to preface my remarks to say our great interest in the constitutional law of the military has produced such great men as Col. John Glenn and Comdr. Alan Shepard.

Senator ERVIN. That is wonderful, two great Americans. If the good Lord will help us get Colonel Glenn back, we will have a most remarkable achievement.

Mr. FAY. I think just before we came into this room he was just settling into the ocean.

On my right is General Tompkins of the Marine Corps, and on my left Rear Admiral Semmes of the U.S. Navy.

Mr. Chairman, I welcome the opportunity to personally appear before this committee and to make available any Navy information which will further the purpose of committee inquiry. If it please the committee, I shall restrict my remarks to a broad rationale of the Navy's policies on the matters before this body. More detailed information on policies and procedures as they affect Navy and Marine Corps personnel can better be answered by qualified representatives from each branch. For that purpose, I have asked the Assistant Chief of Naval Personnel for Plans B. J. Semmes, General Tompkins of the Marine Corps, and Rear Admiral Mott, the Navy Judge Advocate General to provide technical information which the committee may require.

Introductory to any treatment of Navy policy affecting the constitutional rights and privileges of its members, there should be clear understanding of the basic elements which govern the issuance of such policy. In the Navy's view, the first of these must be the law of the land. From the enactments of Congress dealing with military personnel, we are given both general and specific direction on the many aspects of personnel management including incentives, awards, discipline, and discharge. Navy policy stemming from such enactment may respond to legislation dealing only with Navy or Marine Corps personnel, or to Defense Department policy affecting all services.

A second major element which underlies all personnel policy in the naval service is the recognition that every such policy must contribute to the effectiveness of the Navy and Marine Corps as military organizations. In this regard we realize that a serviceman's well-being must be safeguarded and that high morale and esprit de corps cannot be maintained in an environment of harsh and unjust personnel policies. We also feel, however, that military effectiveness will be damaged if we fail to differentiate between honorable service and that which is less than honorable. Taking this into account, our present policies attempt to reward honorable service with honorable recognition and to withhold such recognition from those who refuse to accept the obligation of military service.

From an examination of the questions forwarded earlier by you, Mr. Chairman, to Mr. McNamara, we feel that two areas of particular committee interest relate to the Navy's policy on and use of the administrative discharge and the overall adequacy of safeguards to constitutional rights in both legal and administrative proceedings.

Turning first to the administrative discharge. As you know, all services operate on a Defense Department policy which establishes uniform standards for discharge. In implementing that policy, the Navy and Marine Corps have established service policies which respond to the particular needs of each branch. At the outset, let me say that the administrative discharge for cause fills a vital need which can be satisfied by no other means. Administrative discharges are not limited to the handling of poor performance alone but also serve a variety of other needs. These include the separation of recruits who for one reason or another cannot complete early training, the separation of persons with personality disorders and those who through no fault of their own cannot complete a service enlistment.

In cases of overall bad performance or specific incidents of misbehavior or misconduct, the administrative discharge is resorted to only after it has been determined that further retention of the individual would not be in the best interests of the service. In this category there are three broad classifications: First, the individual who has been tried and convicted in a civil court of serious crime. Since it is not feasible to retry these persons for the same offense and since their retention would often be damaging to command morale, they are best separated administratively. The second classification is that of the admitted participant in homosexual acts where trial by courts-martial is not feasible because of lack of corroborating evidence or refusal of witnesses to testify. In the presence of convincing evidence of homosexual involvement, such persons must be separated as military liabilities. The third classification involving administrative separation for misbehavior concerns the chronic military offender whose individual offenses may not warrant punitive discharge but where the total record provides ample evidence that the individual's retention will lead to further disciplinary involvement and punitive discharge.

The naval service cannot harbor the above-described convicted felons, sexual deviates, and chronic military offenders. To do so would be to damage the moral fiber and military effectiveness of the organization. They cannot be segregated in the service and their presence in any command tends to degrade the attractiveness of the service for high-grade career personnel. By the same token, a service which is dependent upon the community for the recruitment of sons and daughters cannot afford the inevitable public image that comes with misconduct of a small percentage of military personnel.

If it can be agreed that administrative separation is appropriate for certain types of misconduct, there remains the question of what type discharge shall be issued—honorable discharge, general discharge, or undesirable discharge. In these days of universal military service, every young man who is physically able is liable to serve a period of active and Reserve service. In the Navy and Marine Corps, honorable separation is not given lightly. It is based upon marks accumulated during the entire period of enlistment. It is held up as something to work for while in service and has come to have considerable meaning in the civilian community as evidence of reliability. Persons who complete their enlistment or period of obligated service but who have not maintained good conduct grades are given general discharges. Neither honorable nor general discharge is appropriate for the individual who through his own serious misbehavior must be separated before he has completed service. In effect, such an individual has achieved early release from the legal obligation of active service and has completely escaped any Inactive Reserve obligation which might apply to his enlistment. To characterize his service and discharge as honorable or under honorable conditions would be to negate the incentives now operating in behalf of truly honorable service. We believe that the undesirable discharge does fill a requirement and that its selective use accurately reflects the deserved discharge of a very small percentage of service personnel. In like manner, we believe that general discharges should be given when poor performance warrants a discharge less severe than undesirable.

Relative to the matter of protecting and safeguarding constitutional rights in legal and administrative procedures, I feel that the rights of Navy men and Marines are adequately safeguarded under the provisions of the Uniform Code of Military Justice, and Defense Department policies governing administrative separation. The uniform code insures the protection of individual rights from the time the person is first suspected of having committed an offense until final review of his case by the U.S. Court of Military Appeals is completed. In the case of administrative discharge under conditions other than honorable, Navy and Marine Corps procedures restrict such action to a very small percentage of offenders and then only after adequate safeguard of individual rights.

In summary, the Navy and Marine Corps feel very keenly the responsibility of safeguarding the interests of individual members of our service. We also recognize that the shortcomings of recruiting procedures and early screening permit entry into the service of a few individuals who will not respond to the stimuli of leadership, discipline, and pride of service which motivate most young servicemen. For some of these individuals, separation will be through the process of courts-martial. For others, administrative discharge, whether under honorable or other than honorable conditions, should be used.

Senator ERVIN. Proceed, Mr. Creech.

Mr. CREECH. Thank you, sir.

Mr. Secretary, you have supplied the subcommittee with a great deal of information in advance, and so we shall endeavor to avoid repetitive questioning. However, there are a number of questions that we would like to pose at this time to either you or one of your aides.

You mentioned, sir, on the last page of your statement that in the case of administrative discharges under conditions other than honorable, that these procedures are restricted to a very small percentage of offenders, and then only after adequate safeguards of individual rights.

This morning Assistant Secretary Runge indicated to us a number of safeguards, and I don't know if you are familiar with his statement and if you are alluding to the same safeguards which he mentioned.

Specifically he alluded to such things as the individual will be given notice. In other words, he will be given some opportunity to be advised that this is being considered, and to have his case heard by a board of not less than three officers, and so forth, and to appear in person, be represented by counsel if reasonably available, and submit statements in his own defense.

Are there any other safeguards that you have in mind in addition to those which he mentioned this morning?

Mr. FAY. We use all those safeguards, and I am trying to think of any other safeguards. Can you think of any, Admiral?

Admiral MOTT. We have a departmental review in some cases.

Mr. FAY. That comes after, for the Navy. I would think they generally cover the safeguards that the administrative discharge allows a man.

Mr. CREECH. Well, sir, I should like to inquire as to whether there is any set time with regard to notices. Is an individual given a certain number of days' notice?

Mr. FAY. Prior to being notified of what his type of discharge is going to be?

Mr. CREECH. Yes, prior to having his case heard by the board, is he given a certain definite number of days' notice or does this vary with the individual cases?

Mr. FAY. No, he is not given any set time.

Mr. CREECH. Is there any rule of thumb?

Mr. FAY. No. I would think it is just as a matter of the administrative ability to get the case before these officers.

Mr. CREECH. I wonder, sir, if you would enlighten us as to what is meant in the Navy when we say that he shall be represented by counsel, if reasonably available, rather than who if reasonably available shall be a lawyer.

Mr. FAY. As you probably know, we have the Navy School of Justice, through which we put about 1,500 officers a year for about a period of 7 weeks. They are given a background of how courts-martial and administrative discharges are handled.

It is generally found that there will be some of these officers available for this man to have as counsel, if there is not a lawyer available. He does have the right if he so desires and wants to employ a private counsel.

Mr. CREECH. What would happen in the case of a man who is at sea, for instance, who wanted to employ private counsel? Would his case be continued until he was in port and have the opportunity to employ counsel?

Mr. FAY. As Admiral Mott just informed me, very few of these cases are processed at sea. If the case should be processed on board ship at sea, and a lawyer is on board that ship, he would be assigned as counsel if his other duties did not prevent him from serving as counsel.

Mr. CREECH. And the same would be true I presume for men who are stationed overseas?

Mr. FAY. That is correct.

Mr. CREECH. I was impressed with your statement, sir, concerning the degree of emphasis which the Navy and the Marine Corps places, of course, on honorable separation. You have indicated that this is not something which is considered lightly.

We have had it proposed to us that in some services perhaps honorable discharges are given in some instances to avoid the difficulty of ferreting out people, of confronting them with courts-martial, and situations which might be difficult to process. I gather from your statement that you do not feel this is the case.

Mr. FAY. That is not the case in the Navy or the Marine Corps.

Mr. CREECH. I was also very interested in your statement that—

> since it is not feasible to retry these persons for the same offense—

meaning, of course, Marines and sailors who have been convicted by civilian courts, civil courts—

> and since their retention would often be damaging to comand morale, they are best separated administratively.

We have had a number of complaints from servicemen alleging that in some instances they may not be tried for the same offense, so we are not maintaining that there is double jeopardy, but they have maintained that they were tried for offenses growing out of the offenses

for which they were tried in civil court, and in some instances the allegation is made that, where they were convicted of relatively minor offenses by the civil court, they had been administratively processed for what they considered to be a very minor offense.

Mr. FAY. Some offenses in the civilian community are looked on with less severity than those in the military community. I think we all appreciate that you live in a different life under a military community than you do in a civilian community. The offender must be considered in the light of the effect on the naval service and the effect on the morale of other men serving with the individual who has committed the offense.

Mr. CREECH. So that one consideration would not necessarily be the seriousness of the offense per se, but its impact upon the service. Would that be a consideration?

Mr. FAY. I would feel that is correct. Do you concur with that, Admiral?

Admiral SEMMES. Suitability of the man.

Admiral MOTT. I would like to point out that our regulations state that you can't try a man for the same act or acts unless it is approved by the Secretary.

Mr. CREECH. Thank you very much. That is very interesting. I don't believe that is a requirement, or rather that that is a regulation of the Army and the Air Force. Do you know?

Admiral MOTT. I can't answer that question. We will provide it for the record, or they will provide it.

Mr. CREECH. I think we will perhaps ask them the same question. What is your feeling, Mr. Secretary, with regard to the procedures which are employed in administrative discharges, and for that matter courts-martial? Do you feel there should be any different procedures for wartime as opposed to peacetime?

Mr. FAY. No, I don't. Of course, I think the one thing that in wartime, your prime objective is winning the war, and everything else has to be secondary to winning the war.

Now if we find that under wartime conditions that we have to limit the procedures to a degree in order to satisfy our desire of winning the war, I think that will have to be considered at that time. But I would think the procedures that we have now should adequately take care of us during wartime.

Mr. CREECH. It has been recommended, it has been proposed rather, that there is no necessity for military jurisdiction over retired personnel not on active duty. In your opinion should this jurisdiction be eliminated?

Mr. FAY. You are speaking of retired military personnel?

Mr. CREECH. That is right.

Mr. FAY. Who are still on military retired pay?

Mr. CREECH. Yes.

Mr. FAY. I would like to pass that one to the Judge Advocate General.

Admiral MOTT. We have actually tried at least one retired officer, and he has been convicted.

However, we try retired officers in very rare instances. It has been my recommendation to the Secretary in the past that we not try a

man unless the Navy was so inextricably involved in the case that it reflected upon the whole Navy.

You may remember the case of Admiral Erdman, in which there was considerable pressure on the Navy to try this officer by general court-martial. The Secretary decided not to do this, that is, not to ask that he be delivered to the Navy for prosecution. It was primarily a civil offense, and the Department of Justice had jurisdiction. I felt the Department of Justice should proceed in the case, which the Department of Justice did.

So by and large it not only has been my recommendation as Judge Advocate General to the Secretary not to try retired people, but the Secretary has gone along with it.

However, we would not wish to relinquish our jurisdiction over retired personnel because there are certain cases, where the Navy might want to take action. We have had one homosexual case where there were active military people involved, and we felt that this so involved the service that the service should retain jurisdiction, the Congress having specifically given it to the service by law.

Mr. CREECH. My next question concerns courts-martial, and I wonder as a practical matter how are the members of the court-martial selected by the commanding officer.

Mr. FAY. Is that directed to me?

Mr. CREECH. It would be directed to you, sir.

Mr. FAY. I will just say what I know about it, and then I will pass it to the Judge Advocate General. If you are speaking of just a summary court-martial, I think that the commanding officer picks the man he feels is the best qualified along legal matters. This would probably be somebody who has been through the Naval School of Justice.

If he happens to be a lawyer, he would be the man he could select, but in most cases he would be the man who is familiar with the procedures, and in the case of the special court-martial, again it would apply to the three members of the court-martial, that is the people who are the closest and the best and most familiar with the legal practices of the court-martial.

As to the general court-martial, I will pass that to the Judge Advocate General.

Admiral MOTT. Mr. Counsel, I don't really think the criteria for selection of court members varies between commands, whether it be high command that select the general court-martial members or whether it be the commanding officer of a ship who selects the special court-martial, or the summary court members. All are bound by good sense and experience to pick the most mature and most judicially minded people that are available. Actually the Manual for Courts-Martial abjures him to do exactly this, that he in every case should pick people to sit on courts, sitting in judgment of either their fellow officers or their men, who are by experience the most mature people available. This is the general law which would apply whenever court members were picked.

Mr. CREECH. To what extent is a member, is a court-martial member's performance, reflected in his efficiency rating?

Admiral MOTT. It shouldn't be reflected at all. I don't actually know of cases where it is.

In other words, for a reporting senior to make any remarks which are derogatory would violate the law; that is derogatory about a man's service on a court. It has always been my advice to reporting seniors not even to say anything that was good about court services.

You can handle his fitness report in other ways without specifically commenting upon his service in a court-martial, by commenting on how he discharges his duties generally. In the Navy I don't know of any case since the Uniform Code of Military Justice went into effect where command has commented in fitness reports upon the service of members of courts.

Mr. CREECH. Your answer would be circumscribed, I presume, to the Navy and Marine Corps.

Admiral MOTT. That is correct.

Mr. CREECH. In your experience.

Admiral MOTT. That is correct. We have had one or two cases early in the code, the *United States* v. *Deain*, where there might have been some pressure put upon court members by the president of the general court-martial. We solved that problem by getting rid of the permanent president, and we don't have that any more.

Mr. CREECH. I am sure that you are aware that this is one of the types of complaints which the subcommittee has received— command influence; and of course in a recent case, as recently as last December, the Court of Military Appeals reversed the case on the basis of command influence.

Admiral MOTT. That is not a Navy case, however.

Mr. CREECH. You are correct, it was an Army case. Senator Ervin indicated this morning, of course, that he was pleased to be informed by the Army that there was a new regulation, so that in the future the commanding officer will not be giving instructions to courts-martial, and we understand that this is being entertained by the Navy, that you are considering such a regulation. Is this correct? Do you care to comment on that?

Mr. FAY. Would you repeat that again?

Mr. CREECH. Yes. Senator Ervin has been informed by the Army that no longer will the commanding officer give instruction to courts-martial members with reference to the administration of military justice.

Mr. FAY. I will pass this again to the JAG.

Admiral MOTT. As you are aware, sir, paragraph 38 of the Manual for Courts-Martial allows this kind of instruction for courts. However, it is a very delicate matter.

You hate not to give these people any instructions in their duties as jurors, and yet you must treat very carefully to see to it that you don't get on the wrong side of the line and say something which might be considered to prejudice the trial of the case.

I know that when I was a district legal officer, I wouldn't allow anybody else in my shop to give that instruction. I gave it myself. And I might say that I always advised command not to give it.

I would hesitate to say, Mr. Counsel, that we should give up all efforts to instruct court-martial members in the duties that they would have when they became members.

I would say that there are methods of proper control. The instruction should be given so far ahead of their prospective service that it couldn't possibly taint their service.

But I will admit to you, sir, that it is a most delicate area. Of course, this problem of article 38 instruction would be solved by sending these people to the School of Naval Justice for 7 weeks. We try to send as many as we can. There they get the kind of education and instruction which gives them the necessary information to sit as a court member.

Mr. CREECH. It is our understanding that the Navy is contemplating at this time issuing a brochure or booklet which would be issued, and in that way overcome any obstacle to the courts-martial being informed, and by the same token would avoid the opportunity for any command influence by avoiding the discretionary appraisal by the commanding officer.

Admiral MOTT. That is correct. It will be a most difficult book to write and to review.

Mr. CREECH. But are we correct in that understanding, sir?

Admiral MOTT. You are correct; yes, sir.

Senator ERVIN. I am under the impression that when you have a court-martial in the Navy, and you have heard the evidence and the time comes for the court to make a decision, that under the practice the youngest officer in the court has to vote first, is that correct?

Mr. FAY. The youngest officer has to vote first?

Senator ERVIN. Yes.

Mr. FAY. That is correct.

Senator ERVIN. In other words, that avoids the young officer being influenced by anything except his own judgment. In other words, not yielding in deference to some member of the court who may have had more experience.

Mr. FAY. Or who are senior to him.

Mr. CREECH. I would just like to inquire, sir, in your view if the handbook at such time as it is available would preempt the necessity for any instruction by the commanding officer or anyone else to the court-martial.

Admiral MOTT. I would say that is the design, Mr. Counsel, that it would preempt the field.

I would like to add that usually the way this article 38 instruction is carried on is before the court is really impaneled, as you would put it in civilian parlance. You have a whole group of prospective court members that you bring in, and you give them this instruction before they ever sit on a court-martial of any kind.

Mr. CREECH. Mr. Secretary, I should like to ask you, sir, What is your view with regard to the accusation that the Uniform Code of Military Justice is too unwieldy to work effectively during wartime?

Mr. FAY. Well, No. 1, it hasn't been tried in wartime, so it is a pretty hard question to answer. I would say that it will have to stand the test of time.

Mr. CREECH. I am certain that you are aware that certain men who have been prominent in the field of the administration of military justice, certainly at least one individual, has on occasion proposed that the code be repealed, and that the Court of Military Appeals be abolished. I wonder what your reaction to that proposal is.

Mr. FAY. Although I have never been exposed personally to the operation of the Court of Military Appeals, my feeling is that it works very well.

I think the UCMJ is a very fair way of dealing with people. We feel that the administrative discharges, in the way they have been handled, the courts-martial the way they have been handled, the man gets justice before either method of discharge.

Mr. CREECH. Do you have any further comments?

Mr. FAY. Yes.

Admiral MOTT. Admiral Radford, when he was commander in chief of the Pacific Fleet, after the Korean war or during the Korean war, had a study made of all of the commands in the Far East. The conclusion of Admiral Radford was that the code would work in wartime, judged by the test it was given in the Korean war.

Mr. CREECH. Thank you, sir. Mr. Secretary, are you familiar with the bill which would provide for the issuance of rehabilitation certificates?

Mr. FAY. I am not familiar with it in detail. I know of it along in the broad scope of which you expressed yourself.

Mr. CREECH. I wondered if you would care to comment on that proposal.

Mr. FAY. Unless I became more familiar with it and the effect it would have upon our judicial policies and the way we are handling ourselves, I would rather not comment.

Mr. CREECH. Would you care for any of your aides to speak on it?

Mr. FAY. We could submit a position for the record, if that would be desirable.

Mr. CREECH. I think that would be helpful and desirable.

(The material referred to is as follows:)

DEPARTMENT OF THE NAVY POSITION ON H.R. 1935, 87TH CONGRESS

The Department of the Navy believes that the Department of Defense position, as presented in General Counsel, DOD, letter to the chairman, Committee on Armed Services, House of Representatives on 25 May 1961, is both sound and tenable. This letter is included in House of Representatives Report No. 515 on H.R. 1935, 87th Congress.

The opposition to H.R. 1935 is not predicated upon the belief that discharge review boards and records correction boards would be unable to cope with the additional workload which would result from enactment of the legislation. With additional personnel and budgetary support, these boards could handle such addtional duties. The Department of the Navy does, however, consider it inappropriate to have agencies of the Armed Forces issue exemplary civilian rehabilitation certificates attesting to the character, conduct, and habits of persons after they have been discharged from the service and become members of the civilian community, because such matters are not within the implied competence of military organizations. They do properly fall within the purview of civilian agencies, Federal and State, which deal with the welfare and social readjustment of civilians.

Mr. EVERETT. At an earlier point, reference was made by Admiral Mott to the *Deain* case which involved a permanent president of the Navy court-martial who would rate the other members.

We have heard claims from various sources—we have heard this with reference to the other two services actually—that in the boards of review the senior member, the chairman of the board, would rate the other members, would give them their efficiency rating, which seems to involve the same type of problem presented by the Navy case that I referred to earlier.

In the Navy does the chairman of the board of review rate its military members?

Mr. FAY. No, he does not, unequivocally no.

Mr. EVERETT. In the Navy, as I understand it, unlike the other two services, you have used civilians on your boards of review along with naval personnel. Has this worked out satisfactorily?

Mr. FAY. I believe on our board of review we have civilians, and we have officers, and it has worked out very well.

Mr. EVERETT. Now in reference to an earlier answer I believe you pointed out on the basis of the information provided by Admiral Mott, that most of the administrative discharges are processed in port and at a time when lawyers are reasonably available, and not processed at sea.

Under those circumstances we wondered whether there was any necessity for trying a special court-martial case resulting in a bad conduct discharge, without having an attorney available to represent the defendant.

In other words, is there a necessity to give a man a bad-conduct discharge while he is at sea, and not hold the whole procedure at a time when the ship is docked?

Mr. FAY. I think under many circumstances we do hold the court-martial at the dockside. Now if it is necessary to hold it at sea, it is because they are not going to get to dockside in time, or they wouldn't be able to convene at dockside.

Mr. EVERETT. It has been our understanding that in only a small percentage of the special courts-martial resulting in bad-conduct discharges in the Navy was an attorney provided for the defendant, for the accused, and if these cases are tried in port, why is it that an attorney is not furnished? Wouldn't he be reasonably available?

Mr. FAY. If he is not there, it is because he isn't reasonably available.

Mr. EVERETT. Apropos of reasonable availability, how many lawyers are there available in the Navy, and if the cases are tried in port, why would there be such difficulty in getting a qualified law specialist, who is present, to advise the accused?

Mr. FAY. We have, as you know, 668,000, roughly, in the Navy, and we have 471 lawyers, and it puts a great burden on them.

We have the Navy School of Justice at which officers are indoctrinated in the ways of the law. We feel that the graduates of this school do a very representative job and very few of the cases that they act on are actually overturned by a higher authority. So we feel that they have done a very good job.

(Discussion off the record.)

Mr. EVERETT. Apropos of the Navy problem of the unavailability of lawyers, do you feel that a separate JAG Corps in the Navy would aid in obtaining more lawyers, or do you think you need more lawyers?

Mr. FAY. Actually we have a ceiling of 566 that we are allowed, and we have not been able to build up to that, although we are endeavoring to build up to the higher number of 566.

Of course, with the appointment of a new Secretary of the Navy recently, he has the right to state his views on this pending legislation. Whether the new Secretary will support the JAG bill remains to be seen. However, the legislation is before the Congress now.

Mr. EVERETT. Is one of the theories underlying that proposed legislation that it would attract more lawyers into the service and into

the Navy, and thereby enable you to provide counsel in situations such as those which we were referring to?

Mr. FAY. I have heard that strong argument from the Judge Advocate General on my right and then I have heard it represented from the other side on my left, so this is something which I think probably the legislation itself would have to decide.

Now we are getting very good young lawyers, and we have good senior lawyers now, as you can attest to from the officer on my right and the one directly behind me. But numbers is a problem and maybe it isn't just a JAG Corps bill that is going to solve our problem of getting highly competent people. Maybe there is something related to pay.

Mr. EVERETT. In another vein, with reference to availability of personnel, am I correct in the premise that there is some provision in the uniform code for interservice use of personnel?

In other words, for use in a Navy court-martial of a qualified Air Force law officer and so forth; and, if that premise is correct, what efforts, if any, have been undertaken by either the Navy or the other two services, to your knowledge, to utilize legal talent that might be available in a different service?

Mr. FAY. I would like to pass this question, but I would like to make one comment in passing.

I am not familiar with it, but it would appear that this wouldn't serve the best interests of the separate service, because the different services have problems which are unique to their own service, and I think maybe somebody coming from another service wouldn't understand quite the background which created the situation. But I would like to pass the question to the Judge Advocate General.

Admiral MOTT. I believe this is a matter for determination by the service Secretaries. The law permits it, you are quite correct.

There is a provision in the Uniform Code of Military Justice which would allow a law officer of one service to sit in the general court-martial of another.

It hasn't been done, to my knowledge, although I do remember a very famous trial of an Army officer in which I was requested to furnish a naval defense counsel. The Army officer requested this particular officer to defend him. I found him reasonably available and provided him to defend the Army officer concerned.

Mr. EVERETT. In that same vein, Admiral, can you see any difficulty that, say an Army law officer would have in trying a case before a Navy court-martial, or an Army trial counsel prosecuting a case before a Navy court-martial, or vice versa?

Admiral MOTT. It would depend somewhat on the case. There are certain cases in which there would be no difficulty whatsoever. There would be other cases in which the Army or the Air Force officer might have a lot of homework to do to learn Navy orders and Navy command structure and so on.

But I just feel that this is an area which we shouldn't get into unless we are forced to get into it. I feel that we should stick to our own service. It would probably make command unhappy in both the Navy, the Air Force, and the Army, to have such substitution.

Mr. EVERETT. Mr. Secretary, the Army, as we understand it, pioneered in developing a structure of military judges, specialized law

officers who do nothing but try cases, do nothing but perform duty as judges.

It was our understanding that the Navy had also experimented with this program, and according to the responses furnished to the chairman earlier, this program had cut the error at the trial level by a very significant percentage.

We wondered what plans the Navy had either for continuing this program or for expanding it, or whether, on the other hand, they intended to cut it out altogether.

Mr. FAY. No. The Navy is trying this on a trial basis now, and I think they have found that it has been very successful so far, and I think if it continues to show the success it has, that we will recommend that this be expanded.

Mr. WATERS. Mr. Fay, I just have one or two questions. I think you indicated that in connection with the rating of members of the court-martial, it could be handled in some other ways. Do you recall those words? Perhaps it was Admiral Mott.

Mr. FAY. I think it was.

Admiral MOTT. They were my words. What I was suggesting was that when you rate an officer, you rate him on his overall performance of duty and on the fitness report form there is a place, I believe, which says "collateral duties."

You could take his court service into consideration there. That is to say, if he performed very well, you would mark him high in collateral duties. You might possibly, if he had gone into the court out of uniform or something like that, mark him down in military neatness just as you would if he went in some other place out of uniform.

It has nothing to do with his performance as a member of the court. It is just an overall evaluation of his service as a military officer.

Mr. WATERS. As I understand it then, Admiral, any dissatisfaction expressed by a convening authority would certainly not be under any circumstances reflected on an officer's efficiency report for any other reason.

Admiral MOTT. That is correct. I might give you an example. I won't mention where, but I went into a courtroom at a command recently where I noticed that not only didn't they have the accused in the proper uniform of the day, but the court members were in every different kind of uniform that the Navy has. It was a very unmilitary looking place, and I suggested to the admiral at this particular command that he ought to look into the way he ran his courts. After all, this is a place where the military is on display. Their appearance has nothing to do with the way they vote or their performance, but it does have something to do with the way they look and the way they conduct themselves.

Mr. WATERS. Thank you, Admiral.

Mr. Fay, I believe perhaps your expression in connection with the use of administrative discharges in court-martial was that they worked very well for the type of men upon whom they were used. Is that correct?

Mr. FAY. Well, for——

Mr. WATERS. I don't want to state your words inaccurately.

Mr. FAY. If I said it that way, I would like to rephrase it. I would say that they work very well for the people who have to be brought before them.

Mr. WATERS. And would you care to elaborate on that, sir?

Mr. FAY. Well, I would be happy to. It might take some time because it would take the full gamut of the charges of the people who would be brought before them.

But I will say that when we speak of undesirable discharges, we are speaking of only 2 percent of the people who receive administrative discharges. So we are speaking of a very small amount.

Mr. WATERS. The reason I brought that up is perhaps for the purpose of clarification. Certainly you didn't indicate or mean to indicate in any way that this was because the people had something wrong with them that they were brought up in that fashion?

Mr. FAY. No. I think the individual himself creates the situation that brings him up under these administrative procedures.

Mr. WATERS. Thank you, sir. Thank you, Mr. Chairman.

Senator ERVIN. Could it be said that a general discharge is used to separate from the service persons who have certain defects in aptitudes or medical capacity or behavior, rather than a person who has serious lapses in behavior?

Mr. FAY. That is correct, and, Mr. Chairman, amazingly enough even of those groups of people who fall into the unsuitable category, two-thirds of those people get honorable discharges and only one-third get general discharges.

Senator ERVIN. In other words, it is reserved to those who in a very real sense are inadequate to meet the high standards that you would like to have in the service?

Mr. FAY. That is correct.

Senator ERVIN. Is it a fair inference that a substantial proportion of those who receive undesirable discharges take those discharges rather than to be subjected to court-martial?

Mr. FAY. That is true.

Senator ERVIN. They prefer to go out that way rather than to be subjected to court-martial, and the Navy of course prefers that method also?

Mr. FAY. That is correct.

Mr. EVERETT. I have one more question in somewhat the same vein. We had a general impression from some of the material furnished to us that in the Navy the practice is that if a man is proposed for undesirable discharge because of misconduct, and if he requested trial by court-martial, and you do not try him by court-martial, for whatever reason it may be, then he is given the benefit of the doubt and given a discharge under honorable conditions. Is that a correct understanding?

Mr. FAY. Could you phrase that again, please?

Mr. EVERETT. That if you are thinking of discharging a sailor or marine by reason of misconduct, giving him an undesirable discharge, and if he says, "No, I want to be tried by court-martial for this", and if for some reason you decide not to try him, then he is given the benefit of the doubt and discharged under honorable conditions. Is that the way it works?

Mr. FAY. I am told that that is the way it works.

Mr. EVERETT. That if he wanted a trial, he would get the benefit of the doubt and would be presumed innocent unless it was proved that he was guilty when tried by a court-martial?

Mr. FAY. I find it hard to accept, but I am told that is the way it has worked in the cases that they have had brought before them. This situation applies only to sex perversion cases.

Mr. EVERETT. Thank you.

Senator ERVIN. Mr. Secretary, if there are no further questions we certainly are indebted to you and the members of your staff for the assistance you have given us in this matter, and I am certain that your objectives and ours are the same.

Mr. FAY. Thank you very much, Mr. Chairman, and thank you for your very fair treatment of us.

Mr. CREECH. The next witness will be the Honorable Alfred B. Fitt, Deputy Under Secretary of the Army for Manpower. Mr. Fitt, I believe you are accompanied by Mr. Raymond Williams, Executive Secretary of the Army Board for Correction of Military Records; Maj. Gen. Robert A. Hewitt, Director, Military Personnel Management, Deputy Chief of Staff for Personnel; and Maj. Gen. Bruce Easley, Director, Army Council for Review Boards.

## STATEMENTS OF HON. ALFRED B. FITT, DEPUTY UNDER SECRETARY OF THE ARMY (MANPOWER), AND BRIG. GEN. A. B. TODD, JAG; ACCOMPANIED BY RAYMOND WILLIAMS, EXECUTIVE SECRETARY, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS; MAJ. GEN. ROBERT A. HEWITT, DIRECTOR, MILITARY PERSONNEL MANAGEMENT, OFFICE OF DEPUTY CHIEF OF STAFF FOR PERSONNEL; MAJ. GEN. BRUCE EASLEY, DIRECTOR, ARMY COUNCIL OF REVIEW BOARDS; AND COL. ALVIN D. ROBBINS, EXECUTIVE, ARMY COUNCIL OF REVIEW BOARDS

Mr. FITT. Mr. Williams is not here this afternoon, but we are prepared to go ahead.

Mr. CREECH. Would you please identify the gentlemen with you for the record?

Mr. FITT. My name is Alfred B. Fitt, Deputy Under Secretary of the Army for Manpower. On my right is Brig. Gen. Alan B. Todd, Assistant Judge Advocate General for Military Justice, and on his right is Maj. Gen. Robert A. Hewitt, Director of Military Personnel. On my left is Maj. Gen. Bruce Easley, Director of the Army Council of Review Boards, and I should say that General Todd will follow me with a prepared statement, concerned primarily with the rights and protections afforded to our Army personnel in trials by courts-martial.

My statement to you today will primarily be concerned with the subject of administrative discharges from the Army, but before getting down to details I have some general comments which I hope will be helpful to the subcommittee.

The Army is an amazingly large institution, and that it runs at all, much less well—and I suggest that it does run well—is a circumstance for which all Americans are entitled to be proud and thankful. At the moment there are over a million soldiers in uniform. Since the beginning of World War II more than 15 million men and women have worn that uniform, so you can see that a very significant fraction of

our adult population has had real, living, breathing experience with Army customs, habits, discipline, and achievements.

In those it touches directly the Army inspires as many emotions as are found in mankind. The horrors of war aside, most are happy in their service careers; some grumble; some fall in between; but the Army is a pride-inspiring institution, and those who have served in it, or are serving now, are almost all of them proud of their roles and proud to be able to say they have served their country in this fashion.

The point I seek to make is that the Army is not a monolithic establishment separate and apart from the American stream, with concepts and practices opposed to our country's carefully built and carefully preserved traditions of justice and decency and freedom. It is not a totalitarian organization, with officers arrayed against enlisted man and giving only lip service to the standards embodied in our Constitution or in the laws that Congress has passed for the government of the armed services.

Many people have only the vaguest notion of military justice, and when they think about it at all they tend to perceive the Army as an establishment in which obedience is coerced and disobedience or misconduct ruthlessly, swiftly, and arbitrarily punished, with no hope of appeal or escape from the supposed brutalities of the system.

Yet nothing could be further from the truth. Over and over again, as my own experience with Army justice and Army discharge procedures has broadened, I have been struck by the scrupulous care which is taken to give maximum protection to the serviceman whose contribution or faithfulness have come into question. His entitlement to counsel is, for example, far greater than that of a person out of uniform. Adverse decisions, whether by a court-martial or an administrative board are not only subject to review, but the review is automatic and in almost all cases multiple. Even after his separation from service the man with a less-than-honorable discharge can petition the Army Discharge Review Board to upgrade it, and if his case fails there he can proceed to the Board for Correction of Military Records on which sit only civilians. Clemency and mercy are the rule rather than the exception. For example, the sentences of those convicted at general courts-martial are set aside or modified on review in about two-thirds of the cases—a far cry from civilian justice, where appellate review of the sentence itself is almost unknown.

My next general observation has to do with the nomenclature of discharges. I think everyone will agree that if a man's service is to be characterized at all, then discharge certificates ought not to characterize everyone's service with the same adjectives because not everyone's service is the same. Most men serve honorably and faithfully, and these—254,046 of them in 1961—receive honorable discharges. A handful of men—510 in 1961—following criminal conviction at a general court-martial receive dishonorable discharges.

But then there are the soldiers who fall in between the clear category "honorable" and the equally clear category "dishonorable." In this in-between area we find the constant AWOL, the alcoholic, the deadbeat, the civil offender, the shirker—men guilty of no enormous crimes and running the gamut from almost acceptable in their conduct to almost completely unacceptable. The label to put on this

kind of man when he's discharged has varied over the years. From 1893, when discharges first began to characterize service, and for the next 20 years there were only three kinds given, "discharges," "discharges without honor," and "dishonorable discharges." In 1913, the Army began to issue an unclassified discharge which actually fell somewhere between "honorable" and "without honor" and well above "dishonorable," and this in turn was superseded in 1916 by the "blue discharge" which continued in vogue until 1947.

The blue discharge did not characterize service at all and could be issued under honorable as well as other than honorable conditions. Inevitably the bland ambiguity inherent in this situation led to a common belief that honor was incompatible with a blue discharge, and so in the public mind the stupid were lumped with the shifty, and the minor offender with the chronic troublemaker.

Another defect of the blue discharge was that if given under honorable conditions there was no loss of VA and related benefits, but if given under other than honorable conditions certain forfeitures were possible. Inasmuch as the discharge certificate itself told the VA nothing except that the man might be ineligible, a laborious inquiry had to be made in every case by that organization to determine the veteran's eligibility for benefits.

In 1947, the nomenclature was changed in an effort to cope with the problems I have just described. In place of the blue, we adopted—and still have—two kinds of discharge, the general, which is issued under honorable conditions, and the undesirable, issued under other than honorable conditions.

We believe that the range of administrative discharges, honorable, general and undesirable is now sufficiently discriminating to permit fair and unambiguous characterization of a soldier's service. To be sure, the fact that a man did not earn an honorable discharge will be at the very least a personal embarrassment to him in afteryears and may in some instances, particularly if he were given an undesirable discharge, handicap him severely in seeking employment or in other ways. But this will follow so long as we isssue more than one type of discharge, no matter what nomenclature is adopted. Our real concern, and I have no doubt yours as well, is that our system for determining administratively that a soldier should receive something less than an honorable discharge is as completely fair and as completely accurate and as completely reliable as men can make it, while still being workable.

There are ample statutory provisions authorizing the Secretary of the Army to issue administrative discharges without specification as to type, or in which the law clearly contemplates administrative discharge under other than honorable conditions. The current law and its predecessors, essentially unchanged since 1776, have been interpreted by the courts to mean that the exact method of separation and the characterization of the discharge are the prerogatives of the executive who has the power to issue the discharge.

The criteria and procedures established for the award of discharges are provided in detail in copies of our regulations which have previously been furnished the committee, but let us consider the case of a soldier who ultimately receives an undesirable discharge.

Prior to the commencement of formal proceedings, every effort is made to rehabilitate the individual. Only when reassignment,

counseling or other rehabilitative efforts have proven fruitless is he considered for separation with less than an honorable discharge. The appropriate commander may then recommend to the next higher commander that the soldier appear before a board of officers to determine whether he should be retained in the military service.

Prior to appearance before the board, and at each stage of processing thereafter, safeguards have been established to assure that the rights of the individual are fully protected.

After notice is given a serviceman to appear before a board of officers, he is examined by a medical officer. The doctor furnishes the individual's commanding officer a complete report on his mental and physical condition. The examiner will also state, if appropriate, that the individual was, and is, mentally able to distinguish right from wrong, and to adhere to the right, and that the individual has the mental capacity to understand and participate in subsequent board proceedings. If it appears that the existence of a mental or physical disability is the cause or contributing cause of unfitness, a board of medical officers will be convened to examine the serviceman.

During proceedings before the boards of inquiry, the soldier is entitled to military counsel, a legally qualified counsel, if reasonably available, or civilian counsel. If civilian counsel is selected, the individual must bear the expense. If counsel of the individual's own choosing is not available, an experienced officer of mature judgment will be furnished by the convening authority to act as counsel, although the soldier may always decline such help.

The convening authority for these boards is an officer who exercises general court-martial authority, such as the commander of a division, or higher commander. Such a commander normally has the benefit of a legal staff to advise and assist him in these matters.

The board consists of three experienced officers of mature judgment, at least one of whom is of field grade. Before beginning the proceedings, in the event the individual has previously declined counsel, the president of the board must advise him of the type of discharge he may receive, and again advise him that he may request counsel. The respondent must then either accept or decline counsel, which choice becomes a part of the proceedings.

During the hearing either the recorder or junior member of the board presents the evidence and examines the witnesses, including those of the soldier if he is not represented by counsel.

(At this point Mr. Williams joined the Army witness group.)

Mr. FITT. A typical presentation will always include, as a minimum, the military history of the soldier, and matters pertaining to his marital status, civilian environment, age and family background. Before the board hearing is concluded the soldier is afforded full opportunity to present evidence or to call witnesses in his behalf to the extent that they are reasonably available.

While such boards are not bound by the rules of evidence prescribed for trials by court-martial, a general observance of the spirit of the rules as laid down by the Uniform Code of Military Justice is required in order to promote orderly procedure.

The individual is permitted to be present at all open sessions and to cross-examine witnesses. He is advised that any statement he makes may be used against him, and that he need make no statement.

Neither may he be compelled to incriminate himself, nor to answer any questions, the answer to which might tend to incriminate himself, nor to answer any questions, the answer to which might tend to incriminate him, nor to produce evidence if it is not material to the issue or might tend to incriminate him.

After all the evidence is in, the board will recommend either discharge and the character thereof, or retention in the service (including trial periods to be assessed at a later date so as to permit rehabilitation).

The board's proceedings and recommendations are then reviewed by the convening authority who has available to him the advice and assistance of his legal staff officers. There is no authority at this level to direct actions more severe than those recommended by the board. The commander may lessen the severity of the recommendations, concur, set aside the findings and refer the case to a new board, or even dismiss the proceedings entirely.

Under present regulations an undesirable discharge may be issued without board proceedings when a soldier has entered the service under fraudulent conditions but only after careful consideration by a reasonable senior officer, usually at least at the level of major general. In no case will the discharge be ordered prior to complete verification of the facts, including a thorough examination of pertinent records prepared at time of, or prior to, entry into the service.

Similarly, an undesirable discharge may be issued without board proceedings when the serviceman has been on unauthorized absence for a year or more, or upon his conviction in a civil court of a felony type offense, or of any offense involving narcotics violations or sexual perversion. We have in the works a change in the regulations which will confer the right to a board in these kinds of cases, except for the prolonged AWOL, or the man serving a penitentiary sentence imposed by civilian authority. In any event, the foregoing exceptions to the board requirement apply only to Regulars, for reservists may be issued such discharges only as a result of board action, unless this requirement is waived by the individual.

The administrative discharge system for eliminating officers is provided for in considerable detail by title 10 of the United States Code and, in general, substantially parallels the system for enlisted men, including the right to counsel, review by a senior Army commander, and access to records in order to prepare a defense.

Administration action to separate an officer from the service may be initiated either by his major field commander or by various agencies within the Headquarters, Department of the Army. In either case, the elimination recommendation is reviewed by the Deputy Chief of Staff for Personnel prior to being forwarded to the Selection Board for decision as to whether the officer should be required to show cause why he should retain his commission. If this board retains the officer, the case is closed. If the officer is required to show cause, the case is forwarded to a field board of inquiry.

The field board of inquiry is conducted in the major command where the officer is assigned. He is afforded a minimum of 30 days to prepare his case, and appears in person with legal counsel provided by the Government or his own civilian counsel as he prefers. The board of inquiry can retain the officer or recommend elimination.

Where elimination is recommended, the case is then referred to the board of review, which operates under the direction of the Secretary of the Army. This board may retain the officer or recommend his elimination. If the officer's elimination is recommended, the board of review may recommend clemency. The case is then forwarded to the Secretary of the Army for final determination. At any stage in proceedings, the officer may, if eligible, apply for retirement, resign, or request discharge.

Mr. Chairman, we have a number of charts which I would like to explain at this time, and a number of exhibits. Before I get to the charts, I would like to discuss briefly with you a series of exhibits we have prepared, hoping to make all of this a little easier to understand, because some of this is rather complex and rather difficult to keep in mind.

The first chart in the material you have before you I asked to be prepared so that we could give you a graphic presentation showing the percent of discharges in the same fiscal years that the committee asked us to furnish the statistics on.

As you will see from exhibit 1, there is a very modest number of discharges given which have anything other than the fully honorable characteristics to them, and there are no significant trends which appear in this first graphic presentation.

Senator ERVIN. Excuse me, Mr. Secretary. I was very much impressed by the figures about the number of dishonorable discharges in 1961. Only about two out of each thousand that were separated from the service in that year were dishonorably discharged.

Mr. FITT. Yes; I think it was about three-tenths of 1 percent, Senator, and it has continued to go down. It is two-tenths of 1 percent in 1961.

Exhibit 2 presents actually the same picture as exhibit 1, but it illustrates what you can do with a graph, because we have expanded the graph to show only the less than fully honorable discharges, and you can see the peaks and valleys in the rate of issuance of the general and the undesirable discharge particularly, dishonorable and the bad conduct discharge having steadily declined in percentage importance since 1956.

The same is true now of the undesirable, which peaked in 1958 and has steadily declined since then.

I checked with our people on the statistics for the first half of fiscal 1962, the year that we are now in, and actually since we extended the period of service for all of our enlisted men whose enlistments would have expired last fall.

We extended them by 4 months in the main. Only those who were being separated administratively, for one reason or another, other than expiration of service, were getting out, so that it would give a very unfair picture if we were to calculate the percentage of less than fully honorable discharges during that period.

But for the first quarter, July, August, and September last year, the decline in undesirable discharges which you will note beginning with the period after 1958 did continue. It will not continue into the

second quarter, but I expect as we get even with the game during the latter part of this year we will get a valid trend again.

Now, exhibit 3 is reproduced in large scale over here, and it is broken down into three parts. First, the judicial actions by which officers and enlisted men are separated, and then over here on your right, my left, a breakdown of the various different ways by which administrative discharges are awarded, and you can see quite clearly from these charts who hears the cases, who calls them, exactly what the entitlement to counsel may be, who reviews the proceedings, what kinds of discharges can be awarded, who has the burden of proof and other information, which I think will be helpful to the subcommittee in keeping track of the different ways by which these various separations are brought about.

Then exhibit 4 in the material that you have is a charge sheet which is used in court-martial proceedings, and I particularly wanted to call to your attention the second page of exhibit 4, because as you read through this, you will see the very careful steps that are taken to make sure that the accused is not being railroaded in our judicial system, our military judicial system.

This is the sheet that is applicable in the summary court-martial, and you will note there is a requirement that there be a sworn statement that the man has been informed of the charges against him, together with a statement which he must sign at the time indicating whether he objects to the trial or consents to it, and throughout these forms you can see the care which is taken to make sure that the man understands his rights, and that the rights to which he is entitled are conferred upon him.

The next exhibit is the record—a summarized record of a trial by special court-martial, and again you will see the same kinds of record keeping that we require to make sure that a proper case has been made against the man, and that the rights to which he is entitled have all been respected.

Exhibit 6 is much the same or offered for much the same purpose. This is the report which is filed by an investigating officer when criminal conduct is suspected. We have what we call an article 32 investigation.

That means that before any formal charges are launched, a careful investigation is made, in the course of which the suspected individual is entitled to counsel.

Then I thought you would be interested in the last five exhibits. These are specimen copies of the different kinds of discharges that the Army gives. I had never seen a bad conduct or a dishonorable discharge before, and I thought you might be interested in seeing them as well.

That concludes my portion of the Army's statement, sir, and I would like to introduce now General Todd to discuss the military justice aspects of the committee's inquiry.

Senator ERVIN. I might say that these exhibits are very illuminating. I am certainly pleased that you have prepared and presented these to us. They certainly make for ease of understanding.

(The material referred to is as follows:)

EXHIBIT 1

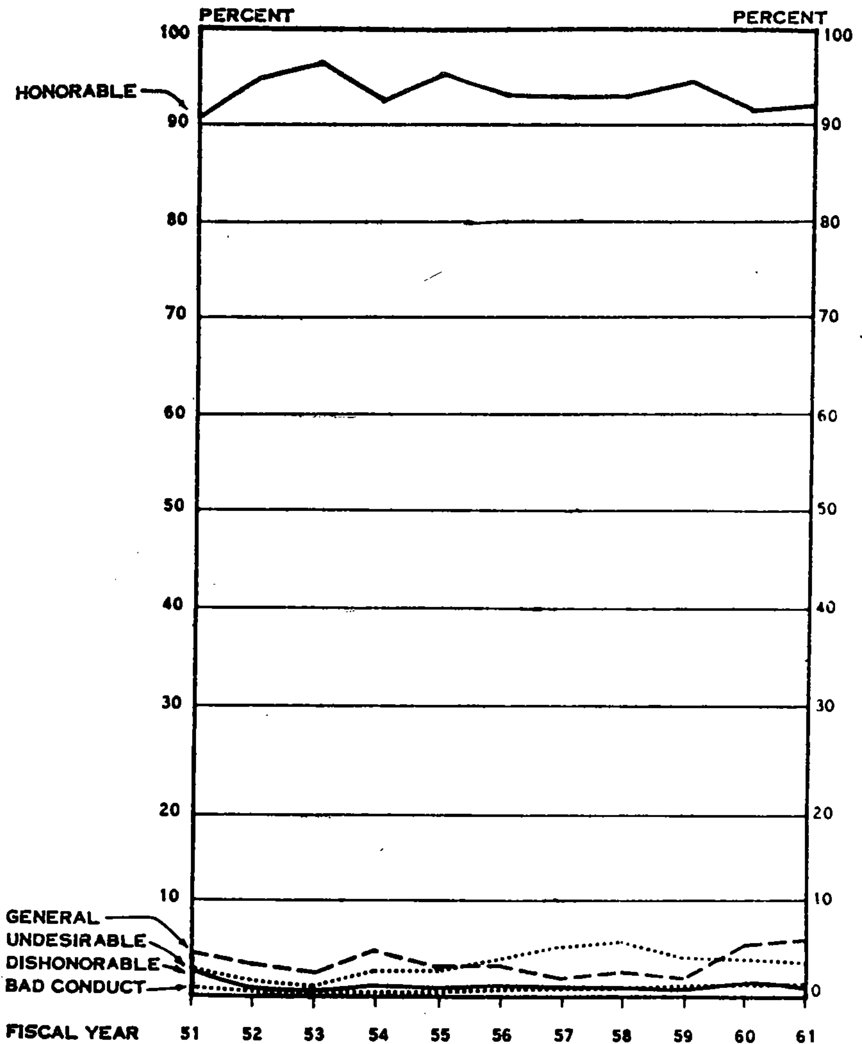


EXHIBIT 2

PERCENT OF DISCHARGES BY TYPE BY FISCAL YEAR

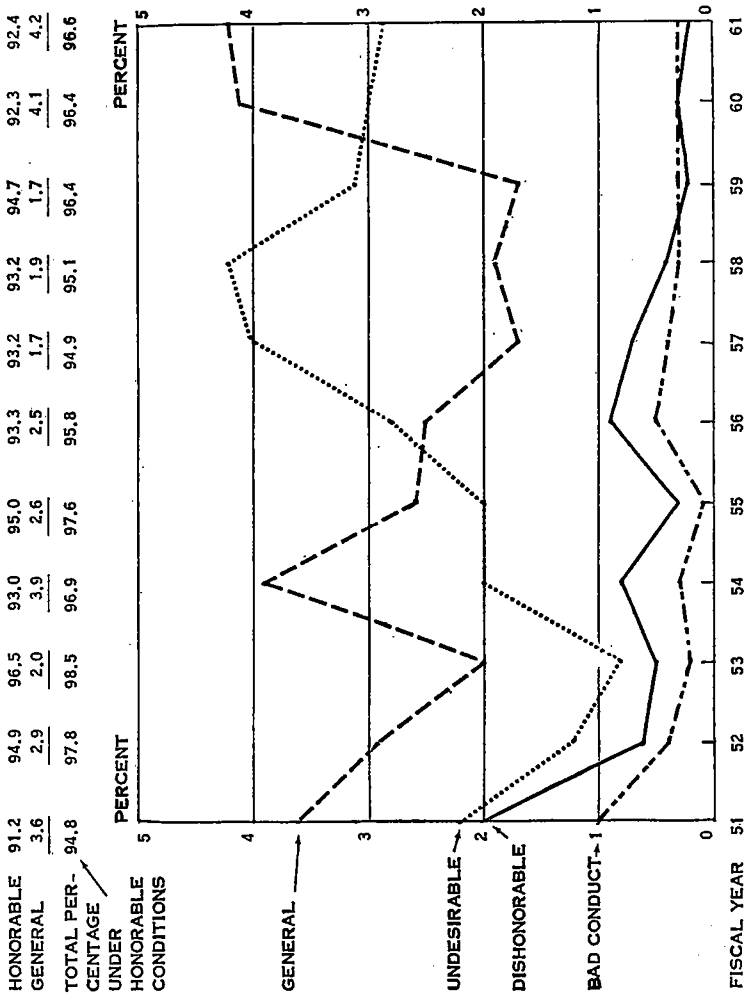


EXHIBIT 3

*Department of the Army*

JUDICIAL ACTIONS

| | Summary court-martial | Special court-martial | General court-martial |
|---|---|---|---|
| Inception of action | Anyone subject to the UCMJ. | Anyone subject to the UCMJ. | Anyone subject to the UCMJ. |
| Heard by | SCM officer | Composed of at least 3 members. | Composed of at least 5 members. |
| Entitlement to counsel | Not entitled to military counsel. May retain civilian counsel at own expense. | Appointed military counsel in every case. May have, but not entitled to, appointed qualified military lawyer. | Appointed JA as counsel in every case. |
| Review | 1, CA; 2, JA officer | 1, CA; 2, JA officer | 1, CA; 2, B/R; 3, USCMA; 4, SA; [1] 5, President.[2] |
| Type of discharge that may be issued | None | None | 1, Dishonorable; 2, bad conduct; 3, dismissal. |
| Burden of proof | Guilt established beyond a reasonable doubt by Government. | Guilt established beyond a reasonable doubt by Government. | Guilt established beyond a reasonable doubt by Government. |

[1] Officer dismissal cases and clemency actions.
[2] Death and general officer cases.

LEGEND

B/R—Board of reveiw.
CA—Convening authority.
JA—Judge advocate.
SA—Secretary of the Army.
SCM—Summary court-martial.
UCMJ—Uniform Code of Military Justice.
USCMA—U.S. Court of Military Appeals.

ADMINISTRATIVE ACTIONS

| | Homosexual (AR 635-89) all military personnel | Elimination of officers (AR 635-105) | Resignation by officers in lieu of administrative elimination action (AR 635-120) | Resignation by officers in lieu of court-martial (AR 635-120) |
|---|---|---|---|---|
| Inception of action by | Any CO in chain of command of individual; usually the immediate CO. | Any CO in chain of command of individual, or DA Headquarters from overall review of records. Selection Board, DA, must concur in recommendations. | By individual officer | By individual officer. |
| Heard by | EM only; Board of 3 or more officers, 1 of whom is field grade. Board hearing may be waived. Officers only: See AR 635-105. | RA officers (moral or professional dereliction or national security); Board of 3 or more general officers. All others: Board of 3 or more officers above lieutenant colonel including 1 general officer. Board hearing may be waived. | | |
| Entitlement to counsel | Military counsel appointed if requested. Legally qualified counsel is furnished if available; civilian counsel of his own selection at own expense. | JA officer, or counsel of own selection at own expense. | Legal advice available through staff judge advocate. | Military counsel furnished; legally qualified counsel is furnished if available; civilian counsel of his own selection at own expense. |
| Review | GCM convening authority | 1, major commander; 2, B/R; 3, SA. | 1, CO's in chain of command to DA; 2, discharge review board; 3, SA. | 1, CO in chain of command to DA; 2, discharge review board; 3, SA. |
| Type of discharge that may be issued | 1, honorable; 2, general; 3, discharge other than honorable,[1] 4, undesirable.[2] | 1, honorable; 2, general; 3, discharge other than honorable. | 1, honorable; 2, general; 3, discharge other than honorable. | 1, honorable; 2, general; 3, discharge other than honorable. |
| Burden of proof | Findings adverse to individual must be supported by substantial evidence. | Officer must provide convincing evidence that he should be retained. | Not applicable | Not applicable. |

[1] For officers only.
[2] For enlisted personnel.

LEGEND

CO—Commanding officer
AR—Army regulations
B/R—Board of review
GCM—General court-martial
EM—Enlisted personnel

Hq—Headquarters
JA—Judge advocate
SA—Secretary of the Army
DA—Department of the Army

| | Misconduct (AR 635-206) EM only | Unfitness (AR 635-208) EM only | Unsuitability (AR 635-209) EM only |
|---|---|---|---|
| Inception of action by | CO exercising GCM authority. | Usually the immediate CO of individual. | Usually the immediate CO of individual. |
| Heard by | Board of 3 or more officers, 1 of whom is field grade. Board may be waived by GCM authorization if action is based upon (1) fraudulent enlistment, (2) conviction by civil court, (3) prolonged AWOL. Board may be waived by individual. | Board of at least 3 officers, 1 of whom is field grade. Board hearing may be waived. | Board of 1 or more officers, 1 of whom is field grade. Board hearing may be waived. |
| Entitlement to counsel | Military counsel furnished: legally qualified counsel is furnished if available; civilian counsel of his own selection at own expense. | Military counsel appointed; legally qualified counsel is furnished if available; civilian counsel selection at own expense. | Military counsel appointed if requested; civilian counsel of his own selection at own expense. |
| Review | GCM convening authority. | GCM convening authority. | SPCM convening authority. |
| Types of discharge that may be issued. | 1, honorable; 2, general; 3, undesirable. | 1, honorable; 2, general; 3, undesirable. | 1, honorable; 2, general. |
| Burden of proof | Findings adverse to individual must be supported by substantial evidence. | Findings adverse to individual must be supported by substantial evidence. | Findings adverse to individual must be supported by substantial evidence. |

LEGEND

AR—Army regulations
Bd—Board
CO—Commanding officer

EM—Enlisted personnel
GCM—General court-martial
SPCM—Special court-martial

EXHIBIT 4

## CHARGE SHEET

PLACE | DATE

ACCUSED (*Last name, First name, Middle initial*) (*List aliases when material.*) | SERVICE NUMBER | GRADE

ORGANIZATION AND ARMED FORCE (*If the accused is not a member of any armed force, state other appropriate description showing that he is subject to military law.*)

DATE OF BIRTH

CONTRIBUTION TO FAMILY OR QUARTERS ALLOWANCE (*MCM, 126h (2)*)

PAY PER MONTH

BASIC $

SEA OR FOREIGN DUTY $

*TOTAL* $

### RECORD OF SERVICE

INITIAL DATE OF CURRENT SERVICE | TERM OF CURRENT SERVICE

PRIOR SERVICE (*As to each prior period of service, give inclusive dates of service and organization in which serving at termination, if available.*)

### DATA AS TO WITNESSES

| NAME OF WITNESS | ADDRESS | WITNESSES FOR | |
|---|---|---|---|
| | | PROSECUTION | ACCUSED |
| | | | |

### DOCUMENTS AND OBJECTS

LIST AND DESCRIBE. IF NOT ATTACHED TO CHARGES, NOTE WHERE IT MAY BE FOUND.

### DATA AS TO RESTRAINT

| NATURE OF ANY RESTRAINT OF ACCUSED | DATE | LOCATION |
|---|---|---|
| | | |

DD FORM 1 NOV 57 458 EDITION OF 1 DEC 55 MAY BE USED

1

Charge : Violation of the Uniform Code of Military Justice, Article

Specification

*If this space is insufficient for all charges and specifications, they will be set forth numerically, front to back, on separate sheets attached to this page.*

| SIGNATURE OF ACCUSER | TYPED NAME AND GRADE | ORGANIZATION |
|---|---|---|
| | | |

**AFFIDAVIT**

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this_____day of_____________, 19 , and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

SIGNATURE — GRADE AND ORGANIZATION OF OFFICER

OFFICIAL CHARACTER, AS ADJUTANT, SUMMARY COURT, ETC. *(MCM, 29e, and Article 30a and 136)*

*Officer administering oath must be a commissioned officer.*

DATE

I have this date informed the accused of the charges against him *(MCM, 32f(1))*.

SIGNATURE, *Commanding* — GRADE AND ORGANIZATION OF IMMEDIATE COMMANDER

DESIGNATION OF COMMAND OF OFFICER EXERCISING SUMMARY COURT-MARTIAL JURISDICTION — PLACE — DATE

The sworn charges above were received at______hours, this date *(MCM, 33b)*.

FOR THE[1] ______________________

SIGNATURE, GRADE, AND OFFICIAL CAPACITY OF OFFICER SIGNING

**1ST INDORSEMENT**

DESIGNATION OF COMMAND OF CONVENING AUTHORITY — PLACE — DATE

Referred for trial to the____________court-martial appointed by________________

______________________________________________

________________ , ________________19___, subject to the following instructions: [2] ______________________

BY [1] ________________ of________________
COMMAND OR ORDER

SIGNATURE, GRADE, AND OFFICIAL CAPACITY OF OFFICER SIGNING

I have served a copy hereof on each of the above-named accused, this________day of ________________, 19 _____.

SIGNATURE — GRADE AND ORGANIZATION OF TRIAL COUNSEL

*[1] When an appropriate commander signs personally, inapplicable words are stricken out. [2] Relative to proper instructions which may be included in the indorsement of reference for trial, see MCM, 33j(1). If none, so state.*

Fill in blank numbers of pertinent charges and specifications or "all specifications and charges," as may be appropriate for use unless departmental regulations prevent such election *(MCM), 32f(2))*.

☐ THE ACCUSED HAS BEEN PERMITTED AND HAS ELECTED TO REFUSE PUNISHMENT UNDER ARTICLE 15 AS TO

☐ THE ACCUSED HAS NOT BEEN OFFERED PUNISHMENT UNDER ARTICLE 15 AS TO

| GRADE AND ORGANIZATION OF OFFICER EXERCISING JURISDICTION UNDER ARTICLE 15 | SIGNATURE |
|---|---|
| | |

| RECORD OF TRIAL BY SUMMARY COURT-MARTIAL | CASE NUMBER *(Inserted by convening authority)* |
|---|---|

*TO BE FILLED IN BY THE ACCUSED*

| I ☐ CONSENT ☐ OBJECT TO TRIAL BY SUMMARY COURT-MARTIAL | SIGNATURE OF ACCUSED |
|---|---|

*TO BE FILLED IN BY SUMMARY COURT IF APPLICABLE*

**When an accused has been permitted and has elected to refuse punishment under Article 15, trial by summary court-martial may proceed despite his objection.**

1. THE ACCUSED, HAVING REFUSED TO CONSENT IN WRITING TO TRIAL BY SUMMARY COURT-MARTIAL AND NOT HAVING BEEN PERMITTED TO REFUSE PUNISHMENT UNDER ARTICLE 15, THE CHARGES ARE HEREWITH RETURNED TO THE CONVENING AUTHORITY.

| GRADE AND ORGANIZATION OF SUMMARY COURT OFFICER | SIGNATURE |
|---|---|
| | |

2. WAS THE ACCUSED ADVISED IN ACCORDANCE WITH PARAGRAPH 79d, MCM, 1951? ☐ YES

| SPECIFICATIONS AND CHARGES | PLEAS | FINDINGS | SENTENCE OR REMARKS |
|---|---|---|---|
| | | | |
| | | | NUMBER OF PREVIOUS CONVICTIONS CONSIDERED *(MCM, 75b(2))* |

| PLACE | DATE |
|---|---|
| | |

| GRADE, ORGANIZATION AND ARMED FORCE OF SUMMARY COURT OFFICER *(MCM 4a)* | SIGNATURE |
|---|---|
| | |

*Enter after signature, "Only officer present with command", if such is the case.*

*TO BE FILLED IN BY CONVENING AUTHORITY (MCM, 89, and app. 14a.)*

| ORGANIZATION | PLACE | DATE |
|---|---|---|
| | | |

ACTION OF CONVENING AUTHORITY

| GRADE AND ORGANIZATION OF CONVENING AUTHORITY | SIGNATURE |
|---|---|
| | |

**ENTERED ON APPROPRIATE PERSONNEL RECORDS IN CASE OF CONVICTION.** *(MCM, 91c)*

| GRADE AND DESIGNATION OF OFFICER RESPONSIBLE FOR THE ACCUSED'S RECORDS | SIGNATURE |
|---|---|
| | |

***NOTE:*** *Summary of evidence, if required by the convening or higher authority, will be attached on separate pages.*

84154 O—62——6

EXHIBIT 5

SUMMARIZED

# RECORD OF TRIAL[1]

(and accompanying papers)

of

..................................................................................................................................................

(Last name, first name, middle initial) (Service number) (Rank or grade)

..................................................................................................................................................

(Organization and armed force) (Station or ship)

By

# SPECIAL COURT-MARTIAL

*Appointed by* ..................................................................

(Title of convening authority)

..................................................................................................

(Command of convening authority)

Tried at

.................................................................................................... on .......................................... 19.......

(Place or places of trial) (Date or dates of trial)

## ACTION OF SUPERVISORY AUTHORITY

(Par. 94a (1), (2), MCM, 1951)

........................................................................................................................................... 19.......

(Command and location of supervisory authority) (Date record received)

| | *Date* | *Remarks* |
|---|---|---|
| FINAL DISPOSITION: | | |
| Findings and sentence, as approved by convening authority, correct in law and fact; to file . . . . . . . . . . . . . . . . . . | ...................... | |
| OR | | |
| Findings and sentence, as modified or corrected (see remarks), correct in law and fact; to file . . . . . . . . . . . . . . | ...................... | |
| OR | | |
| Acquittal or sentence set aside (see remarks); to file . . . . . . . . . . . . . . . | ...................... | |
| COPIES OF SCMO DISPOSED OF IN ACCORDANCE WITH DEPARTMENTAL REGULATIONS . . . . . . . . . . . . . . . . . . . | ...................... | ...................................................... (Signature and rank of judge advocate or law specialist) |

[1] See back cover for instructions as to preparation and arrangement.

DD FORM 1 JUL 53 491 Edition of 1 May 51 may be used.

## CHRONOLOGY SHEET [1]

In the case of ..........................................................................
(Name of accused)

Date of alleged commission of earliest offense tried: .......................................... 19.......

Date record forwarded to supervisory authority: [2] .......................................... 19.......

.........................................................................................................
(Signature and rank of convening authority or his representative)

| | *Date* 19...... | *Cumulative Elapsed Days* [3] |
|---|---|---|
| 1. Accused arrested or confined by military authority of command in which trial held [4] . . . . . . . . . | .................. | 0 |
| 2. Charges preferred (date of affidavit) . . . . . . . . . . . . . . . . | .................. | .............. |
| 3. Charges received by convening authority . . . . . . . . . . . . . | .................. | .............. |
| 4. Charges referred for trial . . . . . . | .................. | .............. |
| 5. Sentence or acquittal . . . . . . . . | .................. | .............. |
| Less days: | | |
| Accused sick, in hospital, or AWOL . . . . . . . . . ____ | | |
| Delay at request of defense . . . . . . . . . . . ____ | | |
| Total authorized deductions [5] ____ | | .............. |
| 6 Net elapsed days to sentence or acquittal . . . . . . . . . . . . . | | .............. |
| 7. Record received by convening authority . . . . . . . . . . . . . | .................. | .............. |
| Action of convening authority . . . | .................. | .............. |

[1] The convening authority is responsible for completion of the Chronology Sheet. The trial counsel should report any authorized deductions and any unusual delays in the trial of the case.

[2] Unless otherwise prescribed in departmental regulations, the supervisory authority is the officer exercising general court-martial jurisdiction over the command. See par. 94*a* (1), (2), MCM, 1951.

[3] In computing days between two dates, disregard first day and count last day. The actual number of days in each month will be counted.

[4] Item 1 is not applicable when accused is not arrested or confined or when he is in confinement under a sentence of court-martial at time charges preferred. Item 2 will be the zero date if item 1 is not applicable.

[5] Only this item may be deducted.

REMARKS:

SUMMARIZED

# RECORD OF TRIAL

(Proper)

of

........................................................................................................................................
(Last name, first name, middle initial) (Service number) (Rank or grade)

........................................................................................................................................
(Organization and armed force) (Station or ship)

By

## SPECIAL COURT-MARTIAL

*Appointed by* ........................................................................
(Title of convening authority)

........................................................................................................
(Command of convening authority)

Tried at

........................................................................................ on ........................................ 19........
(Place or places of trial) (Date or dates of trial)

### COPIES OF RECORD [1]

..................... copy of record furnished the accused as per attached receipt.

..................... copy(ies) of record forwarded herewith.

### RECEIPT FOR COPY OF RECORD [2]

I hereby acknowledge receipt of a copy of the above-described record of trial, delivered to me at ........................................................................................................................

this ......................... day of ..........................................., 19........

..........................................................................
(Signature of accused)

I hereby acknowledge receipt of a copy of the above-described record of trial, delivered to me at ........................................................................................................................

this ......................... day of ..........................................., 19........

..........................................................................
(Signature of accused)

[1] If copy of record prepared for accused contains matters requiring security protection, see paragraph 82*g*, MCM, 1951.

[2] If personal delivery to accused is impossible, see paragraph 82*g* (1) and page 525, MCM, 1951.

## PROCEEDINGS OF A SPECIAL COURT-MARTIAL

The court met (at) (on board) ................................................, at ........................... hours,

................................................................., 19........, pursuant to the following orders:[1]

[1] Insert here literal copies of all appointing and amending orders of courts to which the charges have been referred. Any request of an enlisted accused for enlisted court members, together with any declaration of the nonavailability of such enlisted persons, will be inserted immediately following the orders.

PERSONS PRESENT[1]

PERSONS ABSENT[2]

The accused and the following (regularly appointed defense counsel and assistant defense counsel) (counsel introduced by him) were present:

The following appointed (reporter) (and) (interpreter) (was) (were) sworn:[3]

The trial counsel stated that the legal qualifications of all members of the prosecution were correctly stated in the appointing orders except as indicated below.

The trial counsel further stated that no member of the prosecution had acted as investigating officer, law officer, court member, or as a member of the defense in this case, or as counsel for the accused at a pretrial investigation or other proceeding involving the same general matter except as indicated below.[4]

[1] List members and counsel by rank or grade and name.
[2] Reasons for absence before arraignment will not be shown (par. 41*d*, MCM, 1951).
[3] Delete if not applicable.
[4] If a member of the prosecution is disqualified by reason of prior participation, the disqualifying fact will be shown, together with the action that was taken under paragraph 61*e*, MCM, 1951.

The defense counsel stated that the legal qualifications of all members of the defense were correctly stated in the appointing orders except as indicated below.[1]

The defense counsel stated that no member of the defense had acted as the accuser, a member of the prosecution, investigating officer, law officer, or member of the court in this case except as indicated below.[2]

The trial counsel announced that the accused had (not) made a request in writing that the membership of the court include enlisted persons.

The members of the court and the personnel of the prosecution and defense were sworn.

Each accused was extended the right to challenge any member of the court for cause and to exercise one peremptory challenge against any member.

The following members of the court were excused and withdrew for the reasons stated opposite their respective names:

There was no contest with respect to the challenging of any of the members for cause except as indicated below.

The accused was then arraigned upon the following charges and specifications:[3]

[1] If individual counsel is present, show his legal qualifications or lack of legal qualifications.
[2] If a member of the defense is disqualified by reason of prior participation, the disqualifying fact will be shown together with the action that was taken under paragraph 61f(4), MCM, 1951.
[3] Insert, following this page, the charge sheet. Use the accused's copy of the charge sheet to prepare his copy of the record.

The defense had no motions to present except as indicated below.[1]

The accused pleaded as follows:[2]

## PRESENTATION OF PROSECUTION CASE

The trial counsel made (an) (no) opening statement.

The following witnesses for the prosecution were sworn and testified in substance as follows:[3]

[1] The substance of any motions made by the defense before pleas are entered will be recorded here, together with the ruling of the court thereon. The substance of any motions made by the defense after pleas are entered will be recorded at the proper chronological point in the record, together with the ruling of the court thereon.

[2] If the president explains the meaning and effect of a plea of guilty, the record will show the explanation as indicated at page 533, MCM, 1951.

[3] Unless otherwise prescribed by departmental regulations, the convening authority may direct that testimony be recorded verbatim if a reporter is present. If a witness testifies through an interpreter, that fact will be shown. For manner of recording presentation of defense case, see page 534, MCM, 1951. Additional testimony will be shown on blank pages immediately following this page.

## PRESENTATION OF DEFENSE CASE

The defense counsel made (an) (no) opening statement.

The accused was advised by the president of his right to testify or remain silent. The following witnesses for the defense were sworn and testified in substance as follows:

The prosecution made (an) (no) argument.
The defense made (an) (no) argument.
The prosecution made (a) (no) closing argument.

Pursuant to Article 51*c*, the president instructed the court as to the elements of each offense charged, the presumption of innocence, reasonable doubt, and burden of proof.

Neither the prosecution nor the defense having anything further to offer, the court was closed. Thereafter, the court opened[1] and the president announced that, in closed session and upon secret written ballot, (the accused was found not guilty.) (two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, the accused was found: )

The trial counsel read the data as to age, pay, service, and restraint of the accused as shown on the charge sheet. (The trial counsel stated that he had no evidence of previous convictions to submit.) (The attached evidence of previous convictions was offered and admitted in evidence as Prosecution Exhibit ................, without objection, except as indicated below.)

After the accused was advised by the president of his right to present evidence in extenuation or mitigation, including the right to remain silent or to make a sworn or unsworn statement, (the defense counsel stated that he had nothing further to offer.) (the defense presented the following matters: )

[1] "Parties to the trial" must be accounted for when court opens after being in closed session, but the accounting need not be shown in a summarized record. After a recess or adjournment, record should show, "All parties to the trial who were present when the court (adjourned) (recessed) were again present (except)." The reason for the subsequent absence of any member who was present at the arraignment must be shown (par. 41*d*(4), MCM, 1951).

Neither the prosecution nor the defense having anything further to offer, the court was closed. Thereafter, the court opened and the president announced that in closed session and, upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, the accused was sentenced:

The court adjourned at ............... hours, ................................... 19.......

## AUTHENTICATION OF RECORD

............................................................ ............................................................

............................................................ ............................................................

Trial Counsel President

I have examined the record of trial in the foregoing case.

............................................................

............................................................

Defense Counsel

## ACTION OF CONVENING AUTHORITY[1]

............................................................
(Command of convening authority)

............................................................
(Station or ship)

............................................................ 19.......

In the foregoing case of

............................................................

............................................................
Commanding

[1] See appendix 14*b*, MCM, 1951.

## INSTRUCTIONS FOR PREPARING AND ASSEMBLING A RECORD OF TRIAL BY SPECIAL COURT-MARTIAL WHEN A VERBATIM RECORD IS NOT PREPARED

USE OF FORM.—This form for a summarized record of trial by special court-martial will be used in preparing records in cases to which it may be reasonably adapted without extensive alterations. If a particular page of the form does not provide adequate space to record the actual proceedings in accordance with appendix 10*a*, MCM, 1951, that page will not be used; instead that part of the record will be typed on regular legal length bond paper, using appendix 10 as a guide.

DELETIONS.—In preparing the record, inapplicable words of the printed text must be deleted. Deletions may be made by striking over the inapplicable word or phrase, or by *ruling it out in ink*. When several consecutive lines are to be deleted, a single line, ruled in ink, from upper left to lower right will suffice. No deletion or remark is necessary when there are no exceptions after an item ending "except as indicated below."

RECORDING TESTIMONY.—A summarized record need contain only a summarized report of the testimony as indicated in paragraph 83*b* (2) and page 533, MCM, 1951. However, unless otherwise prescribed by departmental regulations, the convening authority may direct that a summarized record contain a verbatim report of the testimony of witnesses if a reporter was appointed and actually served in that capacity throughout the trial.

COPIES.—In addition to the original record and allied papers, prepare one copy of the record of proceedings in court, including copies of all exhibits received in evidence (or description thereof), for each accused. The convening authority may direct the preparation of other copies.

ARRANGEMENT.—When forwarded by the convening authority, a summarized record of trial by special court-martial will be arranged and bound with allied papers as shown below. The trial counsel will arrange and bind the record as shown except for the items shown in *italics* which are to be inserted by the convening authority.

1. Front cover and chronology sheet.
2. Court-martial data sheet.
3. *Court-martial orders; four copies promulgating the result of trial as to each accused.*
4. Charge sheet (unless included in record of trial proper).
5. Any papers which accompanied the charges when referred for trial (unless included in the record proper).
6. Records of former trials.
7. Record of trial proper in the following order:
   (*a*) Receipt of accused, or certificate of trial counsel, showing delivery of copy of record to accused.
   (*b*) Record of proceedings in court.
   (*c*) *Action of convening authority.*
   (*d*) Exhibits admitted in evidence.
   (*e*) Clemency papers.
   (*f*) Offered exhibits not received in evidence, but which are attached at request of counsel.
8. Briefs of counsel.
9. This back cover sheet.

U. S. GOVERNMENT PRINTING OFFICE : 1953—O-283892

EXHIBIT 6

**INVESTIGATING OFFICER'S REPORT**
*(Of charges under the provisions of Article 32, Uniform Code of Military Justice, and paragraph 34, Manual for Courts-Martial, U.S., 1951)*

INDORSEMENT

FROM: *(Grade, name and organization of investigating officer)*

DATE OF REPORT

TO: *(Title and organization of officer who directed report to be made)*

| GRADE AND NAME OF ACCUSED | SERVICE NUMBER | ORGANIZATION | DATE OF CHARGES |
|---|---|---|---|
| | | | |

| *(Check appropriate answer)* | YES | NO |
|---|---|---|
| 1. IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 32, UNIFORM CODE OF MILITARY JUSTICE, AND PARAGRAPH 34, MANUAL FOR COURTS-MARTIAL, 1951, I HAVE INVESTIGATED THE CHARGES *(Exhibit 1)* APPENDED HERETO. *(If, and as soon as, it is determined the accused elects not to be represented by counsel or by qualified counsel during the investigation, the investigating officer will complete in ink items 1 through 4, except 4f, and will ask the accused to sign item 4e.)* | | |
| 2. AT THE OUTSET OF THE INVESTIGATION I READ TO THE ACCUSED THE PROVISIONS OF ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE, AND ALSO ADVISED HIM: | | |
| *a.* OF THE NATURE OF THE OFFENSE(S) CHARGED AGAINST HIM | | |
| *b.* OF THE NAME OF THE ACCUSER | | |
| *c.* OF THE NAMES OF THE WITNESSES AGAINST HIM SO FAR AS KNOWN BY ME. | | |
| *d.* THAT THE CHARGES WERE ABOUT TO BE INVESTIGATED BY ME | | |
| *e.* OF HIS RIGHT, UPON HIS REQUEST, TO HAVE COUNSEL REPRESENT HIM AT THE INVESTIGATION, EITHER-- | | |
| *(1)* CIVILIAN COUNSEL, IF PROVIDED BY HIM, OR | | |
| *(2)* MILITARY COUNSEL OF HIS OWN SELECTION, IF SUCH COUNSEL BE REASONABLY AVAILABLE, OR | | |
| *(3)* COUNSEL, QUALIFIED UNDER ARTICLE 27*(b)*, APPOINTED BY THE OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION | | |
| *f.* OF HIS RIGHT TO CROSS-EXAMINE ALL AVAILABLE WITNESSES AGAINST HIM | | |
| *g.* OF HIS RIGHT TO PRESENT ANYTHING HE MIGHT DESIRE IN HIS OWN BEHALF, EITHER IN DEFENSE OR MITIGATION | | |
| *h.* OF HIS RIGHT TO HAVE THE INVESTIGATING OFFICER EXAMINE AVAILABLE WITNESSES REQUESTED BY HIM | | |
| *i.* OF HIS RIGHT TO MAKE A STATEMENT IN ANY FORM | | |
| *j.* OF HIS RIGHT TO REMAIN SILENT OR TO REFUSE TO MAKE ANY STATEMENT REGARDING ANY OFFENSE OF WHICH HE WAS ACCUSED OR CONCERNING WHICH HE IS BEING INVESTIGATED | | |
| *k.* THAT ANY STATEMENT MADE BY HIM MIGHT BE USED AS EVIDENCE AGAINST HIM IN A TRIAL BY COURT-MARTIAL | | |
| 3. *a.* THE ACCUSED REQUESTED MILITARY COUNSEL BY NAME | | |
| *b.* NAME AND GRADE OF SUCH COUNSEL — ORGANIZATION | | |
| *c.* MILITARY COUNSEL REQUESTED BY NAME WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(B), UNIFORM CODE OF MILITARY JUSTICE | | |
| *d.* IF ANSWER TO PRECEDING ITEM WAS "NO", ACCUSED WAS INFORMED THAT SUCH UNQUALIFIED COUNSEL MAY NOT REPRESENT HIM AT ANY GENERAL COURT-MARTIAL | | |
| *e.* MILITARY COUNSEL REQUESTED BY NAME WAS REASONABLY AVAILABLE. *(If not available, explain in item 18, having reference to paragraph 34c, Manual for Courts-Martial, 1951, page 46)* | | |
| *f.* THE ACCUSED STATED HE WOULD BE REPRESENTED BY CIVILIAN COUNSEL | | |
| *g.* NAME AND ADDRESS OF SUCH COUNSEL — MEMBER OF THE BAR OF | | |
| *h.* *(This item to be used by accused's civilian counsel only)*<br>_______________ *Place and date*<br>I HEREBY ENTER MY APPEARANCE FOR THE ABOVE-NAMED ACCUSED AND REPRESENT THAT I AM A MEMBER OF THE BAR OF _______________<br>_______________ *(Signature of Counsel)* | | |
| 4. *a.* THE ACCUSED REQUESTED THAT COUNSEL BE APPOINTED BY THE GENERAL COURT-MARTIAL AUTHORITY TO REPRESENT HIM | | |
| *b.* NAME AND GRADE OF SUCH APPOINTED COUNSEL — ORGANIZATION | | |
| *c.* APPOINTED COUNSEL *(as in b above)* WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(B), UNIFORM CODE OF MILITARY JUSTICE | | |
| *d.* IF ANSWER TO PRECEDING ITEM *(4c)* IS "NO", ACCUSED SPECIFICALLY WAIVED COUNSEL WITH SUCH QUALIFICATIONS | | |
| *e.* *(To be signed by accused if answer to 3a and 4a, or 3c, or 4c was "NO". If accused fails to sign, investigating officer will explain circumstances in detail in item 18)*<br>_______________ *Date*<br>I HAVE BEEN INFORMED OF MY RIGHT TO REPRESENTATION AT THE INVESTIGATION BY COUNSEL QUALIFIED UNDER ARTICLE 27(B), UNIFORM CODE OF MILITARY JUSTICE. I HEREBY WAIVE MY RIGHT TO (SUCH QUALIFIED COUNSEL) (COUNSEL).<br>_______________ *(Signature of Accused)* | | |

NOTE: If additional space is required for any item, enter the additional material on a separate sheet. Be sure to identify such material with the proper numerical and, when appropriate, lettered heading *(Example, "5c")*. *Securely attach any additional sheet to the form and add a note in the appropriate item of the form: "See additional sheet." Any matters considered pursuant to paragraph 34, MCM, 1951, which are not identifiable with some other heading in the form should be entered in item 18.*

DD FORM 1 JUN 59 457 PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE.

| *(Check appropriate answer continued)* | | | YES | NO |
|---|---|---|---|---|
| f. COUNSEL FOR THE ACCUSED WAS PRESENT THROUGHOUT THE INVESTIGATION *(If the accused waives the right to have counsel present throughout all or a part of the investigation after having requested counsel, state the circumstances and the particular proceedings conducted in the absence of such counsel)* | | | | |
| 5. a. IN THE PRESENCE OF THE ACCUSED I HAVE INTERROGATED ALL AVAILABLE WITNESSES UNDER OATH OR AFFIRMATION AND HAVE EXAMINED ALL DOCUMENTARY EVIDENCE ON BOTH SIDES. | | | | |
| b. I HAVE REDUCED THE MATERIAL TESTIMONY GIVEN BY EACH SUCH WITNESS UNDER DIRECT AND CROSS-EXAMINATION TO A SWORN OR AFFIRMED WRITTEN STATEMENT EMBODYING THE SUBSTANCE OF THE TESTIMONY TAKEN ON BOTH SIDES. | | | | |
| c. THE SWORN OR AFFIRMED WRITTEN STATEMENTS OF SUCH WITNESSES ARE APPENDED HERETO AS INDICATED: | | | | |
| NAME AND GRADE OF WITNESSES WHO WERE PRESENT | ORGANIZATION OR ADDRESS | EXHIBIT NUMBER | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| 6. a. THE SUBSTANCE OF THE EXPECTED TESTIMONY OF EACH OF THE FOLLOWING ABSENT WITNESSES WHOSE PRESENCE WAS NOT REQUESTED BY THE ACCUSED, OR WHO, HAVING BEEN REQUESTED, WERE NOT AVAILABLE, OR FOR WHOM THE REQUEST WAS WITHDRAWN, WAS OBTAINED FROM SUCH WITNESSES IN THE FORM OF A SWORN OR AFFIRMED WRITTEN STATEMENT, OR WAS STIPULATED TO BY THE ACCUSED IN WRITING. SUCH STATEMENTS OR STIPULATIONS ARE APPENDED HERETO AS INDICATED: | | | | |
| NAME AND GRADE OF ABSENT WITNESSES | ORGANIZATION OR ADDRESS | EXHIBIT NUMBER | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| b. A COPY OF EACH SUCH WRITTEN STATEMENT HAS BEEN SHOWN TO THE ACCUSED. | | | | |
| c. IF AN ABSENT WITNESS IS REQUESTED BY THE ACCUSED BUT IS NOT AVAILABLE, ENTER A PROPER EXPLANATION | | | | |
| 7. a. THE FOLLOWING DOCUMENTS HAVE BEEN EXAMINED, SHOWN TO THE ACCUSED, AND ARE APPENDED AS INDICATED *(describe documents)* | | EXHIBIT NUMBER | | |
| | | | | |
| | | | | |
| | | | | |
| b. IF ANY DOCUMENTS MADE AVAILABLE TO THE INVESTIGATING OFFICER WERE NOT EXAMINED OR WERE EXAMINED BUT NOT SHOWN TO THE ACCUSED, OR WERE EXAMINED BUT ARE NOT APPENDED, STATE THE REASONS | | | | |
| | | | | |
| | | | | |
| | | | | |
| 8. a. THE FOLLOWING DESCRIBED REAL EVIDENCE WAS EXAMINED, SHOWN TO THE ACCUSED, AND IS NOW PRESERVED FOR SAFEKEEPING AS INDICATED: | | | | |
| b. IF CERTAIN REAL EVIDENCE WHICH WAS EXAMINED WAS NOT SHOWN TO THE ACCUSED, STATE THE REASONS | | | | |

| *(Check appropriate answer continued)* | YES | NO |
|---|---|---|
| 9. THE ACCUSED AFTER HAVING BEEN INFORMED OF HIS RIGHT TO MAKE A STATEMENT OR REMAIN SILENT: | | |
| *a.* STATED THAT HE DID NOT DESIRE TO MAKE A STATEMENT | | |
| *b.* MADE A STATEMENT APPENDED HERETO *(Exhibit )*. | | |
| *c.* THE CIRCUMSTANCES OF THE TAKING OF ANY CONFESSION OR ADMISSION OF ACCUSED WERE INQUIRED INTO BY ME AND SUCH CONFESSION OR ADMISSION APPEARS TO HAVE BEEN OBTAINED IN ACCORDANCE WITH ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE. AND/OR THE 5TH AMENDMENT. *(Where appropriate, attach statement of person taking confession or admission showing circumstances of taking)* | | |
| *d.* THE ACCUSED, AFTER BEING ADVISED THAT HE DID NOT HAVE TO MAKE ANY STATEMENT WITH RESPECT TO IT, WAS SHOWN THE CONFESSION OR ADMISSION AND DID NOT CONTEST IT AS BEING NOT IN COMPLIANCE WITH ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE. *(If the confession or admission was contested, attach accused's explanation of the circumstances.)* | | |
| 10. *a.* THERE WERE REASONABLE GROUNDS FOR INQUIRING INTO THE MENTAL RESPONSIBILITY OF THE ACCUSED AT THE TIME OF THE ALLEGED OFFENSE *(MCM, 120b)* | | |
| *b.* THERE WERE REASONABLE GROUNDS FOR INQUIRING INTO THE MENTAL CAPACITY OF THE ACCUSED AT THE TIME OF THE INVESTIGATION *(MCM, 120c)* | | |
| *c.* IF GROUNDS FOR INQUIRY AS TO THE ACCUSED'S MENTAL CONDITION EXISTS, STATE REASONS THEREFOR AND ACTION TAKEN | | |
| *d.* A REPORT OF A (BOARD OF MEDICAL OFFICERS) (PSYCHIATRIST) IS APPENDED *(Exhibit )* | | |
| 11. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL. *(If any essential witness(es) will not be so available, list name, address, reason for nonavailability, and recommendation, if any, whether a deposition should be taken. List estimated date of separation and/or transfer, if pertinent and available)* | | |
| 12. EXPLANATORY OR EXTENUATING CIRCUMSTANCES ARE SUBMITTED HEREWITH. | | |
| 13. *a.* I HAVE INVESTIGATED AND FIND PREVIOUS CONVICTION(S) OF OFFENSES COMMITTED WITHIN THE THREE YEARS NEXT PRECEDING THE COMMISSION OF AN OFFENSE WITH WHICH THE ACCUSED IS NOW CHARGED *(MCM, 1951, par 75b(2))* AND DURING: | | |
| *(1)* A CURRENT ENLISTMENT, VOLUNTARY EXTENSION OF ENLISTMENT, APPOINTMENT, OR OTHER ENGAGEMENT OR OBLIGATION FOR SERVICE OF THE ACCUSED, OR | | |
| *(2)* THE LAST ENLISTMENT, APPOINTMENT, OR OTHER ENGAGEMENT OR OBLIGATION FOR SERVICE OF THE ACCUSED WHICH TERMINATED UNDER OTHER THAN HONORABLE CONDITIONS OR FROM WHICH THE ACCUSED DESERTED AND SUBSEQUENTLY ENLISTED. | | |
| *b.* AN EXTRACT COPY OF THE ACCUSED'S MILITARY RECORDS OF PREVIOUS CONVICTIONS IS APPENDED *(Exhibit )* | | |
| 14. IN ARRIVING AT MY CONCLUSIONS I HAVE CONSIDERED NOT ONLY THE NATURE OF THE OFFENSE(S) AND THE EVIDENCE IN THE CASE, BUT I HAVE LIKEWISE CONSIDERED THE AGE OF THE ACCUSED, HIS MILITARY SERVICE, AND THE ESTABLISHED POLICY THAT TRIAL BY GENERAL COURT-MARTIAL WILL BE RESORTED TO ONLY WHEN THE CHARGES CAN BE DISPOSED OF IN NO OTHER MANNER CONSISTENT WITH MILITARY DISCIPLINE. | | |
| 15. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM AND THE MATTERS CONTAINED THEREIN ARE TRUE, TO TH BEST OF MY KNOWLEDGE AND BELIEF. *(If the answer is "NO", explain and indicate recommended action on additional sheet).* | | |
| 16. ANY INCLOSURES RECEIVED BY ME WITH THE CHARGES AND NOT LISTED ABOVE AS AN EXHIBIT ARE SECURELY FASTENED TOGETHER AND APPENDED HERETO AS ONE EXHIBIT *(Exhibit . If no such inclosures were received, check "NO".)* | | |
| 17. *(Check appropriate box ONLY if trial is recommended)* TRIAL BY ☐ GENERAL ☐ SPECIAL ☐ SUMMARY COURT-MARTIAL IS RECOMMENDED. | | |

| 18. REMARKS *(If more space is required, attach additional sheets. Check* ☐ *YES* ☐ *NO if additional sheets are attached)* | |
|---|---|
| | |
| 19. I HAVE NO PREVIOUS CONNECTION WITH THIS CASE OR ANY CLOSELY RELATED CASE. *(If any connection is indicated, attach a full explanation.)* I AM NOT AWARE OF ANY REASONS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. *(If any reasons appear to exist, attach a statement giving full details.)* | |
| TYPED NAME, GRADE, AND ORGANIZATION OF INVESTIGATING OFFICER | SIGNATURE |
| | |

☆ U. S. GOVERNMENT PRINTING OFFICE : 1959 O - 510372

EXHIBIT 7

Honorable Discharge

from the Armed Forces of the United States of America

SPECIMEN

This is to certify that

______________________________

was Honorably Discharged from the

Army of the United States

on the ______ day of ______________ This certificate is awarded as a testimonial of Honest and Faithful Service

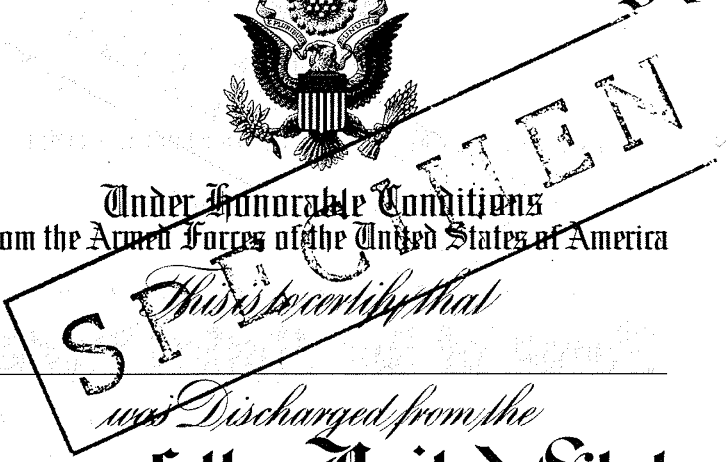
______________________________

______________________________

84164 O—62——7

EXHIBIT 8

# General Discharge



Under Honorable Conditions
from the Armed Forces of the United States of America

*This is to certify that*

_______________________________________________

*was Discharged from the*



# Army of the United States

*on the* ______ *day of* ____________ *under honorable conditions*

_______________________________

_______________________________

EXHIBIT 9

# UNDESIRABLE DISCHARGE

FROM THE ARMED FORCES OF THE UNITED STATES OF AMERICA

SPECIMEN

THIS IS TO CERTIFY THAT

______________________________

WAS DISCHARGED FROM THE

ARMY OF THE UNITED STATES

ON THE ______ DAY OF ____________

AS UNDESIRABLE

______________________________

______________________________

EXHIBIT 10

# DISCHARGE

**UNDER OTHER THAN HONORABLE CONDITIONS**

FROM THE ARMED FORCES OF THE

UNITED STATES OF AMERICA

SPECIMEN

THIS IS TO CERTIFY THAT

______________________________

WAS DISCHARGED FROM THE

ARMY OF THE UNITED STATES

ON THE ______ DAY OF ____________

______________________________

______________________________

EXHIBIT 11

# BAD CONDUCT DISCHARGE

FROM THE ARMED FORCES OF THE UNITED STATES OF AMERICA

SPECIMEN

THIS IS TO CERTIFY THAT

______________________________

WAS DISCHARGED FROM THE

ARMY OF THE UNITED STATES

ON THE ______ DAY OF ____________

BY REASON OF SENTENCE OF A

______________ COURT MARTIAL

______________________________

______________________________

EXHIBIT 12

# DISHONORABLE DISCHARGE

FROM THE ARMED FORCES OF THE UNITED STATES OF AMERICA

THIS IS TO CERTIFY THAT

______________________________

WAS DISCHARGED FROM THE

ARMY OF THE UNITED STATES

ON THE ______ DAY OF __________

BY REASON OF SENTENCE OF A

GENERAL COURT MARTIAL

______________________________

______________________________

SPECIMEN

Mr. FITT. Thank you, sir.

General TODD. Shall I proceed?

Mr. CREECH. At your convenience. If you would prefer to proceed now, General, we can hear you at this time and then present all the questions at the same time, whatever you prefer.

General TODD. I think probably it might be easier for me to go ahead and then have all the questions.

Mr. CREECH. All right, sir; thank you.

General TODD. My name is Alan B. Todd, brigadier general, U.S. Army, Assistant Judge Advocate General for Military Justice, and, Mr. Chairman, I welcome the opportunity to appear before this subcommittee to discuss a matter of vital interest to the Congress, to the members of our Military Establishment, and to those of us charged directly with the responsibility of securing the privileges and protections of a country founded upon the rule of law.

Congress has sought to insure that the provisions and protections granted by the Constitution extend to those individuals serving our Nation as members of one of the armed services. The Department of the Army and the Judge Advocate General believe that the intent of Congress that the protections of the Constitution of the United States extend to the members of the Military Establishment has become a reality. We welcome the opportunity to discuss the constitutional safeguards extending to each of us in the military service.

I shall confine my remarks to the procedural safeguards surrounding criminal proceedings in the military, necessarily excluding the many substantive liberties guaranteed by the Constitution, such as those contained in the first amendment.

The provisions of the fifth amendment concerning the right to a presentment or indictment by a grand jury were so drafted by the framers of the Constitution as to specifically permit the exclusion of members of the military forces. The right to be admitted to bail has never been known to the military law. That the right of trial by jury does not apply to criminal proceedings before military courts is well settled historically and judicially. The Federal courts have ruled the denial of the right to jury trial is implicit in the express constitutional exception of the grand jury requirement with respect to military personnel.

Nevertheless, most of the constitutional safeguards have been extended to members of our Armed Forces either by the Congress through the enactment of the Uniform Code of Military Justice and its predecessor laws or through pertinent judicial decisions of the Federal courts. I shall just mention three of the constitutional protections extended to our military personnel, about which the subcommittee seems most concerned:

### DOUBLE JEOPARDY

A person subject to military law does not divorce himself from his responsibilities under the civil law. On the contrary, the former is superimposed upon the latter with the result that a serviceman's misconduct frequently violates both the Uniform Code of Military Justice and the State or local laws wherein the offense occurred. The rule of law is well settled that trial by one system of laws does not impose a bar to subsequent trial for the same misconduct by a court deriving

its authority from a separate sovereign. In this respect, the serviceman stands in no better and no worse position than do all the citizens of the United States, for in every State there is the possibility that an act in violation of State law, may also be a violation of a Federal law prohibiting the same activity. Nevertheless, the Department of the Army's pertinent policy provision, as set out in regulations, is that a member of the Army normally will not be prosecuted by a court-martial for misconduct which violates both the Uniform Code of Military Justice and the State or local laws if the individual has already been convicted by a civil court.

There are circumstances, however, under which it is believed a military offender should be prosecuted by court-martial even though he has already been tried in a State court. Let up assume that a military policeman, who is on duty dressed in his identifying uniform, observes that a soldier is engaged in a fist fight with another individual on a public street in a civilian community. When the military policeman attempted to apprehend the soldier, the latter struck him with a beer bottle. Subsequently, the soldier was convicted of assault and battery in the local civilian court and was fined $20. The military commander of the soldier may have decided that the soldier, by assaulting a military policeman who was then in the execution of his duties may have committed a serious military offense, and that the sentence of the civilian court was inadequate under the circumstances. The officer exercising general court-martial jurisdiction over the individual may, therefore, authorize disposition of the matter under the Uniform Code of Military Justice, notwithstanding the previous trial. This would be based upon his personal determination that authorized administrative action alone is inadequate and that punitive action is essential to maintain discipline in his command.

## SPEEDY TRIAL

The constitutional right to a speedy trial is perhaps one of the most rigidly enforced rights in the military system. The Uniform Code of Military Justice, and the decisions of the boards of review and the U.S. Court of Military Appeals, establish an accused's right to challenge the promptness with which he is being prosecuted. The prosecution must then show the full circumstances of any delay, and the court decides, from all the circumstances, whether the prosecution has proceeded with reasonable dispatch. One of the vital safeguards toward insuring each accused a speedy trial is the close scrutiny maintained by Army commanders and judge advocates over pretrial confinement. Such confinement may not be imposed unless actual restraint is deemed necessary to insure the presence of the accused at the court-martial or the offense allegedly committed was a serious felony. The Uniform Code of Military Justice requires that confinement supervisors report to their commanding officers the name of each prisoners newly confined, the offense charged against him, and the name of the person who ordered or authorized the confinement. Additionally, many Army commanders require that the approval of the staff judge advocate be obtained before any person in their command may be placed in pretrial confinement.

### ASSISTANCE OF COUNSEL

The Uniform Code of Military Justice provides for counsel for an accused almost immediately after charges are preferred against him, i.e., during the statutory pretrial investigation of the charges which must be held if the case is later to be referred to a general court-martial. The accused must be advised by the Government of his right to be represented during this investigation by civilian counsel, if provided by him, or by miltary counsel of his own selection if reasonably available, or by military counsel appointed by the general court-martial convening authority. The U.S. Court of Military Appeals has interpreted this provision to mean that the military counsel appointed for the accused during the investigation must be a qualified and competent lawyer. The right to counsel continues into the actual trial arena if the accused is tried by a special or general court-martial. In general courts-martial, qualified and competent judge advocate officers are appointed in every case as defense counsel, but in Army special courts-martial, legally trained defense counsel are appointed only in those cases where appointed trial counsel are legally trained. A high standard of performance is demanded from the trial defense counsel in courts-martial, and the Court of Military Appeals has been ever watchful to strike down any conviction where, in its opinion, counsel's conduct of the accused's defense was inadequate.

The right of an accused to appellate counsel is implicit in the military system of justice. Every court-martial case in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal, dishonorable or bad conduct discharge, or confinement for 1 year or more must be reviewed by a board of review. Throughout the appeal, the accused is represented by civilian counsel if provided by him, or by military counsel appointed by the Judge Advocate General. We, in the Army, take great pride in the quality of appellate defense work done by the attorneys assigned to the Defense Appellate Division of the Office of the Judge Advocate General. Their independence of action and freedom of discretion is meticulously respected by all Army authorities. The statistics provided in response to question No. 28 of the subcommittee questionnaire reflect this independence and the vigor with which the appeals of all accused persons are presented to the military appellate bodies.

Two somewhat recent advancements in the field of military law have proved to be of great benefit to both accused persons and the orderly and efficient administration of military justice in the Army. I refer to the negotiated guilty plea program, initiated by the Army in 1953, and the Army's specialized law officer program, organized in 1958.

In the years immediately preceding the introduction of the Army's negotiated guilty plea program, the percentage of convictions based upon guilty pleas was running less than 10 percent, while for a corresponding period, the percentage of convictions based upon guilty or nolo contendere pleas in U.S. Federal courts was in excess of 90 percent. Since 1953, and the advent of the guilty plea program, the Army percentage has risen to 60 percent, and the percentage in Federal courts has remained rather constant at 90 percent.

The program, insofar as the Department of the Army is concerned, has proven itself to be advantageous to the Government and the

accused alike. It has not resulted in any loss of rights or protections for the accused inasmuch as the offer to plead guilty must originate with the accused, who has been furnished the advice and assistance of counsel. The court to whom the accused pleads guilty must ascertain to its satisfaction that the accused has entered such a plea with full understanding of its significance and because, in fact, he is guilty. The accused may withdraw his plea at any time before sentencing.

Senator ERVIN. General, may I ask you a question at this point? Is this right of an accused an absolute right?

General TODD. Yes, sir.

Senator ERVIN. It is not one that is in the discretion of the court, like it is in the civil courts?

General TODD. No, sir; it is an absolute right, and he is so advised, Senator, before the plea is accepted.

Senator ERVIN. That gives the accused in that respect certainly a superior right to what the accused has in the ordinary criminal court.

General TODD. Yes, it does, Mr. Chairman.

Senator ERVIN. Because the right to withdraw a plea of guilty there is usually discretionary.

General TODD. That is right.

Senator ERVIN. With the court and not with the accused. Thank you.

General TODD. The program has been of benefit to the Government in a saving of time, money, and manpower that might otherwise have been expended in the preparation and trial of contested cases.

The Army's specialized law officer program, now in its fourth year of operation, has reduced significantly the number of appellate reversals based upon law officer error in general court-martial cases. This program has permitted the specially selected senior judge advocates appointed thereto to devote their full time, energy and study to the duties of law officer, with a resultant higher standard of performance, fewer errors, and, in general, a more efficient system of general court-martial trial proceedings.

The Army has expended considerable effort to assure the complete independence of the judge advocates assigned to the law officer program. It is the Army's desire that the law officer's status approach as nearly as possible that enjoyed by a Federal trial judge.

The military criminal code under which we operate is not without its shortcomings. In October 1959, the Secretary of the Army appointed an ad hoc committee of nine general officers to study and report on the effectiveness of the Uniform Code of Military Justice and its bearing on good order and discipline within the Army. Study of their report by the other services resulted in the formation of an interservice working committee composed of representatives of the Judge Advocates General of the Army, Navy, and Air Force, who prepared legislation designed to effect changes to the Uniform Code of Military Justice considered to be the most urgently needed by all of the services. As a result of this action, some proposals were approved by the services and submitted to Congress. One of these, H.R. 7657, creating a new "bad check" statute (10 U.S.C. 923a), was enacted into law during the first session of the 87th Congress (Public Law 87-385). Another proposal would amend article 15, Uniform Code of Military Justice (10 U.S.C. 815), which authorizes the imposi-

tion of nonjudicial punishments by commanding officers for the disposition of minor offenses. This proposed change would increase the disciplinary authority of commanders to an extent now usually associated with a summary court-martial. Still another proposal is designed to effect certain procedural changes in court-martial trials. These changes would more closely aline the procedural aspects of trials by court-martial to those employed in criminal trials in United States district courts.

The Department of the Army is of the opinion that an effective system of military justice must insure that constitutional safeguards are extended to every service member, must provide practical checks and balances to assure protection of the rights of individuals and prevent abuse of punitive power, should promote the confidence of military personnel and the general public in the overall fairness of the system, and must foster good order and discipline in the Armed Forces, both in war and peace, at home and abroad. This is the ultimate goal that those of us concerned with the military judicial system are constantly seeking to achieve.

Senator ERVIN. General, on the top of that page there is a statement with reference to the proposed amendment to article 15. Does that propose—I am not familiar with that amendment—to increase the power of commanders to exercise disciplinary power without court-martial?

General TODD. Yes, sir. That is the so-called nonjudicial punishment or commonly called company punishment, the commander's authority; yes, sir.

Senator ERVIN. As a National Guard captain, I found the most effective way to discipline men is to offer an enlisted man the option of taking company punishment or going before a summary court.

General TODD. That is correct.

Senator ERVIN. And the advantage of company punishment over a summary court is the fact that there is no notation made on the serviceman's record——

General TODD. That is correct.

Senator ERVIN (continuing). Of company punishment.

General TODD. And there is no conviction by court-martial, you see, if he accepts company punishment.

Senator ERVIN. Yes. I thought that was a very effective way when handled at the discretion or on the part of the company commander.

General TODD. Yes, sir; Mr. Chairman, that is the general intent of the proposed legislation.

Senator ERVIN. And of course that only applies to relatively minor offenses.

General TODD. Minor offenses, those which are now punishable by summary court-martial.

Senator ERVIN. How far does this proposed amendment undertake to extend that procedure?

General TODD. Only to the extent that a summary court-martial would be able to punish a man. That is roughly 30 days' confinement, and so forth, and pay losses equivalent to what a summary court could now take. There are some small changes, but that is about what it is.

Mr. FITT. Mr. Chairman, I neglected to introduce Col. Alvin D. Robbins on my far left, when I made my initial introductions. He is executive officer to General Easely.

Mr. CREECH. Mr. Fitt, in your statement you state that you have been struck by the scrupulous care that is taken to give maximum protection to the serviceman.

I wonder, sir, if you would care to tell us if there is anything more than what you have indicated here with regard to the scrupulous care which you feel the Army exercises at such time as a man's faithfulness or his contribution is questioned.

You have indicated that he is entitled to counsel at that sort of hearing. Are there other things that you would like to call to the subcommittee's attention?

Mr. FITT. I think that the questions which the subcommittee posed to the Defense Department and to the Army and the other services together with the supplementary questions which we got last week were intended to and did elicit a very comprehensive series of answers which described in great detail the steps that all of the services take in processing and evaluating administrative discharges, and I hesitate to enumerate the kinds of things which I think illustrate the scrupulous care that is taken, for fear that I might omit some that properly should be included in the list.

Mr. CREECH. This has been covered in the information which you submitted to us.

Mr. FITT. I think so, sir; yes.

Mr. CREECH. In your statement you say—

For example, the sentences of those convicted at general courts-martial are set aside or modified on review in about two-thirds of the cases—a far cry from civilian justice, where appellate review of the sentence itself is almost unknown.

I wonder, sir, in your estimation does the high percentage imply that perhaps the courts-martial are not giving proper consideration to these cases?

Mr. FITT. No, sir. I think there are several explanations or reasons for that. One has been brought out already, and that is the effect of the negotiated guilty practice that we follow in the Army. This has demonstrably tended to increase the number of sentence reductions, because the negotiated sentence is not known to the courts-martial at the time it hears the case, so that that has contributed to the percentage of reductions that I mentioned here.

Other factors are, I think, the major commander who has the task of reviewing these sentences is in a better position to evaluate, or to achieve uniformity in sentences, and I think that there is a general attitude of mercy that strikes or moves most of the officers who have these cases to review.

Mr. CREECH. Sir, you say that:

Prior to the commencement of formal proceedings, every effort is made to rehabilitate the individual. Only when reassignment, counseling, or other rehabilitative efforts have proven fruitless is he considered for separation with less than an honorable discharge.

Do you feel, sir, that you have indicated in your answers in the detail that you would like to, the kind of counseling which he is given or the kind of rehabilitative efforts which are undertaken, or would you care to comment further at this time?

(At this point Senator Carroll entered the hearing room.)

Mr. FITT. I would rather not express a judgment on the adequacy of our answer. If there were questions which our answers inspired, we would be glad to answer those questions in turn. Would you like to add anything to that, General Hewitt?

General HEWITT. Just the efforts of a commanding officer who, under most of these cases, gives the man another assignment other than the one he failed, in an attempt to show that he can perform in another duty.

Most of the boards where an enlisted man is considered under that category, the board looks into the fact that he has been given a reassignment or given several trials.

In the course of that he is counseled by his commanding officer and by the noncommissioned officers he works with in an effort to get the man to do a satisfactory job and a satisfactory performance of it.

Mr. CREECH. At such time as his record is reviewed, there is an indication of the reassignments which have been made in order to assist the individual.

General HEWITT. That is usually required by the board investigating his case; yes.

Mr. CREECH. Is there also, sir, an indication of the counseling which he has received?

General HEWITT. You won't find an entry in the record that per se counseling was given; no.

In the vast majority of cases, it has been given by the commanding officer in the course of that reassignment.

Senator ERVIN. If I may interrupt, gentlemen, this is Senator Carroll, a member of the subcommittee. We are delighted to have him with us.

Senator CARROLL. Mr. Chairman, I am happy to be here. I am also on another subcommittee having to do with important irrigation problems. I will read the record that has been made here this morning, and I want to follow these hearings, as I know how important they are. I am glad to be here.

Senator ERVIN. We are getting some most illuminating information and observations. I am sorry that you couldn't be here, but being a Member of the Senate, I understand it is impossible to be in three or four places at one time, which we are required daily to do.

Mr. FITT. I am glad to see Senator Carroll here, sir. I used to work for him.

Senator CARROLL. He used to be one of my advisers.

Senator ERVIN. We have received some very good advice.

Senator CARROLL. He was a very valuable member of the Subcommittee on Administrative Practice and Procedure. I am sorry to lose him, but we recognize that this, too, is a worthy cause.

Mr. CREECH. I should like to go back to the question which was posed just a few minutes ago with regard to the complaints which the subcommittee has received from a number of servicemen and former servicemen, in which it is alleged that they received no advance notice, and they had not been counseled.

Apparently if they had been reassigned, they were not aware of the basis for the reassignment relative to any charge which was going to lead to an administrative discharge. I wonder if you would care

to comment on this type of complaint which we have received, indicating surprise on the part of the individual who is being considered for administrative discharge.

Mr. FITT. It would be very difficult for me to understand how such a complaint could have validly been made, in view of the various steps I have described to you that must precede the issuance of an undesirable discharge.

The regulations contain no specific period of notice which must be given an individual who is facing a proceeding which might lead to an undesirable discharge. But he must be given the medical examination, and then he must be advised of his right to counsel, and he must have a board hearing.

Mr. CREECH. This is after notice has actually been given to him. The complaints which we received alleged that they were not aware that this was in the offing.

In other words, if they had received reassignments, they maintained that they were not informed that they were being reassigned with a view to rehabilitating them or to assisting them to adapt to the Army, in order to avoid this type of administrative discharge.

Mr. FITT. Of course this would considerably precede any formal administrative effort to separate the man. We do require that he be given reasonable notice of such a formal proceeding.

Mr. CREECH. Yes; I would like to come to that later, if I may.

Mr. FITT. Surely.

Mr. CREECH. I have specific questions on that. What I would like to have you discuss, and you have indicated to us that you feel that such complaints are not valid, that it is your feeling that the servicemen are aware at the time that most of them are notified that they are going to be subjected to proceedings for administrative discharges, and that they have had some advance notice in the form of either reassignment or counseling. Am I correct in that? Is that your feeling?

Mr. FITT. The officer who has command over the individual who seems to be heading for trouble has the responsibility of trying to avert that trouble for the individual, and of steering him into useful paths.

And just what techniques are used, what words are uttered to the soldier to get him to straighten out would obviously vary tremendously, depending upon what kind of people are involved, and the circumstances of the particular case.

So I hesitate to say categorically that in every instance at some specific point in time every person who ultimately faces an undesirable discharge proceeding has been given notice, specific notice by his commander, that he will ultimately face a discharge board.

Mr. CREECH. Do you think it would be desirable to have a procedure whereby servicemen would be notified that if their records did not improve, or their performance did not improve, or whatever the conditions of objection to them did not improve, that they might ultimately be subjected to this type of procedure?

Mr. FITT. I think that is part of the reasonable approach to the problem. But I would hesitate to formalize it and say that on such and such a date such and such a kind of notice must be given.

I would think that the ordinary sensible commander, in attempting to counsel the soldier, would warn him that he faces a possible separation under undesirable conditions.

Mr. CREECH. But a serviceman receiving several different assignments, that is reassignments, would not necessarily feel that this was being undertaken as a means of adapting him to the service, would he necessarily? Aren't servicemen frequently reassigned?

Mr. FITT. Yes.

Mr. CREECH. Without this in view, without any consideration of this sort, if you are not told when you are being reassigned that this is for the purpose of assisting you in adapting to the service, whatever your difficulty may be, then the individual might not know that he was being considered for administrative discharge, until such time as he actually received notice to report before the board, is that correct?

Mr. FITT. The individual knows his own circumstances. He knows whether he has been in trouble or whether he has had a good clean record.

I think we can't ignore entirely the responsibility of the individual to acquaint himself with the world around him.

But as I say, in the ordinary case I would assume that counseling would include an effort to get him to straighten out and warning him of the pitfalls that lie in front of him, if he doesn't straighten out.

Mr. CREECH. But the record at the time he comes before the board does not indicate whether he has received such counseling, is that correct?

General HEWITT. No record.

Mr. FITT. No record of that. He may have visited the chaplain, for example, and gotten his counsel there.

Mr. CREECH. The chaplain would not be the officer who makes the determination; is that correct? And the chaplain would not necessarily be familiar with other circumstances of his military service, unless he was so advised by the commanding officer, would he?

Mr. FITT. That is true. I am advised by General Easley of the Discharge Review Board, that as a matter of fact the records that do come to them indicate in many cases that despite repeated counseling and rehabilitative efforts the undesirable discharge resulted.

Mr. CREECH. So in many cases they do indicate this, but not all.

Mr. FITT. That is correct.

Mr. CREECH. With regard to the notice which is given to the serviceman to appear before the board, is there any specified length of notice or is there a rule-of-thumb used with regard to notice?

Mr. FITT. It is a reasonable time. If he is taken by surprise, he can request a delay.

Mr. CREECH. And extensions of time are granted in such circumstances?

Mr. FITT. Oh, yes.

Mr. CREECH. With regard to the examination by medical officers, this of course is for the benefit of the board, and this report I presume is made available to the individual. He knows what the medical officer has informed the board, is that correct?

Mr. FITT. Yes, either he or his counsel.

Mr. CREECH. Either he or his counsel are informed as to the report, and they have full access to the report of this military physician.

Now by the same token, is there any provision made for examination by a physician other than an Army doctor, an outside physician?

Mr. FITT. I think he could attend or secure the services of any physician that he wished, and submit that report to the board just as he can submit any material he thinks relevant to the board.

Mr. CREECH. Are the reports of physicians other than the Army physicians given the same weight? Is there any indication as to the type of credence that is placed upon reports of civilian physicians that are introduced?

Mr. FITT. I haven't examined that question, and I will ask General Hewitt to state whether we do have any information on that point.

General HEWITT. I would certainly venture they would be given full credence. I think it is so rare that I would hesitate to state any categorical answer on the thing.

Usually the examination of medical officers are generally accepted by the man or his counsel in this type of a case.

Mr. FITT. I would add that throughout these proceedings where there is a doubt, it is resolved in favor of the man, so that if it should appear that his conduct is attributable to a physical condition or mental illness, that his discharge would be effected through that avenue, rather than the administrative discharge for misconduct.

Mr. CREECH. I notice that you say in the next page of your statement that:

> If it appears that the existence of a mental or physical disability is a contributing cause of unfitness a board of medical officers will be convened to examine the serviceman.

I presume here we are covering such people as the narcotic addict, the alcoholic, the sex psychopath, that type of individual.

Mr. FITT. Yes.

Mr. CREECH. On the same page you say—

> During the hearing either the recorder or junior member of the board presents the evidence and examines the witnesses including those of the soldier if he is not represented by counsel.

I should like to inquire as to whether the recorder is necessarily a lawyer.

Mr. FITT. No. sir.

Mr. CREECH. He is not. And also I should like to inquire if you feel it would be difficult for him to represent both sides equally.

Mr. FITT. This is an age-old problem. What we have here is not an adversary proceeding though. If the soldier has no person representing him, and this is a matter of his own option, then it may follow that he simply is not capable of bringing out the testimony of his own witnesses, and it is in this sense that I think the recorder would examine the witness that the soldier himself has asked to appear in his behalf.

Mr. CREECH. This is done then to assist the serviceman.

Mr. FITT. That is correct, and bearing in mind after he has elected not to have his own counsel.

Mr. CREECH. You have said that before the board hearing is concluded, soldiers are afforded full opportunity to present evidence or to call witnesses in their behalf, to the extent that they are reasonably available.

I wonder, sir, what is meant by "reasonably available," and also I should like to know whether subpenas or depositions are available to the serviceman.

Mr. FITT. The subpena power is not available in this proceeding. This is the same question of course you discussed at length this morning with Mr. Runge.

He can submit affidavit evidence where the witness is not reasonably available, and under those circumstances I think the absence of the subpena power becomes more understandable.

Obviously in the Military Establishment it is difficult to define "reasonably available" in precise terms. We give him reasonable notice in writing of the fact that he is about to face a board proceeding.

The precise definition of "reasonable" is frequently impossible, we can't achieve it, so I wouldn't want to suggest to this subcommittee that there is not a possibility of differing interpretations at different times and in different places over the years.

But we think that the subpena power as a practical matter cannot be extended to these board proceedings. Both the Government and the soldier can submit any evidence they wish in writing, and that would include statements from friends or others who might not be in the area and available to testify in person.

Mr. CREECH. And what opportunity is there, for instance, in cases where affidavits are submitted for the individual to cross-examine these people in cases where the Government submits the affidavit?

Mr. FITT. There isn't any opportunity.

Mr. CREECH. There isn't any?

Senator ERVIN. If I may interrupt, this is not designed to be an adversary proceeding.

Mr. FITT. That is correct, Mr. Chairman.

Senator ERVIN. And the recorder is trying to determine whether or not the interests of the Government demand that this man be separated from the service, and also whether the interests of this man can be served by some method short of such action. In other words, the board is trying to determine that question.

Mr. FITT. Not finally, sir. It makes a recommendation to an officer who usually is at least a major general.

Senator ERVIN. But it is not designed to be an adversary proceeding, but is designed as far as is humanly possible to have one agency, both from the standpoint of the Government and the individual concerned, to reach a conclusion that would enable him to make a recommendation.

Mr. FITT. That is correct, sir.

Mr. CREECH. In these cases where a man is being labeled undesirable or unsuitable, or unfit, do you feel that it is desirable that there should not be adversary proceedings?

Mr. FITT. I think that the proceedings we have, which are not adversary, represent a fair method for issuing administrative discharges.

Mr. CREECH. Mr. Secretary, I don't want to belabor this point any longer. I will just ask—for the sake of example I think it would be interesting for the record—if you can indicate to us with regard to the reasonably available witness what your experience has been.

For instance, if a man wants a witness who is within the same State or on a military reservation within a radius of 500 miles, something of that sort, do you have any idea as to the procedure? Is there any

rule of thumb with regard to the procedure which is followed in making witnesses available?

Mr. FITT. I would like to pass this to General Hewitt.

General HEWITT. I would say there is no definite rule of thumb, depending on the circumstances in the particular case which I think would govern on that, Mr. Counsel.

Senator CARROLL. Mr. Chairman, may I ask a question at this point. I have been reading some parts of the testimony of Mr. Runge, and I have in my hand a series of forms of the various types of discharges.

Mr. Secretary, you are an able lawyer and you have been well trained in the administrative process.

Mr. FITT. Yes, sir, I acknowledge that.

Senator CARROLL. Very often I have been called on by people who have received less than an honorable discharge from the service. As the years have passed and they say that they find themselves under a blight, they are excluded from applying for civil service employment, and that in many other ways, it has interfered with their lives, so, these hearings are extremely important.

How long now have you held your present post?

Mr. FITT. Eight months.

Senator CARROLL. Are we giving men involved in administrative discharge proceedings or something else, an opportunity for adequate hearing and counsel? May they call witnesses in their own defense? What is their right of review?

Mr. FITT. Are you speaking now, Senator Carroll, of the man who has already received his discharge and is seeking to reopen the case?

Senator CARROLL. No. I am thinking of these individuals before they are discharged. I can understand that there are many individuals who are not desirable in the service. Sometimes individuals go haywire in the service. Sometimes even career men fall in this category.

But are there adequate protections against unfairness? Can the serviceman subpena witnesses? Can they fight this thing if they want to fight it? Are the safeguards adequate to enable them to fight to protect themselves?

Mr. FITT. Answering your first question, in an administrative proceeding leading to the separation of an individual with an undesirable discharge, the right of subpena does not exist, but the right to counsel does, the right to adequate notice of the nature of the proceeding and the charges that lead to the proceeding, the right to a physical examination, the right to submit any evidence the soldier wishes in his own behalf. All of these rights are guaranteed to the affected enlisted man.

Senator CARROLL. What about the right of review?

Mr. FITT. The case is presented initially to a three-member board, one member of which at least must be of field grade.

That board, after considering all of the evidence, makes its recommendation to the officer who convened the board, and that would be an officer with general court-martial authority, or specifically and typically a major general ordinarily would be the rank that is involved, and no soldier may be separated with an undesirable discharge unless a major general or other officer with general court-martial convening authority has personally approved that character of discharge for that soldier.

Senator CARROLL. Mr. Chairman, am I going over grounds we have previously covered?

Senator ERVIN. No.

Senator CARROLL. I want to get down to specifics.

I am reminded of a case that we had in Colorado where a career man, an enlisted man had an excellent record for many years, and it was about 2 years before his retirement, and he got into some very serious difficulty. He was tried in the police court. Then began the process to get rid of him in the military. This was a man with years of experience, and in this particular case he was a family man. He had given his life to the military. Just how could he have fought the administrative discharge? What would have been his rights to protect himself?

In simple language, what could he have done to test the truth of the charge against him in another court? Would he have the right to confront witnesses, the right to subpena his own witnesses, the right to counsel, and the right to review?

How do we handle cases like this?

Mr. FITT. Ordinarily he would be separated administratively and not through court-martial conviction. And the rights that he would have would be those that I described earlier.

Senator CARROLL. That means that he would then have the right to counsel. He would not have the right of subpena?

Mr. FITT. That is correct.

Senator CARROLL. But if he does not have the right to use subpenas and is confronted with a record from another court, how can he test its validity, its authenticity? Unless he has the right to subpena, to compel witnesses to come in, how can he or his counsel cross-examine as to the authenticity of the record, or question whether he is the person to whom it applies?

What I am trying to do is explore how you handle these cases because you must have had hundreds of cases similar to this, which are tragic cases for the military and for the man's family. Of course, where the proof is convincing, a man should not be kept in the service.

I am wondering just how the man could test that issue?

Mr. FITT. He would test it first of all in the civilian jurisdiction, where he was tried apparently for some offense against the statute, and I assume that in the Colorado State court proceeding he had the right of confrontation, subpena and so forth.

Senator CARROLL. In this particular case the serviceman was permitted to enter a plea of nolo contendere. In our court, a nolo contendere admits guilt for the purpose of the criminal case, but is not an admission for any other purpose.

Suppose this serviceman retained private counsel. Could he do that if he had the money?

Mr. FITT. Yes, sir.

Senator CARROLL. Suppose the private counsel said, "But I cannot prepare his case unless I can subpena witnesses."

It would seem to me that there ought to be enough leeway even in administrative discharges to permit, where the interests of justice require, the compulsory production of testimony or documents.

Would this create a great workload?

Would it interfere with your present procedure?

Mr. FITT. It might in some cases. It probably would not in other cases.

This is a matter of course, a right which Congress would have to confer upon the services.

Senator CARROLL. You do not think the laws have given you authority broad enough to cover it now?

Mr. FITT. I am sure it is not, Senator.

Senator CARROLL. There is such a right, is there not, in cases involving dishonorable discharge?

Mr. FITT. That is in connection with a criminal proceeding. It is the military form of a criminal trial. Now of course the right of subpena does exist there. But it does not exist in the administrative separation proceeding.

We are not aware of any right of subpena in other cases involving the separation of employees.

For example, in the civil service, in the Federal service the determinations involving the separation of an employee are in proceedings where there is no right of subpena.

Senator CARROLL. My point is this, Mr. Chairman: Any discharge that is other than honorable can work a great hardship on a man and his family in civilian life. Although you are not going to imprison him, such a discharge puts a mark on him. It would seem to me that if he wants to fight, he ought to be able to fight it as hard and as effectively as though you are going to put him in prison.

Did you say the present law is inadequate to permit this?

Mr. FITT. No.

I think I said that it is quite clear that the subpena power is not available in these proceedings, these administrative proceedings.

Senator CARROLL. Is it not available because of the failure of Congress to make it available or is it not available because of the administrative regulations?

Mr. FITT. I would not want to characterize it as a failure on the part of Congress, Senator.

The power simply does not exist, and in order to have it legislation would be required.

Senator CARROLL. This is the point, Mr. Secretary, I want to make. If we need to strengthen the law because there is an omission in the law, the purpose of these hearings is to show what more is needed.

Mr. FITT. We are not recommending the extension of the subpena power to this kind of separation proceeding.

Senator CARROLL. I did not ask you, Mr. Secretary, what you are recommending.

I asked you whether you think the present law is broad enough so that you could issue a subpena if you wanted to or is there a deficiency in the statute?

Mr. FITT. It is not broad enough to permit the issuance.

Senator CARROLL. It is not broad enough as it is now?

Mr. FITT. That is correct, sir.

Senator CARROLL. And you do not want it any broader. This is what you are saying. You do not ask for it?

Mr. FITT. We do not ask for it.

Senator ERVIN. Is this not a question that we run squarely into on these undesirable discharges?

Should not a party who is about to be separated from the service by an undesirable discharge have a right to say "I demand that I be court-martialed instead of being given an undesirable discharge, and have an opportunity to present my cause before a court-martial where I can subpena witnesses"?

Mr. FITT. No, sir.

We are of the view that he should not have that right as an absolute matter, and there are several reasons for this view.

One is that the basis of the separation is not necessarily a specific criminal offense. It is a pattern of conduct which justifies the characterization "undesirable," but it may not necessarily be specifically a crime.

Senator ERVIN. I was under the impression that cases of that type are ordinarily under a general discharge. As a general rule, has not a man who is given an undesirable discharge run afoul of the military law or civil law?

Mr. FITT. Well, I think that is true in most of the cases, but it is not universally true that he has committed a specific criminal offense for which he can now be tried. His undesirable discharge may be the result of a series of criminal convictions.

For example, he may have been convicted of a civil offense and is now confined in a State penitentiary. In theory that same conduct which led to his civil conviction is a violation of the Code of Military Justice, and we could try him over again. But we do not think that is desirable.

Senator ERVIN. There might be mitigating circumstances?

Mr. FITT. Yes, sir.

Senator ERVIN. There might have been perjured testimony.

I recognize that we put a great burden on the military, but here is a man, it seems to me, against whom there is pretty drastic action to say, "We are going to give you an undesirable discharge, which will deprive you of your rights under the laws and benefits of veterans, which will place a stigma on you, and we are going to deny you the right to produce testimony by subpena."

Mr. FITT. Well, it is not intended; in fact, it is specifically forbidden in the regulations to use the administrative route to avoid trying a man by court-martial. If the offense is one which should properly be tried by a criminal court, then it is improper just to ease him out by the administrative route, and this is the rule that we follow.

Senator ERVIN. But his ultimate fate conceivably might be almost as bad as if you gave him a dishonorable discharge?

Mr. FITT. Yes, sir; except he would not have a criminal conviction on his record.

Senator ERVIN. But he would have a forfeiture of all of his benefits under the laws and he would have the stigma that is carried with it.

I realize that in a great percentage of these cases the serviceman is probably glad to get the undesirable discharge and go out by that route, but it is only later that he comes to the conclusion that he would like to shatter this scheme of things. But there are conceivably cases where the individual at the time says, "I do not want this undesirable discharge. I am not due to have it."

That is the crucial question, it seems to me.

Mr. FITT. I think you are right, sir, yes.

Senator CARROLL. This is why, Mr. Chairman, I hope you take a look at the Uniform Code of Military Justice to see if it is comprehensive enough.

Speaking personally, I would be willing to have the board make the determination whether they should issue a subpena under these circumstances if there should be need to compel the attendance of witnesses. There ought to be some way of reviewing these things impartially.

Mr. FITT. There is, Senator Carroll.

Senator CARROLL. But I mean on the question of whether or not a subpena should have issued or whether, without a subpena issuing, they themselves ought to have the power to compel the attendance of witnesses requested by the defendant or his counsel.

This is something I wish you would give some thought to.

Mr. FITT. We shall.

Senator CARROLL. If this is not authorized law, we should know it. This subcommittee may want to make some recommendations of its own.

I have not mentioned this case to you as a criticism of the Army. I did think it might be harsh. All these years of service and the benefits which he earned during those years were lost because of one unfortunate instance. Psychiatrists know much more about this than I do, but I know people change through the years. This was a good man with a good record until suddenly something happened.

I am not critical of the result. But I would like him to have a fair chance if he wanted to fight. As Senator Ervin says, the serviceman should be able to say: "I am not going to stand for this, I will fight you in the court-martial." You say he does not have a right to demand a court-martial.

Mr. FITT. He is not entitled as a matter of right to a trial any more than a civilian defendant is entitled as a matter of right to a trial.

Senator ERVIN. The military code does not cover this at all. Does it?

General TODD. That is correct.

Senator ERVIN. In other words, this is independent and the Army, in establishing these various types of discharges, acts within the exercise of the discretionary power which Congress imposed, I think, just about the time I started up here in Government.

Is that not correct?

General TODD. That is correct; yes, sir.

Senator CARROLL. May I ask why then they do not have the discretionary power to permit the issuance of a subpena on behalf of the defendant in these administrative proceedings?

General TODD. You mean the Secretary would have authority to promulgate regulations with subpena power in them?

No; I think that would take statutory authority.

Senator CARROLL. I was under the impression you said this was not covered by the manual, but this is covered in the discretionary authority that has evolved through history. The administrative procedure that you outline here is not under the Administrative Procedure Act; is it?

Mr. FITT. No, sir.

Senator CARROLL. I did not think so.

So what you have done through the years is sort of promulgate your own regulations, have you not?

General TODD. They are promulgated pursuant to statute.

Senator CARROLL. Does the statute prohibit this——

General TODD. No, sir; but it does not authorize it.

Senator CARROLL. Is the statute broad enough, in your opinion, that you could do it by regulation, or not?

General TODD. No, I do not think it is, Senator Carroll.

Senator CARROLL. If you thought that this subcommittee should broaden it, what would we do? What words should be used?

Do you not think that if the Congress began to give outlines as to how you should conduct these administrative hearings it might have undesirable effects?

General TODD. I think you have to consider, Senator, that there are thousands of these boards. Necessarily, they involve the man's character. Many of them are convened overseas. The man would want to call many character witnesses, and they would have to, by subpena power, be authorized to call those people wherever the board sat, and it would be a tremendous problem where you have thousands of board cases, and, of course, it would be a tremendous cost.

Senator CARROLL. I was not thinking of character witnesses. I was thinking of records or witnesses with knowledge bearing on fact issues. Character evidence is a different matter.

But suppose there is a real issue of fact. There must be some way for a man to have a way to protect his name from such a stigma.

Anyway, I wish you would give it some thought and we will come back to it again. I am not trying to put great burdens upon you, but it seems to me that, as I expressed once and as I express again, this is so important to the individual—it affects his whole life—that you ought to have something more than just perfunctory proceedings.

Mr. CREECH. Mr. Secretary, in your statement you have referred to rehabilitation. This is in the fifth paragraph. You say:

> After all evidence is in, the board will recommend either discharge and the character thereof, or retention in the service (including trial periods to be assessed at a later date so as to permit rehabilitation).

I should like to ask, sir: Are there certain facilities for rehabilitation?

Is there a program of rehabilitation which is undertaken and would this apply to such people as alcoholics, as homosexuals, drug addicts?

What type of rehabilitation?

Mr. FITT. I know we do not have a specific installation like that of the Air Force, but so far as the details of the period of rehabilitation mentioned here and the conditions that are imposed, I would like to refer the question to General Hewitt.

General HEWITT. We have, as the Secretary pointed out, no center for such rehabilitation. It is done at various commands under the cognizance of the commanding officer or the commanding general of the installation. I would not say that this would normally be applied to trying to rehabilitate homosexuals or alcoholics or narcotics addicts. It would be the individual who, in the determination of the reviewing authority, had not had ample opportunity prior to the board proceed-

ings in various assignments that I discussed with you before in attempting to give him another opportunity to prove that he can give satisfactory service.

Mr. CREECH. There is nothing in the way of hospitalization or treatment?

General HEWITT. No, sir.

Mr. FITT. If he is a medical case, he has not gotten this far in the proceeding to separate a man as an undesirable.

Mr. CREECH. Later in your statement, Mr. Secretary, you say:

> Similarly, an undesirable discharge may be issued without board proceedings when the serviceman has been on unauthorized absence for a year or more, or upon his conviction in a civil court of a felony type offense, or of any offense involving narcotics violations or sexual perversion.

Here, sir, I would like to inquire: Is the undesirable discharge processed, even though the case might be on appeal?

Mr. FITT. No, sir.

Senator ERVIN. Mr. Secretary, I regret very much that I have to leave, but I want to thank you on behalf of the subcommittee for the very fine cooperation we have received in this investigation, and I thank you gentlemen for coming down and giving us this personal appearance. It has been very helpful to us and we are very grateful.

Mr. FITT. Before you leave, Senator, I would like to say on behalf of the Army that this whole proceeding has been helpful to us too.

Senator ERVIN. Thank you.

Mr. FITT. We would like to submit an answer in writing on that specific question.

(The material referred to is as follows:)

> A discharge based on a civil conviction is not completed unless the individual has indicated in writing that he does not intend to appeal the civil conviction, or unless the time for appeal has run, or, if an appeal was perfected, until final action has been taken thereon, see paragraph 21, AR 635–206.

Senator CARROLL. What was the question?

Mr. FITT. Whether a person, a soldier, is issued an undesirable discharge because of a civil conviction prior to the running of time for perfecting an appeal or the disposition of the appeal that he may have taken from that civil conviction.

(At this point, Senator Ervin left the hearing room.)

Senator CARROLL. May I ask counsel the purpose of the question?

Mr. CREECH. The Secretary, on page 8 of his statement, said that an undesirable discharge may be issued in several instances, and he specified.

> Upon the conviction in a civil court of a felony type offense or any offense involving narcotics violations or sexual perversion.

I inquired as to whether the undesirable discharge was processed even though the case might be up on appeal, even though there had been no final disposition of the case in the civil court. Would the Army process the undesirable discharge, anyway?

He said that they would like to submit in writing a detailed answer to that question.

Senator CARROLL. I can understand why this would be a difficult problem for the military.

Suppose you had a man in the service who commits some crime in the community. He has been convicted and he is now appealing, and

pending appeal they initiate this administrative discharge process. That is a tough one and I wish you well.

Mr. FITT. Thank you, sir.

Mr. CREECH. Mr. Everett has some questions.

Mr. EVERETT. Apropos of the questions asked by the chairman and by Senator Carroll earlier, I gather that you would construe article 47 of the Uniform Code, which refers to persons not subject to the code who are subpenaed to appear as a witness before any court-martial, military commission, court of inquiry or any other military court or board as not supplying authorization to subpena a civilian witness to appear before a discharge board.

Am I correct that that is your interpretation of article 47?

General TODD. Yes, it would be, Mr. Everett.

Mr. EVERETT. Are there any instances in the Army which you know of where, under the Army regulations governing undesirable discharges, a board has heard the matter, has declined to recommend the undesirable discharge, but thereupon the matter has been referred by the commanding officer to another board to hear the case upon the same evidence, and that that board has recommended an undesirable discharge?

Mr. FITT. No, sir; no such case has come to my attention, and we made inquiry.

Mr. EVERETT. I believe the regulations that were furnished to us by the Army did authorize this action under certain conditions, and I gather that this has been a dead letter in the regulations up to the present time.

Would that be your impression, Mr. Secretary?

Mr. FITT. That is my understanding.

Mr. EVERETT. Would there be any opportunity to extend the excellent field judiciary system that the Army has devised to apply to the administrative proceeding?

In other words, to have one of your military judges sit as a judge for the administrative board, giving thereby to the respondent the same type of protection that is available to him in a general court-martial?

Would that not be a reasonable means of handling the problem?

Mr. FITT. I would like to refer that to General Todd.

General TODD. It would require a great many more law officers than we have now. I just do not think it would be feasible, with the number of board cases we have and the number of senior judge advocates that we have available now, to have law officers sit on administrative boards.

We have at the present time 24 officers assigned to that program. They could not nearly cover all the board cases that would require their presence under that system.

Mr. EVERETT. Would it be possible to supplement them, as I understand the Army is doing on the boards of review, with retired officers called to duty by their own consent?

General TODD. If we could get enough of them and it would be authorized, of course that could be done. But we would have to have a great many more.

Mr. EVERETT. In line with some of the earlier questions, Mr. Secretary, concerning command control, we were informed that the Army—

actually, this was information furnished in reply to written questions—we were informed that the Army has in the past 2 or 3 weeks discontinued the practice of instructing members of the court-martial concerning their duties and responsibilities in administering military justice. I wonder whether the Army has also contemplated changing the rating system in the boards of review whereby the chairman of the board rates the junior members?

Has that been under consideration?

Mr. FITT. Do I have to speak for all time?

I know it is not under consideration at the present time. I am not sure whether this has been a subject of disagreement in the past.

General TODD. May I speak on that?

It has not been a subject of disagreement.

We feel that the system as it is now is a fair one. We have had no instance whatsoever of any complaint by a junior member of a board that his rating by the chairman was unfair on the basis that such rating was an attempt to influence his decisions as a member of the Board.

Senator CARROLL. May I interrupt?

Explain this rating of a junior officer, so that the record will be clear.

Mr. EVERETT. Mr. Chairman, I was referring to some of the testimony earlier in which it was brought out that on boards of review, which review convictions by court-martial, there are usually three military members. These military members receive certain efficiency reports which are the basis for promotions and for assignments, and in the Army system, unlike the Navy system, the senior member of the board, who is the chairman actually makes a rating of the other two members. And the question came up in light of a Navy case involving a similar practice at the trial level where the practice had ben condemned by the Court of Military Appeals as to whether this became a vehicle for control of the junior members by the chairman, just as if the chief justice of a supreme court rated the other members of the court and thereby determined what assignments they would have or whether they were reelected.

Senator CARROLL. You mean that the rating system might be used to influence the decisions of the junior members of the board?

Mr. EVERETT. Precisely.

Senator CARROLL. Thank you very much.

Mr. EVERETT. That was the purpose of the question.

It was more responsive to the difference between what appears to be the Navy practice and what now appears to be the Army practice.

Senator CARROLL. The General's response to that is that——

General TODD. We have had absolutely no instance of it, Senator Carroll.

Actually these members of the boards of review are all senior members of the Judge Advocate General's Corps. They are imbued with their independence sitting as judges on a review-type court. We have been impressed with their feeling of independence, and they are left alone by the Judge Advocate General to do their duty as reviewing judges.

As I say, we have had absolutely no instance of any complaint whatsoever of influence by a chairman over a junior member because of his rating.

Senator CARROLL. This raises another question—one on which I have expressed my views. I have been investigating cases in which it has been said by some that there have been attempts to influence the judgment of some of these commissions through ex parte communcations.

Can the board considering a discharge case be influenced in any way by commanding officers? Can anybody talk to the board about the case off the record?

General TODD. Can anyone outside who has no part in it——

Senator CARROLL. Can anyone who does not confront the enlisted man talk about his character or record?

The Secretary has said that this is not an adversary proceeding. I want to know what, if any, influences could be brought to bear on the board itself.

General TODD. Do you mean the court-martial itself, Senator Carroll, or the administrative board?

Senator CARROLL. The administrative board. I would assume that nobody could talk privately to the members of a court-martial.

General TODD. That is absolutely correct. No one can talk to the members of the board about the case—to the court about the case.

So far as the administrative boards are concerned, I think perhaps that they are not influenced by any outside attempt to tell them about the case.

Senator CARROLL. Are most of the members of the administrative boards JAG officers?

General TODD. No, they are not.

Senator CARROLL. They are not?

General TODD. No, sir.

Mr. FITT. I think it would be helpful to describe the procedure again, that the board that sits in the administrative discharge proceeding is one which does not decide the case. It makes recommendations to a general officer, usually a major general, and we have stated in our answers to the questions and in my testimony that that officer has available to him the advice and assistance of his judge advocate staff, so that I would not want to suggest that there are not people who have access to the man who ultimately decides the case. But we simply do not have the same rule that is applicable in a judicial proceeding to the extent that when a matter is sub judice, nobody speaks to the judge about it except his immediate law clerk perhaps, or nobody should.

That is not quite the case in these administrative proceedings where the commander has available to him his JAG people and other staff people to help him with the case.

Senator CARROLL. I want to get this procedure fixed in my mind.

An enlisted man is up for administrative discharge. By whom is the board normally appointed, the commanding officer?

Mr. FITT. We have the chart, Senator Carroll.

Usually the action is started by his immediate commanding officer.

Senator CARROLL. Are we down now to the company level?

Mr. FITT. Usually he is the officer who is best acquainted with the individual and starts the case.

Senator CARROLL. Then the company commander appoints the board?

Mr. FITT. No, sir; that is appointed by the general court-martial authority.

As I say, that is usually a major general. It would be the head——

Senator CARROLL. Does the major general appoint the company commander?

Mr. FITT. Could he?

Senator CARROLL. Yes. He could appoint anybody he wants to the board, a major general?

General HEWITT. He would not normally appoint the company commander, because he will probably be one of the witnesses called before the board. So he would not be a witness and a member of the board at the same time.

Senator CARROLL. But the major general could appoint anybody he desires to the board; could he not?

General HEWITT. Yes, sir.

Senator CARROLL. Let me ask the next step.

There is a finding by this board. By whom is it reviewed and where?

Mr. FITT. It is reviewed by the convening authority, the officer with the power to convene a general court-martial.

Senator CARROLL. That is the same major general who sets up the board, is it not?

Mr. FITT. That is correct, sir.

General HEWITT. He is the one.

Senator CARROLL. What is the next step in the right of review?

Mr. FITT. The soldier's right of review?

He has no right of review from that officer's decision prior to discharge. After discharge he can appeal to the Army Discharge Review Board, which is composed of military officers sitting on a full-time basis in Washington, and if he is unsuccessful before that board, then he can appeal to the Army Board for Correction of Military Records, which is an all-civilian board, again sitting in Washington, and that board can grant him or deny him relief.

So he has two appeals from the character of his discharge authorized in the case that we are talking about.

Senator CARROLL. Now let's go back to the Army Discharge Review Board. I assume it is under the Secretary.

Mr. FITT. Now we are talking about——

Senator CARROLL. After discharge.

Mr. FITT. This is the Army Discharge Review Board; yes, sir.

Senator CARROLL. The one, I assume, under the Secretary of the Army?

Mr. FITT. That is correct.

Senator CARROLL. One under the Secretary of the Navy and the Secretary of the Air Force; is that right?

That is a review after discharge?

Mr. FITT. Yes, sir.

Senator CARROLL. Now, after that review. Then there is another board. You say the Correction of the Records Board?

Mr. FITT. Yes, sir; Army Board for Correction of Military Records.

Senator CARROLL. And these are civilians?

Mr. FITT. Yes, sir.

Senator CARROLL. How many of these cases—speak now from your own experience if you have any statistics—come up to the first step after the discharge?

Mr. FITT. The Army Discharge Review Board?

Senator CARROLL. Yes.

Mr. FITT. I would like to ask General Easley to answer that question, Senator.

Senator CARROLL. If you do not have the information now, I would like to have it for the record.

Mr. FITT. It is all in the statistical material furnished to the committee, Senator, but I do not have the figures immediately in mind.

Senator CARROLL. Can you give a figure for, say, the last year or two?

Mr. FITT. Colonel Robbins will answer that.

Colonel ROBBINS. Sir, we have here and have inserted in the record the number of cases which the Army Discharge Review Board has heard since fiscal year 1951.

We are not able to correlate the number of appeals heard by the Army Discharge Review Board in any one fiscal year with the total number of general and/or undesirable discharges awarded in that same year. This is because the statute of limitations allows the individual a 15-year period after separation to appeal his discharge.

Senator CARROLL. This is after discharge?

Colonel ROBBINS. This is correct, sir.

In fiscal year 1961, sir, the Army Discharge Review Board heard 2,476 cases. This is already in the record, sir.

Senator CARROLL. 2,476?

Colonel ROBBINS. This is for fiscal year 1961. This was in response to questions 9 and 10 of the original questionnaire.

Senator CARROLL. In other words, do I understand now that this number sought review because they were not satisfied with what happened to them at the lower level.

Colonel ROBBINS. That is correct, sir.

Senator CARROLL. Do you have any comments, General Todd, about the nature of these cases?

General TODD. No, sir. We don't handle those, Senator Carroll.

Senator CARROLL. Can you tell me the outcome of those 2,400-some total cases?

Colonel ROBBINS. Sir, the record submitted in response to question 9 shows that 70 discharges were changed and that the total percentage of change was approximately 3 percent.

Senator CARROLL. Do you have the record of how many appealed to the Board for Correction of Military Records in the same year?

Mr. WILLIAMS. Appeals from the ruling by the Army Discharge Review Board?

Approximately 95 were considered by the Army Board for Correction of Military Records in fiscal year 1961.

Senator CARROLL. Can you tell me the disposition of those cases?

Mr. WILLIAMS. Based on a sampling of the cases previously considered by the Army Discharge Review Board over a 5-year period our records indicate about 3 percent are changed by the Army Board for Correction of Military Records.

Senator CARROLL. What do you mean by sampling?

Mr. FITT. We don't keep statistics on this single point, Senator, and so on this and a number of other questions asked by the committee we had to furnish sampling answers.

Senator CARROLL. This, again leads me back. Here we have some 2,400 who feel so strongly about this that they demand review. Would the power to subpena evidence, records and witnesses have helped to present the case itself, or the justice of the decision?

This is something you won't answer today, but think about whether we should change the basic law. I had no idea that so many men would appeal from the major general's decision and that of the Board, and even after discharge, they are still fighting.

They must feel pretty strongly about this. We ought to consider what procedural safeguards are necessary to make such proceedings fair to everyone.

Mr. EVERETT. Mr. Secretary, let me turn to one other aspect of the command control which we realize you have had a complaint about in the form of some affidavits in a recent case, the *Kitchens* case.

As you will recall, in that instance the defense counsel at Fort Jackson, according to the court reports of the Court of Military Appeals, indicated that by reason of the fact that he had protested certain instructions given to the court members, he had been, as it were, subjected to some threats by the assistant or acting staff judge advocate at Fort Jackson, threats vis-a-vis the efficiency reports, promotions, and assignments. I should also mention that the subcommittee has on one or two occasions received similar complaints from former JAG officers—I have in mind one who was in Europe and another at a post in the South—to the effect that, after successful and spirited performance of defense duties, their military justice career was terminated and they became claims officers and legal assistance officers; and they referred to this as a type of coercion exerted upon them.

I wonder whether there are any comments that you or General Todd would have with reference to this type of accusation that command control directly or indirectly is exerted upon the military defense counsel provided to the accused.

Mr. FITT. I will make a preliminary answer and then ask General Todd to comment.

But we would like to have the details of the complaint so that we can evaluate it in relation to our present system?

Mr. EVERETT. Apropos of that, what steps, if any, have been taken by the Army to investigate and correct the situation that was complained of at Fort Jackson?

General TODD. With respect to that, first of all, Mr. Everett, in the *Kitchens* case you will remember the court did not decide that there was command influence. They decided that there was enough doubt so that they should reverse the case. And they, by way of a footnote, I believe, spoke of the possible influence over the defense counsel by the chief of military justice. The Judge Advocate General almost immediately—I say almost because the case was sub judice at the time and he felt he should not interfere by way of investigation while the case was being considered by the courts. But immediately upon the court's decision he investigated this, actually brought the officer back to the United States who was supposed to have influenced the defense

counsel and gave him a chance to have his say as to what he had done. There was a complete denial on his part that he had influenced the defense counsel. As a matter of fact, that officer who allegedly was coerced, was later promoted. But, nevertheless, this is a thing that the Judge Advocate General of the Army is very strict about with respect to any influence whatsoever on defense counsel. In all of our judge advocate offices throughout the world, we imbue them with the spirit that this man is the defendant's lawyer, and he is to be left alone and fight the case just exactly the way he feels he should fight it.

You will remember in the *Kitchens* case that the defense counsel did bring up the command influence issue at the trial even after this so-called talking to by the chief of military justice. We are watching this very closely, and wherever it crops up measures will be taken to stamp out any type of command influence.

Mr. EVERETT. Two questions, and I might ask them as followups on your comments, General Todd.

What other accusations or allegations of command influence on defense counsel have come to your attention from people that you thought were in a position to have some information on that score; and, secondly, what efforts have been made to provide an organizational setup such as that of the field judiciary which would lessen the opportunity for possibilities of such command control?

General TODD. Well, I haven't personally had any other instances brought to my attention other than the one you are speaking of in the *Kitchens* case.

So far as administrative measures to prevent this type of thing are concerned, it is very difficult, of course, where we have defense counsel from the same office as trial counsel and where we have our judge advocates stationed all over the world in many varied situations to separate them physically, so that they will have an office apart and will be entirely by themselves.

But through our teachings at our Judge Advocate General's School at Charlottesville, through all the instruction we give our people as lawyers, they are imbued with the spirit that when you are defending an accused in a court-martial trial, you are absolutely independent, and you are on your own. You are not to be influenced by anyone who attempts it. That is about all I have on that, Mr. Everett.

Mr. EVERETT. Do you think, General, that it would help the Army in its task of building up the status of the court-martial and the law officer if the law officer had the authority to rule on challenges to court membership, to rule finally on motions for findings of not guilty and matters of that sort?

There are certain powers he does not have today which a Federal trial judge would have.

Do you think it would aid the Army in its task of building up the law officer's status if such powers were given to the law officer?

General TODD. Yes, I do. I think that would help, and I think it would also facilitate our trials.

Mr. EVERETT. General, we have had a report——

Senator CARROLL. May I interrupt at this point?

Would you need to change the basic statutory law to achieve what you have said?

General TODD. Yes, sir; and we are approaching such a change. We have, being staffed at the present time, a proposed change which would give the law officer this authority.

Mr. EVERETT. General, the subcommittee received some information at an earlier time that at one major Army post the practice is to appoint lawyers to serve on special courts-martial as members of the court, but that at this same post the accused is not furnished a qualified attorney as military defense counsel. Have you received any reports or complaints to that effect?

General TODD. No sir, we have not; and we looked with interest on that comment on the questionnaire sent by the subcommittee. We would appreciate any particulars with respect to that. It is not generally the practice, we know that, because we don't have enough lawyers in the Army to appoint to courts of that nature, the special courts-martial. We don't have enough judge advocate officers to staff them with counsel. It would be a rare instance, I am sure, where lawyers are appointed as members of such courts. We would appreciate any particulars the committee could give us on that.

Mr. EVERETT. Finally, General, I suppose this is more appropriately directed to you than to the Secretary, does the Department of the Army, does the Judge Advocate General of the Army consider there is any necessity for retaining the summary court-martial as a court, or could the summary court-martial, and perhaps the special court-martial as well, be abolished in favor of a choice between article 15, nonjudicial punishment, on the one hand, and a general court-martial on the other, with the accused having the option to obtain a general court-martial if he declined to accept a nonjudicial punishment?

General TODD. This is among the proposals that we have decided upon with the other services are necessary changes to the code.

We have a piece of legislation, the so-called A bill, which would give more company punishment authority to the commanding officer. This would then not require that we have the summary court. Our view is that the summary court is not necessary. With respect to the special courts-martial, though, the Army took the view previously that this was not necessary. The other services did not agree with this. They feel that for certain types of trials, it is necessary, and we have gone along with this view and proposed another piece of legislation which would more or less liberalize the special courts-martial, that is have a special court-martial with the law officer, or a special court-martial with the law officer alone. This would be a very flexible and good system, we feel.

Senator CARROLL. Gentlemen, it is 10 minutes to 6. I don't want to curb you but I thought you were going to continue to 5:30. But, of course, I took up a few minutes myself.

Are there any questions on this side?

Any further questions?

I would like now to ask you another question, not for the subcommittee, but for myself. Suppose that an enlisted man wrote this committee, and said that he had evidence in support of a complaint. How should the matter be investigated? Is it better to have him go through channels to the Inspector General, or to the Judge Advocate General's office? And if he did, does he risk any retaliation? What

would happen to him if he came in here to testify? I don't want men coming to us outside of channels, but still I want to give them a chance to speak out. This one letter did attract my attention.

Do you have any advice? I will be glad to take an off-the-record answer if you prefer.

General TODD. That is not necessary. Actually, Senator Carroll, there are two different officers, the Judge Advocate General and the Inspector General.

Senator CARROLL. Yes.

General TODD. And there is provision in the regulations for all enlisted men to confer with the Inspector General. He can unburden himself there, however he wishes.

Senator CARROLL. That was my first impression.

Is there anything in the Army regulations to prohibit this man from testifying here at his own expense?

General TODD. Here before this subcommittee?

Senator CARROLL. Yes.

General TODD. No; nothing whatsoever.

Senator CARROLL. Do you think there would be any effort to retaliate if he did?

General TODD. Honestly, I don't think anything would happen to him.

Senator CARROLL. Do you think that if he went to his commanding officer and said, "I would like to go before a hearing and I am willing to pay my own expenses if I can get leave, I am going to testify on this subject," there is anything in the Army regulations that would prohibit that?

General TODD. No, sir.

Senator CARROLL. Assuming he could get the leave and pay his own way.

General TODD. Nothing to prevent it that I know of.

Senator CARROLL. As a matter of policy perhaps it might be well to have the Inspector General look into the statement. Does the Judge Advocate General have the power to conduct such an investigation?

General TODD. That is normally not our function. Actually, the men do go to the Inspector General, and there is regular provision for the Inspector General when he inspects the post to have an hour for the enlisted men to come and talk to him, and this is made available to them all over the world.

Mr. FITT. We get a great many letters, Senator Carroll, written by enlisted men to their Congressmen and Senators or to the President or other prominent officials that are referred to us. We investigate them, and where a bad situation is revealed we try to correct it and do correct it.

Senator CARROLL. I am sure you do.

Mr. FITT. And the man is not penalized because he has brought to the attention of the Army a situation which should be corrected.

Senator CARROLL. In this particular case the individual stated that he was not being personally persecuted and punished or discriminated against. He felt that the system had deteriorated in the last 17 months. This individual was a university graduate with two degrees. He is a career enlisted man, who is concerned about the same things

84154—62——9

that concern us in these hearings. If we could have someone investigate what he says, it would be helpful to the military. It seems to me that the Inspector General or the Judge Advocate General or perhaps the Secretary's Office itself should find out the basis of his statements. Do you have your own independent investigators, Mr. Fitt, or do you refer it down through channels?

Mr. FITT. Normally we would refer it through channels, Senator, and we have a great deal of confidence in the Army staff and in the operation of the system as it is now constituted.

Senator CARROLL. Would you refer it to the Inspector General, or to the Judge Advocate General? Could you refer it to the Judge Advocate General's Office?

Mr. FITT. It all depends on what kind of a letter it is, Senator. It would go to the appropriate division or department for handling and investigation if it were the kind of letter which seemed to require some sort of followup, and I gather that the letter you have in mind warrants in your judgment to be followed up.

Senator CARROLL. Actually, I think this perhaps would be better directed to the Secretary of the Army and let you follow—return a reply as to how it should be done.

Mr. FITT. Yes, sir; we will be glad to receive it and I can assure you that there will be no action prejudicial to the man taken simply because he has written to his Senator.

Senator CARROLL. I don't vouch for the validity of what he has written, but it appears to be a very intelligent letter, and consequently, without checking quickly while these hearings are on we could get some quick response on that.

Mr. FITT. Yes, sir; we would be glad to do that.

Senator CARROLL. And this would in no way prejudice the career man himself?

Mr. FITT. I assure you he would not be penalized because he has written you. This is one of the constitutional rights that a serviceman has and we respect it.

Senator CARROLL. You have been very helpful to me.

General TODD. On that one point, Senator, as a matter of fact when these letters do come from the Hill to the Pentagon, and they are forwarded by our Legislative and Liaison Section, there is a regular sentence they always put in these letters that no unfavorable action will be taken against the man. This is always done.

Senator CARROLL. You have been most helpful. I thank you very much, gentlemen.

We will stand in recess until 10 o'clock tomorrow morning.

(Whereupon, at 6 p.m., the hearing was recessed, to reconvene at 10 a.m., Wednesday, February 21, 1962.)

# CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL

---

WEDNESDAY, FEBRUARY 21, 1962

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 457, Old Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee) presiding.

Present: Senators Ervin (presiding), Carroll, and Keating.

Also present: William A. Creech, chief counsel and staff director; Robinson O. Everett, counsel; and Bernard Waters, of minority counsel.

(Present at this point: Senator Ervin (chairman), presiding.)

Senator ERVIN. The subcommittee will come to order.

Mr. CREECH. Mr. Chairman, the first witness this morning is Hon. Benjamin W. Fridge, Special Assistant to the Secretary of the Air Force for Manpower, Personnel, and Reserve Forces, Department of the Air Force; and also Maj. Gen. A. M. Kuhfeld, the Judge Advocate General, Department of the Air Force.

I believe these gentlemen will appear at the same time. General Kuhfeld's statement, I believe, will follow that of Mr. Fridge's.

They will be accompanied by:

Col. V. J. Lozito, Promotions and Separations Division, Directorate of Military Personnel, Department of the Air Force;

Mr. Leroy J. Spence, Directorate of Personnel Planning, Department of the Air Force;

Col. Arnold Le Bell, Chief, Military Justice Division, Office of the Judge Advocate General;

Col. Harold R. Vague, Chief, Legislative Division, Office of the Judge Advocate General; and

Lt. Col. John H. Thompson, Office of the Secretary of the Air Force Personnel Council.

Mr. Fridge?

## STATEMENTS OF BENJAMIN W. FRIDGE, SPECIAL ASSISTANT TO THE SECRETARY OF THE AIR FORCE FOR MANPOWER, PERSONNEL AND RESERVE FORCES; AND MAJ. GEN. A. M. KUHFELD, THE JUDGE ADVOCATE GENERAL, DEPARTMENT OF THE AIR FORCE; ACCOMPANIED BY COL. V. J. LOZITO, PROMOTIONS AND SEPARATIONS DIVISION, DIRECTORATE OF MILITARY PERSONNEL, DEPARTMENT OF THE AIR FORCE; LEROY J. SPENCE, DIRECTORATE OF PERSONNEL PLANNING, DEPARTMENT OF THE AIR FORCE; COL. ARNOLD LeBELL, CHIEF, MILITARY JUSTICE DIVISION, OFFICE OF THE JUDGE ADVOCATE GENERAL, DEPARTMENT OF THE AIR FORCE; COL. HAROLD R. VAGUE, CHIEF, LEGISLATIVE DIVISION, OFFICE OF THE JUDGE ADVOCATE GENERAL, DEPARTMENT OF THE AIR FORCE; AND LT. COL. JOHN H. THOMPSON, OFFICE OF THE SECRETARY OF THE AIR FORCE PERSONNEL COUNCIL

Mr. FRIDGE. Mr. Chairman and members of the subcommittee, I am Benjamin W. Fridge, Special Assistant for Manpower, Personnel, and Reserve Forces to the Secretary of the Air Force. On behalf of the Secretary of the Air Force, Mr. Zuckert, it is my honor to appear before you today and present the views of the Air Force in connection with the subject matter of your investigation.

From examination of the staff reports of this subcommittee, it appears that the primary areas of concern to the subcommittee are the policy and practices of the Armed Forces with respect to the discharge of their personnel. These areas touch upon a vital aspect of the handling of people in the Armed Forces in a manner consistent not only with the requirements of the Armed Forces and the national defense, but also with the personal, legal, and constitutional rights of these people.

May I say, on behalf of the Department of the Air Force, that this Department has consistently recognized the importance of, and the problems inherent in, the administration of the people upon whom we must rely for our effectiveness. The present Secretary and Chief of Staff of the Air Force, as well as their predecessors, have frequently reiterated in public statements that despite advances in technology and the increased complexity of modern weapons, the key element in a combat-ready force is the corps of professionally trained people to operate it.

I might add at this point, since the subcommittee has made specific reference to the Air Force Rehabilitation Training Center at Amarillo, Tex., that Secretary Zuckert, while he was an Assistant Secretary of the Air Force in 1951, in recognition of the importance of people and the responsibility of the Air Force to utilize them to best advantage, made the decision to activate that rehabilitation center.

In order to supply this corps of trained people and to maintain the maximum defense force for the dollar, the Air Force strives to obtain—and keep—dedicated and capable men. We have many of those kind of men in the Air Force—men who will work 70 to 75 hours a week because they feel their deep responsibility to the Air Force and to their fellow citizens.

However, despite all precautions in setting enlistment standards and by means of other screening devices, we find in the Air Force, as in any large organization, that a small segment of our people are not the proper material and do not measure up to our requirements. These people must be eliminated from the Air Force, and the question is how should this be done?

By law, the Armed Forces are required to issue a discharge certificate to each enlisted person discharged from military service. As the statistics previously furnished the subcommittee show, during 1961 94.6 percent of all persons discharged from the Air Force received honorable discharges and an additional 3.8 percent received general discharges, under honorable conditions. In contrast, 0.9 percent—or less than 1 percent—received undesirable discharges, with the remaining 0.7 percent consisting of those ordered discharged with a punitive discharge as the result of an approved sentence by court-martial. I emphasize those figures to the subcommittee to show the relatively small group of persons with whom we are here concerned.

There is, I am certain, no problem concerning those people who receive honorable discharges. Further, in view of the judicial safeguards of the Uniform Code of Military Justice, the clemency considerations extended at each stage of appellate review, and the retraining program at the Air Force Rehabilitation Training Center at Amarillo, Tex., all of which will be gone into in more detail later by General Kuhfeld, I have no hesitation in saying that those who are discharged with a punitive discharge as the result of a court-martial have had their period of service in the Air Force properly characterized.

There remains that middle area of people whose service must be terminated administratively and who by law must be issued a discharge certificate. It has been the consistent view of the Armed Forces that the honorable discharge should not be cheapened by issuing it to persons whose military service has been morally inadequate or is characterized by a purposeful failure to perform military duties acceptably. The vast majority of servicemen who perform their duties with integrity and vigor and enjoy the respect and confidence of the military community are entitled to have their period of service characterized with a discharge certificate reflecting the manner in which they performed their military obligations. Conversely, those relatively few persons who do not live up to their obligations should not receive a discharge certificate which purports to show that their service was on a par with the larger group.

In issuing discharges to persons in this middle area, the Air Force acts with full realization of the importance that the civilian community attaches to the character of discharge received by a serviceman. The Air Force has no desire or intent to stigmatize unfairly the man who must be eliminated before his period of service is completed. To this end, the Department of Defense has set forth by departmental regulations the policies which must be followed in making a determination of the type of discharge to be issued. The Air Force has followed such policies, and has issued its own regulations, which were furnished to the subcommittee, setting forth the procedures to be followed. Accepted administrative practices are followed—which are quasi-judicial in nature—including the right to notice, hearing, counsel, and review by senior commanders and their staff judge advocates.

The Air Force has made, and is making, a conscientious effort to administer this program fairly, and in a manner consistent with our military requirement for capable people. We have weeded out a considerable number of our ineffectives and, as the statistics furnished to the subcommittee show, the number of undesirable discharges issued by the Air Force has declined substantially in recent years. In the administration of a program such as this, in an organization as large as the Air Force, it is inevitable that complaints of injustice will be made in individual cases and undoubtedly some errors occur. The Congress has recognized that such errors do occur and has established by law machinery to consider and correct such errors. We stand ready to correct any errors made by us and, in the form of the Air Force Discharge Review Board and the Air Force Board for Correction of Military Records, we have the administrative machinery available to do so.

For example, during 1961 a total of 1,321 cases of persons who had received undesirable discharges was considered by the Air Force Discharge Review Board. Of this total, 68 of the discharges were upgraded by the board to general discharges and 25 were upgraded to honorable discharges. In the same year, 854 general discharges were considered and 134 of them upgraded to honorable discharges. For the 5-year period ending in July 1961, 7.37 percent of the undesirable discharges considered were upgraded, and 21.67 percent of the general discharges were converted to honorable discharges. In addition to the review afforded by this board, in 1960 and 1961 the Air Force Board for Correction of Military Records granted relief to 3.98 percent of the cases considered by it for changes in the character of discharges previously awarded. Of this number, 2.39 percent were cases which had previously been considered by the Discharge Review Board.

We feel that in the administration of our personnel program and in the field of military justice we have maintained an excellent record. We welcome any suggestions for improvement, and we are happy to cooperate with the subcommittee in its investigation of these areas.

I have touched only briefly on matters relating to military justice because General Kuhfeld, the Air Force Judge Advocate General, is present and will go into more detail on this matter as well as the problems and procedures relating to administrative separation. In addition, representatives from the office of the Deputy Chief of Staff, Personnel, of the Air Force, the Discharge Review Board, and the Board for Correction of Military Records are present.

I, and the people who are with me, will be happy to answer any questions by members of the subcommittee.

Mr. Creech. Mr. Fridge, General Kuhfeld, the chairman will be happy to have General Kuhfeld present his statement now, or, if you would prefer, we can proceed with questions at this time and then he can read his statement, whichever you feel would be advantageous.

General Kuhfeld. I think it would be more advisable for me to present it now, Mr. Chairman.

Mr. Chairman and members of the subcommittee, I am Maj. Gen. Albert M. Kuhfeld, the Judge Advocate General, U. S. Air Force. I, too, as does Mr. Fridge, appreciate the opportunity to appear before you today and present the views of the Air Force in the matters concerned in your investigation, very important matters that you are considering.

I will discuss first of all the question of administrative discharges. By that term, I refer to all separations from military status which occur prior to the expiration of the service member's contract or obligated period of service other than punitive discharges adjudged by courts-martial. In some cases, the authority to issue administrative discharges is used to permit the voluntary separation of a serviceman because of personal considerations, such as hardship, essentiality to national health, safety, or interest, or for other reasons. There is, I am certain, little concern with this group of people, because such voluntary separations virtually always result in issuance of an honorable discharge.

The principal other group of people who receive administrative discharges consist of those persons who should not be permitted to complete their normal term of service because of such factors as inability or failure to perform their duties in a satisfactory manner, moral dereliction, or a pattern of misconduct which has seriously compromised their usefulness to the Air Force.

Mr. Fridge has already mentioned briefly the reasons why the Air Force and the other military services require authority to effect administative discharges. There is no inherent right, I think we all agree, in any person to be continued in the military service, and the mission and objective of the Armed Forces are too vital to our national defense to permit their being entrusted to persons of low capability, or low standards of integrity and conduct. Further, once the decision has been made that an individual must be discharged, there is a further requirement to characterize the quality of the service which he has performed. Such characterization is necessary to determine the individual's eligibility for benefits under both Federal and State law, and to distinguish the substandard service of some individuals from the capable, industrious, and honest service of other servicemen who constitute the vast majority of the total; in other words, to prevent the dilution of the honorable discharge.

The question of what criteria shall be used to distinguish the person who is to receive an honorable discharge or a discharge under honorable conditions from the person who is to receive one under other than honorable conditions is not easy of solution. In this connection, I would like to say a few words concerning the policy used by the Air Force in determining whether an honorable, a general, or an undesirable discharge is issued.

The Department of Defense directive, which has been brought to the attention of this subcommittee, governing administrative discharges provides in general that an honorable discharge will be issued when a service member has been proficient and industrious in the performance of his duties and his military behavior has been proper. In other words, even an individual who lacks the capacity to perform his work according to Air Force standards will be issued an honorable discharge if he has performed his duties to the best of his ability and has conducted himself in accordance with exemplary standards of conduct.

A general discharge, which is a discharge under honorable conditions and carries with it the full entitlement to all benefits prescribed by law for persons who are honorably separated, is issued in those cases where the member's record is not sufficiently meritorious to war-

rant an honorable discharge. For example, if an individual has been convicted of an offense by a general court-martial or convicted by more than one special court-martial during the current period of service, he may be issued a general discharge. Even in these cases, however, where the circumstances are such that the discharging authority feels that the member's overall military record offsets these offenses, an honorable discharge may be granted, and frequently is.

I might add at this point that even persons convicted by court-martial in which a bad-conduct or dishonorable discharge is adjudged have the opportunity during appellate proceedings to have their punitive discharges suspended or remitted, be restored to duty, and to earn a general or an honorable discharge.

An undesirable discharge is issued only for unfitness, misconduct, or for security reasons. Even in these instances, however, if the circumstances so warrant, a general or honorable discharge may be issued. The Air Force in its implementation of the DOD directive on this matter provides specific guidance in the case of undesirable discharges which insures that the member's entire military record will be taken into account. Under this directive, despite the fact that a service member is being separated for unfitness, misconduct, or security reasons, if his overall record contains factors or circumstances which would result in injustice to the individual if he were issued an undesirable discharge, then he may be granted a general or an honorable discharge as the facts may warrant.

The Air Force recognizes, as Mr. Fridge stated, the adverse effects of characterizing an individual's service as "other than honorable." The policy directive of the Department of Defense, previously mentioned, was issued in 1959. However, even prior to that time, in the light of expressions of concern by interested congressional committees and individual Members of the Congress, the Air Force began a careful evaluation of the policies and procedures used in effecting administrative discharges.

We believe that the standards and procedures set forth in the 1959 Department of Defense directive are fair and provide adequate protection for the rights of the individual. Air Force regulations which implement this directive emphasize the need for insuring that the "other than honorable" discharge is issued only when clearly warranted by the member's record of military service. These regulations specifically point out the adverse effects of such a discharge. In addition, the Air Force Discharge Review Board and the Board for Correction of Military Records utilize the more liberal criteria prescribed by the 1959 directive in considering cases of individuals separated prior to the issuance of that directive.

And I might say parenthetically, Mr. Chairman, that the Veterans' Administration and all concerned with the review of discharges were advised that those criteria would be adopted and would be utilized in reviewing discharges issued prior to the 1959 directive.

Air Force experience in recent years clearly indicates that the liberal criteria now in effect have had a substantial impact. For example, in 1958, approximately 8,300 undesirable discharges were issued by the Air Force. By 1961, the number of such discharges had dropped to 1,700. On a percentage basis, 4.2 percent of the persons discharged in 1958 received undesirable discharges, whereas in

1961, the figure was 0.9 percent—or, as Mr. Fridge put it, less than 1 percent. In recent years, approximately one-third of the undesirable discharges issued by the Air Force were issued to persons who had been convicted of a felony by a civil court, or had engaged in homosexual activities while in active service. The remaining cases involved individuals who had clearly demonstrated an unfitness for military service by unacceptable conduct and character traits which made necessary the characterization of their service as "other than honorable."

The Air Force will continue to monitor this area closely to insure that a less than honorable discharge is given only when the issuance of an honorable discharge would be a clear injustice to Air Force members who have served in an exemplary manner, and to those governmental and civilian agencies which must rely on the statement of the Air Force as to the quality of service which the individual has performed.

Parenthetically here, too, Mr. Chairman, I should point out that the various Veterans' Administration Acts passed by the Congress provide that only people who have served honorably or under honorable conditions are entitled to benefits, and we feel that, to comply with those statutes, it is necessary that we characterize the discharges of various individuals.

I would now like to discuss briefly the administration of military justice within the Air Force. As the members of the subcommittee know, the administration of military justice within all of the Armed Forces is governed by the Uniform Code of Military Justice, a public law passed by the 81st Congress, and generally effective on May 31, 1951. This code was the result of extensive study and drafting by a committee, appointed by Mr. Forrestal while he was Secretary of Defense, and headed by Prof. Edmund Morgan, Jr., then dean of the Harvard Law School. As the legislative history of this code shows, the primary purposes of this revision of military law were to provide a code that would be equally applicable to all the Armed Forces, and to evolve a system which would insure the maximum amount of justice within the framework of a military organization.

From the time that the code became effective, through 1961, there has been a total of 352,661 cases tried by court-martial in the Air Force. Of this total, 250,409 were tried by summary court-martial, 87,895 by special court-martial, and 14,357 by general court-martial. During this same period of time, I have been closely associated in the Air Force with the administration of military justice, and have been able to observe at firsthand the operation of the code.

From the announced scope of the investigation by this subcommittee, and the list of questions submitted by it to the Department of Defense, it is apparent that the subcommittee is interested primarily in two areas, insofar as military justice is concerned: first, the differences in administration of military justice among the Armed Forces and whether such differences result in any adverse effects on the individual serviceman; and, second, the question of "command influence" in the administration of military justice.

On the question of differences among the services in the administration of military justice, I would like to make the following preliminary observations. Although one of the criteria laid down for the

committee headed by Professor Morgan was that the code should be uniform in substance and uniform in interpretation and construction, the code itself contemplates that there may be variations in its administration to make allowance for the differing needs of the Armed Forces.

Several of the articles expressly authorize actions to be performed "under such regulations as the Secretary of the (military) Department may prescribe." For example, article 28 grants such authority for the appointment of reporters and interpreters. Other articles grant discretionary authority to the Judge Advocates General in the matter of who shall be certified as competent to act as counsel or law officers before general courts-martial. Article 15 expressly authorizes a specified type of punishment to be imposed upon "a person attached to or embarked in a vessel," thereby recognizing the special problems of maintaining discipline on a ship.

Also, in discussing these differences, I would like to make clear that I do not purport to speak for the other Armed Forces on their reasons for adopting administrative practices not utilized by the Air Force, or for not adopting practices found by the Air Force to fit its needs. In some cases, diversity has resulted from practices that were frankly experimental in nature. For example, I understand that the Army specialized law officer program, which is mentioned in several of the committee questions, started out as a limited pilot program. It apparently met certain needs of the Army and has now been adopted by it on a worldwide basis. In examining the possible advantages and disadvantages to the Air Force in adopting a similar program, I noted first of all that the performance of our law officers under the present Air Force system was excellent. Relatively few Air Force cases have been reversed by the Court of Military Appeals for law officer error. Therefore, no need is seen to change our present program, which, so far as the Air Force is concerned, contains certain advantages from a training standpoint.

In that connection, Mr. Chairman, I might say this: That I have counted the cases handled by the Court of Military Appeals in the last 6 months from July 1 to December 31, 1961. In four of the decisions the Court of Military Appeals held that the Army law officer erred. In five of the decisions the court held that the law officer of the Navy erred. In three of the decisions they held that the law officer of the Air Force erred.

The total cases considered and opinions written were as follows: 22 on Army cases; 20 on Navy cases; 6 on Air Force cases.

The number of reversals during this 6-month period: 11 in Army cases; 15 in Navy cases; 4 in Air Force cases.

I think that speaks pretty highly for the job that our law officers are doing in handling these trials. Accordingly, then, I see no need to change our program which, so far as the Air Force is concerned, contains certain advantages from a training standpoint. For example, when an Air Force judge advocate is certified as competent to perform duties as a law officer and is designated as the law officer of a general court-martial, he is expected to, and does, make a thorough study of the legal issues that may be involved in the type of case at which he will preside. He, therefore, is motivated to keep current on recent court decisions and other matters that will aid him

in performing his professional duties in a competent manner. Further, in military justice, as in any legal system, there are cases of varying legal complexity. In serious cases in which complex legal issues can be anticipated, our more experienced law officers are assigned. However, in less complex cases, law officers with less experience can be assigned and thereby acquire that reservoir of experience that in time of war or emergency can be utilized to expand our Judge Advocate General's Department to meet the increased needs of an expanded force. We, therefore, do not anticipate that the Air Force will adopt the specialized law officer program.

Parenthetically, too, because I think maybe this question will be asked later, my concept of a military force in peacetime is that it serves two purposes:

A deterrent and to train the people that we are going to use in the event of an all-out emergency.

For instance, in the Air Force we have aerial refueling. Perhaps there would be less difficulty if we had only one crew that kept on practicing refueling and then wrote books about it. But when you got to war, there would have to be people who are experienced in doing the job.

In our situation with our law officer program, I feel that if we get into a situation like we got into in World War II, with units scattered all over the face of the globe, we are going to have to have people who have had some experience in doing this job, and we are going to have a great reservoir of people that we can utilize.

There are many other reasons for the position which I have taken in connection with this whole program, which perhaps we can discuss after this statement.

The subcommittee has also noted the fact that the Air Force and Navy utilize special courts-martial to impose bad-conduct discharges, whereas the Army does not. As the subcommittee knows, the imposition of a bad-conduct discharge by a special court-martial is authorized by the code. As set forth in the Air Force answer to question 14 of the subcommittee, it has been possible, and it is the practice in the Air Force, to appoint, with very, very rare exceptions, qualified legal counsel to represent persons tried by special court-martial. In view of this practice, and the provisions of the code which provide for complete appellate review of cases involving a bad-conduct discharge, the Air Force has used such statutory authority in appropriate cases.

The subcommittee has also noted the divergence among the services in the matter of negotiated pleas. The Air Force does not utilize this procedure, and the reasons for this decision are set forth at some length in the Air Force answer to question 22 asked by the subcommittee. I would like to observe further, however, that I recognize that the negotiated plea practice has certain benefits, primarily in the areas of expeditious handling of cases and elimination of some of the expense of assembling witnesses and evidence. There are, however, certain advantages accruing from our present Air Force practice which, in my opinion, warrant its continuance in the Air Force. The primary advantage is the elimination of post-trial complaints of "pressure" exerted upon an accused to induce him to plead guilty, alleged misunderstanding of the final negotiated agreement, or complaints by an accused that he did not understand that he had a possible legal defense, and that his plea was therefore inadvertent.

May I say again, and interject on that, Mr. Chairman, that over the years that I have been connected with the Judge Advocate Generals, Department of the Air Force, I have had numerous letters from Congressmen sending over letters that they have gotten from constituents who have complained that they were told to plead guilty by their defense counsel; that the defense counsel was interested only in getting the case done; that they had told their defense counsel that they were not guilty and the defense counsel said:

"Would you rather take 5 years or 1?"

Now, these statements, I am sure, were not true, but I have gotten many letters from Congressmen based on it.

In each of those instances I have had somebody from my office pick up that record of trial where the plea of guilty was interposed, take it over and let the Congressman read it, and when the Congressman got through, he could see that the evidence was there that the plea was a provident plea; that the record showed the man's guilt; and he generally ended up by saying:

"Thank you very much, that is all I wanted to know. I can see that this complaint is not justified."

If you do not have that in the record, if you do not have a prima facie case in the record, you are not in a position to do that, as I have been proud to be in the position to do over the 10 or 11 years that I have been connected with the office here in Washington.

A second, but equally important, advantage is in the post-trial clemency consideration of each case. In addition to the thorough appraisal of each accused which I require my staff judge advocate to forward with the record of trial, we have found that pertinent information comes from the circumstances surrounding the commission of the offense itself. For this reason, and in order to permit appellate authorities to determine with moral certainty that a plea of guily is not inadvertent, we require the prosecution to present at least a prima facie case even when a guilty plea is entered, in order that the record will show these circumstances. In view of this requirement, we have preferred to avoid the possible difficulties that could arise from the use of negotiated pleas.

The subcommittee has further noted that although the Navy uses civilian members on its boards of review, the Army and Air Force do not. Article 66 of the code authorizes the use of either military or civilian members. As many of the members of this subcommittee know, and as the legislative history of the code shows, the provision in article 66 authorizing the use of civilian board members was inserted after the Morgan committee had prepared its draft bill. The insertion was made at the express request of the Coast Guard to accommodate the shortage of uniformed lawyers and long past experience of that service. In response to a question on this matter by Senator Kefauver, Mr. Larkin stated to the Senate subcommittee of the Committee on Armed Services:

> Just as Commander Webb pointed out, the Coast Guard requested the added provision for themselves. When the idea was presented to the committee, they decided that they might as well make it general since the appointment of such civilians in any of the Armed Forces was entirely within the power of the respective judge advocates general.

Our experience has been that the use of military board members has been advantageous to the Air Force. Air Force boards of review con-

sist of senior judge advocates who have had extensive experience in military justice matters at base and staff level. We have found their work to be excellent. Further, we feel that the experience gained by these officers on boards of review benefits the Air Force when they are rotated to staff positions in the field since they take with them an awareness of the considerations involved in the military appellate process.

On the matter of the operation of the Air Force rehabilitation training center at Amarillo, Tex., our written answer to the committee in response to question 30 is comprehensive and expresses our satisfaction with its operation. Mr. Fridge has gone into that to some extent, too. Therefore, I will not go into further detail at this time; however, I will be happy to answer any questions that the committee has on the subject.

The final matter that I would like to discuss is the question of command influence on court-martial proceedings. As you may recall, this question was of vital concern during the hearings that were held on the Uniform Code of Military Justice. The final product was one that was frankly shaped in recognition of the fact that the code must not only provide the essential constitutional and legal safeguards for an accused inherent in a civilian judicial system, but must also recognize the military circumstances under which it must operate—both in peace and in war—and the requirement for discipline in a military operation. In his testimony at the hearings, Professor Morgan stated:

> I am aware that there are many schools of thought on military justice, ranging all the way from those who sponsor complete military control, to those who support a complete absence of military participation.

He further stated:

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

The question of "command influence," however, is not entirely one sided. The influence of a commander may be, and frequently is, exerted on the side of justice rather than injustice. He has the power to determine that in the interest of justice a case should be disposed of without trial. He can, and frequently does, disapprove a portion of the sentence adjudged by a court if he deems a lesser sentence more appropriate. I have had forwarded to me copies of lectures given by commanders or their representatives, pointing out the duties and high responsibilities of members of courts-martial in a manner calculated to instill in them a higher sense of their judicial responsibilities.

And I will say again that there are instructions to courts and instructions to courts. Some of the instructions that might be conceived that could be given to courts I would stamp out in a minute. I would certainly not stand still for them for one single second. Neither would the Boards of Review, nor would the Court of Military Appeals.

The kind of lectures that I am talking about are lectures which are educational to the members of the court, and which instill in them a feeling of the responsibility that they have sitting as a member of a court, which I deem one of the most serious jobs that they have to perform in connection with their military duties.

There have, of course, been cases where a commander has taken action which by judicial standards was found to have been improper command influence. The relatively—and I emphasize "relatively few cases"—the relatively few cases in which this has occurred have primarily arisen as the result of a written communication or lecture stating command policies under circumstances in which there was a reasonable probability that the policies so stated could adversely affect a specific case. I can state without hesitation that our military counsel have not been at all reluctant to raise this issue in court or on appeal, and that boards of review within the Air Force and the Court of Military Appeals have been very alert to take corrective action in all cases in which the matter has come in issue.

Statistically, in the nearly 11 years in which the Uniform Code has been in operation, there have been 14 reported cases in the Air Force in which the problem of improper command influence has been raised. In six of these cases, the board of review found that improper command influence existed. However, in one of these six cases, the Court of Military Appeals reversed the decision of the board of review and found no improper command influence. In two cases in which the board of review considered the question and found no prejudicial command influence, the Court of Military Appeals reversed the decision of the board and found such improper influence. In the remaining cases, the board of review considered the question and found no improper influence. The Court of Military Appeals either denied a petition for review, or no petition was submitted by the accused.

This concludes my prepared statement. I will be happy to answer any questions that the members of the subcommittee may have.

Senator ERVIN. General, as I understand your remarks, you think that it is essential that the man instruct those who are going to sit on courts-martial as to their legal duties as members of such courts?

General KUHFELD. Well, I cannot say that it is essential, sir.

Senator ERVIN. Desirable, if not essential?

General KUHFELD. But I think that it is desirable, because I think it is an important duty and it is an important function, and I think the members of the court, the officers who are going to sit on that general or special court, should go in there with some knowledge of what their job really is, sitting there and acting in that kind of an important capacity.

Senator ERVIN. And you made it very clear in your statement, as I interpret it, that nothing should be said by a commander under those circumstances which could be construed, or reasonably construed, to be any intimation as to what decision he thinks should be made in a specific case?

General KUHFELD. I would never let a case stand in which that kind of action had been taken. Certainly, I would not, Senator.

Senator ERVIN. We have the problem which arises in virtually every field where we have to give power and authority to a person, and it is impossible for all people to exercise power and authority wisely under all circumstances.

On the other hand, it is necessary to have the authority and power posed in someone, if any organization is going to function.

Your position is that, while there may be in a relatively few cases some abuse of this power, that these cases of abuse are so negligible

in numbers and are so apt to be corrected that there is no necessity for Congress taking any action, specific action, in this field?

General KUHFELD. That would be my view, Mr. Chairman.

Senator ERVIN. What do you have to say as to the suggestion that there should be something done to give a man the right to test the imposition upon him of an undesirable discharge prior to his being separated from the service?

General KUHFELD. We are getting now into the administrative field, Mr. Chairman.

Senator ERVIN. Yes.

General KUHFELD. In approaching 90 percent of the cases in which there is administrative discharge involved that would end up with a general or undesirable discharge, the Air Force furnishes legal counsel—I mean a judge advocate to advise with the respondent.

Now the area, as I see it, that the chairman is getting into is, supposing one of these individuals said; "I would rather be tried by court-martial." Should he be entitled to be tried by court-martial? I would say not.

I would say that the decision as to whether he should be tried by court-martial should be left to the military authorities. Now why do I say that?

The cases in which the man is not tried by court-martial—let us take a child molestation case, for instance—you will have a situation where a youngster 5 or 6 or 7 years old—one case that I am thinking about in particular, where the youngster made a statement identifying the individual as the person who had taken indecent liberties with her, a little girl. The individual made a statement himself admitting that he had taken these indecent liberties.

Then he learns that a psychiatrist, a chaplain, the little girl's parents have said: "This will irreparably hurt this little girl if she is required to go on the witness stand and testify to these things that happened."

Now in that kind of a case I think the commander should be supported 100 percent in his determination that we have got to rid the service of this individual, but we do not have to sacrifice this little girl in order to do it, and we will use the little girl's statement and we will use his statement, the respondent's statement, to show what he did, and then eliminate him, despite the fact that he is asking for a court-martial, with full knowledge that we would not be inhuman enough to put the little girl on the witness stand.

I think you have got to consider all of those factors, Mr. Chairman, when you go into considering a problem of: Can this man force you to give him a court-martial?

Senator ERVIN. Is it fair to say, in the overwhelming majority of cases where servicemen are separated from the service by an undesirable discharge, that that method is satisfactory, preferred by them, rather than the court-martial route?

General KUHFELD. Yes, sir. I think that the fellow that asks for a court-martial, except in these unusual circumstances such as I am talking of, is a very rare breed. You do not find a fellow very, very often asking for a court-martial instead of administrative action, because when he asks for a court-martial, he visualizes himself sitting in jail or something like that, and this he does not want.

Senator ERVIN. Your position is, or, rather, you say, as a result of your experience in connection with administration of military justice in the Air Force, that in the overwhelming majority of cases that the present practice followed by the Air Force in respect to the granting of undesirable discharges is not only satisfactory to the Government, to the service, but is satisfactory to the men granted such discharges?

General KUHFELD. Administrative discharges are not in connection with the court-martial system as we understand.

Senator ERVIN. That is right.

In other words, as I understand it, they are not covered by the code, the Uniform Code of Military Justice at all?

General KUHFELD. That is right.

But I think, with the changes that have been made, the evolution that has come about in being liberal with the higher type discharges, that the system that we are operating under is operating well, Mr. Chairman, and is perfectly satisfactory.

Mr. FRIDGE. I fully concur in that, and would like to point out that there is adequate review of the chain of command of the administrative discharge system in much the same fashion that a court-martial would receive an appellate review.

As both I and General Kuhfeld pointed out, we have discharge boards of review both in the air staff and in the secretariat. I have a deputy, who is an attorney, who reviews these things also, and if there is still disagreement among all these things, they come to me and some of them to Mr. Zuckert, himself.

And we are just as concerned with the rights of the individual as we are with trying to move some undesirable individual out of the system, out of the Air Force.

Senator ERVIN. Could you give me just briefly the procedure?

Here is an individual who is being considered as one who should be separated from the service by an undesirable discharge. What is the process?

Mr. FRIDGE. Colonel Lozito will answer that. Colonel Lozito, sir, is an expert in this business.

Colonel LOZITO. Sir, when the commander makes the judgment that an individual should be considered for separation, and has taken into consideration all of the rehabilitation efforts that should have been made prior to this judgment, why, he then advises the individual of the commencement of such an action, administrative action, and the individual is then appraised of his various rights to have counsel, to appear before a board of officers.

In the case of an undesirable discharge, there would be a field grade officer on the board, one of the members being from the Judge Advocate General's branch, and he, likewise, has the right to be represented by counsel.

As the general pointed out, in 90 percent of the cases he does have counsel to represent him, and he, likewise, is apprised of his option to waive such a Board hearing.

He, likewise, is advised that he has the right to present evidence in his behalf, to question witnesses that appear, and so forth, and these rights are all spelled out to him, and, in fact, these rights are spelled out to him in writing.

Senator ERVIN. In other words, he is given election of whether he will accept the undesirable discharge of his own choice, or have the Board pass on him?

Colonel LOZITO. Yes, sir.

He has this judgment to make, and I might point out that in some recent sample surveys we made, we find that the majority of the individuals who are confronted with this situation waive appearance before the Board, for reasons best known to themselves.

Senator ERVIN. What review is there of the action of the Board, assuming the Board recommends that an undesirable discharge be granted in a particular case?

Colonel LOZITO. Yes, sir.

In an undesirable discharge case, our answers to some of the questions would reflect that it has to be approved by the commander exercising general court-martial jurisdiction. So you have then the case being heard at a base level, and then traveling up the chain of command to the special court-martial level to the officer exercising general court-martial jurisdiction.

In our command this is primarily a general officer of two- or three-star rank.

Senator ERVIN. I am not thinking so much about where there is a court-martial, but where there is no court-martial and where a Board——

Colonel LOZITO. That is what I mean, sir.

I am saying that the same officer who exercises general court-martial jurisdiction is the officer who reviews the discharge and is the final authority in the issuance of that discharge.

Senator ERVIN. Is that done automatically in case the Board recommends an undesirable discharge?

Colonel LOZITO. Yes, sir.

It is part of the automatic review.

General KUHFELD. Mr. Chairman, the reason that we say the officer exercising special court-martial jurisdiction, the officer exercising general court-martial jurisdiction, when it has nothing to do with court-martial at all, is because those at the levels at which the commander has a legal staff, and what we are providing is the reviews at levels where the commander has a legal staff, a staff judge advocate and attorneys to advise him.

And the attorneys, the legal staff goes over each of these records and advises him with regard to it. That is why we use that terminology.

Senator ERVIN. Of course, we have, I think, a fundamental distinction between civil government and the military, as I see it.

In other words, a civil government is set up for one main purpose; that is, to administer justice. That is, I would say, to my mind, the most sacred function of the civil government. Now, in the administration of justice, as I see it, in the Military Establishment, there is a twofold purpose: One is to enforce discipline, and the other is to rid the service of the personnel who prove to be unsuitable or unfit for service.

General KUHFELD. Yes.

Senator ERVIN. Putting it that way——

General KUHFELD. And, of course, the main purpose of the military service, Mr. Chairman, is to protect this country, and we have got to be able to have the proper people to do the proper job, because we can administer the best justice in the world, and if the Air Force cannot run the complicated machines that we have got today, this country would be in terrible shape.

So that our main responsibility is to defend this country and deter anybody else from trying to attack it.

The administration of justice is important—very, very important—but that is just an adjunct to the main problem that I have described.

Senator ERVIN. In other words, you are not created for that main purpose, as the civil government is?

General KUHFELD. That is right; yes, sir.

Senator ERVIN. At the same time I think all of us recognize that we must, of course, maintain what are called the essentials of due process in the administration of military justice, as well as in the administration of civil justice.

General KUHFELD. That is right, Mr. Chairman, and I think that over the years I have been very, very interested—I have been one of the main proponents, I think—in this restoration business, the rehabilitation, considering an individual as an individual, instead of just a number on a piece of paper. I might point out, the committee might be very interested in this, that as far back as 1958, December of 1958—that is before the DOD directive came out—we were concerned with what was happening in the administrative discharge field.

I want to read, if I may, a very brief memorandum for the record attached to a telegram that went out to all the major commanders.

This telegram was prepared by Mr. Spence, who is here today. This memorandum for record, back in December of 1958, before the Department of Defense directive, says this:

> General White—

who was then the Chief of Staff—

> by memo of November 3, 1958, to the Deputy Chief of Staff, Personnel, expressed his concern over the continued large number of inept and unsuitable airmen being identified and discharged with less than honorable discharge. He expressed the view that the proper solution to this problem was to improve screening procedures at the recruiting stations to insure that these individuals who probably will not make satisfactory airmen are not enlisted.
>
> General White referred to congressional concern over the large number of airmen being discharged with less than an honorable discharge, and stated that he was also concerned with this problem, and he expressed the view that the inept, unsuitable type of individual had enough difficulty without the added stigma of the unsuccessful service career.

And at General White's direction a telegram went out to all the major commands, which told them that in connection with these inept airmen, that unless they had done something definitely wrong, that they would be processed under AFR 39–14 convenience of the Government, and given honorable discharges. So you can see that we have been concerned with this problem for a long time, Mr. Chairman.

Senator ERVIN. Do you have any questions?

Mr. CREECH. Yes, Mr. Chairman.

Mr. Fridge, I should like to direct your attention to page 4 of your statement, sir, in which you speak of the administrative practices which are followed in administering military discharges.

I should like to ask you, sir, before the serviceman is given notice that he is to appear before a board, what indication does he receive from the Air Force that there is a possibility, or a probability, I should say, that such action might be taken against him?

Mr. FRIDGE. Your question is, before he is to appear before a board, what indication does he receive that such action will be taken?

Mr. CREECH. Before the actual notice is given to him to appear before the board, does he receive any indication from the Air Force that he is being considered for administrative action?

Mr. FRIDGE. I am sorry, but I am going to ask General Kuhfeld to answer that one, if I may.

General KUHFELD. There is a counseling program, the noncommissioned officer over the particular airman counsel him, tell him where he has been wrong in the past. The commander counsels him.

Finally, if they come to the conclusion that he has to be separated, he is given notice of the reasons why he will be called before a board.

He is given counsel to represent him, and then a hearing is set down, unless he waives it, a hearing before a board or a single officer in some cases, depending on how long the man has been in the service. And he is given notice that that hearing will be had.

Now, if for any reason he is unable to be ready for the time of that hearing, they postpone it or they continue it, in order to reach his requirements, so that in every instance he knows, unless he just cannot understand anything, he knows what is going on, and he knows what the reasons are that he is going to be called before the board and all of that.

Mr. FRIDGE. This pertains to a specific act.

Throughout his entire daily service he is supervised, of course, by a sergeant or officers, and I know from experience that if a young man starts on the wrong track, these senior people will counsel him initially before any particular act, before anything goes wrong that would be subject to administrative discharge or a court-martial.

Mr. CREECH. Now, the person who makes the recommendations to the board that administrative action be taken in the case of an individual serviceman, is he the commanding officer?

Mr. FRIDGE. Yes, sir, he is the commanding officer.

Mr. CREECH. Might this serviceman have direct liaison with the commanding officer, or would he possibly be someone whom he might not know?

Mr. FRIDGE. It is our policy that all commanding officers should have an open-door policy, and I assure you that this is a factor and they do have.

Any airman, regardless of rank, has the authority to go see his commanding officer at any time, by simply obtaining the permission of the first sergeant.

Mr. CREECH. The commanding officer who recommends administrative action, is he not also the one who appoints the board?

Mr. FRIDGE. No, sir.

Normally, the commander that would recommend the administrative action would be the squadron commander, and the board could be appointed by a wing commander or possibly higher.

Mr. CREECH. The wing commander or possibly higher authority who appoints the board, would he not on any occasion recommend administrative action against the serviceman?

Mr. FRIDGE. He could, yes, sir, and frequently in the case he may also want to see the individual soldier or airman.

Mr. CREECH. Now, the man goes before the board. General Kuhfeld indicated that he has received counseling. Is this counseling made a part of the record which is presented to the board? Is there a record of the counseling which he has received?

General KUHFELD. Well, if he appears before the board, then his cousel appears with him. If he has waived, the counsel is required to sign, too, on this waiver, in other words, that he has talked it over with the individual, the respondent, and that the respondent has waived——

Mr. CREECH. That is not exactly what I mean. I am referring to counseling in advance of notice.

General KUHFELD. Oh, yes.

Well, you see, we have under our regulations what we call a control roster. Now, this control roster, an individual who is starting to get into trouble, who is starting to do things that might lead to court-martial, that might lead to administrative separation, minor things, is put on a control roster, and, as part of this control roster arrangement, he is counseled. He is counseled by noncommissioned officers; he is counseled by the commander; and he realizes, or they try to make him realize, that he is going in the wrong direction and it is necessary for him to change, so that he is pretty well advised.

Mr. CREECH. The question, sir, is this:

Is there a record of this counseling at the time the man comes before the board? Is there a statement in the record to the effect that he has been counseled on specific occasion by certain individuals?

General KUHFELD. Our regulation AFR 39–17, for instance, and this is true in most of them, provides that the immediate commanding officer, when there is something starting in that might lead to a separation, must prepare a report which includes the name and so forth, the reasons why he is recommending his action, and a statement—and this is the report which he is required to make under the regulation—a statement showing the attempts made within the organization to make the person into a satisfactory airman.

The commander will also state whether the airman's assignments and duties have been varied to include service under different officers and noncommissioned officers in a different section or unit, and various information that he must furnish of record before the action is initiated to eliminate the fellow administratively.

Mr. FRIDGE. Does this answer your question, sir, or do you concern yourself with advice given to him prior to the commencement of actual proceedings?

Mr. CREECH. Actually, what I was thinking of is the type of advice which he receives periodically in this counseling, which he supposedly receives.

General KUHFELD. This is all reported.

Colonel LOZITO. Sir, I might make reference also to the administrative regulations which refer to an Air Force Regulation No. 35–31, which is a character guidance counseling type of regulation, and there are requirements imposed upon the commanders to continue during the man's military career this type of counseling that you are seeking, counseling with the chaplain, with the commanders, with

the various professional people on the base, and these are recurring things.

To answer specifically whether these things are brought to the attention of boards, as General Kuhfeld pointed out, yes, there must be in many cases evidence before the board of attempts to rehabilitate.

And you will find in many of these cases that the individual has certainly been aware of the trouble that he is in, such as the placing of his name on a control roster. This is done in writing. He acknowledges this.

These are matters of record, and find their way into the records of administrative board hearings.

Mr. CREECH. So at the time the board convenes, the record shows that this man has received counseling periodically from the various officers who are over him?

Colonel LOZITO. Yes, sir.

Mr. CREECH. Noncommissioned and otherwise?

Colonel LOZITO. Yes, sir.

Mr. CREECH. All right, sir.

Now, with regard to notice, how much notice is given an individual?

General KUHFELD. We do not have any specific time. It is a reasonable notice, and, as I said in answer to one of the other questions, Mr. Creech, if the individual is going to appear before the board and wants additional time, he is always given the additional time.

Mr. CREECH. With regard to counsel, I understand that legal counsel is made available if reasonably available. Is that the situation?

General KUHFELD. That is right.

Mr. FRIDGE. Yes, sir, that is the situation. Actually statistics show that in 15 of our major commands, in 100 percent of the cases in 8 of the commands it has always been available; in better than 84 percent of the cases in 6 other commands; and in one remote command, the Alaskan Air Command, that availability has dropped down to 28 percent of the cases sometimes. But in 14 out of 15 commands it is available in almost all instances, and only in the remote area has it been available in a low percentage.

Mr. CREECH. How about the availability of civilian counsel?

General KUHFELD. He must pay for it. If he wants to hire civilian counsel, he may, and they may appear for him, but there is no appropriation under which the service can pay for him. But, as Mr. Fridge points out, "available" means, Can you make this man available to do this job for this particular respondent? And across the board in well over 90 percent of the cases a judge advocate is made available to the man.

Mr. FRIDGE. I would like to add that the seriousness of the offense would have something to do with the availability of legal counsel in a remote area. If it is a minor infraction in a remote area, he might not have legal counsel; where, if it was a serious crime, he certainly would have.

Mr. CREECH. To what extent, for instance, in the remote area of which you are speaking is there any interchange of legal personnel being utilized? For instance, are counsel obtained from the Navy, from the Army?

General KUHFELD. Yes, we have that.

Even in the court-martial system, even when we go into trying cases, we have agreements. I have been authorized by the Secretary to enter into agreements with the other services on his behalf where we use law officers, counsel from the Navy, the Army, and they use law officers and counsel from the Air Force in these joint commands.

Now, our whole legal assistance program that we have is dovetailed together, and we permit our people, we permit Army and Navy people to come to us, our legal assistance officers, and they do the same. So there is a cross-utilization wherever there is a lawyer available by any of the services, and he is permitted to go talk to him and they will take care of him.

Mr. CREECH. I notice that in your discussion of the discharge practices you say, of course, that there is review by senior commanders.

Might the senior commander be the same individual who had authorized the board to convene, who had appointed the members of the board?

General KUHFELD. It might be.

Mr. CREECH. And, by the same token, might he be the same man who had recommended the individual for an administrative discharge?

General KUHFELD. This could be possible, too. It does not happen too often, but it could be possible.

Mr. CREECH. Now, when these decisions of the senior commanders are reviewed by the staff judge advocates, are these reviewed at the same time in collaboration with the commander, or, in other words, is it possible for the staff judge advocate to overrule the decision of the senior commander?

General KUHFELD. No, sir.

He makes his analysis and he makes his recommendation to the commander.

Mr. CREECH. I see.

General KUHFELD. Now, in your undesirable discharge case, for instance, that goes to the officer exercising general court-martial jurisdiction, the possibility that he would be the man who initiated that being so remote as to be negligible.

The final review by the officer exercising general court-martial jurisdiction—what happens is that the record comes in. It is referred to the staff judge advocate who makes his analysis of that record and his recommendations to the commander. The commander then acts on the basis of that recommendation.

Mr. CREECH. In previous testimony the point has been made that the administrative discharge procedure is not an adversary proceeding, and, as such, that not necessarily the same provisions are made.

But we have had a great deal of discussion about the desirability of subpena powers and of depositions, and I wonder if you would care to comment on your feeling, or, rather, if you would care to give the committee the benefit of your thinking with regard to the desirability of having subpena powers.

General KUHFELD. Now we are talking about the hearing board?

Mr. CREECH. Yes.

General KUHFELD. Out in the field.

Mr. CREECH. First of all, you might just tell us:

Is it your feeling that it is not an adversary proceeding?

General KUHFELD. It is my feeling that it is not an adversary proceeding, and that is indicated by the fact that a great percentage of the people come in and waive the board hearing.

They say:

"Yes, I know I am a class 2 homosexual and a class 3 homosexual. You have the thing. I will waive the board."

So that, really, in the final analysis, it does not go—it does not become adversary except in a few instances. Now, subpena power, sometimes—most of the witnesses are military witnesses that are going to come before a board. There is no problem with them because they can be ordered before the board.

A few times they are civilian witnesses. You do not have any basis upon which you can get them in. You do not have any basis upon which you can ask them for a deposition or require them to give a deposition, or anything of the kind.

In those few instances, perhaps a subpena power, even though it was used extremely rarely, would serve a useful purpose, sir.

Mr. CREECH. Do you think it would be useful, then?

General KUHFELD. It would be used very, very rarely, but I think it would serve a useful purpose.

Mr. CREECH. Speaking of the instances in which you might use it, are servicemen sometimes given administrative discharges in the Air Force on the basis of convictions in civil courts?

General KUHFELD. AFR 39–22, yes, sir.

Mr. CREECH. In such cases it might be helpful to the serviceman in presenting his case, then, to be able to subpena records, is that correct?

General KUHFELD. It might be.

Mr. CREECH. Would that be one of the instances you would be thinking of?

General KUHFELD. Subpena duces tecum, that might be.

Mr. CREECH. Yes.

Now, in the Air Force, does the Air Force proceed with an administrative hearing of this sort to give a man an administrative discharge even though he may have taken an appeal of the conviction in the civil court?

General KUHFELD. Our regulation provides not. Our regulation provides that if there is an appeal pending, that the action in his case will be deferred.

It is general policy to withhold the execution of an approved discharge pending the outcome of an appeal. In other words, that is our regulation and that is the practice.

Mr. CREECH. Do you feel, General, that this has posed any difficulties for the Air Force in awaiting for the final disposition of the case?

General KUHFELD. I would be less than frank if I answered and said that it had not posed problems. Pretty near everything poses a problem and you have got to balance. You have some of these instances where appellate processes in the civilian courts are mighty, mighty slow, and in that kind of an instance you might have with you, especially if he is out on bail pending the completion of appeal, we would have to have working for us somebody that had been convicted perhaps of a very serious offense and the commander does not have confidence in him.

Suppose it is a big larceny and he is afraid to have him do anything. It is a balancing of convenience and inconvenience.

Mr. CREECH. This goes back to what you said earlier, General.

You spoke of the primary purpose of the armed services, specially the Air Force. And I should like to ask you this, sir: Isn't morale also an important factor in carrying out its primary purpose of national defense?

General KUHFELD. It is very, very important; extremely important.

Mr. CREECH. And isn't it possible that the administration of military justice has a direct bearing upon morale of the serviceman?

General KUHFELD. Definitely.

Mr. CREECH. And in such instances as this, where there might be a delay that imposed some problem——

General KUHFELD. We are talking about administrative business now?

Mr. CREECH. Yes. There might be some problem imposed, awaiting the final disposition of a case by the civil courts, that morale factor might be sufficiently important to override the inconvenience to the commanding officer?

General KUHFELD. Yes.

But, you see, even then, Mr. Creech, your morale proposition is a two-way street, too, again balancing factors. If you had a fellow who was prominently mentioned in the paper as having committed a pretty serious crime, the morale is not enhanced by the fact that we have to keep him around the base while the appeal is pending, either, you see.

But you have individuals, you have all kinds of problems that you have to take into consideration.

Mr. CREECH. By the same token, General, if he is subsequently acquitted, the morale of the other servicemen is not enhanced either, is it, when they realize that they might be subjected to a similar proceeding?

General KUHFELD. No.

That is why I say you have got a balance of all kinds of things, and that is what we have tried to do: Balance all of these factors to come up with the procedures that we follow in our regulation, to wit, withhold the separation of the man, if he is appealing, to see what the appeal does, and we balanced all of those and came to that conclusion.

Mr. CREECH. Mr. Fridge, are you familiar with Congressman Doyle's bill which would provide for the issuance of rehabilitation certificates?

Mr. FRIDGE. I am, sir, generally familiar with it.

Mr. CREECH. Would you give this subcommittee the benefit of your thinking with regard to this proposal?

Mr. FRIDGE. As I understand his bill, it would provide a certificate of rehabilitation, let us call it, when a man, after discharge, had shown that he was qualified in civilian life.

This appears to me to be a worthy thing to do for an individual who, in his younger years, had had certain problems within the military service. As to just who should do this and how it should be done, I would leave that to the wisdom of Congress to decide.

Mr. CREECH. General, would you care to comment on this proposal?

General KUHFELD. Well, my own personal views, now—as you perhaps know, Mr. Creech, I was the witness for the Department of Defense in the hearings before the Doyle subcommittee on that bill.

I think that something like this would do the man good in connection with his seeking employment and all this, that, and the other thing. Personally—now I am talking personally, Al Kuhfeld—I think that Mr. Doyle's position that the certificate of exemplary rehabilitation would be worth more if given by the concern that gave him the undesirable discharge, that it has got a lot of reasonable basis.

Mr. CREECH. Gentlemen, yesterday there was some discussion of a proposal to provide for a discharge of an individual who might be contesting either an undesirable or a dishonorable discharge, regardless of the type.

In other words, he might be contesting any type of discharge other than honorable.

What would be your feeling with regard to there being a program whereby the armed services would issue a discharge which would indicate that the type of discharge was still pending; that this was something to be considered later; so that a man would not be given necessarily a dishonorable discharge or an undesirable discharge and have to avail himself of his administrative remedies, which eventually might correct it, in which case for a period of a year or 2 years he may have been walking around the streets seeking employment with a discharge indicating that he had received an undesirable discharge, rather than one which would indicate that the type of discharge which he would receive was still under consideration?

Mr. FRIDGE. I would like to answer that first. This is my personal opinion.

I believe that within the various review processes of any administrative discharge that we might give, there is adequate time to bring forth all of the facts which brought this action in the first place.

I would oppose such a system as you suggest. I think having five different types of discharge, varying from honorable to dishonorable, that there would be relatively few changes that would warrant such a system.

I would recommend that we continue with the present system of evaluating the facts and granting the discharge. In other words, completing that particular case, and if the man can bring out facts that might change that, then we have the administrative machinery; namely, the Board for the Correction of Military Records, to appeal to.

General KUHFELD. I think I would say the same thing, Mr. Creech, for perhaps a little bit different or additional reasons.

First of all, I think that if you are going to have a policy, even though he is appealing, that you give him a discharge, you have kind of agreed that there is no basis for his appeal, that he has had it anyway.

Then, if you give him a discharge without character, we might say, that discharge without character would immediately have the connotation a lot worse, maybe, even, than the undesirable discharge or as bad as the undesirable discharge has, because, certainly, back in 1947, when the committee met and they decided to get rid of the blue discharge, the discharge without designation of service, because the blue discharge was causing all kinds of connotations, and to come up with the general discharge, a discharge under honorable conditions, and an undesirable discharge, nobody felt that a discharge under hon-

orable conditions, a general discharge, was going to have any bad connotations.

But it very soon did have some kind of bad connotations because it was not as good as an honorable.

Now, then, if we come up with a fellow with a discharge without character of service at all, they are going to say: "By golly, he does not even get a general discharge; what is the matter with that fellow?"

And I do not think you would gain anything at all on it. You would just complicate the situation pretty seriously.

Mr. CREECH. Gentlemen, it has been proposed, it has been said, rather, that there is no necessity for the military having jurisdiction over retired personnel not on active duty. Now, in your opinion, should this jurisdiction be eliminated?

General KUHFELD. No, sir; it should not be eliminated. It should be used very, very sparingly. I think that you have got to have it in certain instances where an individual, a retired officer, might commit some offense that was connected with the service, and where it was looked upon as a service responsibility, and you wanted to do something about it.

I went into this, I have talked this same situation over with the various Secretaries as they came in, and I think, as you know, Mr. Zuckert is very, very knowledgeable in this whole area of personnel and the administrative field, the military justice field.

He was actually on the committee, on the Morgan committee, that came up with the Uniform Code of Military Justice.

I have discussed this at some length with Mr. Zuckert. As a result of that discussion, he came out with this policy, Air Force policy, on court-martial of retired Regular Air Force personnel. This, I think, fits all the requirements:

1. Although article II(4) of the Uniform Code of Military Justice provides that retired personnel of a regular components of the Air Force who are entitled to receive pay are subject to military law and thus amenable to trial by court-martial, charges against retired regular military personnel will be processed only under the following conditions:

(a) No retired Air Force personnel will be brought to trial without the prior personal approval of the Secretary of the Air Force; and,

(b) Ordinarily, no case will be referred to the Secretary for approval unless the person's conduct clearly links him to the Military Establishment or is inimical to the welfare of the United States.

When that policy was formulated, we had a case in which the postal authorities had picked up an Air Force, a retired Air Force officer, for sending pornographic literature through the mail. The Postal Department wanted us to take the case and try it.

We felt that this man had been retired, and this was a problem for the civilian authorities, and Mr. Zuckert certainly agreed with that, and this was his policy.

I think that fits all the requirements, Mr. Creech.

Mr. FRIDGE. If it did involve such a thing as espionage or something affecting national security, then we believe he should be tried under the military code.

Mr. CREECH. In spite of the fact that in each of these instances, that the individual would be covered by existing laws elsewhere, and that, of course, the civil courts would have jurisdiction over him?

General KUHFELD. This really may be assuming something that has not quite been accomplished. For instance, let us take your Espionage

Act right now. There is a matter before Congress to insure that that has extraterritorial application. Supposing that we had a retired officer traveling in Europe and he got mixed up in some kind of a spy situation. He may have gone over on invitational orders from the Air Force.

The public would look upon the Air Force as having some responsibility for that man, and the Air Force certainly would feel some responsibility for him, and I think in that kind of an instance we would feel that we should have the authority to try him.

Not necessarily that we would, because if it was a case in which the U.S. courts had jurisdiction, all of these things are subject to agreement and we work out as to who can best handle them, but I think that that power should be there in the event we need it.

Mr. CREECH. How long has the military been in a position, any military organization in this country, to try a retired officer or a retired serviceman?

General KUHFELD. It is in the present code in article II, subsection 4. It was in the Elston Act, and I do not recall if it was in the 1920 statute or not. I think not.

Mr. CREECH. So, actually, this is a relatively new development in the field of military law; is it not?

General KUHFELD. Yes, except that—well, I know this. I know that at the time that the uniform code or at the time the Elston bill was being considered, then the Judge Advocate General of the Army took the position that we did not want jurisdiction over retired personnel; in other words, that he had retired, we would wipe our hands of it.

And the Congress, after the hearings, in the Congress' wisdom said: "Wait a minute, now; we pay him retired pay with money appropriated by this Congress, and we are going to hold that you have some responsibility with regard to that person," and that is what the situation is.

Mr. CREECH. We have received complaints, as I am sure you are aware, about the influence being exerted on court-martial members; and specifically this has been directed to the lectures which are given.

Now, the chairman has been advised by the Department of the Army that in the future the commanding officers will not make these lectures to the courts-martial, and the Navy has indicated that it is going to prepare a brochure which will be used instead of having these lectures made.

I wonder if this is something which the Air Force has considered or whether it is something which you are considering, and, if so, do you have any proposals?

Mr. FRIDGE. I would say that I think that our present system is an excellent thing. It is actually the education of the officers rather than specific instruction to a given court—in effect, we conduct classes, so to speak, on bases to acquaint all officers with their responsibilities on military courts. I would not recommend a change in that system, nor would I recommend the publication of another pamphlet by the Air Force on this subject.

General KUHFELD. Let me expand on that.

I have never been a devotee of expediency. You have a decision—and I don't run out into the wild blue yonder. I am trying to think of years from now, or months from now, or 10 years from now, when

I perhaps will have nothing to do with it. Therefore, I do not go with an expedient of not educating the people just because you have one problem.

I have got confidence in my judge advocates. I have got confidence that they will do what they are expected to do, and the record, the fact that since 1951, there have only been 14 cases that have come in to boards of review where there is any claim of command influence, indicates that that confidence is not misplaced.

Now, I think you can get to the point where you put everybody in a vacuum on the basis of an expedient and then you do not get the job done. There is a job to be done, a serious job to be done, and I think the people should know what that job is, and I think they should know their responsibilities about the job.

And just because some guy made a mistake, I am not going to cut off everybody else from getting any information. That is the way I look at it.

Mr. CREECH. In other words, you feel that the system which the Navy and which the Army intend to use is not going to be comparable to yours?

General KUHFELD. I think that if a man is going to ask questions, if he wants to ask, "What happens under these circumstances?" somebody should be there to explain the thing to him.

Mr. CREECH. Yes.

General KUHFELD. I have no compunction to having the defense counsel who is going to be on any court, the lawyers on the base, to hear any lecture that is given, and they are not reticent about complaining if they feel that there was something said that had any smack of command influence.

Almost invariably, when these lectures are given, I would say practically invariably when these lectures are given, they are given to the group of officers and the defense counsel are at those lectures, and that is why in these 14 cases where there was command influence raised, they had heard the lecture themselves. They knew what was said, and they were able to raise the issue based on what they heard.

Now, certainly, I do not see how you can take the position that you are hurting anybody. There is nothing gained to give lectures that are going to result in disapprovals of all the cases and retrials of them all, so that I do not see anything wrong with the system that we have, properly supervised, and I have got confidence in my people that they are going to handle it right, and they have handled it right in the past.

Mr. CREECH. As a practical matter, how are the court-martial members selected by a commanding officer?

General KUHFELD. There are two systems. When I was in the field, when I was staff judge advocate, I would submit a list to the commander, to the convening authority, the officer exercising general court-martial jurisdiction, of people whom I checked on and who would be available for court-martial duty, and he would say: "We will put these people on the order. We will take this man off and put this man on."

In some instances, the list is submitted by the people in personnel, and the commander selects the people that are going to be on the

court. Then the court-martial order is published with those people on the court.

Mr. CREECH. To what extent, if any, is a member's performance, as such, reflected in his efficiency rating?

General KUHFELD. I have heard this discussed, Mr. Creech. I have been on selection boards, and I have reviewed effectiveness report after effectiveness report on a selection board, and I have never seen a single one where they said this man is a poor court-martial member or he is no good on court-martial. Fundamentally, if anybody is saying that he voted for a too-light sentence or if he voted to acquit, somebody had to violate their oath of office, and I do not think they do that, because his oath as a member of the court says he is not going to disclose how anybody voted in this case or what they said about anything.

I have yet to see any effectiveness report that has mentioned his performance on the court, and I will ask Colonel Lozito—he has been on the review board, he is a member of the review board, where people can come up and say: "I would like to have this, that, or the other effectiveness report removed from my record"—I will ask him if he has seen any.

Colonel LOZITO. I might say, Mr. Creech, in the year and a half that I have been on the Office's Personnel Review Board, reviewing appeals to Headquarters, U.S. Air Force, to have a performance record withdrawn from the officer's official file, I have never seen this issue raised.

Mr. FRIDGE. I would like to add, Mr. Creech, that it would be extremely unusual to have anyone on the court who would be rating anyone else on that same court.

The man that prepares the efficiency rating of the individual is his immediate commanding officer, and it would be an unusual circumstance to have a captain on the board, for example, whose immediate commander, be he a major, lieutenant colonel, or colonel, was also on the same board.

Mr. CREECH. So in the Air Force system there is no senior officer on the court-martial itself who rates the other members?

General KUHFELD. Oh, no.

Mr. CREECH. How about on your various review boards?

General KUHFELD. The chairman of the board rates the other members of the board; of the three officers on the board of review the senior officer rates the other two members.

Now I am just as proud as I could be of anything of the job that the boards of review are doing in the Air Force. We have selected those people from our topflight people and bring them in. They are all lieutenant colonels and colonels. Generally the colonel is the chairman of the board. And I look at those effectiveness reports. People are my responsibility from the standpoint of my office, and I have never seen a single effectiveness report where there has been anything based upon disagreements on legal issues before a board of review, where the chairman has rated the fellow down on that basis.

These people, Mr. Creech, are lawyers, and they realize that there are differences on legal problems, and I think that in boards of review, where somebody is vigorously dissenting and has good reason, the other members of the board have high regard for him. And some-

times dissents are the things that will give him a very, very high effectiveness report because he has the ability to analyze this question and come out with a sensible answer on it, even though the others do not agree. And I think that if there is anything in this subcommittee's mind that there is anything bad about the fact that the chairman of a board of review rates the other two members of the board of review, they should just disabuse their minds of it, because there is certainly, in my opinion, nothing to that at all.

Mr. CREECH. General, let me say that I do not believe that any members of the subcommittee, and, I am certain, none of the subcommittee's staff, have any predilections on this matter, or any other.

We ask questions to elicit information and not necessarily to indicate any proclivity of our own.

General KUHFELD. I understand that, Mr. Creech, but I feel very strongly on this issue, as you can see.

Mr. CREECH. Now, with regard to the Uniform Code of Military Justice, do you feel that it is too unwieldy to work during wartime? This is one of the allegations that has been made.

General KUHFELD. Well, frankly, I think under the present system that it would not work in time of war. Now let me tell you why.

You have in the statute right now, in the Uniform Code provision for branch offices of the Judge Advocate General. You have a provision that the Assistant Judge Advocate General in charge of that branch office shall perform for the theater commander the same duties that the Judge Advocate General does for the air staff and the Secretary.

It provides for boards of review in these branch offices. And there the matter stops.

Now the situation would be where all of these cases that involve appellate review would have to be funneled in to Washington under the present situation, and, frankly, if we got into a situation like we did in World War II, I was the staff judge advocate, 5th Air Force, over in the Far East, and felt that all of the records of trial that were tried there, as well as the CBI, the Mediterranean, all of the European theater, the Alaskan theater, all of which had branch offices, had to be funneled in to Washington for considering petitions and so forth, I am just afraid that all of the ships and airplanes would be busy carrying records of trial.

I do not see how it could work under those kinds of conditions.

I think, seriously, there has got to be some kind of change to take care of that particular problem in the event of wartime, if we are talking about a war like World War II, where we have theaters spread all over the face of the globe.

Mr. CREECH. In your opinion, sir, in such conflicts as the Korean conflict, what was your experience in that regard?

General KUHFELD. I think, Mr. Creech, that that would be no example at all, because we had a comparatively small number of people involved in the Korean conflict. It was a single theater, and this did not pose a problem. But I think your problem comes if you have something like we had in World War II.

Mr. CREECH. General, it has been advocated by some individuals that the uniform code be repealed, and that military justice revert to the

Elston Act; and also it has been proposed that the Court of Military Appeals be discontinued.

I wonder what your feeling is with regard to these proposals, sir.

General KUHFELD. What your proposals come down to is, certainly, the judicial council that you had under the Elston bill did a tremendous job. I think they reviewed just as many cases and did just as good a job as the Court of Military Appeals.

I think the Court of Military Appeals does a good job in reviewing the cases. I think they handled the cases, too. I think that having the judicial council, it would be infinitely cheaper, if we were considering that. I would never advocate going back beyond the Elston bill.

Now, I think all of us know that the Elston bill set up practically all of these safeguards except the court that is in the present Uniform Code of Military Justice, and I think that if the Elston bill had been made applicable to the Navy, which it was not at this time, the Navy was operating under the articles of the Government for the Navy, perhaps the Elston bill would have been tried longer than it was and would have been able to prove its worth.

I have never advocated going back beyond the Elston bill. I think there should be definite provisions for reviews that insure that the individual and all of his rights are protected. I can say this: I do not think that there is any question about his rights being protected under the present code. I was engaged for 4 years as State's attorney, for years as Assistant Attorney General, and I would say without any fear of successful contradiction that I know of no State or no system of the administration of justice in which the accused or the defendant has more protection than he has under the Uniform Code of Military Justice.

Mr. CREECH. General, you have indicated that you would not go beyond the Elston Act. Do you feel that the present system is preferable, that it is a better system, than that provided by the Elston Act?

General KUHFELD. No. I do not think it is a better system than the Elston Act.

Mr. CREECH. Do you think that it is comparable to it?

General KUHFELD. Yes.

I think in the Elston Act, the Elston Act would have taken care of your wartime situation, because it provided for branch judicial councils with these theater judge advocate-assistant judge advocate offices, and it would have provided for that.

Mr. CREECH. Mr. Everett has some questions.

Mr. EVERETT. General, concerning the instructions to the court, are you familiar with the letter that went out to the Judge Advocate General of the Army, from the Chief of Staff to the Army, with reference to instructing court members?

General KUHFELD. Yes.

Mr. EVERETT. Is it not your understanding that they envisage that any instruction to court members will be given by the law officer who is appointed to advise the court, who is appointed to preside over the court?

Is that not your understanding?

General KUHFELD. No; that is not my understanding.

My understanding is that there have been a couple of decisions which have said that the commander said too much in talking to the

people, and we are not going to take a chance of this happening again; so, in order to insure that it does not happen again, we wipe out the whole deal.

Mr. EVERETT. Under the Army system, if there is any question that a court member has, he can present it to the law officer who will be available to answer that question with the defense counsel present, and it will be made a matter of record; is that not correct?

General KUHFELD. Yes.

Here we are talking about two different things, I think, Mr. Everett. Instructions on the law, certainly, the law officer or the president of a special court gives those instructions, and that is what they are supposed to follow.

But you do not expect the law officer—and he would not have the time, or it would not be proper for him—to give them a talk on what their responsibilities are as members of the court.

Now, I would not stand still for a minute to get the five members or seven members appointed to a general court-martial together and give them a big talk about what the commander expects in this particular case. I would not stand still for that. That is no good.

And in most of these lectures, trying to tell the officers, because the various officers are going to be on court in their military career, these lectures, these instructions, are generally to the people, not because they are on the court, but because they may be on a court sometime.

Mr. EVERETT. Let me ask you this, then, General, to try to get to grips with the problem.

Is it not your understanding of the Army's reasoning that, in part, they are saying: "Like Caesar's wife, this whole thing must be above suspicion"? They are not saying anything is wrong.

General KUHFELD. I think that is right.

Mr. EVERETT. But they realize it has raised a question?

General KUHFELD. I think that is absolutely right.

Mr. EVERETT. And that it destroys confidence in certain quarters in the system.

Is that not part of their reasoning; just the suspicion is unfortunate, irrespective of what actually occurs?

General KUHFELD. I think maybe that is right.

Mr. EVERETT. Now, with reference to the details of the controversy, does it not arise out of paragraph 38 of the Manual for Courts-Martial, which has been upheld by a 2-to-1 vote of the Court of Military Appeals, and if I may read to you from that provision of the Manual for Courts-Martial, the first sentence states:

> A convening authority may, through his staff judge advocate or legal officer, or otherwise, give general instruction to the personnel of a court-martial which he has appointed, preferably before any cases have been referred to the court for trial.

Now, that envisages that there will actually have been specific members appointed to a court-martial, does it not?

General KUHFELD. Yes, sir.

Mr. EVERETT. So is this not somewhat different from a general instruction period or lecture to the members of a base given under the auspices of the staff judge advocate at that base with reference to their general responsibilities?

General KUHFELD. Yes, it is.

Mr. EVERETT. So do you not think that a dividing line could and should be drawn between what appears to be authorized by the manual, which can only arouse suspicion, on the one hand, and the instructions that you were explaining to the chairman a few moments ago?

General KUHFELD. No, I am not worried about suspicion. I think that we can demonstrate, and I think we have demonstrated, that we have done a good job in administering military justice.

People will be suspicious of you if you go to church every Sunday, no matter what you do. People are suspicious.

So it is not who says it or how it is said, but what is said to those people.

I would not stand still at all if they said, "You have got to bring in the maximum punishment; you have got to convict all these people because the case would not go to trial unless we felt he was guilty," or any of those kinds of things. I do not care if they said that, if they had a lecture where everybody—no court is appointed on the base yet at all and if that kind of a lecture was made, I think it would make every one of those people that heard that ineligible to sit on a court. So it is what you say, not where you say it or who you say it to, I think, that counts.

Mr. EVERETT. Apropos of those protections, General, is it not also true that, except for a case involving a general court-martial or a special court-martial case where a bad conduct discharge is administered, the record of trial, the verbatim record of trial is not prepared, is not forwarded to your headquarters, and, therefore, you would not know what instructions had been given to the members of the court, unless it was specially raised in some way?

In other words, there is no verbatim record for you except in a bad conduct discharge case?

General KUHFELD. That is correct.

Mr. EVERETT. So that the statistics that you mentioned would have no relevance to any claims that there had been command influence in cases which did not result in a bad conduct discharge, if tried by a special court, or cases which were tried by a general court?

General KUHFELD. I would not see the records, but I am certain that if that had happened in a non-BCD case, and a special court-martial case, I would get letters from the fellow that was defense counsel.

We have got a lawyer defense counsel in all those cases. And I have got an open-door policy. Nobody goes through anybody else to get to me and I have had letters from those people. I think you know that yourself.

And I would have letters from all these people if that kind of a thing was happening.

Mr. EVERETT. General, with reference to defense counsel, the subcommittee was informed of the situation that apparently developed out at Fort Jackson, the conflicting claims of possible command influence on defense counsel.

During your connection with the Office of the Judge Advocate General, I believe you have been here in Washington in charge——

General KUHFELD. Since there was an Air Force.

Mr. EVERETT (continuing). For quite some time.

Are you familiar with any similar claims that have arisen in the Air Force, or have there been any?

General KUHFELD. No, sir, and I will say this, and I will say it very, very categorically:

That, as far as I am concerned, if a defense counsel goes in and does not do the best job he can do for his client, he is no good. That is true with our people in appellate defense up here that argue before boards of review and argue before the Court of Military Appeals.

A fellow does not make any points with me by sitting around and not doing his job, that is for sure. I expect him to do the best job he can. That is what he is appointed for.

Mr. EVERETT. General, you referred to AFR 39–22, I believe it is.

General KUHFELD. Yes.

Mr. EVERETT. As it currently stands, which provides that no one shall be discharged during the pendency of an appeal?

General KUHFELD. That is the policy.

Mr. EVERETT. Pardon me?

General KUHFELD. That is the policy. There have been exceptions, but that is the general policy.

Mr. EVERETT. That is not a regulation?

General KUHFELD. That is a regulation that I read from.

Mr. EVERETT. Yesterday the subcommittee was furnished some information about a case, I believe the *Jackson* case, which involved an undesirable discharge by reason of a conviction which was later set aside, and then there was a refusal by the Air Force Board for Correction of Military Records to change the undesirable discharge.

Is this a reflection of a policy that is now outdated?

General KUHFELD. That policy has been changed from what it was then. I am familiar with the *Jackson* case, I am very familiar with it. But the policy has been changed. Now, we tried to run back the regulations to figure out when it had been changed, and it has been in the last 2 or 3—we have not been able to figure out how far it was.

Colonel LOZITO. This one is dated 1959. The current policy was in force at that time.

Mr. EVERETT. The subcommittee received a complaint recently from, I believe an Air Force master sergeant with 19 years' experience, in an outlying area, to be sure, but he maintained that the same thing had occurred to him. I gather this was within the past 2 years. Would it be your view that in the event of a reversal of a conviction, an undesirable discharge, under AFR 39–22, should be changed to some other character discharge?

General KUHFELD. I cannot say categorically "Yes" to that either. I think I have pretty much the view that the court of claims did when it considered the *Jackson* case and the fact that they did not change it in the *Jackson* case.

I think that the kind of discharge, regardless of the basis upon which it is issued, should characterize what that particular dischargee did.

And so if you had a case in which an examination of all the records showed that he did commit the second degree rape or he did commit this, that or the other offense, the reversal is based upon some technical error, but, nevertheless, from the standpoint of the evidence showing that he did it, you are convinced from the standpoint of the Board for

Correction of Military Records, Discharge Review Board, that he had done that particular thing, it seems to me he is just as undesirable as he was when he was convicted.

In other words, if it is a rape, we do not want the fellow and we do not want to give him an honorable discharge, either.

(At this point in the proceedings, Senator Carroll entered the hearing room.)

Mr. EVERETT. If, as in that case, the reversal occurred because of denial of right of counsel, and if there is no opportunity for a confrontation against the witness, is it not somewhat unfair to presume he is guilty in the absence of proof in a proceeding where he has counsel and is able to——

General KUHFELD. I think, ordinarily, on a reversal, you change the discharge. But I am saying I would not say categorically in every case, because it all depends on what proof was in that case.

Supposing that you had a full and complete confession. There was no question about the voluntary nature of the confession at all. And in which he admitted that he did all of these things. I am not so sure but what I would say, "All right, I will let the discharge stand," in that kind of an unusual situation.

But, ordinarily, our policy, it would follow from our policy that you change the type of discharge.

Mr. EVERETT. General, some reference has been made to AFR 39–17, and yesterday in the testimony by Army and Navy witnesses there was reference to similar regulations in those services.

Is it your understanding that under the existing AFR 39–17 dealing with undesirable discharge, if a commanding officer disagrees with the recommendation of a board, let us say a recommendation that a man receive a discharge under honorable conditions rather than undesirable, he can rerefer the matter to another board?

General KUHFELD. Our regulations provide for that, but it is used very, very rarely. It is generally a situation where there is additional evidence, something else comes up that was not in before, or where the conclusions of the board, its conclusions are grossly incompatible with the facts that they found.

Now, this happens how often?

Colonel LOZITO. It is very rare.

General KUHFELD. But we have it in our regulations. For instance, if you had a situation, Mr. Everett, where the board found that this particular respondent had been molesting children, had been molesting his own daughter, and so forth and so on, and they come up and said—and this is one of the examples that we had, the board came up and said:

"Give him an honorable discharge," I think that under that kind of a situation, which is rare, and it is a misunderstanding situation of the board, you should be able to send it back and let them reconsider, because their conclusions are so utterly incompatible with the facts that they found.

Mr. EVERETT. If that were a criminal proceeding, though, based on the same misconduct, would that not violate all the concepts of double jeopardy, both in the military and out of the military?

General KUHFELD. Yes, but we have to keep in mind the distinction between a criminal case and an administrative situation.

(At this point in the proceedings, Senator Carroll left the hearing room.)

Mr. EVERETT. Would you not agree that the undesirable discharge might create as much stigma for the man, have the same effect on his veterans rights, as would a bad conduct discharge, let us say, from a special court-martial?

General KUHFELD. Yes, it might.

Mr. EVERETT. So would you say, General, that despite the label "administrative" or despite the term "adversary" or "nonadversary," it would behoove the subcommittee to look at the substance rather than the label in determining what type of safeguards should be applied?

General KUHFELD. I do not quite get that, Mr. Everett, substance rather than the label?

Mr. EVERETT. You said earlier that this is a nonadversary proceeding, and that it results in an administrative discharge, but if it appears that the harm resulting from the administrative discharge, the undesirable discharge, would be as great to the individual as the harm that would result from, let us say, a punitive discharge, then would you feel that the subcommittee and the Congress should disregard the label and should inquire into whether the protection given is equivalent to that which the man would receive in a criminal proceeding?

General KUHFELD. I would not say equivalent, because you do not run the risk of confinement, forfeitures, and all that. I think I would answer to this extent: To be sure that the man is being fairly treated.

I do not care whether you call it an undesirable discharge or a dishonorable discharge or bad conduct. I think we have got to be sure that the individual is being fairly treated, and that he does not get something that he is not entitled to.

Mr. EVERETT. You would say, then, that certain concepts of due process would be as applicable to this type of proceeding as any type of criminal proceeding?

General KUHFELD. Oh, yes, certainly.

Mr. EVERETT. General, I gather from your reference to joint commands, an interchange of legal personnel is limited to joint commands?

General KUHFELD. From the standpoint of court-martial, right.

Mr. EVERETT. In a summary court-martial, is counsel made available to an accused?

General KUHFELD. No, sir.

The whole concept of the summary court system is the police court theory. It is that the summary court, in effect, represents both sides in getting at the facts. So that there is not any provision for the appointment of military counsel in a summary court.

If the individual hires civilian counsel, he may hire him. And we have a policy from the standpoint of the Air Force that if the accused comes in with civilian counsel, then the convening authority will designate trial counsel to present the matter before the summary court, because the minute he comes in, based upon that particular case, the whole concept of the summary court has been changed.

Instead of his being there representing both parties just to get the facts and decide what to do, he becomes the judge in an adversary proceeding, so we have to furnish that.

Mr. EVERETT. So that unless the defendant has a civilian counsel, the summary court officer is supposed to represent both the defendant and the Government?

General KUHFELD. Right.

Mr. EVERETT. But when a civilian counsel is brought in, then a special trial counsel is appointed to represent the Government?

General KUHFELD. That is right.

Mr. EVERETT. Now, General, it has been proposed in certain quarters that the summary court be abolished, that article 15 be expanded, and that the accused receive an option to take the article 15 nonjudicial punishment, or to request a court-martial by a special court or a general court, as the appropriate authorities might designate.

Would this, to your mind, be an improvement on the protection of the accused and an improvement in the operation of military justice?

General KUHFELD. Mr. Everett, I have been the Department of Defense witness on these military justice changes for a long, long time. This elimination of the summary court and the enhancing of the punishment powers of the various commanders under article 15 originally was, I think, my idea, and I certainly think that it is very, very desirable, because I think we eliminate a conviction on the individual's record, and I think we put the authority where we put the responsibility in maintenance of discipline: to wit, on the commander.

And I think he can do a better job under that concept than he can under the summary court.

Mr. EVERETT. General, would you also favor some system under which in any type of court-martial a law officer will be provided, perhaps by a modification of the existing special court or perhaps by its abolition entirely, so that the accused, before he receives the stigma of conviction, would have the benefit of a trial by a qualified law officer, selected either on the Army basis or your basis?

General KUHFELD. I do not think this is necessary. I think that there are a lot of considerations in this. If you were not furnishing counsel, that is one problem. But there has not been a case where an individual has got a bad conduct discharge that I know of—and I see them all unless I am on leave, which is very seldom—where the accused has not been represented by counsel.

The court is given the same instructions by the president, and the sentences, of course, are smaller. It seems to me that there are a lot of advantages both ways, and, incidentally, we have pending now a bill in the Congress which provides that you may put a law officer on a special court.

In other words, if it is a complex case, a complex situation, you may put a law officer on a special court. The way this thing sizes up, as far as I am concerned, take a larceny over $50. No real aggravating circumstances. In the Air Force we would refer that case, if we decided it should be tried by court-martial, we would, almost without exception, refer that case to a special court-martial.

The maximum punishment it could be was BCD and forfeiture two-thirds pay per month for 6 months and confinement to hard labor for 6 months.

Now, in the Army under their system, you might say eliminating the BCD power, if they wanted that man separated, if they felt that the

circumstances were such that he should be separated punitively, it would go to a general court, where the maximum sentence was 5 years.

Now, either the sentences are going to be very disproportionate or the Army is going to be cutting down a lot of those sentences that are given by a general court, because, certainly, if they have up to 5 years, just human nature means that the sentences are going to be more, the confinement part is going to be more than in a case where the maximum for the court is 6 months.

So there is a lot of arguments on both sides.

Mr. EVERETT. So then the Army policy, the present policy of not having a special court give a bad conduct discharge, tends to result in heavier sentences for the accused?

General KUHFELD. As imposed by the court. I do not think in the final analysis, in my opinion, they are going to be a little bit heavier, but you are going to have them cut down on appellate review and so forth to approach what you have.

Mr. EVERETT. General, in one of the Air Force responses to questions posed prior to these hearings by the subcommittee reference is made to the tremendous drop, almost to the vanishing point, of suspensions of bad conduct discharges and dishonorable discharges.

This was related to the Court of Military Appeals decision in the *Cecil* and *May* cases.

In light of the effect of these cases on the Air Force clemency operations designed to give a break to the accused, would it be your recommendation that some legislative action be taken to reinstall the earlier arrangement?

General KUHFELD. Yes; it would.

For instance, I do not think, if you suspend until completion of appellate review or release from confinement, you have actually placed that man on probation, because he has not gotten out of the confinement. He had not had an opportunity much to commit any offense, and so he has not been placed on probation. But I might say this:

That the *Cecil* case, I think, hurt. It cut down definitely the number of suspensions in the punitive discharge field. But, in order to cope with that, we have made arrangements now in connection with our Amarillo program, where the people coming from the Atlantic go through McGuire. No discharge is executed. The people coming from the Pacific go through Travis. No discharge is executed.

There they are evaluated by the judge advocate and a board for consideration for Amarillo, restoration, or what have you, and so then we say we will send these people to Amarillo. Even though the appellate review has been completed, and even though they are authorized to execute the punitive discharge, the arrangement that we have worked out is that Amarillo does not execute the discharge until a determination is made on the restoration potential of this individual.

So that what we are trying to do, indirectly, is what we used to do directly before May and Cecil.

Now, where we are hurt on this whole thing, however, is the man who goes to the disciplinary barracks. We have a lot of transfers from the disciplinary barracks to Amarillo. But the individual who is transferred from the disciplinary barracks to Amarillo most of the time, almost invariably, will go with an executed punitive discharge,

because there was no provision for suspending until released from confinement.

They execute the discharge, and then he goes to Amarillo. Now, if he is restored under our program, he must reenlist for 2 years, and then, when he serves out those 2 years honorably, he will get an honorable discharge, but he still cannot say he never got a dishonorable discharge, and this is what bothers me on this May-Cecil situation.

Mr. EVERETT. Would you feel, then, that the protection for the servicemen in the Air Force would be enhanced by reinstating this?

General KUHFELD. Yes, sir.

Mr. EVERETT. Mr. Fridge, does the Air Force consider that there really is a need to have a general discharge?

Mr. FRIDGE. The general discharge, sir, is needed to insure that the honorable discharge's high quality is retained in cases where there is some shadow on the man's service. We do consider it necessary; yes, sir.

Mr. EVERETT. Would you concede that the general discharge does tend to create some stigma for the person who receives it?

Mr. FRIDGE. I do.

But it still is considered to be under honorable conditions, but it is one step—yes.

Mr. EVERETT. And those Air Force regulations specifically mention that it may hinder employment and impair the individual's future life in other ways if he receives a general discharge?

Mr. FRIDGE. They do.

Mr. EVERETT. In light of that, would you consider that it might be desirable to have a requirement of a board hearing in every instance before a man could receive anything other than an honorable discharge?

Colonel LOZITO. I might say, sir, from the answers provided by the Air Force, you will note that in 95 percent of the cases of people who are given general discharges, 95 percent of them are a result of a show-cause action wherein the individual had the opportunity to appear before a board or before an evaluation officer.

And in those 300-and-some cases that we had indicated, these were the result of a determination being made by the commander at the time of discharge, either for ETS, convenience of the Government, or other than a show-cause action.

This judgment was made after considering the individual's whole record for that particular enlistment. So, based on the criteria that is established in the regulations, the judgment was made by the commander that he fits that criteria.

Now, in addition to that, the commander is required to prepare a statement of justification to attach to the man's personnel records of why he chose to give this man going out ETS a general discharge rather than an honorable. And, of course, this memo of justification then is used in the event there is a subsequent appeal.

Now, the Air Force is likewise considering going one step further, because we have only a small number of cases where this is involved, and that is to have that judgment by the unit commander reviewed by the next higher commander—in this case, a special court-martial authority commander—before the general discharge is actually executed as a result of ETS or convenience of the Government.

Mr. EVERETT. In light of the fact that only a small percentage is involved, although the number is certainly not negligible, would there be any great burden on the Air Force requiring that some type of board be convened to determine whether or not the man received a general discharge at the end of his enlistment, instead of an honorable discharge?

Mr. FRIDGE. No, sir; I do not think so, since we do it in 95 percent of the cases now, the other 5 percent would not be a major problem.

General KUHFELD. I think it was 388 cases, was it not?

Colonel LOZITO. 355.

General KUHFELD. That would not enhance the problem at all.

Mr. FRIDGE. Last year we had a total of 7,160 and 350 more or less would not make any difference.

Mr. EVERETT. May I ask you one more question.

With reference to discharge boards generally at what might be termed the trial level, whether it be under 39–16, 39–17, or whatever other regulation, to what extent is a lawyer, a legal adviser, provided for the board?

General KUHFELD. The regulations provide that where there is one available, he be put on the board, and in some commands it is done all the time.

In commands that do not have as many lawyers, they do not put a lawyer on the board, but they have the staff judge advocate's office available for legal advice.

Mr. EVERETT. Has it been your experience that the only consideration on this is the actual physical availability of legal officers or do other considerations enter into it?

Mr. FRIDGE. Other considerations also enter into it, the seriousness of the offense and this type of thing.

Senator ERVIN. Mr. Secretary and General Kuhfeld, we certainly do appreciate very much the cooperation that we have gotten from the Air Force in this investigation and appreciate far more than I can say your making a personal appearance and giving us the benefit of your experience and your observations on this very important subject.

General KUHFELD. Mr. Chairman, I, for one, appreciate the opportunity of having been able to come over before you and discuss these matters with you.

Senator ERVIN. I am very happy for all of us to have a discussion of these problems, which are very real problems.

Mr. FRIDGE. Thank you, Mr. Chairman. We appreciate the opportunity of coming here.

Senator ERVIN. We certainly appreciate your coming. Thank you very much.

Mr. CREECH. The next witness will be Maj. Gen. Reginald C. Harmon, U.S. Air Force, retired.

General Harmon?

## STATEMENT OF MAJ. GEN. REGINALD C. HARMON, U.S. AIR FORCE, RETIRED

General HARMON. Mr. Chairman and members of the subcommittee, I am Reginald C. Harmon, major general, U.S. Air Force, retired. I have been requested, and it is my honor, to appear before this subcommittee to present my views on certain matters under investigation.

From September 8, 1948, until March 31, 1960, when I retired, I was Judge Advocate General of the U.S. Air Force. From 1940 until the time the Air Force became a separate service, I served as an officer in the Judge Advocate General's Department of the Army and prior to that I had been a practicing lawyer in civilian life. As a result of my long tenure as Judge Advocate General, I had the *unique* experience of being the only person in American history charged with the responsibility of the administration of military justice in a similar capacity in one of the military services under all three sets of governing laws of recent times: the 1920 Articles of War, the 1949 revision to such articles under the Elston Act, and the Uniform Code of Military Justice effective in May 1951.

In the years following the effective date of the Uniform Code, I became increasingly concerned with what I considered serious defects in its operation. I was concerned primarily with increasing time delays in the processing of cases, the high cost in dollars of administering justice under the code, and with what appeared to me to be the emphasis of form over substance in some of the decisions of the Court of Military Appeals. It was my opinion that the administration of military justice under the Uniform Code was unwieldy and cumbersome in peacetime, and would probably be unworkable in the event of a major large-scale war. Up until this date, I have not been presented with any new evidence which would change that opinion.

I was also concerned at some of the statistics available to me, which showed substantial increases in the number of undesirable discharges being given administratively, at the same time that the number of cases, and the number of discharges adjudged by court-martial, were steadily decreasing. By 1958, the statistics indicated to me that commanders had found the time delays of cases processed under the Uniform Code so frustrating and so impossible to live with that in an effort to rid the service expeditiously of malcontents and misfits, they were resorting to the increased use of the administrative discharges, but definitely not with any desire to deny anyone any of the alleged safeguards of the Uniform Code of Military Justice. I so stated on several occasions in 1958, and the statistics for this period bear out the logic of my conclusions at that time.

By the end of 1958 when all of the statistics for that full year could be computed, it appeared that another factor, in addition to the reluctance of commanders to use courts-martial, may have influenced the rise in administrative discharges. During the period of about the latter part of 1957, the Air Force began to place increased emphasis on personnel quality control. This program entailed the early identification of the unfit and their prompt elimination by administrative means. This program reached its peak in 1958 and may have been partially responsible for the high number of administrative discharges for that year.

Since 1958, both undesirable and general discharges have been on the decline while both dishonorable discharges and bad conduct discharges, resulting from courts-martial, have slowly declined. I believe this has been brought about by two factors:

1. Resulting from personnel quality control just mentioned, the Air Force is getting a better quality of personnel, and
2. Due to the congressional objections to the giving of either undesirable or general discharges, as brought out by the investigations of

the Doyle committee, and later reflected in Department of Defense directives, honorable discharges are being given now and have been in recent years in lieu of undesirable and general discharges which were really deserved in many cases, thereby cheapening the definition of the honorable discharge.

I believe the greatest single objection to the Uniform Code of Military Justice is its tendency to destroy what once was the principal asset of the military justice system: that is, the swift and certain punishment of the guilty man. The certainty of punishment and the promptness of prosecution seem now to be only a matter of historical interest. I believe there are two principal reasons for this situation:

(1) The code is unnecessarily laden with built-in delays. There are too many reviews upon reviews indiscriminately granted to all offenders. I see no reason why an accused who understandingly pleads guilty to a single offense of absence without leave or larceny should have available to him all of the reviews granted to the man convicted of a heinous crime who says he is innocent and fights it all the way.

(2) In many instances, form has been elevated over substance in the administration of the code. Convictions have been set aside for reasons that seem to the average person to have little to do with the fairness of the trial or the protection of the fundamental rights of the accused.

Notes that I made in previous years indicate that up to the end of 1953, more than 700,000 courts-martial cases of various kinds were tried under the code in all the services. During that period, less than 7 percent of that number were reviewed by boards of review, and 421 decisions were rendered by the Court of Military Appeals. These figures indicate that less than 1 percent of the cases serious enough to warrant review by a board of review and less than 1 in 1,600 was decided by the court. The Air Force Judicial Council, under the Elston Act, reviewed a greater percentage of the cases and its decisions were at least as favorable to the accused as those of the Court of Military Appeals.

It is my opinion that the Elston Act did a better job than the Uniform Code in administering discipline, on the one hand, and just as good a job in protecting the rights of the individual, on the other, and under the Elston Act it was done at one-tenth of the cost as far as appellate review was concerned, in addition to the saving of perhaps 200 lawyers at an average salary of $7,500 a year each. This saving alone would amount to $1.5 million per year in the Air Force alone.

In addition to the cost of extra lawyers and the cost of the Court of Military Appeals and its staff to hear 1 case in 1,600, due to the much longer processing time, we are paying the salaries for long periods of time of criminals who are ultimately convicted and given punitive discharges.

As a result of my experience in the administration of military justice under all three of the systems which have been in operation during the past period of more than 40 years, I am of the opinion that the Uniform Code is the most expensive, the least efficient and the most ineffective system of the three and does not protect the constitutional rights of the accused any better than the other two sysems, if properly administered. I am sure no sensible American and certainly no lawyer

of any experience wants to sanction the denial of the constitutional rights of any human being under our system of government, but the very fact that all of us would deem it impractical to install five roofs on top of our respective places of abode does not mean that we do not believe in shelter. I am becoming increasingly concerned that throughout our entire society we are becoming so zealous in being sure that the constitutional rights of the lawless are protected that we are not doing a very good job in protecting the rights, both constitutional and otherwise, of the great majority of our citizens who never violate the law intentionally.

My testimony before this subcommittee would not be complete if I did not express my recommendation as to what I think should be done to correct the inefficiencies of which I speak. I recommend the repeal of the Uniform Code of Military Justice in its entirety and the reenactment of the Elston Act with the provision that it apply to the Navy as well as to the other services.

I would be the first to concede that perhaps there were miscarriages of justice in the administration of the Articles of War of 1920, the first of the three systems mentioned above. In my judgment, these were brought about by evils of administration rather than through statutory defects. Even a good statute cannot be of maximum benefit to society if poorly administered, and I believe it is unfortunate that during the years since World War II, we did not concern ourselves with the improvement of our administration of military justice rather than concentrating our efforts in the field of statutory reform.

Your chairman has asked me to comment upon the Air Force rehabilitation and training program which is carried on at Amarillo Air Force Base, Tex., and which was established about 10 years ago this month.

As Judge Advocate General, I had certain clemency powers with regard to sentences imposed by courts-martial. As is true with every power, those clemency powers carried with them some very serious corresponding responsibilities. In order to discharge those responsibilities in the exercise of clemency powers and in order that commanders might be better enabled to exercise their clemency powers, my associates and I decided to initiate in the Air Force what we called a post-trial investigation in every case in which an accused was sentenced to a punitive discharge. The purpose of that investigation and the full report of it was similar to that of a probation officer's report utilized by a sentencing judge in civilian life. It was to give us a complete picture of the individual involved, and to make commanders in the field realize that in military justice matters they were dealing with people, not merely with papers or names or numbers in the abstract. This post-trial investigation has been in operation for many years now and has worked extremely well.

As a result of these post-trial procedures, we found that there was lacking in the military service an adequate system of probation which gave an offender an opportunity to rehabilitate himself. To be sure, there was a holding out to the individual concerned something in the nature of a promise, either expressed or implied, that if he had a good record in prison, he would have an opportunity to earn an honorable discharge. However, the punitive discharge was usually executed at the end of the prison term in a routine fashion and the opportunities

for rehabilitation were not promising. Consequently, I advised my superiors at the time that, as far as I was concerned, I was not going to hold out any such promises in the future unless I was certain that they would be carried out if the conditions were met. Shortly thereafter we obtained approval for the establishment of a specialized training unit known as the 3320th Retraining Group at Amarillo, Tex. It is a major Air Force confinement facility which conducts a specialized treatment program for restoring to duty, selected Air Force prisoners. It is heavily staffed with specialists such as psychologists, psychiatrists, sociologists, and the chaplains of the principal faiths. The prisoner is selected on the basis of his own individual merit, placed on his own responsibility, and given every opportunity to start life anew.

Throughout these 10 years, 5,700 airmen have been processed through this center; about half of them have been restored to duty and about 70 percent of those restored have been successful in completing their military enlistment and have become good citizens. As a result of this program, about 2,000 people are now either serving faithfully in the military service or are law-abiding citizens of their respective communities who would otherwise probably be hardened criminals or be burdens upon society in one way or another. I believe this program is one of the best rehabilitation programs in the United States, if not the best today, either State or Federal. I still get letters from people I once sent to Amarillo and who are now productive citizens which justify my confidence in this program and in the belief that if we were to spend even greater effort in the field of rehabilitation and correction and less in the overprotection of the rights of the accused, we would be rendering greater service to American society.

This concludes my prepared statement. I shall be glad to answer any questions by members of the subcommittee or its counsel.

Senator ERVIN. I am much impressed by your statement that—

> I am becoming increasingly concerned that throughout our entire society we have become so zealous in being sure that the constitutional rights of the lawless are protected that we are not doing a very good job in protecting the rights, both constitutional and otherwise, of the great majority of our citizens who never violate the laws.

As a lawyer, I am very much concerned about the Supreme Court of the United States converting a rule governing arrests into a matter of evidence in the case, in which the Court decided that the arresting officers ought to be removed from any temptation to receive a confession, and, therefore, if there is any unusual delay between the time of arrest and the time of arraignment, that the confession, no matter how voluntarily made, would not be admissible in evidence.

There was a bill introduced in the Senate to set aside the rule and restore the rule that voluntary confessions would be admissible in evidence, and that an involuntary confession should be excluded from evidence, and that the trial judge who heard the witnesses had an opportunity to observe their demeanor and should pass upon the matter.

The Senators argued against that bill awaiting the decision of the *Mallory* case, and I was astounded at what my ears heard.

I could not resist the temptation to get up and say, if I actually believed what my ears had heard on the floor of the Senate during the

last hour or so, I would come to the conclusion that society does not need any protection from criminals, but that criminals need protection from the law enforcement officers.

I thoroughly agree with you in the observation that enough has been done for those who murder, rape, and rob, and it is time that somebody was concerned about doing something for those who do not wish to be murdered, raped, or robbed. So I think you have made a very crucial observation about a tendency in our country today in that statement that I refer to. That seems to be a chronic attitude in this country.

General HARMON. Mr. Chairman, in the year, I think it was 1905, William Howard Taft, who later became President and still later Chief Justice, made a speech to the Yale Law School in which he predicted that if we kept going as we seemed to be going at that time, in 50 years the citizens of the United States would have great problems in protecting themselves from the lawless, because so many loopholes would have been created to protect criminals that protection would be very badly needed by the law-abiding citizen, and I agree with that statement. I think those were prophetic remarks by the former President and Chief Justice.

Mr. CREECH. General, I should like to ask several questions of you.

You stated in the third paragraph of your statement, and I read it for your convenience:

> It was my opinion that the administration of military justice under the Uniform Code was unwieldy and cumbersome in peacetime, and would probably be unworkable in the event of a major, large-scale war.

Then you went on to cite that there were a number of cases which had caused you to arrive at this decision. You comment:

> In many instances, form has been elevated over substance in the administration of the code.

And you indicate that—

> Convictions have been set aside for reasons that seem to the average person to have little to do with the fairness of the trial or the protection of the fundamental rights of the accused.

I wonder, sir, if you would care to specify any particular cases that you had in mind, or if you would care to do so later for the record?

General HARMON. Yes, I would be glad to, Mr. Creech.

I mentioned in my prepared statement the posttrial investigation that we conduct. We started conducting these many years ago. The Court of Military Appeals came out with two cases, the *Griffin* and *Vera* cases, which held that if, as a result of the posttrial investigation any derogatory information was brought out concerning the character of the accused, he should have an opportunity to present evidence rebutting that derogatory information.

Now there has never come to my attention a single incident where the probation officer's report was subject to collateral litigation in any civilian court, so that that simply meant that in conducting the posttrial investigation, if we have to have a lawsuit about any derogatory information that is brought out, the judge advocate who was conducting the posttrial investigation would be very cautious about bringing out any such derogatory information, so he would say nothing.

As a result we just did not have the benefit of the kind of investi-

gation we should have had and many people were denied the opportunity to go to Amarillo and rehabilitate themselves who would otherwise have been given that opportunity.

Mr. CREECH. And you are going to give us indications of cases in which you feel that form has been elevated over substance and in which you feel that, to the average person, the convictions that are set aside have little to do with fairness of the trial or the protection of fundamental rights of the accused?

General HARMON. I referred to reviews upon reviews in my prepared statement, where there is one review right after another with no real contradiction about guilt. The fellow admits it and it is a minor offense in many cases.

The case is pending and the commander has the fellow on his hands for a long, long period of time. That is what I mean by unwieldly delays.

Mr. CREECH. Yes, sir.

I just feel it would be helpful for the record if we could have some cases to illustrate the points which you make. Not at this time, General. I mean at your convenience. You can supply that later.

General HARMON. I see what you mean and will supply them.

Senator ERVIN. General, you may supply it later in the form of a letter which we will insert in the record.

General HARMON. I will do that, Mr. Chairman.

(The following are cases submitted by Reginald C. Harmon at the request of the chairman of the subcommittee to illustrate statements made by him on February 21, 1962, in his testimony to the effect that the Uniform Code of Military Justice is unwieldy and cumbersome; that in many instances form had been elevated over substance in the administration of the code; and, that convictions had been set aside for reasons that seemed to the average person to have little to do with the fairness of the trial or the protection of the fundamental rights of the accused.)

UNITED STATES *v.* SIMPSON (10 U.S.C.M.A. 299; 27 C.M.R. 303)

This decision invalidated the automatic reduction provisions provided by Executive Order 10652 (1956). The court recognized that the code provided reduction in grade of an enlisted person as permissible punishment within the power of a court-martial to adjudge but ignored the historical and traditional background of, and requirement for, the automatic reduction provisions prescribed by the President as Commander in Chief of the Armed Forces. This resulted in situations where men convicted of serious crimes, with sentences including dishonorable discharge or bad conduct discharge, and lengthy confinement were serving their sentences in grades up to, and including, master sergeant. Under the *Simpson* decision, if sentences included hard labor, with or without confinement, but no punitive discharges were adjudged and no reductions specifically adjudged, these accused were required to be returned to duty in the grade they held at time of trial. This, of course, inured to the substantial benefit of the accused but did little to enhance the traditional dignity and prestige of noncommissioned officers or other grades above the lowest enlisted grade.

On August 19, 1959, the Comptroller General of the United States rendered his decision on the *Simpson* case, holding, in substance, that the provisions for automatic reduction declared invalid by the Court of Military Appeals was administrative rather than judicial in character and pending decision in the case of *Johnson* v. *United States,* then in the Court of Claims, held that service members coming within the scope of the *Simpson* decision should be paid at the lowest enlisted grade.

Thus, the services were confronted with the conflict created by these decisions, the Court of Military Appeals saying the President exceeded his powers and the Comptroller General determining that he did not. As a result of these conflicting decisions, many airmen convicted by courts-martial, whose final sentences included any of the accessories which formerly resulted in automatic reduction, were serving in assigned grades held at time of trial, up to and including master sergeant, but received pay only in the grade of basic airman.

The *Johnson* case was decided on July 15, 1960; the Court of Claims denied the plaintiff's petition for reinstatement to a higher grade from which, prior to the *Simpson* decision, he had been automatically reduced as a result of the now invalidated Executive order. Although this decision did hold valid the President's power as Commander in Chief to issue regulations for the government of the Armed Forces, the court did not involve itself in the *Simpson* decision asserting that "* * * the proper exercise of judicial restraint requires this court to decline to intervene in this matter."

This decision did not correct the situation and to rectify the existing confusion and uncertainty it was necessary, since the time of my departure from the active military scene, to seek legislation and, on July 12, 1960, the President signed into law article 58a of the Uniform Code of Military Justice restoring the automatic reduction provision declared invalid by Court of Military Appeals in the *Simpson* case.

UNITED STATES *v.* COTHERN (8 U.S.C.M.A. 158; 23 C.M.R. 382); UNITED STATES *v.* BURGESS (8 U.S.C.M.A. 163; 23 C.M.R. 387); UNITED STATES *v.* SOCCIO (8 U.S.C.M.A. 477; 24 C.M.R 287); UNITED STATES *v.* SWAIN (8 U.S.C.M.A. 387; 24 C.M.R. 197)

In the *Cothern* case a conviction for desertion was based on a 17-day absence. The law officer in his instructions advised the court that an intent to remain away permanently might be inferred from a much prolonged absence. The Court of Military Appeals set the conviction aside on the grounds that the statement of law by the law officer, which was also a part of the manual, was erroneous. On the same day the court decided the *Burgess* case, which involved an unexplained absence for 6 months and the court held the same instruction to be prejudicially erroneous. Subsequently and for the same reasons the court reversed the findings in the *Soccio* case, which involved a 4½-year absence. Finally, the Court of Military Appeals decided the *Swain* case, where the accused left his unit in an oversea combat area in France in 1944 and was not returned to military service until 1956. The law officer also instructed in this case that the court from the long unexplained absence could infer the intent to desert. Again the Court of Military Appeals held this to be error.

These cases are based on a single Federal court case, *Morissette* v. *United States*, 342 U.S. 246. This case had no applicability to the issues involved in these desertion cases as it involved a charge of larceny and a defense of mistake of fact. As a result, we now have a case on the books which is, certainly without logical basis, and predicated on a legal basis totally irrelevant to the legal issues involved in the military offense of desertion.

UNITED STATES *v.* BENNIE (10 U.S.C.M.A. 159; 27 C.M.R. 233)

In the *Bennie* case, the decision of the Board of Review was reversed and the record of trial was returned to the Judge Advocate General of the Army for reference to another convening authority. The court based this action on their determination that the staff judge advocate's review was insufficient where he completely summarized the evidence for the prosecution and defense and concluded that in his opinion the guilt of the accused had been established beyond a reasonable doubt, recommending approval of the findings of guilty and the sentence. Although the summarization of the evidence was complete and extensive for both sides and contained proper conclusions and advice to the convening authority concerning his recommended action the Court of Military Appeals held this to be insufficient.

In substance, the effect of this decision is to require lawyers preparing the posttrial review to perform the hollow task of writing in chronological form or forcing them unnecessarily to burden their reviews with a discussion of each minor incident of trial. This decision ignores the fact that lawyers preparing these reviews have been extensively trained to evaluate and summarize evidence. Thus, our judge advocates are left in the position of not being able to conclude

that a record is either legally sufficient or insufficient after setting forth all material and pertinent evidence without engaging in conjecture or speculation as to what reasoning will satisfy the Court of Military Appeals.

UNITED STATES *v.* HOLMES (6 U.S.C.M.A. 151; 19 C.M.R. 277)

The accused was convicted of larceny of gasoline. During the trial the Government elicited testimony to the effect that the accused, without having been advised of his rights under article 31, Uniform Code of Military Justice, with regards to making a statement, in response to a request by an investigating agent, "showed" the agent the clothing he wore on the evening when the offense was committed. The Court of Military Appeals reversed the findings of guilty on the possibility that the trial court might have considered this inadmissible evidence during its deliberations.

Conceding that the evidence was inadmissible there is no probability that it influenced the court in its findings. There was sufficient compelling competent evidence before the court to support the findings of guilt. A full confession made by the accused after being fully advised of his rights was admitted in evidence along with other weighty circumstantial evidence. The accused produced no testimony or evidence to rebut the showing made by the Government. In the absence of any showing that the subsequent confession was induced by the accused's prior identification of his clothing the impact of the inadmissible evidence was negligible and should not have required a reversal.

UNITED STATES *v.* RODGERS (8 U.S.C.M.A. 226; 24 C.M.R. 36)

The accused was convicted of five offenses, specifically absence without leave, two specifications alleging desertion and two specifications alleging failure to obey a lawful order. Charges alleging all of these offenses were prepared and received by the officer exercising summary court jurisdiction at a time when none of the specifications were affected by the statute of limitations. Subsequently after the accused's apprehension, the Government with respect to one desertion charge desiring to amend the specification to show the termination date, rather than resorting to interlineation on the original, redrafted the entire charge sheet. Considering the date on this new charge sheet, the statute of limitations had run on the two offenses of failure to obey. Lacking any affirmative showing of a waiver of the statute of limitations, the Court of Military Appeals dismissed the findings as to these two offenses.

This is a classic example of elevating form over substance. The court conceded that the accused could have been brought to trial on all charges on the original charge sheet which had been seasonably filed and that the desired change could have been accomplished by amendment. Despite this and because a redrafted charge sheet was substituted in which no new offense was alleged, two perfectly good specifications were set aside.

UNITED STATES *v.* NOWLING (9 U.S.C.M.A. 100; 25 C.M.R. 362)

The accused, among other offenses, was convicted of wrongful possession of an unauthorized pass with intent to deceive. The accused being observed in town by an air policeman who suspected he did not have a pass, when asked to produce one, displayed a pass bearing the name of another. The Court of Military Appeals reversed the findings of guilty as to this offense on the grounds that the pass was erroneously admitted. The court held that when a reasonable suspicion exists that a pass violation is being committed the suspect must first be advised as to his rights under article 31, U.C.M.J., before an examination or surrender of his pass is requested. No such prior advice was given in this case.

A requirement for a member of the military to show his authority to be absent from duty is a custom which has been universally adopted in the military and it should not be restricted by unrealistic conditions. Further, physical acts constitute a statement only when they are in the nature of an admission which the accused alone can give and which requires the active and conscious use of mental faculties in the production of evidence not theretofore in existence. The accused's production of a pass in this case was not a statement within the meaning of Article 31, U.C.M.J., since it required only the accused's physical not mental cooperation. There is nothing to ascribe to Congress an intent to deny to the military the right to require from its members the production of identifying credentials.

U.S. *v.* WILLIAMS (8 U.S.C.M.A. 325; 24 C.M.R. 135); U.S. *v.* GITTENS (8 U.S.C.M.A. 673; 25 C.M.R.)

In the *Williams* case the accused was convicted of several offenses, the most serious of which alleged the wrongful use of a habit-forming narcotic drug in violation of article 134, Uniform Code of Military Justice, which denounces conduct to the prejudice of good order and discipline in the Armed Forces or of a nature to bring discredit upon the Armed Forces. The law officer in instructing on the elements of the offense at no time instructed that in order to convict the court must find that the accused's conduct was prejudicial to good order and discipline in the Armed Forces and was of a nature to bring discredit on the Armed Forces. The Court of Military Appeals held that the failure to specifically so instruct constituted reversible error. In the *Gittens* case the accused was convicted of several offenses of assault upon an air policeman in the execution of his duties and the findings of guilt were reversed for the same reason as in the *Williams* case. These opinions graphically demonstrate the absurd results of applying a rule which is unsupported by reason or logic. It is sheer futility to require a court-martial to find what is obvious to everyone, namely, that the commission of such offenses has an adverse impact on the military service.

UNITED STATES *v.* MCCAULEY (9 U.S.C.M.A. 65; 25 C.M.R. 327)

The accused was convicted of sleeping on post. For a definition of the word "sleep," three members of the court referred to an opinion mentioned by the trial counsel which was contained in a volume of the court-martial reports. The Court of Military Appeals in reversing the findings held that this was prejudicial error as the definition of "sleep" was an integral part of the discussion of the facts of the case referred to and the court may have been influenced by those facts.

In this case not one fact was in dispute, and the evidence was compelling. The definition of the word "sleep" was one approved in a former opinion of the Court of Military Appeals, and, in any event, whether the definition was correct or incorrect, it would have had no impact on the findings because all of the testimony showed that condition to have existed. Error without prejudice should not result in a reversal and if any prejudice was presumed it was effectively dispelled by the record.

UNITED STATES *v.* OSBORNE (9 U.S.C.M.A. 455; 26 C.M.R. 235)

The accused was convicted in this case, among other offenses, of making false official statements with intent to deceive in violation of article 107, Uniform Code of Military Justice. Suspecting the accused of having made false entries in his personal history statement, his commanding officer, after giving the appropriate warning in accordance with article 31, U.C.M.J., elicited statements which formed the basis for the court-martial charges. In these statements the accused falsely denied any prior record of civilian arrests and courts-martial. The Court of Military Appeals in reversing the conviction held that while a military person has a duty to correctly fill in required official forms, there is no corresponding duty which obligates him to speak truthfully regarding false entries which are the subject of inquiry as a basis for possible criminal prosecution.

It is a strange concept which underlies the principle that a serviceman may with impunity falsify to a commander about entries in his official records. When doubts arise as to the accuracy of such records verification is required. Such things as security clearances, pay and allowances and fraudulent enlistment are dependent on information furnished by members of the service and when an inquiry by a superior is directed to him concerning correctness he has a duty to speak the truth and his answers are "official" within the meaning of article 107 Uniform Code of Military Justice. A suspect member may rely on his privilege and remain silent but if he speaks he should be required to tell the truth under pain of violating article 107 of the Uniform Code of Military Justice.

UNITED STATES *v.* MAY (10 U.S.C.M.A. 258; 27 C.M.R. 432); UNITED STATES *v.* CECIL (10 U.S.C.M.A. 371; 27 C.M.R. 445)

In the *May* case the convening authority ordered the sentence as approved executed but suspended the execution of the punitive discharge "until com-

pletion of the appellate review." In the *Cecil* case the convening authority approving the sentence which included a punitive discharge ordered execution of the punitive discharge, "suspended until the accused's release from confinement or until completion of the appellate review whichever is the later." The Court of Military Appeals in these cases held that suspension of a sentence until the expiration of confinement or the completion of appellate review may not be vacated without a hearing as provided for in article 72, Uniform Code of Military Justice. Thus, where a punitive discharge is adjudged, suspending execution of the discharge makes the accused a probationer who is entitled to remission of the punitive discharge unless he commits some subsequent misconduct to justify vacation proceedings.

At no time prior has the court ever equated the terms "probation" and "suspension." From the statute itself it is manifest that not all suspensions are probationary so as to require proceedings to vacate. Yet the majority of the court has now determined that the word "suspension" is a term of art with but a single meaning—that it necessarily accomplishes a probationary status. A probationary suspension is generally one predicated on conditions over which an accused has some control and with which he must comply. In these instances the only impediment to execution was an event, i.e., completion of appellate review or confinement, over which the accused had no control. Where the convening authority order affirmatively shows no intention to place an accused on probation no hearing should be required, predicated on subsequent misconduct or otherwise.

As a result now, where execution of a punitive discharge has been suspended for a time certain, thus creating a probationary status with automatic restoration, designation of a disciplinary barracks or a retraining group as a place of confinement engenders great difficulties. A prisoner's incentive to earn restoration is minimized for he is automatically restored if his conduct provides no good cause for vacation proceedings under article 72, Uniform Code of Military Justice. This also has a demoralizing effect on other prisoners who must demonstrate by good conduct, efficiency, and attitude their worthiness of restoration to duty.

UNITED STATES *v.* WHITE, SIRPLESS (10 U.S.C.M.A. 63; 27 C.M.R. 137)

The accused was convicted by general court-martial of conspiracy to escape from confinement and escape from confinement. One of the prosecution witnesses testified as to the accused's and his own participation in the offenses in return for a grant of immunity. The grant of immunity was recommended by the staff judge advocate and approved by the convening authority. In remanding the case for a review by a different staff judge advocate and an action by a different convening authority, the Court of Military Appeals held that the convening authority by granting immunity to a witness for the prosecution was thereby precluded from acting further in the case. The granting of immunity by a convening authority, it was held, involves him in the prosecution of the case to the extent where it creates doubt as to his ability to impartially perform his statutory duty, i.e., to require him to determine the weight to be given the testimony of a witness to whom he has granted immunity.

A decision, detrimental to both the Government and the accused, has stripped the convening authority of his judicial power and disqualified him from performing his review functions simply because in his official capacity as an officer exercising general court-martial jurisdiction, he prevously granted immunity to a Government witness. This results in complications and delay in review of cases and diminishes the prospects of clemency by having the record reviewed by an officer far removed from any personalized contact with him and who is unfamiliar with the disciplinary problems of the command.

To grant immunity is purely an official act which falls on a convening authority by virtue of his assignment. It merely removes the bar of self-incrimination and is an expedient which permits the Government to produce evidence. However, it is not a stamp of verity on the witness' testimony, nor would a convening authority have a fixed opinion of veracity at the time he grants immunity. On the contrary, the weight to be given such testimony could only be determined after the witness testified under oath, was subject to cross-examination, and his testimony balanced against all other contrary evidence.

UNITED STATES *v.* JONES (10 U.S.C.M.A. 532; 28 C.M.R. 98)

Accused, on conviction, was sentenced to dishonorable discharge, total forfeitures and confinement for 3 years. The convening authority approved only 18 months' confinement but otherwise approved the sentence. At a rehearing on the sentence the law officer advised the court that the maximum punishment it could adjudge was that adjudged at the original trial. The Court of Military Appeals set aside the sentence and ordered a rehearing on the grounds that the law officer's instructions were erroneous as he should have advised that the maximum punishment was the lowest quantum approved before the second trial. Further, he should not have indicated the basis for the limitation on punishment.

Under this decision a court must be kept ignorant of the limits of punishment imposed by statute and must impose punishment under the mistaken belief that a much reduced penalty—one reached after mitigating, clemency, and other factors have been injected—is the legal maximum set by the President. While an accused's rights must be protected he should not have the benefit of a sentence yardstick so weighted in his favor and one entirely disproportionate to the gravity of his offense.

UNITED STATES *v.* DOBBS (11 U.S.C.M.A. 328; 29 C.M.R. 144)

A general court-martial convicted the accused of larceny and absence without leave. Intermediate appellate agencies approved the findings and sentence which included confinement at hard labor for 12 months and a bad conduct discharge. The Court of Military Appeals reversed the findings because the president of the trial court, during trial, utilized the procedural guide section of the "Manual for Courts-Martial—1951." No other portion of the manual was referred to nor was the book left with the court during any of its deliberations in closed sessions.

No hint of impropriety has ever attached to the contents of the procedural guide portion of the manual which the president of a court needs to assist him. The Court of Military Appeals however has previously condemned the practice of using the manual by members of general courts-martial because of the inherent danger to an accused's rights where court members are permitted to refer generally to a legal reference which contains inaccuracies and other deficiences. (*U.S.* v. *Rinehart*, 8 U.S.C.M.A. 402; 24 C.M.R. 212.) The reversal of the conviction in this case evidently was predicated on a determination to punish a service for possible deviation from a former decision as it was accomplished wholly without regard to any impact of the asserted error upon the fairness of the trial.

Mr. CREECH. General, on page 3, paragraph 4 of your statement, you state:

I am of the opinion that the Uniform Code is the most expensive, least efficient, and most ineffective system of the three, and does not protect the constitutional rights of the accused any better than the other two systems, if properly administered.

In your view, sir, were the other systems properly administered?

General HARMON. I think the Elston bill was properly administered, but I do not think the articles of 1920 were properly administered, and I think if they had been, probably some of the statutory reform would never have been started.

I do not think enough time or attention was paid to administration under the first of the three systems.

Mr. CREECH. You have acquainted the subcommittee with the rehabilitation center at Amarillo, which you have discussed. I wonder if you have given much attention, or if you have had an opportunity to review the Doyle bill, which would provide for the issuance of rehabilitation certificates to servicemen. Are you familiar with that proposal?

General HARMON. No, I am not very familiar with it, just vaguely familiar. I might be able to answer your question. What is it?

Mr. CREECH. That bill provides, among other things, that where a serviceman has received a discharge less than honorable and has performed as a useful citizen, his citizenship has been exemplary perhaps—at any rate, he has for 3 years had no marks against him, an indication that he is a good and useful citizen—that his discharge might be corrected, might be upgraded, and then at that time, after 3 years, this certificate would be issued.

General HARMON. I am for rehabilitation all the way, and I think that that would probably be good legislation.

Mr. CREECH. General, you made very clear in your statement your feeling about the Uniform Code, and I do not think it would serve a useful purpose to ask you any questions about that. But I would like to inquire as to whether you feel there should be entirely different procedures in the administration of military justice in wartime as opposed to peacetime?

General HARMON. No, I do not think there should be any difference. I can give the reasons for that. The protection of the rights of the individual and the necessity for discipline are both important ingredients and they are just as essential one time as another.

I think we ought to have a system that works well in peacetime to reach both of those goals and to give us an opportunity to train our personnel to administer military justice in time of war.

As we shift from a peacetime system to a wartime system, it means that when war starts, we are going to have a system that we do not have anybody trained to administer.

Mr. CREECH. General, as a retired officer, I wonder what your views are concerning the proposal which was discussed this morning that the military jurisdiction over retired personnel not on active duty be eliminated?

General HARMON. I do not think it should be eliminated. I think it is all right. It is used very rarely, Mr. Creech, very, very rarely. In all of my nearly 12 years as Judge Advocate General I could count on the fingers of one hand, I think, all of the cases in the Air Force where retired personnel were tried, but I believe that the authority ought to be there for those rare cases.

Mr. CREECH. Thank you.

Mr. EVERETT. General, I would like to ask you whether you feel it would be desirable to provide that where an accused entered a guilty plea at the trial level before a general court-martial, let us say, that it be reviewed only in Washington, and that there be no petition to the Court of Military Appeals and no intermediate review.

In other words, is there some possibility of cutting down the number of reviews where the defendant pleads guilty voluntarily, as you see it?

General HARMON. I see no reason for the right of appeal in that case.

Mr. EVERETT. You would just close it out more or less at the trial level?

General HARMON. I would.

Mr. EVERETT. General, what are your views with reference to the negotiated plea procedure that the Army has introduced in order to speed up trials, reduce costs, and so forth? Would you consider that a desirable procedure, or do you perceive substantial objection to it?

General HARMON. When I was Judge Advocate General, I did not initiate such a policy. I think that answers the question. I did not think it was a good thing for the Air Force, and this is not in any sense a criticism of the other services. They may have reasons for their policy that are different than the reasons which exist in the Air Force.

However, I think the negotiated plea in the military service is an entirely different kind of thing than the negotiated plea in the civilian community, because of the difference in the rank of the people involved, and I think, or I thought when I was in the service and when I was Judge Advocate General that, while there would be some advantages of having it in the way of expediting the administration of military justice, I thought the disadvantages far outweighed the advantages because we would be getting all kinds of complaints about the fellow being pressured into making the plea by someone who was senior to him in rank.

So I do not agree with it.

Senator ERVIN. General, I found in my experience as a trial judge that sometimes the men taken to court enter pleas of guilty who are not represented by counsel, and when the inquiry has been completed, it showed he had not committed the crime charged against him.

Do you fear that that would happen in negotiated pleas?

General HARMON. That he plead guilty to something that he did not commit at all?

Senator ERVIN. Yes.

I do not mean necessarily that. He may have done something wrong, but what he did, did not constitute a crime. In other words, do you think there is danger of a person pleading guilty where his conduct may have been bad, but it did not actually constitute all the elements of the offense?

General HARMON. I think there might be a danger of that. I do not think that a man would plead guilty to something that he did not do, but I think, due to his lack of understanding of what the implications were from what he did, he might plead guilty to something that really, as you pointed out, did not actually amount to the crime that he pleaded guilty to.

Senator ERVIN. Do you not think that where the negotiated plea takes place, that the court should at least investigate the matter enough to be satisfied that the elements of the offense actually exist?

General HARMON. We have always had the policy that after a plea of guilty, the prosecution is required to present a prima facie case, and I think that should be continued.

Mr. WATERS. I have just one question, General, if I may. What standards exist for sending a man to Amarillo?

General HARMON. In the first place, if a man had been convicted of either murder, rape, or narcotics violation or was a chronic alcoholic, he was not eligible to go. Secondly, he was considered on the basis of his past record, what kind of a record he had and his present attitude toward what he had done, simply an appraisal of the possibilities of his being able to rehabilitate himself, if sent.

Mr. WATERS. Thank you, General.

Senator ERVIN. General, the subcommittee is deeply grateful to you for the assistance you have given us and for the observations which

have been based on your experience as the Judge Advocate General of the Air Force.

I would infer that you think that the Congress stepped in too quickly on imposing the Uniform Code of Military Justice after passing the Elston Act, which you say operated very well and which you think should have been continued.

General HARMON. Yes, I think they did. I think they should have continued it, and I think it is very unfortunate for the country, Mr. Chairman, that they did not. The reason they did not was that the Elston bill was not made to apply to the Navy. The Navy at the time was not willing to accept it because they were wedded somewhat to the old Articles for the Government of the Navy, and because I am afraid many of that service did not understand the Elston Act and what it really did.

As a result, rather than simply making it apply to the Navy as well as the other services, we got into the field of statutory reform, and we went to a new one that, in my opinion, is much worse.

Senator ERVIN. We certainly appreciate your giving us the benefit of your experience at our request.

General HARMON. Thank you very much, Mr. Chairman, and I appreciate the opportunity to present my views to the committee, and anything I can do in the future to help, I shall be glad to do so.

Senator ERVIN. Thank you.

Let the record show that Senator Carroll, a member of the subcommittee, was here this morning but was called to service on another committee and, therefore, was unable to remain.

The subcommittee stands in recess until 2:30.

(Whereupon, at 12:55 p.m., the hearing was adjourned, to reconvene at 2:30 p.m., of the same day.)

AFTERNOON SESSION

(Present at this point: Senator Ervin (chairman), presiding.)

Senator ERVIN. The subcommittee will come to order.

Mr. CREECH. Mr. Chairman, the first witness this afternoon is Hon. Robert Quinn, chief judge, U.S. Court of Military Appeals.

Judge Quinn?

Senator ERVIN. Judge Quinn, we are delighted to have you with us.

## STATEMENT OF HON. ROBERT QUINN, CHIEF JUDGE, U.S. COURT OF MILITARY APPEALS

Judge QUINN. Thank you very much, sir.

I have no statement.

Mr. CREECH. Judge Quinn, I understand that you have very kindly said that you would answer questions which we might have for you.

Judge QUINN. Certainly.

Mr. CREECH. And we do have several that we would like to pose at this time.

Judge QUINN. Fine.

Mr. CREECH. Sir, in the annual report of the Court of Military Appeals for the year 1960, on page 12, you state:

> The unusual increase in the use of administrative discharge since the code became a fixture has led to the suspicion that the services were resorting to that means of circumventing the requirements of the code.

I wonder, sir, if you would care to elaborate on this assertion by the court and give the subcommittee information relative to the basis upon which this determination is made by the court.

Judge QUINN. I will be glad to.

Mr. Chairman, the information that we received from our chief commissioner, Mr. Tedrow, taken from the Congressional Record regarding Mr. Doyle's bill, indicated that the undesirable discharges had gone up from 17,645 in 1954, to 20,107 in 1955, to 27,786 in 1957, to 31,448 in 1958. And the figures in 1959 were only partial.

But there had been a definite increase in undesirable discharges each succeeding year from 1954.

Now, General Harmon, who was then the Judge Advocate General of the Air Force, gave a talk in Los Angeles in 1958 at the Judge Advocate General's meeting at the American Bar Convention, in which he called attention to the fact that there was a remarkable increase in administrative discharges, and he then said, among other things, that the Air Force was using the administrative and undesirable discharge to circumvent the Uniform Code of Military Justice.

And, according to the report in the JAG Journal at that time he said:

> There has been a tremendous increase of undesirable discharges by administrative proceedings with a corresponding reduction in court-martial incidence. Commanders are avoiding the technicalities in the administration of the court-martial system by administrative action.

In other words, General Harmon made it very plain at that meeting in Los Angeles, at which I was present, that the Air Force was circumventing the Uniform Code of Military Justice by getting rid of men that were undesirable by giving them undesirable discharges administratively rather than by giving them a court-martial where they would have a chance to defend themselves.

That was, I think, the basis for the statement in the annual report, Mr. Chairman.

Mr. CREECH. Sir, what are your observations about the manner in which the Uniform Code of Military Justice is operating at this time?

Judge QUINN. Mr. Chairman, I would say that the Uniform Code of Justice is working very satisfactorily. I understand there has been testimony before the committee to the effect that perhaps the Elston Act might be as satisfactory as the Uniform Code, perhaps in some respects more desirable.

But, of course, the fundamental difference is that under the Uniform Code the court of last resort is a civilian court. Congress said in 1950, when it enacted the Uniform Code of Justice, that it wanted at the apex of the military judicial structure a civilian court, subject to no pressures from the military.

This court is absolutely independent of any outside influence.

Now, it is true that maybe the judicial council might function properly according to the opinion of some of our military men. But, nevertheless, it is a military tribunal, and it is always subject to military pressure, fitness reports, good assignments, penalties and so on and so forth. So that the judicial council, under the Elston Act, could never take the place of the U.S. Court of Military Appeals. That is the fundamental difference.

The code is working satisfactorily. Of course, there is room for improvement, Mr. Chairman.

No doubt but what some of the recommendations that we have made that are now under consideration by the Armed Services Committee would simplify procedures, would streamline the code, would save time, would save power, manpower, and would save money, and we hope that the Congress will get to the point of adopting those recommendations.

But we could save time, I think, in the matter of not swearing in the law officer at every session of a court, swearing in counsel—counsel are always sworn to do their duty—swearing in the reporter, and so forth. Time and paperwork could be saved, and I hope we will get around to that.

But, fundamentally, there is nothing wrong with the way the Uniform Code of Justice works today.

Senator ERVIN. And when Congress established the Military Court of Appeals, it certainly acted in harmony with the very ancient and fundamental doctrine that the military should be subject to control of the civilians.

Judge QUINN. Exactly, Mr. Chairman.

And, lucky for me as an individual, I have two associates, former Members of the Congress of the United States, Judge Ferguson, a former Member of the Senate, a former colleague of yours, Mr. Chairman, Judge Kilday, who served in the House for approximately 24 years, and certainly there never were two finer or more hardworking or more judicious temperaments than we have in Judge Kilday and Judge Ferguson.

So, leaving myself out of the picture, I would say that the court is a good court.

Senator ERVIN. Judge, I would not leave you out of the picture at all because you have done a magnificent job, in my opinion, in pioneering in a field in which we have vastly extended the principle of independent judiciary.

Judge QUINN. Thank you very much.

Senator ERVIN. I have attempted to keep up, as far as the time at my disposal permits, with the work of the court since I came to the Senate, and, from that standpoint, I am very much impressed by the excellence of the decisions and principles of the court.

I feel that I should say this to show that, notwithstanding my high admiration and affection for your two associates with whom I have served in the Congress, I would like to pay this tribute to you.

Judge QUINN. Thank you very much, Mr. Chairman.

Mr. CREECH. Judge Quinn, I believe that you have served, that you are the only person who has ever served as chief judge of the court; is that not correct, sir?

Judge QUINN. That is correct.

Mr. CREECH. And you have been there, of course, some 10 years now, and I wonder, sir, if you have noticed an improvement in the quality of military justice as demonstrated by the records of the trials which have come before you?

Judge QUINN. Yes, Mr. Chairman.

I think there has been a very definite improvement in the quality of the records that come up to us. They definitely have improved.

The work of counsel, both for the Government and the defense, I think, has improved greatly in the last 11 years. There have been fewer errors, and not very much indication any longer of command control.

We did have in the early days some indications of it, and we had, I remember, one president of a court, an admiral in the Navy, making the outright statement that, of course, boys in the service had no constitutional rights at all.

I think we have amply demonstrated to all the services and to all our commanding officers that the boys in the military service have all the constitutional rights of any American citizen, except where they are excluded, in as many words, by the provisions of the Constitution itself.

I think there has been a definite improvement all along the line, Mr. Chairman. The boards of review have definitely improved in the quality of their work. The courts-martial themselves, the law officers, are acting certainly very much more like judges than they did 10 years ago, and I think counsel for the defense, as well as for the Government, have been taught through our opinions that they are to do their utmost in the defense of their client, and that they must give everything that they have got to the defense of the case before them.

So I think that we are more and more approaching the quality of justice that you get in the Federal courts of our land.

Mr. CREECH. Sir, as you have said just a few moments ago, the subcommittee has received testimony from at least one witness who has advocated that military justice return to the Elston Act and that the Uniform Code of Justice be abolished. Do you feel, sir, that the development which you have observed would have taken place, had the court not been in existence, had the previous system of military justice been continued?

Judge QUINN. I would say with absolute positiveness, Mr. Chairman, that there would have been no such development.

Mr. CREECH. Sir, would you care to expand on that answer?

Judge QUINN. I think the very existence of the civilian court itself is a definite detriment to command control, not the number, the small number of cases that come before us. Perhaps they would not be very numerous. But the very existence of the court is a curb on command control.

And, of course, as I indicated a few minutes ago, we are completely independent in every sense of the word. No power on earth can influence our decisions. We decide according to the law and according to the facts.

Now, a judicial council consists of three members of the military service, and I would say it would be impossible for them to have complete independence.

They have superior officers. They have men who mark their fitness reports. They are indebted to certain members of their own organization. They have not the complete freedom of movement that a court of last resort should have.

Mr. CREECH. Sir, with regard to the Uniform Code, are there any suggestions which you would care to make in regard to amendments to it in areas in which your experience has indicated that perhaps amendments should be made in order to safeguard the constitutional rights of the service personnel?

Judge QUINN. I think, Mr. Chairman, that perhaps those rights are adequately safeguarded as far as we are able to safeguard them. Certainly we will and have, to the best of our ability, protected the constitutional rights of every serviceman. We have recommended some 17 rather minor changes in the code, and those recommendations are before the Armed Services Committee for consideration.

For instance, we do believe that the law officer should be really built up into the stature of a judge and that there should be such a thing in the military service as jury trial waived.

In other words, any accused, with proper advice of counsel, should have the election to be tried by the law officer or the judge, and I think they ought to call them judges, myself. I think that we should have that provision. Most States have it, and I think his rights would be adequately safeguarded, and there would be a tremendous saving in time, manpower, and chance of error. So I believe that would be one instance where we would be taking a step in the right direction.

Now, I have not before me the other 17 changes that we have recommended, but we are on record in our annual report several different times as to what we think ought to be done to somewhat streamline the Uniform Code.

Mr. CREECH. And there would be no additions which you would care to make to the suggestions which the court has already made?

Judge QUINN. No, I think not, Mr. Chairman.

Mr. CREECH. Sir, I believe article 32 of the code is concerned with pretrial investigation. I wonder what your feeling is with regard to making available the subpena power to both the investigating officer and the defendant at such time as the pretrial investigation is taking place?

Judge QUINN. I think it would be a good idea.

Mr. CREECH. Also, I believe there is no provision in the code for Government counsel at the pretrial investigation under article 32, although the subcommittee has been told that there have been cases where Government counsel appear.

I wonder if you would care to express a view concerning this?

Judge QUINN. Of course, upon request, the accused is entitled to counsel, and it would seem to me, by the same token, if the accused is entitled to counsel, that the Government should be entitled to counsel, and I see no objection to the Government being represented at the pretrial.

Mr. CREECH. What is your feeling, sir, with regard to the investigating officer?

Do you feel that it would be advantageous to have him be an attorney?

Judge QUINN. Personally, it would seem to me that it would be well to have an attorney, if possible. It seems to me that a lawyer does a better job as a rule in that type of work than a nonlawyer.

Mr. CREECH. It has been indicated to us that there is no right to counsel in summary courts-martial, and I wonder, sir, what your feeling is with regard to the lack of counsel in view of the sixth amendment guarantee of the right of defendants to counsel in criminal cases?

Judge QUINN. This is before summary courts? Of course, we have more or less concurred in recommendations that article 15 punishment be increased to some extent, and that the summary court be dispensed with.

So that perhaps would obviate any necessity for counsel.

Of course, I am a firm advocate of the right of counsel, and I think if any boy, whether it is before a summary or special or general court, asks for counsel, that he ought to have it, if it is reasonably available.

Mr. CREECH. Sir, with regard to changing article 15, there have been some proposals made for the increase of article 15 authority of the commanding officer to impose nonjudicial punishment.

Do you feel, sir, that this would be desirable?

Judge QUINN. Yes, I do.

Mr. CREECH. Do you care to elaborate on your statement, sir?

Judge QUINN. Well. of course, whatever punishment he gets under article 15 would leave nc record, and, after all, I think that perhaps conviction in a summary court which leaves a boy with a record is far more dangerous than maybe even a little more severe punishment in the matter of fine or 8 or 10 days in jail.

So that I think, at least to some extent, it is a lesser punishment. And most of the commanding officers around the world that we have talked to—and Judge Ferguson and I have been in many parts of the world; Judge Kilday has just come on the court and has not had an opportunity to get out into some of the theaters of war; he undoubtedly will—they have indicated to us that a little more power in the field of nonjudicial punishment would be very useful to them; that it would promote discipline, improve the situation in their commands, and, yet, would leave no record as far as the boy is concerned.

In other words, there would be no record of any conviction, and, therefore, no permanent blot upon his record.

So it seems to me that the increase in powers that we have recommended to the Armed Services Committee would actually be in the boy's favor. It would do him little or no harm, and it would remove any possibility of a conviction remaining on his record.

Mr. CREECH. Sir, you mentioned the boards of review, and I wonder if you have any views as to the way in which the boards of review are operating and whether there is need for legislative action in connection with these boards?

Judge QUINN. I think the products, the quality of the opinions, that have come from the boards of review in the last few years have shows definite improvement.

I think in the last 10 years there has been a marked improvement in the quality of the output of the boards of review. I would be of the opinion, Mr. Chairman, that the boards of review should have tenure, and perhaps greater stature. They are actually an intermediate appellate court, and I think it might be well for the Congress to recognize that fact and to give them greater tenure and broader powers.

Senator ERVIN. There is no question, in fact, that the old expression "experience is the most efficient teacher of all things"——

Judge QUINN. Yes.

Senator ERVIN. And it would be highly advantageous to have some continuity of service on the boards for that reason?

Judge QUINN. I think that is quite right, Mr. Chairman.

Senator ERVIN. Judge, it would seem to me that it would be an inevitable improvement in the administration of military justice, as a result of having a tribunal which has the authority to interpret the Uniform Code of Military Justice and to build up, as the court has, a body of interpretations of the ambiguous portions of many statutes.

I think you and I would agree, as lawyers, that for some reason human beings who write statutes have more difficulty in phrasing those statutes in understandable English than other persons engaged in other fields of writing, perhaps.

Judge QUINN. Yes, indeed, Mr. Chairman, I would agree with you.

Senator ERVIN. And so many of our statutes are not really understandable until they have been hammered out on the anvil of judicial decisions.

Judge QUINN. Yes, I quite agree, Mr. Chairman.

Mr. CREECH. Judge Quinn, the subcommittee has received a number of complaints which concern a variety of charges, and in some instances we have heard from former members of the armed services who performed as defense attorneys, as members of JAG, or who had some connection, in one way or another, with the administration of criminal justice, and some of the allegations which we have received have indicated that in some instances, if defense counsel became too aggressive, too persistent, in pursuing the defense of his client, this might adversely affect his rating in some instances; that men who had some experience as defense counsel found themselves given other assignments.

And also we have had the allegation made that frequently—I should not say "frequently"—we have had the allegation made that in some instances the defense counsel would be perhaps the least experienced of the counsel available, and that later, as he became more experienced, then he would be prosecuting cases instead of defending them.

I wonder, sir, from the records of the trials of courts-martial which you have seen, in light of your vast experience as a lawyer and trial judge, as well as appellate judge, if you have any impression about the caliber of the defense provided by military defense counsel?

Judge QUINN. I think, all in all, Mr. Chairman, that they do an excellent job.

Of course, we have had instances where a better job could have been done. But I think, generally speaking, that they do a good job. I have seen no indication of where there would be any direct interference with the efforts of defense counsel to properly protect the rights of his client.

I think perhaps, as far as our court is concerned, that it would be difficult to say that the quality of defense counsel did not measure up to the quality of Government counsel, although, perhaps, I would say that maybe the most brilliant of the lawyers that we have seen appear before us have appeared on the side of the Government.

I think maybe two or three very outstanding lawyers have appeared on the side of the Government.

But, generally speaking, I think there are no limitations on defense counsel. I think they have complete liberty to do what they think is right in the defense of their client, and that they generally do a very good job. Of course, it is not 100 percent so.

I mean, as you would find out in the civilian field, there are some men who do not quite measure up. But, generally speaking, I would say they do a good job. I have not seen any indications, certainly in the last few years anyway, Mr. Chairman, where there has been any interference with the right of the defense counsel to exert their utmost

abilities in behalf of their clients. I think, generally speaking, they do a pretty good job.

Mr. CREECH. Sir, the subcommittee received testimony prior to your appearance to the effect that the uniform code is unwieldy and cumbersome, and the allegation has been made that because it is unwieldy—this is the allegation, mind you, I am not saying this—that because it is, that it would not work effectively during time of war.

I wonder, sir, if you would care to comment on that?

Judge QUINN. I suppose the obvious answer to that would be, Mr. Chairman, that it already worked satisfactorily through the Korean war, which was, after all, no picnic. I mean we had several divisions committed over there, and it was a pretty bitter war, and certainly it worked satisfactorily through that war.

Now, maybe that is not war in the sense of a worldwide war, but it was a pretty bitter war, and we had very many casualties and we had very many troops committed. It worked completely satisfactorily.

I see nothing that would indicate that the Uniform Code of Justice would not work satisfactorily in any war.

Now, of course, we come to the atomic age, and perhaps unheard of or even undreamed of destruction, and that might be a horse of another color. We just do not know what would happen if atomic bombs began to drop on us.

But, as far as satisfactory operation in the sense of war as we have known it up to date, it seems to me that the uniform code would work satisfactorily.

Mr. CREECH. Sir, do you feel that there should be any differentiation at all between the procedures used during peacetime and those which are used during periods of war in the administration of military justice?

Judge QUINN. Of course, we have some control over our grants and denials and so forth. In the event of an all-out war as we knew it, we will say in 1941 or 1942, where you had 15 or 16 million men under arms, I think, Mr. Chairman, perhaps it would be necessary for us to tighten up a little bit on our procedures.

I think we can show a lot more liberality in grants under the present-day conditions than we could if we had 17 or 18 million men under arms.

Now, what the situation would be in the event of an all-out atomic war, of course, I am not prepared to say. But I think at the present time that the code is working completely satisfactorily, Mr. Chairman, and I think perhaps would work satisfactorily even under conditions that approximated the last World War.

Mr. CREECH. Sir, there have been a number of proposals from time to time from various sources, as you know, concerning the tenure of the members of the court, and also, I believe, proposals concerning the size of the court.

I wonder if you would care to express your views concerning some of the various proposals or what you would consider to be the ideal situation?

Judge QUINN. I think, as as far as the size of the court, certainly at the present time, Mr. Chairman, that we are discharging our obligations satisfactorily. We are completely up to date. Our opinions

go out, I would say, within 30 days of the time that the case is heard, and when we reach the summer we are all square with the board.

I do believe we have recommended to the Congress time and time again that the court be given life tenure. I think that that would be the only ultimately satisfactory solution. We are the court of last resort of the Military Establishment, having jurisdiction now over some 3 million men and women, and in time of war, of course, would have jurisdiction of perhaps 17 or 18 million or maybe 20 million or more men and women.

I believe the court should have life tenure, and I think perhaps that, to some extent, the boards of review should be made into intermediate appellate courts with a substantial tenure.

I believe that eventually the law officer should become a judge in the full sense of the word, with all the attributes that go with a trial judge.

Mr. CREECH. Sir, with regard to the law officer, do you have any additional comments that you would care to make about the Army's program for development of a specialized corps of law officers?

Judge QUINN. The program has undoubtedly been a definite step in the right direction, Mr. Chairman. It is an improvement over what they had, and I think over what the other services now have, although the Air Force has something that approximates it.

But I would say it has been a very large improvement. Those men are now trained as judges. They definitely discharge their obligations as trial judges in a manner that is superior to the way they were discharged before the program was instituted.

I think it has been a very good thing for the Army. I think it would be a good thing for the Navy and the Air Force, too.

Mr. CREECH. Thank you, sir.

I believe Mr. Everett has some questions.

Mr. EVERETT. Judge Quinn, the subcommittee realizes that the majority of your court has held that under existing military law it is permissible for a commanding officer or his representative to give general instructions to court members. Would you think it desirable for legislation to be enacted which would change the existing law in that respect?

Judge QUINN. I am not sure that I have got the full import of your question, Mr. Everett.

Mr. EVERETT. I was thinking, Judge Quinn, of a situation where a commanding officer, before a trial, gives general instructions to the court members.

And my recollection is that the court recently held by divided vote that, in light of the provisions of the "Manual for Courts-Martial" and the history in this regard, existing law permitted this practice.

Would you feel it desirable for the existing law in this regard to be changed so that a commanding officer would not have the authority, either directly or indirectly, to give instructions to court members about the performance of their duties?

Judge QUINN. Of course, I think we have held pretty clearly that he cannot exercise any command influence over the members of the court, and that any instructions that were designed in any way to interfere with the proper administration of justice, of course, would be illegal.

I think perhaps it might be well if that process were eliminated.

Mr. EVERETT. You do not think it would be an overwhelming loss to the performance of military justice?

Judge QUINN. No; I do not.

Mr. EVERETT. Judge Quinn, I would like to ask you if you could comment on what we understand is the practice in two of the services, wherein the chairman of the board of review rates the two junior members on the performance of their duty, prepares an effectiveness report or a fitness report which is later considered for promotion.

What would be your views about this practice?

Judge QUINN. I did not know that there was any such practice, Mr. Chairman, so this is rather a horseback opinion. I would think that it would be rather unfortunate. Certainly, I hope that I never would be called upon to rate the performances of Judge Ferguson and Judge Kilday.

Mr. EVERETT. Judge Quinn, in light of your experience as a Navy legal officer at one time, in addition to your experience with the Court of Military Appeals, I wonder if you have any views as to whether the creation of a separate Navy JAG Corps would improve the administration of military justice in that service, and thereby would provide better protection for persons in the Navy?

Judge QUINN. In my opinion, it would be definitely a step in the right direction. Of course, the Army has a separate JAG Corps, and the Air Force does not have a corps. It has, I think, something that they call a department. But it would seem to me that it would be definitely a good thing for the Navy, for the lawyers in the Navy, for military justice, and for the country as a whole, to have a JAG Corps in the Navy.

Mr. EVERETT. Judge Quinn, in those cases which reach the Court of Military Appeals from special courts-martial—and I gather those would only be cases where a bad conduct discharge had been given—would you have any observations as to the extent to which the constitutional rights of the accused have been protected, comparing these courts with the general court-martial cases, which you also would review?

Judge QUINN. Of course, special courts are very often composed of nonlawyers. There would be no lawyer on the court and there would be no lawyer for the Government and no lawyer for the defendant, and so you get, I would say, perhaps a kind of rough justice under those circumstances.

We have recommended that the power to give a bad conduct discharge be taken away from the special court and that it could only be given by a general court-martial.

Mr. EVERETT. In light of the importance of counsel, would you have misgivings about any type of court proceeding or administrative proceeding which resulted in a less than honorable discharge where the accused or the respondent had not been furnished counsel?

Judge QUINN. I would be very skeptical about that type of proceeding, Mr. Chairman.

I certainly think bad conduct discharges and even undesirable discharges are very, very severe penalties. I am firmly of the opinion that an undesirable discharge should never be given except as a result of a court-martial, except perhaps in the case of homosexual charges;

if an individual so charged, with proper legal advice, knowing what he is doing, with his eyes wide open, decides that he wants to take such a discharge in lieu of a court-martial, I think there it is all right.

Otherwise, it seems to me that the services should have no power to give either undesirable or bad conduct discharges.

Mr. EVERETT. Has it been your experience, Judge, although I realize that your court does not directly review undesirable discharges, has it been your experience that the undesirable discharge creates a severe stigma for the person who receives it?

Judge QUINN. I think, generally speaking, Mr. Chairman, it is worse than a bad conduct discharge, as far as its implications are concerned, and the results also are quite severe. You cannot get a job in a bank or a trust company or for the Government; for Electric Boat, for instance, at New London or any of the places where there is any confidential requirement. They will not give work to a man with an undesirable discharge. It is a very severe penalty.

Mr. EVERETT. Judge——

Judge QUINN. It also has implications that go with it, too, Mr. Chairman.

Mr. EVERETT. And these implications are very damaging, then?

Judge QUINN. I would say yes.

Mr. EVERETT. Would you consider a proceeding in which an administrative discharge, an undesirable discharge was given to be an adversary proceeding?

In other words, if it were an administrative board giving an undesirable discharge over the protests of the respondent, would you term this an adversary proceeding, Judge?

(At this point in the proceedings, Senator Keating enters the hearing room.)

Judge QUINN. I would be doubtful about it, Mr. Chairman.

Mr. EVERETT. This question is really in connection with some of the terminology that was used by witnesses who have preceded you and who described the administrative proceedings and board proceedings as not being adversary, and, therefore, arguing that, or suggesting that, there was no need to comply with the usual formalities of a court proceeding because, under this terminology, it was not labeled "adversary."

Would you view that label as having much significance one way or the other?

Judge QUINN. No.

I think that an undesirable discharge is a very severe penalty, and I believe that it should not be given except as a result of a court-martial, except in the instance where the individual, after proper legal advice, and proper legal protection, decides to accept it for his own personal protection. I mean in the case of homosexuals, I can see there where they might want to take the undesirable discharge. But I think they ought to have a right to a trial. I think it is a very severe penalty.

Mr. EVERETT. Judge Quinn, while I realize it would involve an appreciable increase in the workload of the court, would you see any desirable aspects of proposals that have occasionally been made that the Court of Military Appeals should have the right to review any legal issues connected with the giving of an administrative discharge which was other than an honorable discharge?

Judge QUINN. I have no objection personally. It would increase the workload, and we have a fairly severe workload now, Mr. Chairman. But, frankly, I would have no objection. I do not know how the other members of the court might feel in regard to that.

Mr. EVERETT. In terms of your individual opinion, would you consider this a desirable change in the law to provide for appellate review by your court of undesirable discharges?

Judge QUINN. I think perhaps it might be a desirable protection to American citizens. I mean it is a very severe penalty to be given administratively, and I think there should be some additional protections thrown around people who get undesirable discharges.

Mr. EVERETT. Judge, do you have any views about the desirability of the procedure used in the Army and Navy today, but not in the Air Force, for the negotiation of a guilty plea?

Judge QUINN. I think under the proper protections, that it is desirable to permit negotiated pleas. I think perhaps there might be a difference of opinion in the court as to that. But, frankly, I am in favor of negotiated pleas where the defendant has the proper protections.

Mr. EVERETT. Judge, one final question:

You remarked earlier that you and Judge Ferguson had the opportunity during your service on the court to go into the field and talk to the commanding officers. I wonder what has been the reaction of these commanding officers to the way in which military justice is operating at the present time? What do they tell you about their reactions?

Judge QUINN. Well, I would say, Mr. Chairman, that 99 percent of the commanding officers with whom we have talked indicate that it is working very satisfactorily; that it has improved the quality of justice in the military very substantially, and we find very few complaints.

There are some, but, certainly, most all of our commanding officers throughout the world are in agreement that it is working well and that it has been a highly desirable establishment.

Senator ERVIN. Judge, as I interpret your statements concerning undesirable discharges, you feel that it would be in the interests of military justice to give a man the right to demand trial before receiving such a discharge, but permit him to waive that right, provided he is informed, given legal guidance, as to the nature of the discharge and of his rights?

Judge QUINN. That is correct, Mr. Chairman. Yes, sir.

Senator KEATING. I have no questions.

Senator ERVIN. Mr. Waters?

Mr. WATERS. Thank you, Mr. Chairman.

Mr. Chief Judge, could you tell us whether or not you feel it might be advisable to have the Congress set standards for the military to follow in the issuance of discharges?

Judge QUINN. I am not sure that I completely understand your question, Counsel.

Mr. WATERS. Having in mind the fact that most of these people who are in military service enter under the auspices of the civilian draft board or otherwise, that Congress ought to set up some standards under which the various types of discharges be given, rather than

invest each commander with the discretion to give the type of discharge he has in mind, either a special court-martial or an administrative tribunal?

Judge QUINN. I have not given it any consideration, but, in my opinion, my offhand opinion would be that it would be desirable.

Mr. WATERS. Do you feel that any desirable provision could be incorporated into the military structure for bail so that the man would not remain in confinement while his case is pending on appeal, or, if not bail, something comparable to it?

Judge QUINN. I suppose that up to the present time bail has never been used in the military services. As far as I know, there has never been any such thing as bail. Of course, usually the men are not actually kept in close confinement. I mean they are allowed to work and they are restricted to a certain area, and so forth, but I do not believe that there has been any indication in the history of our country where bail has ever been used in the military services.

I frankly am not prepared to give you an informed opinion as to the desirability of bail under those circumstances.

Mr. WATERS. Thank you, sir.

Thank you, Mr. Chairman.

Senator ERVIN. Judge, we are deeply grateful to you for your appearance here, which was at our request, and we will certainly give serious consideration to the answers you have given to these questions.

Judge QUINN. Thank you very much, Mr. Chairman. It is very nice to be with you.

Senator KEATING. Judge Quinn, I came in late. I gather the general purport of your testimony is that you think that administrative discharges now are carried too far?

Judge QUINN. Senator, if they are not punitive, that puts a little different light on them. But I do not think that any boy should get a dishonorable or bad conduct or undesirable discharge, except where he has a chance to a fair trial.

Senator KEATING. Or a discharge under honorable conditions? Is that still used? Is that phrase still used?

Senator ERVIN. Yes.

Judge QUINN. Yes.

Senator KEATING. Does a discharge under honorable conditions entitle him to VA benefits?

Judge QUINN. Yes I think that he has practically all benefits, if he has a discharge under honorable conditions. There might be some minor benefits that he would not be entitled to, which he would have with a completely honorable discharge. But it is really not a penalty.

And so I think only in the cases of dishonorable, bad conduct, and undesirable discharges, should he be entitled to a trial, if he wants it.

Senator ERVIN. Thank you, sir.

Judge QUINN. Thank you very much, Mr. Chairman.

Mr. CREECH. Mr. Chairman, the next witness is the Honorable Homer Ferguson, judge, U.S. Court of Military Appeals.

Judge Ferguson?

Senator ERVIN. Judge, we are delighted to welcome you and appreciate very much your coming at our invitation.

Senator KEATING. And we welcome him as a former member of this body, as well as a personal friend.

## STATEMENT OF HON. HOMER FERGUSON, JUDGE, U.S. COURT OF MILITARY APPEALS

Judge FERGUSON. I do not have a prepared statement on this question, and I would be glad to try to answer any questions that you have.

Mr. CREECH. Judge Ferguson, you have heard the questions posed earlier to Judge Quinn, and I wonder, sir, if you would care to elaborate upon some of those questions, and also if you would care to indicate if in some instances you and the chief judge have differing or varying opinions on some of the subjects which have been discussed this afternoon.

Judge FERGUSON. You asked one question whether there was any evidence that a trial defense counsel had in some way been intimidated or action taken that might interfere with his performance of duty.

I recall one such case before the court and that is *U.S.* v. *Kitchens*. There the evidence was such that it was indicated the man was put under really great pressure for conducting the defense.

The opinion of the court, which, of course, would speak for itself, ordered a rehearing. I, of course, must say that I have taken a little different view on the question of command control, than the other judges. I would refer the committee to my dissenting opinion in *U.S.* v. *Danzine*, a case just recently published.

Mr. CREECH. And the case to which you referred is, I believe, the *Kitchens* case?

Judge FERGUSON. Yes, that was the first case on that. There were others from the same command involving the same defense counsel, which were reversed for the same reason.

Senator KEATING. I would be interested in Judge Ferguson's summary, if he could, as to the way that he apparently differs from some of the other members of the court on the question of command control.

Judge FERGUSON. We interpreted the statute differently. We are all agreed that command control is not proper and the statute prohibits it. But on determining what is command control, realizing that inferiors are subject to the discipline of a superior officer, are placed on courts-martial as members, I have taken the view that a lecture by that superior to inferior members is about the same as a Governor or Attorney General calling in a civilian jury and lecturing them. This is even stronger in the military where you have a superior-subordinate relationship.

Senator KEATING. You mean there are cases where the commanding officer calls in the members of the court and gives them a lecture with regard——

Judge FERGUSON. He tells them how to act on cases in general. The cases which we have usually speak for themselves. Take the *Kitchens* case, for example. There, the commander himself did not give a lecture but an assistant judge advocate sent a letter to prospective court members in which he inquired concerning the reasons why they had not adjudged punitive discharges in prior cases. He cited five or six cases in which men were tried by general court-martial and no discharges had been adjudged.

We were unanimously agreed that this was practically telling the jury "in the next case we think something ought to be done." I want

to say that I think we agree on the law, but differ on the question whether an inferior officer can read between the lines when he is being lectured by a commanding officer or the staff judge advocate.

Senator ERVIN. That is largely a matter of interpretation.

Judge FERGUSON. It is matter of interpretation.

I do not wish to indicate that there is any conflict in the court. We judges are human, and now and then we do not see the same way. I want to——

Senator ERVIN. I have had experience to the same effect. I have been a judge on the Appellate Court, and I am compelled to say that on some occasions other judges and, indeed, a majority of the court, did not entertain the same sound views that I did. [Laughter.]

Judge FERGUSON. If I don't agree I write a dissent, and it may be gleaned from that that my belief is they have not used the same sound judgment that I would have used.

Mr. CREECH. Sir, would you like to expand further——

Judge FERGUSON. I approve of practically every word that Judge Quinn said. One exception is that Congress should look into the military practice in excusing jurors. The law now provides that the court members themselves pass upon their own qualifications.

I think we have had cases where even the man himself voted on whether he should be excused, but under the practice, when the evidence is put in and a challenge made all members but that individual go in and vote as to whether he should be excused.

Sometimes all the rest of them are subject to exactly the same challenge so it is very difficult to have members of the court pass upon the question, but that would be a matter entirely up to Congress.

Mr. CREECH. Judge, you mentioned the *Kitchens* case several times. I wonder if you would care to expand, on the allegations of defense counsel in that case.

Judge FERGUSON. The facts there are that the defense counsel indicated under oath that he was called before the staff judge advocate and told, in effect, if he wanted to have a career in the service he could not raise issues like command control or embarrass the staff judge advocate by putting in the record what that officer had actually done in connection with the case. Before raising these questions, the defense counsel had always received excellent efficiency reports. Afterward, his ratings were unsatisfactory. He felt it was solely because he had raised the defense of command control.

Mr. CREECH. So his efficiency rating was impaired?

Judge FERGUSON. Yes.

Now, as I understand it, the Army has eliminated efficiency reports on their law officers at the lower level. They are passed on only at the Department of the Army level. Of course, this was only a defense counsel in the *Kitchens* case. Perhaps the same procedure should be adopted on counsel.

Mr. CREECH. Sir, you mentioned undesirable discharges, and you heard a discussion here earlier today concerning it. I wonder, sir, what your view is with regard to the boards that have been proceeding and which have resulted in discharges. Do you feel these proceedings are adversary proceedings, and would you care to give us your views concerning the disposition of such discharges?

Judge FERGUSON. Well, I must say that I have been one who has concerned himself very little with undesirable discharges. I figure that they were not in the channel of cases that would come to our court, and I have not considered them as such and, therefore, I really could not tell you the exact procedure that is carried on down below in giving these kinds of discharges.

I understand from people, civilians, that the words "undesirable discharge" carry a severe penalty as far as a man is concerned when he gets out of the service. I wish I knew more about the practice, but I have always figured it was outside of the channel of the trial of court-martial cases, and I did not concern myself a great deal with it.

I did join in the annual report. I believe, in view of the way citizens feel about undesirable discharges, it should be considered a punitive discharge, no matter whether we, as judges, or the military think it is. If the public thinks it is a punitive discharge, then there should be an adversary proceeding with right of counsel.

One other question that I might differ with the chief judge, and it is only in a minor way, is whether or not our court ought to review these administrative discharge cases.

I am very happy, in fact proud, of the fact that this court is one of the few Federal courts whose docket is up to date. This has been hard work and cooperation on the part of every judge.

For instance, I think we tried cases this week where the briefs were in just a few days before. It means that the judges must examine those briefs and be able to sit ready for argument in a few days, which indicates that we are keeping the cases just as closely up to date as we can.

Senator KEATING. You examine a brief before the argument in your court?

Judge FERGUSON. Oh, yes. They file briefs, and then they come in, and we give them, as a rule—they can get more time if they apply—we give them a half hour on each side.

But I just wanted to say that to show how near up to date we are. We get them in just a few days, and we are ready for the arguments and we hear them and, as Judge Quinn indicated, some cases are out in a few days, and it is a rare case that takes longer.

There are some real problems that we have to look into. But the court has worked hard, and I think that the major cases—and these are major cases that come to the court—that it may be well to give some other court the right to review these administrative discharge cases.

I only cite that on the one proposition here and not that they should not have review; but I think that a criminal court, particularly where there is no bail, should keep up to date, and with this Congress has seen fit to say to this court, "that you have got to pass on every petition for a hearing within 30 days after it is filed with the court," which keeps us from getting behind because we have simply got to obey the mandate of Congress and see that this is passed on so that the man gets a hearing at the earliest possible date.

That is an unusual thing in the statute, but I am satisfied that Congress had in mind that these people would not be out on bail and that, therefore, it is very urgent that speedy and good justice be

administered, and I think that speed, particularly where there is no bail, is a very important element.

Mr. Creech. Thank you.

Judge Ferguson. If there are any other questions I would be glad to respond to them.

Mr. Creech. Yes. I believe Mr. Everett has some.

Judge Ferguson. I am only saying here, gentlemen, that in answering these questions on what the law ought to be rather than what it is, that is the basis of my answer, because I think the judges and the opinions of the court must always speak through the opinions—and I am speaking here, and I am being asked, and I am very happy to say what changes might help so that we would get nearer to what we all pride ourselves in, equal justice under law.

Senator Ervin. I would just like the record to show that the reason why the judges of the Court of Military Appeals are here is because the subcommittee invited them here.

Judge Ferguson. Yes; I thank you.

Senator Ervin. And the subcommittee felt they could give us some very good recommendations or observations as a result of the experience which they alone possess.

Judge Ferguson. I am very glad to come here, and I want to try to answer every question because I think that Congress is entitled to ask us these questions and, particularly, it is true because Congress indicated that they wanted the judges and the Judge Advocate Generals to make a report every year to the Congress.

That indicates that you want to know how we feel about it, and it also indicates why the judges, in my opinion, have traveled, and should travel, to get out into the field to learn from the staff judge advocates and the commanding generals how the law is working; not that we are going to be influenced as to how we should decide a case, but I think that we ought to know how it is working down below because we have to make this annual report to the Congress on any changes that we think ought to be made.

Mr. Everett. Judge Ferguson, are there any comments that you think should be brought to the attention of the subcommittee as a result of these trips that you have made into the field, any observations based on your conversations with commanding officers or staff judge advocates in the field which you think would be helpful in understanding how the code is working today?

Judge Ferguson. Well, I would share Judge Quinn's view on commanding officers.

I have found upon the part of local staff judge advocates that they find difficulty in acting in an impartial way. They are given a very difficult task. They have to review, they first review the case for the CA as to whether or not it will be tried by a general or a special court or tried at all, in fact.

Then, after the evidence is put in, they have to decide the questions of law and to review the evidence for the CA. Then, I think, the law at the present times provides that this same SJA should be in a position to give the defendant advice prior to the 32 examination which kind of puts the staff judge advocate in an odd position as a lawyer; he has grave difficulty in remaining a neutral in his eyes and sometimes in the court's eyes.

Mr. EVERETT. Do you see any way, Judge, to avoid developing this split personality for the staff judge advocate, any arrangement which could relieve that dilemma that he is subjected to?

Judge FERGUSON. I think the one thing that might be helpful, that might help him, is a lawyer who would be assigned to serve as counsel for all accused and with whom any individual might consult rather than to consult the SJA.

You see, the court has held under the statute, and it is a fair interpretation of the law, that a man is entitled to counsel at the article 32 examination, if he so requests.

Now, he is entitled to counsel there. But he is not entitled to appointed military counsel before that time.

We have held that he is entitled to know that he can consult counsel. But then he would have to hire his own unless the military wished to furnish him one. Lawyers, I think, are well aware of the facts that the time when a man really needs a lawyer is when he is arrested rather than after or at the time he is brought before the commissioner in a Federal court for examination.

But the law seems clear that there is no provision to give him a lawyer up until the time he appears at the article 32 examination.

Mr. EVERETT. So then you think it might be desirable to have, as it were, a public defender available as soon as the man is arrested?

Judge FERGUSON. If he wants one; yes.

Now, that may cause some increase in lawyers, but I think the administration of justice is such, gentlemen, that the United States can afford to have lawyers in these cases and provide them for these men who are taken into the service and are there serving their country.

Mr. EVERETT. In connection with the right of counsel and the special court-martial system as it presently operates without a requirement that a legally trained counsel be furnished to the accused, would you feel it desirable if the authority of the special court to mete out a bad conduct discharge were completely eliminated?

Judge FERGUSON. I agree with Judge Quinn on the question of bad conduct discharge. It is a very severe punishment, and experience has taught us that a man ought to have trained counsel in cases wherein a severe punishment may be imposed. It is impossible to have an untrained man defend a man for a crime but an injustice is done when the penalty is as severe as a bad conduct discharge.

A bad conduct discharge stays with the accused all his life. It simply cannot be compared to a sentence of 6-months' confinement.

Mr. EVERETT. Would the same reasoning, perhaps, be applicable along these lines, that in a civilian court a judge would normally preside over a trial before a major punishment was imposed, and similarly some type of qualified judge, whether you term him a law officer or whatever you might term him, should be provided to preside over any proceeding in which a bad conduct discharge were to be imposed?

Judge FERGUSON. I would have to say my experience at the bar and on the bench has been such that I think that should be true. I know there are State courts where supreme court judges do not have to be trained on the law, and sometimes in reading their opinions we discover that they are not. But I really think that our justice demands trained men. It is just like the medical profession and the other professions.

Mr. EVERETT. Judge Ferguson, you discussed the right to the assistance of counsel in several contexts as it is implemented in military justice today.

Do you have any other observations with reference to the availability of counsel and the assistance of counsel, based on your experience with the court?

Judge FERGUSON. I wish you would repeat that, I did not quite get the significance.

Mr. EVERETT. You discussed certain phases of the right to the assistance of counsel as it exists in military justice today.

I wonder whether you had any other observations with respect to this right, either ways in which it could be better implemented or any defects that you think may currently exist in preserving this right?

Judge FERGUSON. The cases indicate that the staff judge advocate should construe the accused right to counsel more liberally and see that he is furnished the proper advice when he requests it. In like manner the criminal investigators should make every effort to see that accused obtains access to counsel when he states that he desires to speak with one. This is merely a matter of interpretation but I think that some of the cases establish an overtechnical interpretation of the right to counsel.

Mr. EVERETT. Judge Ferguson, I would gather from your earlier comments that you would take very much the same approach to the Army's field judiciary program as Judge Quinn does.

Judge FERGUSON. Yes. I share his views in what he expressed here, and I think it has helped.

I might add just a reason that, we are getting opinions out every week. We now have 12 volumes, and they are quite large, 700, 800 pages in a volume.

If a man is not on the job continually he just simply cannot keep up to date and, therefore, he is handicapped when it comes to instructing a jury or passing on the law.

We all know, as lawyers, the importance of getting advance sheets to us so that we know what the current law is.

Now, that Army procedure gives them an opportunity if they have a day off in which they can study, they can really work at the law as a judge.

Mr. EVERETT. In connection with the role of the law officer, the military judge, would you think it would be desirable in other ways to bring his post more into conformity with a Federal judge, as by giving him the power to excuse members of the jury who were disqualified or by giving him some authority with reference to the sentence, just as a Federal judge would normally be imposing a sentence?

Judge FERGUSON. I think you would speed up justice, and I think that you would have a better job if Congress did try to give him more authority and have him feel that he was a real judge, and that the members of the jury would look on him as a judge and take the law from him rather than take what they may think is the law.

I think the average juror in a Federal court has great respect for the judge, and you can see when they are being instructed that they hang on every word that he is saying because they feel that he is the man who is telling them the law and reviewing and telling them the theory of the case, and I think the more respect you can get for the law officer the better.

Mr. EVERETT. Would this, in your opinion, then better assure the maintenance of due process at the trial level, that is, building up the authority of the military judge?

Judge FERGUSON. I would say so.

Mr. EVERETT. With reference to the boards of review, the intermediate appellate courts, as it were, I would like to ask you whether you have any suggestions or proposals which you think might lead to improvement of their operations or whether, on the other hand, you feel that there is no need for change at the present time?

Judge FERGUSON. I would share Judge Quinn's views of longer tenure. I think that it is important there that you treat these boards of review as an intermediate court. They are really intermediate appellate courts. They have the power to pass on the facts and review the facts and the law, which is a very important function.

Where a man who is just put on for a short time, then taken off, and another man put on, they just simply cannot keep up with the law.

I remember just one case, the *Hardy* case, I think, where the record itself showed about 14 different members on a board of review in a period of 6 or 8 months, reviewing a particular case, changing members.

I believe that longer tenure would make for a better system. I also believe that the boards would be better if the chairman did not rate the other two members. I was not aware of this practice before, and I understand that it is not followed in the Navy. I share Judge Quinn's view on that, and I do not see how men can function as judges if they are going to be rated by the ranking member of the board. At the trial level the younger men are required to vote first on the findings and sentence in order to get away from their superior's influence. It would seem that this philosophy should eliminate any such rating system as the military now uses on the boards of review.

Senator ERVIN. I might state, Judge, I understood the witnesses to say that they did not make any estimate for efficiency rating purposes on the basis of service on courts-martial.

Judge FERGUSON. Well, I had not heard that they even passed on the efficiency. I do not know what other efficiency you would have unless it would be attendance or something like that.

Senator KEATING. Well, an ordinary officer being assigned to duties that were not in the Judge Advocate General's department, being assigned to defend an accused, he would be subject to being rated by his superior officer?

Judge FERGUSON. Yes, sir.

Senator KEATING. And his rating would be based on performance in the field or wherever it was, without regard to the court-martial. I did not know, is there something——

Judge FERGUSON. I think they are rated also on their efficiency in the trial of cases and all legal work.

Senator KEATING. I would assume that is part of the officer's duties, and that his rating would be based, in part, on that, too; I do not know.

Judge FERGUSON. I understand that is true down below. I had not known about it in the boards of review.

When I was a member of the Hoover Commission I am almost certain that we advocated placing the boards of review, the Judge Ad-

vocates General, and the entire administration of military justice under the civilian Secretary rather than the executive officers down the line.

Senator KEATING. I believe there have been some complaints that subordinate officers got a poor efficiency rating sometimes, they felt, because they were vigorous in the defense of some accused.

I had a very good rating. The only cases I ever had my client was convicted and sentenced to life imprisonment. That is the only one I defended, so apparently it did not affect my efficiency rating. [Laughter.]

Mr. EVERETT. In light of the proposal to which you referred a moment ago, based on your work with the Hoover Commission, your discussions with them, would you consider, perhaps, it desirable to unify the boards of review, having a service Board of Review, a Department of Defense Board of Review, rather than, and instead of, an Army Board of Review, a Navy Board of Review, and an Air Force Board of Review?

Judge FERGUSON. I think that is a good suggestion. You would then have unification, and I think when Congress passed the code they had in mind unification. I think that is one area that the military would welcome unification.

Mr. EVERETT. I suppose if that were unified it might not make too much difference whether they were civilians or military.

Judge FERGUSON. No, or military.

Mr. EVERETT. Do you have any caveats, worries or current concerns about the Army procedure for negotiated guilty pleas?

Judge FERGUSON. Well, I must say I think some of my opinions on the court have indicated that I was concerned with the guilty plea program. I am still concerned with it.

I came from civilian work, and I have some difficulty, and do yet, in accepting a procedure whereby a judicial officer, the CA, negotiates with a defendant, an accused, for a plea of guilty in return for the approval of a sentence which does not exceed certain limitations. It is simply improper to obtain a guilty plea by promising an accused that he will not receive more than a certain sentence.

I think it takes a very strong lawyer for the accused in that kind of a case to advise his client to plead not guilty. There is a great temptation to take lighter sentence, rather than contest guilt even though the accused does not believe he is guilty. It puts a great strain on the accused.

But it is the law, and I am one who believes in following the law. What I am suggesting here today would require a change in the law.

Senator KEATING. Judge Ferguson, you referred to the fact that there is in the Code of Military Justice some provision now about command control. In general, what does that say? I am not familiar with it.

Judge FERGUSON. Well, in general, it says that there shall be no command control at all.

Senator KEATING. Does that mean command control of the members of the court?

Judge FERGUSON. Members of the court and the lawyers.

Senator KEATING. What about the defense counsel? Suppose he is called in and he is told, "I want you now to defend this case but, of

course, this fellow is guilty and this is a great international incident and we have got to have him convicted," and you go in and do the best you can. Would that be considered command control?

Judge FERGUSON. Would you pardon me if I do not answer that? That may be the case tomorrow.

Senator KEATING. I see.

Judge FERGUSON. I do not know, but I say——

Senator KEATING. I will withdraw that.

Judge FERGUSON. If you will pardon me, I will refer you to my opinion in the *Danzine* case. My views on command control are set forth there. I am sure counsel will be able to give you a copy of that opinion.

Senator KEATING. I never realized that was in a pending case.

Judge FERGUSON. It may not be, but it may be a case tomorrow, and if I answered here, I might have to excuse myself from sitting on the case.

Senator KEATING. I certainly would not want to bring that about. I was referring more to the point of general information.

Judge FERGUSON. But the statute is very general and, as I have indicated, if I have any dispute with my colleagues on this question and the opinions speak for themselves, it is only on the interpretation.

I may have a sentence from a juror in one of these cases that I could tell you why we differ a little bit on the interpetation of what is command control.

Senator KEATING. When you say a juror you mean a member of the court?

Judge FERGUSON. Yes, I mean a court member.

Senator KEATING. Do you carry all your opinions around in your pocket?

Judge FERGUSON. As a major said in a recent case in relation to his voir dire examination, "It isn't really difficult for a line officer to realize what the General wants when he speaks."

Senator KEATING. We are very grateful to you, Judge Ferguson, and you have been very helpful to the committee, and we appreciate it very much.

Our next witness is Judge Paul Kilday whom we welcome here. The acting chairman, who rarely has the privilege of being even an acting chairman, is particularly pleased to greet him.

I think this is one of the very best appointments that President Kennedy has made.

I served with Paul Kilday for a great many years, and he was highly respected in the House of Representatives.

We are very delighted to have you here to give us the benefit of your views.

## STATEMENT OF HON. PAUL KILDAY, JUDGE, U.S. COURT OF MILITARY APPEALS

Judge KILDAY. Thank you indeed.

Judge FERGUSON. May I just thank you, Senator. You have been so kind, gentlemen, and I want to thank you for it.

Senator KEATING. Very well.

Counsel, do you have some questions?

You do not have a prepared statement, do you?

Judge KILDAY. I do not have a prepared statement, Mr. Chairman, but I would first like to express my appreciation for the very kind remarks you have made with reference to my coming here and, perhaps, I should state at least this for the record:

That on the 25th of this month I will have been a judge of this court for 6 months. There is a great deal to be learned in these 12 volumes of opinions written prior to my coming.

But the number of petitions for review is such that I think that I am learning pretty rapidly, because they are cited many times as we come to these petitions, and the cases which we have heard.

I am having what I regard to be a rather unique experience. Prior to coming to the court, as the acting chairman has mentioned, I was a member of the Congress for a considerable number of years.

During all of that time I was a member of the Committee on Military Affairs and the Committee on Armed Services after the Reorganization Act.

The Elston Act was written in the 80th Congress, in which we Democrats were in the minority, and I served as the ranking member of the subcommittee which wrote it.

Mr. Elston of Ohio was chairman and I was the ranking Democrat of that committee, and the Record, the Congressional Record, will show that Mr. Elston and I together presented it to the House.

Senator KEATING. Very well, and it was very well presented, as you always presented things.

Judge KILDAY. Thank you.

I was not a member of the subcommittee which wrote the code, but I was a member of the full committee and did participate to some extent in the hearings before the full committee when the subcommittee reported, and you will find that members of the committee appointed by Secretary Forrestal appeared before the full committee to explain and defend the report of the subcommittee, including Mr. Larkin, Professor Morgan, and the others.

Of course, in the Elston Act we made what was then regarded as a number of radical departures from the system of military justice.

Of course, I remember quite well the complaints which were made by those who returned from World War II as to what they had seen with reference to the administration of military justice; the complaints that men were unnecessarily thrown before a court-martial, that they had in their records even though they had been acquitted that they were tried by court-martial when, perhaps, they should never have been tried at all; and the complaints that when they did reach the court-martial they received something a good deal less than traditional Anglo-Saxon justice.

It was charged, and never denied, that it was not unusual for the convening authority to instruct the court as to the decision to be reached.

It was charged and not denied that the convening authority would actually and officially reprimand the court for having failed to follow the instructions that they had received as to the manner in which to dispose of the case or to reprimand the court for its disposition of the case.

Of course, it was felt that, perhaps, subsequent reviews were not adequate or sufficient to protect the innocent and to accord him a fair trial according to the types of justice that are ingrained in the American people.

Now, the unique part of my experience is that I am looking at it from the other end on the court to see how well we anticipated things and what has been done in connection with correcting them.

I think I can say that there has been a remarkable improvement. Of course, we undertook in the code to provide—you asked about the provision of the code, it so happens that no one here has a copy of the code with them, so far as I know, but the provision is that any person who shall attempt to direct, coerce, intimidate, or in anywise influence the decision to be made shall be guilty of a court-martial offense.

The court has never been divided on the idea that there shall not be command control. There have been divisions as to the application of the facts of a particular case to what constitutes command control.

Senator KEATING. Has there ever been a case where a commanding officer has been charged with trying to influence the decision of a court-martial? Where he has actually been court-martialed for it?

Judge KILDAY. No. Nobody has ever been tried for that, no, sir; not to my knowledge.

Judge QUINN. No.

Judge KILDAY. Judge Ferguson referred to the *Danzine* case. It was decided by the court last fall before I came on it, or last spring before I came on the court, and there was another case pending which had come from the same command, involved the same lecture, and I wrote the opinion after coming to the court.

This is just a difference in viewpoint of judges of the same court. Judge Ferguson inclines to the view that a lecture to the members of the court is, per se prejudicial as being command influence.

The majority of the court now, and prior to my coming, have always held that it depends upon the content of the lecture.

These were lectures given by the staff judge advocate and the commanding general, the convening authority, to the men who had been chosen on courts. It was actually a very long and very detailed and a very fine exposition of civic responsibility, actually.

Now, the court has never failed to reverse where it has been determined that action of this kind, the content of the lecture, has been in anywise coercion, intimidation, or an attempt to direct or anything of that kind.

The difference has been whether it is per se prejudicial and reversible.

It comes up occasionally, I am sure it will always continue to come up, and I think that is where the value of this court will always be, as in the *Kitchens* case, there were a series of those cases decided, I think, since the first of the year, just about this time, and there again the staff judge advocate figured that he had figured out a clever way to get this done and, of course, it did not work.

I think the actual attempt to intimidate courts or instruct courts or reprimand them is pretty well on its way out. I understand that General Harmon testified here this morning. I was a member of the Armed Services Committee during the many years that he was

Judge Advocate General of the Air Force. I know him very well and I have great respect for him, and General Harmon did a fine job as Judge Advocate General of the Air Force.

Of course, he served under the articles of war of 1920, and under the Elston Act, and the Uniform Code of Military Justice. I believe his view is that the Uniform Code is the least desirable, but he would prefer the Elston Act.

I have no doubt but that General Harmon did a very good job under the 1920 Articles of War, considering what he had to work with, I can understand how a thoroughly honorable, honest, and sincere man, as General Harmon is, would feel that the 1920 Articles of War were abundantly sufficient, and that he did actually administer substantial justice in the military under the articles of war of 1920. However, civilians who served during World War II would not agree. We have progressed further than that in modern times.

There have not been too many revisions in military justice in the history of the United States.

Of course, after all, our Military Establishment in peacetime heretofore has been a volunteer or contract service. The people generally have been interested when they have been called to the service in time of war, and when they went home, for a little while they cussed about it, and then they forgot it, and nothing was done about it.

But I think under the code you have come a whole lot nearer the Anglo-Saxon concept of justice and there has been great progress made.

The question was asked as to counsel. I think the records reflect that counsel pretty uniformly do a very good job. True, many of them are very young, but those who appear before us, those who are very young, are very enthusiastic also, and very tenacious, and they have really prepared their cases by the time they get to us, and I am very pleased that mere rank on the other side of the case does not seem to bother them a particle. They present their case the same as if the fellow on the other side was of equal or lesser rank. I think that that part is doing pretty well.

Now, it could be—well, any code probably will need amendment as time goes on. One of the early codes said that it shall never be amended. This code, of course, recognized that it would probably need amendments; and the code meeting between the judges advocate and the court and the reports all indicate that this was for the purpose of amending, modifying, and improving the code.

It could be that in tightening up from a very loose control or no control under the old articles of war they were tightened too tight. I do not know. That is a matter of legislative judgment for the Congress to determine.

Whether we tightened too tight in the article 32 hearing or whether the pretrial advice from the staff judge advocate to the convening authority is too tight, whether we have imposed too many reviews, that is a matter of legislative examination and determination as to whether anything should be done.

Of course, the code leaves questions of law up to the boards of review, and facts also. I do not know that any of these reviews should be eliminated.

I think the military should be very proud of their record in the administration of military justice before our court. We do not grant more than 10 percent of the petitions which are filed with the court, and of that 10 percent I think it runs 45 percent of the decisions of the court are favorable to the accused. So rather than complain, the military should boast of their record. I do not believe that civilians administering justice could have a better batting average than that when they have reached the final appeal of the civilian cases.

Where only 10 percent are reviewed by—10 percent of the applications for review are granted, and of that 10 percent, 45 percent are favorable to the accused, the military, I think, have very fine records in the administration of justice.

Mr. CREECH. Judge Kilday, I did not want to interrupt your remarks concerning the questions which have been asked earlier. If you have anything further which you would care to say about those, please say so.

Judge KILDAY. You see, speaking in the Senate here with no time limitation on debate, I was taking advantage of the restrictions under which I served in the House under the 5-minute rule.

Mr. CREECH. We are delighted, sir, and we appreciate your remarks. But if you have no further elaboration on the questions which had been posed previously, I would like to continue with some other questions, if I may.

Judge KILDAY. Very well.

Mr. CREECH. You alluded to some of the testimony which the subcommittee has received earlier today, and in view of your vast experience in the Congress as a member of the House Committee on Armed Services, and your intimate knowledge and participation in the drafting of the Elston Act and the Uniform Code, I wonder, sir, what your reaction is to the allegation that the Uniform Code is unwieldy and cumbersome in peacetime and would probably be unworkable in the event of a major large-scale war?

Judge KILDAY. Well, my experience this far convinces me that it works all right now under the present situation, whether this be peace or cold war or what it is, with 3 million men under arms; I think it works all right.

Now, I am impressed with the fact that it apparently worked all right during the Korean incident, although I was not then connected with it.

Of course, there is a provision in the code for branch offices of the judge advocate generals; there is no comparable provision with reference to the court. It could be, if the load got so heavy that the court could not carry it, maybe at that time if it is not done before that, the court could be increased by, say, two members, and authority given to assign Federal judges to it, and authority to sit where, in the judgment of the court, it would be necessary.

I do not think that is anything that would be too difficult to overcome.

If it were thought now or later or at the time of the emergency to place additional judges on the court and permit the assignment of circuit court judges or district judges, who are available to sit with them, you could do that quite easily.

Mr. CREECH. Sir, would you care to comment on the allegation concerning the Uniform Code that there are certain serious defects in its operation; namely, delays in the processing of cases, the high cost of administering justice under the code, and emphasis on form over substance, and some of the decisions of the Court of Military Appeals?

Judge KILDAY. What was the last?

Mr. CREECH. Some of the decisions.

Judge KILDAY. As I say, I do not know all of them yet.

Mr. CREECH. I am not giving you any citation, I am sorry, there is no specification here.

Judge KILDAY. As I said, we may have gone too far in the Congress in tightening up on these pretrial procedures. It may be that in the judgment of Congress there should be some lessening of that, perhaps in the reviews, and so on. What I would like to see the man in the military service be assured is what he would have if he were not in the military service, the protections he would have if he were a civilian, as nearly as possible, in view of his military status. So if, being accused of crime, he is taken before the equivalent of a committing magistrate, that he there have the protections which the civilian has, and I do not think that he needs any more.

I believe we get substantial justice in the civilian community, and that he have a trial before a court-martial which observes his constitutional rights, those traditional rights, that have gone into the system.

Mr. CREECH. Yes, sir.

Well, along that line I wonder if I might ask you, sir, about your views concerning retired personnel who are not on active duty. Do you feel that the military should continue to have jurisdiction over them or do you feel that this jurisdiction should be eliminated?

Judge KILDAY. Well, of course, you know in the House we wrote some things into the code about where we thought jurisdiction should extend. The Supreme Court did not agree with us on all of it. They reversed it.

I do not know what the disposition of the Court might be with reference to retired people. My experience with retired military men is that their greatest boast is that they are still soldiers or sailors, and that they are still in the military, that they are in retired status rather than active duty status, and it is a source of great pride to them.

I know there have been a few people called to duty and tried who have been retired, but not many. It is really not a major situation at all.

I do not see much objection one way or the other. I would think that the retired miltiary, as a whole, would prefer to have their status as military people remain the way it is, because they are very proud of being military men even though in retired status.

Mr. CREECH. Sir, I realize as Judge Ferguson has said that the undesirable discharge is being given administratively and are not reviewable by the court. But in view of your vast knowledge of the subject of military justice and your intimate association with the regulations promulgated by the services and the administrative procedures, I wonder, sir, what your feeling is about such discharges and whether you feel they are adversary proceedings; whether you feel

there should be some provision made for them to be reviewed by your court, by the Court of Military Appeals?

Judge KILDAY. First, I do not know whether I can tell you what the solution ought to be. While I was a member of the House this matter was discussed informally many times. It came up in connection with Mr. Doyle's subcommitte, and so on, and, of course, traditionally the military have had the power to do these things, to put an evaluation of character even on the honorable discharge, character, excellent, good, poor, or whatnot, and to issue these general discharges, undesirale discharge or habits and traits of character, and so on.

Now, I think that any lawyer trained in the English system of law, is pretty much amazed when you find that administratively you are making an evaluation of a person's character or conduct.

We all know that there are men walking the streets who are as guilty of all sorts of crimes as they can be, but they have never been found guilty, so there is no record attached because you cannot convict them in the courts of law.

Here you have men who are convicted administratively by being given discharges, who have very substantial amounts of forfeitures which, if not actually illegal, carry actual forfeitures. But then you have the practical situation.

If you have a fellow aboard ship who pretty nearly everybody on the ship figures is a homosexual, and you have everybody upset or you have a barracks thief who is such a good barracks thief that you have not been able to catch him with the goods, but you have got it reasoned down that he is on the only one who could be doing it, what are you going to do, keep the homo aboard ship or send him to another one? Are you going to keep the barracks thief there? You have a practical situation, so you do not know what to do about it. I do not know where you ought to stop in between.

If there were some type of review, I think that would help immeasurably.

At the present time there is only an ex post facto review, correction of military records.

It might be that you could have a review prior to the execution of the discharge by a Board of Review or something of that kind that would be of great value there.

I am sure that the chairman's experience in the Congress is like mine, that when you subject administrative action to review you get a whole lot better administrative action than when no review is necessary, even though it may not be a review within the department.

You will find, for instance, in permanent changes of station, that an individual shall not have more than one permanent change of station in any fiscal year unless it is approved by the Secretary.

It turns out that they just do not do it because they are not going to prepare all those papers and send them up to the Secretary to get permission for them to get a change of station.

You cannot build a laundry at any post or station except in an isolated area without approval of the Secretary of Defense. I do not think there has been a laundry built since that went into effect. They find ways and means to get the washing done rather than to disturb the Secretary.

84154—62——14

I think here if you had some type of review it would be better. Now, whether our court could handle it I do not know because, you see, we do not get appeals directly from courts-martial. We have jurisdiction of cases reviewed by a Board of Review, and a Board of Review has jurisdiction of those where it is a bad conduct discharge or 1 year or more confinement. So that the number is cut down considerably before it reaches us.

Mr. EVERETT. Judge Kilday, with reference to the lectures given to court members before a trial, whether immediately before or some earlier time, irrespective of whether they are just general discussions of members' responsibilities or more specific in their application, do you feel that it would be a major impediment to military discipline if military commanders were prohibited from giving this type of instruction?

Judge KILDAY. No, I do not think it would. Probably more properly these should be to the whole command or the officers of the whole command. It is practically a lesson in civics if it is well done, civic responsibilities, and so on.

It is a whole lot equivalent to what they give jurors in Federal Courts now, I understand. In my time of practice they did not do that, but I understand there is a booklet now that is pretty generally circulated to them. I know in Texas in impaneling the jury for the term or for the week, the judge customarily gives quite a lecture on the responsibility of jurors, just to the panel, before any are chosen.

He probably puts in a little good campaign speech for the next election for himself when he does it.

Mr. EVERETT. Well, the officer would not be campaigning for re-election. Can't he do it before, with the panel before, the case began?

Judge KILDAY. Yes.

Mr. EVERETT. Incidentally, the chairman was informed yesterday in testimony by the Navy witnesses that they have thought of some type of handbook which might be given to court members, something similar to a juror's handbook. Would that comply with what you had in mind basically?

Judge KILDAY. I would like to see the book.

Mr. EVERETT. Judge Kilday, in light of your extensive experience with different types of discharges during your 24-some years in the Congress, I wonder whether you considered that there was any need for the general discharge which seems to be neither fish nor fowl?

Judge KILDAY. I do not know that I can tell you. Actually I do not know what it is.

Mr. EVERETT. It has been one of the things that the subcommittee has been trying to work out, exactly what it is, and it has been a little hard to resolve.

With reference to the administrative procedures and other procedures currently applicable, do you think there is any substance to the allegation sometimes made that people get honorable discharges in some instances simply because it is too much trouble under existing law to give them the type of discharge they really deserve?

Judge KILDAY. I do not know. I guess they cannot get a dishonorable discharge for them because they cannot convict them. The only way you could get a dishonorable discharge, is to be convicted by a general court.

I suppose there are some, just as we have civilians walking the streets, who are awfully guilty of an awful lot of crimes who have never been convicted.

Mr. EVERETT. That is all.

Senator ERVIN. Do you have any questions?

Judge, we miss you over here on the Hill.

Judge KILDAY. Thank you.

Senator ERVIN. I will confess that sometimes we envy you in that you are now in a place where if you find out what the facts are you can tell what the decision is going to be. Over here, we still conduct our business as though we do not hardly know what the facts are.

Judge KILDAY. Mr. Chairman, I miss the Hill over here sometimes. I enjoy what I am doing, the idea that you do not have a thousand things to handle at the same time, but you take one case and pursue it to the end, is really enjoyable.

Senator ERVIN. The committee certainly is grateful to you for coming before it and giving us the benefit of your views, at the request of the committee.

Judge KILDAY. Thank you, sir.

Senator ERVIN. Thank you.

The subcommittee will now adjourn subject to the call of the chairman.

(Whereupon, at 4:35 p.m., the subcommittee adjourned, subject to call.)

# CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL

---

**THURSDAY, MARCH 1, 1962**

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10:20 a.m., in room 457, Old Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee), presiding.

Present: Senators Ervin (presiding), and Keating.

Also present: William A. Creech, chief counsel and staff director; Robinson O. Everett, counsel; Bernard Waters, minority counsel; and Robert Kutak, legislative assistant to Senator Hruska.

Senator ERVIN. The subcommittee will come to order.

First I wish to apologize to those present who are appearing before the subcommittee for my tardiness. There are just not quite enough hours in the day for us to do all the things we have to do and I had to attend another meeting at the Mayflower Hotel.

We have several constituents of a member of the subcommittee, Senator Keating, and I would be glad to give Senator Keating an opportunity to make his statement if he would care to make it at this time. He is one of the hardest working Members of the Senate and ordinarily he is very sound on all his positions except on those occasions when he disagrees with me. [Laughter.]

Senator KEATING. Mr. Chairman, I thank you for those very kind words. We all know how very fair you have been in these hearings. Our disagreements involve matters of principles, not personalities, of course.

I think it should be noted for the record that the meeting which you modestly referred to was a prayer breakfast and the Senator from New York should have been there, too. I don't know anybody who needs it any more than the Congress of the United States, and the country, and I hope that the prayers of our chairman were broad enough to cover at least all the members of this committee.

This morning, we will be hearing the chairman and members of the Special Committee on Military Justice of the Association of the Bar of the City of New York. This committee has done an outstanding job in its study of the Uniform Code of Military Justice and in its proposals for a number of amendments to the Uniform Code to insure that the constitutional rights of servicemen are fully respected in all courts-martial and other legal proceedings.

Mr. Frohlich, who is chairman of the committee, and Messrs. Burns and Rapson have studied the military needs with great care and I believe their testimony can be most valuable to the subcommittee.

We are also going to be privileged to hear testimony from Colonel Paston, a member of the Committee on Military Justice of the New York County Lawyers Association. He is the author of "Superior Orders as They Affect Responsibility for War Crimes," and the standard civil law book, "Summary Judgments." He was a trial judge advocate in 1946 during the Austrian war crimes trials. I am sure he will have a great deal to contribute to this hearing. He is accompanied by Major Nordlicht, who is assigned to the 1328 Judge Advocate General's Corps Training Center. His services in the selection and evaluation of officers for the corps have been most useful.

Mr. Chairman, the Bar Association of New York has been very much concerned to insure that servicemen have available counsel of the highest caliber, who are not subject to command influence, and counsel with full experience in court-martial proceedings.

Among other points, they rightly insist that the law officers should not have any power to consult with court-martial members without the presence of the accused and his counsel.

I want to say to these gentlemen from New York we are very grateful to you for coming down to Washington today to give us the benefit of your considerable study and research and knowledge in this area, and I thank you, Mr. Chairman, for permitting me to make these few opening remarks in greeting my friends from New York.

Senator ERVIN. I wish to join you in expressing the thanks of the subcommittee for their willingness to come and give us the benefit of their study and experience.

Counsel will call the first witness.

Mr. CREECH. Mr. Chairman, our first witness this morning is Hon. D. George Paston, member of the New York bar representing the New York County Lawyers Association. He will be accompanied by Mr. Harold Nordlicht of the New York bar.

## STATEMENT OF COL. D. GEORGE PASTON, CHAIRMAN, COMMITTEE ON MILITARY JUSTICE, NEW YORK COUNTY LAWYERS ASSOCIATION; ACCOMPANIED BY HAROLD NORDLICHT, MEMBER, NEW YORK BAR

Mr. PASTON. Mr. Chairman, and Senator Keating, my name is D. George Paston, Major Nordlicht and I are here at the kind invitation of your committee to present the views of the Committee on Military Justice of the New York County Lawyers Association.

I am the chairman of the Committee on Military Justice of the New York County Lawyers Association, which is the largest local bar association in the country. I served in World Wars I and II. I was a summary court officer, a member of special and general courts-martial, a judge advocate—now called trial counsel—and defense counsel in trials before military courts. I was the trial judge advocate in the war crimes trials held in Austria in 1946.

I also served as defense counsel before the Army review board and the U.S. Court of Military Appeals. I practice law in New York and am admitted to practice before the Federal district and appeals courts and the U.S. Supreme Court. I have had experience before Army administrative boards. I am the author of the two volumes that Senator Keating referred to before in his opening statement.

The members of our committee have had extensive military law experience. Major Nordlicht, after serving in Air Force Intelligence, has, since 1948, been assigned to the 1328th JAGC USAR Training Center in New York where he acts as instructor to its members who are civilian lawyers and reserve judge advocates. He served on a board of officers to consider applicants for commission in the JAGC and on a board of officers to consider the retention or discharge of a JAG reserve officer.

Our committee meets several times during each year. We have furnished to your committee our reports of December 10, 1958, May 1, 1959, May 1, 1960, May 1, 1961, and our letter of February 7, 1962, addressed to you, Mr. Chairman. I make reference to and do not read those reports and letter to avoid burdening your committee with a repetition of its contents.

We are interested in the principles involved and have avoided any reference to semantics in our reports.

Senator ERVIN. Pardon, we will insert a copy of the letter in the record after your statement.

Senator KEATING. Should the reports also, or are they too voluminous?

Mr. CREECH. Yes.

Senator ERVIN. They will also be inserted in the record. In order not to break the continuity of your remarks, we will insert them in the record after your statement is completed.

Mr. PASTON. Thank you, sir.

We are interested in the principles involved and have avoided any reference to semantics. Nevertheless, language employed in proposed amendments to the code should not obfuscate the intent. In the Army's A bill, B bill and D bill, that is erroneous because it is the Department of Defense bills, it is not the Army's bill, so wherever we make any reference in our reports to the Army's A bill, B bill, or D bill, we mean the Department of Defense's bills.

Now, in the Department of Defense's A bill, their proposal to amend article 15 is not altogether clear.

The present article 15 is clearly and simply worded. We say that that language should be retained and only the nonjudicial punishment limitations should be added to as proposed by the Department of Defense without changing the language.

We also suggest and recommend that article 15 should be amended to contain a provision that, "No disciplinary punishment shall be imposed for an offense punishable under this article if the accused has, prior to the imposition of such punishment, demanded trial by court-martial in lieu of disciplinary punishment;" otherwise, the intent of Congress may be thwarted.

"The Manual for Courts-Martial," section 132, provides that no member of the Navy or Coast Guard may demand trial by court-martial in lieu of punishment under the provisions of article 15. In our opinion, members of these Armed Forces are entitled to the same safeguards as members of the Army and Air Force.

The method of carrying out this purpose is demonstrated in appendix 3, pages 459–461 of the manual.

In subdivision (e), p. 4, of the Army's proposed A bill, the fact that a disciplinary punishment has been enforced may be shown by

the accused upon a 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. To properly safeguard each accused, provisions should be made that,

> After a finding of guilty and before sentence the fact that a disciplinary punishment has been enforced must be annexed to the written charges before the court * * *

otherwise, the failure of an accused to show such fact will deprive him of such consideration. The extent of punishment should be measured by the offense charged and of which an accused has been found guilty—not by his alertness in calling the court's attention to an admitted fact.

Now, we address ourselves very briefly to what we consider to be the most important subject and we say that unless the Congress is convinced, and we are not, that there is need for a special court-martial, we recommend that we should not have a summary court or a special court. We should merely have a court-martial.

The Department of Defense's proposed B abolishes the summary court, retains the present special court and general court, and adds new single-officer special and general courts. A greater economy in trained legal personnel can be effected by abolishing the summary and special courts, leaving only (a) commanding officer's nonjudicial punishment, and (b) court-martial, the said court staffed by a law officer, trial counsel, and defense counsel.

The Army proposes—we mean that the Department of Defense proposes—a court presided over by a single law officer if the accused, knowing the identity of the law officer, after consultation with counsel, requests that the court be composed of a law officer, instead of by the law officer so identified.

We give him the privilege of being tried by a court presided over by a law officer already identified, but then we say we will give him a trial by a law officer who may be somebody other than the one already identified. And then the proposal goes further and strips the accused entirely of that privilege by providing that he may have such a trial if the convening authority consents thereto.

If we give him the privilege we should let him have it and not take it away with the other hand.

As the chairman pointed out, our report will be annexed here so I need not go into the details of those changes to various sections of the proposed Department of Defense bill, to eliminate references to the special court which we hope will be abolished the same as the summary court.

Now, article 37 relating to command influence, we recommend that the article be implemented by providing that efficiency reports on and promotion of law officers, trial counsel, and defense counsel shall be the sole function of the judge advocate of the service of which he is a member, and that no convening authority or commanding officer shall, directly or indirectly, intervene in the conduct of any trial or its results.

We cannot stress too strongly that every court should have a law officer, trial counsel, and defense counsel, each certified as qualified and we have pointed out in our reports several ways in which it can be done, and it can be further accomplished by doing away with the

special as well as summary court. Otherwise, we may revert to a situation shown in *Morris B. Brown* v. *U.S.*, No. 50362, decided October 8, 1958, by the U.S. Court of Claims, volume 143, page 605. In that case, the plaintiff, Morris Brown, had been commissioned in 1942 as an army captain. He underwent the necessary physical examinations in connection with his commission and was found normal in all respects. He was on active duty from September 8, 1942, to December 1944. He was detailed as regular defense counsel to a general court-martial convened in Paris. He was not a lawyer, had no training or experience in the law, and had never served as trial judge advocate or defense counsel before a court-martial prior to that time.

Outside of two periods of hospitalization in December, he served as the active defense counsel in 50 or more cases tried from November 6 to December 26, 1944, representing Army personnel charged with major offenses including capital crimes, black market dealing, larceny, rape, desertion, sodomy, striking an officer, and other crimes. Heavy sentences were being passed as a matter of policy, and three or four of his defendants received sentences of imprisonment for 99 years.

The officer who prosecuted most of the cases, in which Brown acted as defense counsel, was a former district attorney. In all cases Brown's opponents were experienced lawyers as were many members of the court-martial. Brown had three and sometimes four assistants to help him in the preparation of the cases for trial but none of these assistants were lawyers or trained in the law in any degree. Besides the heavy sentences meted out to those he "defended," Brown wound up being retired for bronchitis and psychoneurosis.

Senator KEATING. How does a thing like that happen with a man entirely untrained in the law placed in a position like that?

Mr. PASTON. That was prior to the enactment of the Code of Uniform Military Justice.

Senator KEATING. Weren't there trained lawyers in the command there?

Mr. PASTON. There certainly were, because as the decision of the U.S. Court of Claims points out they took the trained lawyers that they had, one of them an ex-district attorney, but used him for prosecution, and used other lawyers as members of the court. They used Brown and his assistants, all nonlawyers, to represent defendants. Brown served as "defense" counsel in addition to his other duties as a transportation officer.

No wonder he wound up in a psychoneurotic condition after some of his people were sent up for 99 years.

Senator KEATING. How did this case arise, what was the nature of this case against the United States?

Mr. PASTON. Brown sought to be retired and his retirement was denied because a psychiatrist had said that in his opinion Brown had this condition before he went on active duty.

Senator KEATING. This was a review of that finding?

Mr. PASTON. That is right.

Witnesses testified that he was in good condition mentally, physically, and otherwise, when he entered active duty and that this condition developed as a result of this experience he had in the Army. The Court of Claims wound up with these facts as findings that I just read, and directed that he be retired.

That condition, I don't think can exist today in view of the Uniform Code of Military Justice.

I think that is the best argument against a proposal I heard recently by somebody to do away with the Uniform Code of Military Justice.

When my committee met recently in New York, your assistant counsel, Robinson Everett, Esq., was present. He impressed us with his ability and courtesy and we were glad to learn that your great endeavor to improve the administration of military justice parallels our studies in this subject. When you sent us your invitation to testify before you, we not only appreciated the opportunity, but our president, Mr. Bensel, gave us his full support.

We find no fault with any of the proposals submitted by the armed services and the U.S. Court of Military Appeals. We are convinced that all have one objective which is to determine how to improve the administration of military justice, enhance discipline, and at the same time safeguard the fundamental rights of every accused.

All of us may have different methods which we believe will secure the same objectives and, in the final analysis, the decision as to the proper methods must be determined by the wisdom of your committee and the Congress. We cannot help but pay our tribute to General Decker, the Army Judge Advocate General, who has demonstrated his dedication to the same objective.

In the course of our study over the years whenever we needed any data or statistics we would write to the Judge Advocate General of the Army and we always were accorded a courteous, proper, and complete answer.

We find no fault with the statement that the armed service should rid themselves of unworthy persons, but we do find fault with any proposal to brand a man for life with the stigma of a discharge under other than honorable conditions, unless such person is given an opportunity, if he is available, to disprove the charges before a court or board, with the assistance of counsel and witnesses.

Many States have statutes providing for severe punishment of habitual offenders. Thus, in New York, a fourth felony offender is sentenced to a minimum of 15 years to a maximum of life imprisonment. Nevertheless, the U.S. Supreme Court, less than 2 weeks ago, on February 19, 1962, in *Chewning* v. *Cunningham*, held that a trial under a State's recidivist statute for being an habitual criminal is such a serious one that the rules for appointment of counsel in other types of criminal trials apply.

We cite that in view of the proposal by some persons that one who has committed several offenses in the Army should be thrown out administratively without a hearing, without a trial, et cetera.

Major Nordlicht, I hope, will be able to add something to what I have said or omitted, and if you will permit him to make a statement, at the conclusion of which, he and I will endeavor to do our best to answer any questions the committee may have.

Senator ERVIN. We will be delighted to hear Major Nordlicht now.

Mr. NORDLICHT. I believe Colonel Paston has adequately and well covered the study of our committee. As he stated we have been devoting ourselves to the proposed changes in the Code of Military Justice. We have not as yet completed our studies, re administrative discharges.

It may be conceded that it is administratively proper to issue administrative discharges in certain cases, such as those who have been AWOL for prolonged periods of time or conviction of a felony in a civilian court or crimes of a similar nature.

However, it is our firm belief and feeling that in any case where an individual who is confronted with a serious charge which would seriously affect his future career that he should be given the opportunity of confronting his accusers or witnesses and the absolute right, not a privilege, but an absolute right to cross-examine these individuals and not be conclusively found by written statements that may be presented against him.

I guess that about covers the matters that I would like to add to Colonel Paston's statement.

(The letter and reports previously referred to follow:)

NEW YORK COUNTY LAWYERS ASSOCIATION, NEW YORK, N.Y.,
DECEMBER 10, 1958

CONFERENCE ON MILITARY JUSTICE, 3–6 P.M.

*Conferees*

I

Representing the Judge Advocate General of the Army: Col. Marion Smoak, Chief, Legislative Branch, Military Affairs Division.
Representing the Judge Advocate General of the Navy: Capt. George A. Sullivan, district legal officer, 3d Naval District, New York.
Representing the Judge Advocate General of the Air Corps: Col. George K. Hughel, Chief, Legislative Division.
Representing the General Counsel of the Treasury: Hon. Arthur C. Rosenwasser, Chief of Courts Section, Coast Guard Legal Division.
Representing the Chief Judge, U.S. Court of Military Appeals: Hon. Alfred C. Proulx, chief clerk, U.S. Court of Military Appeals.

II

Col. Alfred C. Bowman, staff judge advocate, Headquarters, 1st U.S. Army.
Col. Arthur Levitt, commanding officer, 1568th Army Judge Advocate Training Center.
Capt. Frederick W. Read, Jr., commanding officer, Naval Reserve Law Company 3-3.
Col. Noah L. Lord, staff judge advocate, Headquarters, 1st region, U.S. Air Defense Command.
Lt. Col. William J. Rooney, assistant judge advocate, New York Army National Guard.

III

Judge Arthur H. Schwartz, president, New York County Lawyers Association.
Robyn Dare, Esq., executive director, New York County Lawyers Association.
Knowlton Durham, Esq., chairman, Committee on Military Justice, New York State Bar Association.

The members of the Committee on Military Justice, New York County Lawyers Association: Col. D. George Paston, chairman; Emile Zola Berman; John Cye Cheasty; Sheldon Cohen; Thomas G. Corvan; James E. Foley; Joseph Henig; Earle Q. Kullman; Irving J. Kurz; Lawrence G. Marshall; David Romanoff; and Charles G. Stevenson.

AGENDA A

(*a*) The services are experiencing great difficulty in obtaining and retaining an adequate number of qualified lawyers because of the low pay compared to income of lawyers in civilian life.

(*b*) Physicians in the services have received a pay increase.

(*c*) Should the Congress enact legislation to raise the pay of lawyers in the services as an inducement to qualified lawyers to join and remain in the services?

AGENDA B

(*a*) The Judge Advocate General School, U.S. Army, Charlottesville, Va., conducts a worthy graduate course in law.

(*b*) As a further incentive, should the Congress enact legislation to authorize the school commandant to award a degree and credits to those who successfully complete the course, thereby adding to the professional standard of lawyers serving in the Judge Advocate General Corps, creating greater interest by lawyers to serve as such on active duty?

AGENDA C

(*a*) The U.S. Court of Military Appeals, in its decisions, has equated the law officer of courts-martial to a Federal judge.

(*b*) To enhance his prestige and to increase the efficiency of lawyers to perform that function, should the Congress enact legislation exempting such law officers from other military duties?

AGENDA D

(*a*) Thousands of accused are sentenced to dishonorable discharge, forfeiture of all pay and allowances due and to become due, and to serve a stated term of prison confinement.

(*b*) After forfeiting their pay and having served their prison confinement, it is presumed that they have paid their debt to society. But the dishonorable discharge remains on their records as a lifetime bloc which interferes seriously with their rehabilitation and their efforts to become worthwhile members of their respective communities.

(*c*) Should the Congress enact legislation changing the dishonorable discharge to an administrative discharge of individuals who have served a decreed prison confinement?

AGENDA E

The Defense Department agrees that the following proposals should be enacted by the Congress:

*Purpose*

To eliminate procedural difficulties and delays under the Uniform code of Military Justice, to attain more prompt and efficient administration of military justice, thereby benefiting the Government and the individual.

*Cost*

Enactment of the following proposals will effect economies in utilization of manpower and not increase the budgeting requests of the Department of Defense.

*The principal features of the proposed legislation*

1. *Single-officer courts.*—Based on rule 23 of the Federal Rules of Criminal Procedure an accused may request and, if the convening authority consents, be tried before a single officer duly certified as having the same basic qualifications of a law officer (art. 26–a). Such procedure will safeguard the rights of the individual and reduce time and manpower now expended by multimember special courts-martial.

2. *Records of trial.*—At present, the use of a summarized record of trial is permitted in trials by special courts-martial when the accused is acquitted of all charges and specifications or when the sentence does not extend to a bad-conduct discharge. All records of trial by general courts-martial are verbatim complete, even though the sentence is one which, if adjudged by a special court-martial, could be summarized. The proposed bill would provide for a complete verbatim record in only those cases in which the sentence adjudged includes a bad-conduct discharge or is more than that which could be adjudged by a special court-martial. All other records of trial would contain such matter as may be required by regulations prescribed by the President.

3. *Review of records of trial.*—The present law requires all general court-martial cases to be forwarded to the Judge Advocate General even though the sentence of the court is such that, if adjudged by a special court-martial, the record of the special court-martial would not have been so forwarded. The proposed bill provides that general court-martial cases in which the sentence as approved does not include a bad-conduct discharge or does not exceed a sentence

that could have been adjudged by a special court-martial shall be transmitted and disposed of in the same manner as similar special court-martial cases.

The present law requires that all sentences extending to a punitive discharge or confinement for 1 year or more be reviewed by a board of review. The proposed legislation provides that cases now required to be reviewed by a board of review only because the sentence includes a punitive discharge or confinement for 1 year or more will be examined in the office of the Judge Advocate General in accordance with article 69, rather than by a board of review, if the accused pleaded guilty and if he stated in writing that he does not desire review by board of review. The enactment of this provision would materially lessen the number of cases which need to be reviewed by boards of review thereby diminishing the overall time required to process court-martial cases. As this procedure upon review would be employed only in those cases where the accused has pleaded guilty, it is believed that his substantial rights will not be prejudiced thereby.

The present law requires the Judge Advocate General to refer article 69 cases to a board of review for corrective action when he finds all or part of the findings or sentence incorrect in law or fact. In a great many cases, the irregularities concerned involve matters well settled in the law, and in those cases the board of review's action amounts to no more than the application of those well-settled principles, resulting in an unnecessary burden on the boards of review and unduly increases the time required to process court-martial cases. To eliminate this unnecessary reference to a board of review, the proposed legislation authorizes the Judge Advocate General to correct the irregularity or injustice, vesting in him the same powers and authority with respect to those cases that a board of review has. It will be noted that the Judge Advocate General remains authorized to refer any article 69 case to a board of review in his discretion, and it is required that any finding or sentence incorrect in law or in fact be corrected either by a board of review or by the Judge Advocate General.

4. *Powers of the Judge Advocate General.*—The proposed legslation authorizes the Judge Advocate General to dismiss the charges when the court of military appeals or the board of review orders a rehearing which the Judge Advocate General finds impracticable. It is believed that the Judge Advocate General is, in many cases, in the best position to dismiss the charges himself or to determine whether or not a rehearing is impracticable. Further, the administrative necessity of forwarding the record to the convening authority would, in many cases, be eliminated.

5. *Execution of sentences.*—Currently about 407 days elapse between the date an accused is tried by court-martial and the date his sentence is ordered executed after review by the U.S. Court of Military Appeals. As a result, many prisoners complete confinement before their cases have been completely reviewed. Further, since an unsentenced prisoner is not subject to the same treatment as a sentenced prisoner, the administration of confinement facilities is unduly complicated. In some instances, delays in completion of the required review have led to complex administrative problems and loss of morale. Consequently, the proposed legislation provides that a convening authority may order executed all portions of a sentence except that portion involving dismissal, dishonorable, or bad-conduct discharge, or affecting a general or flag officer, thus eliminating the differences between sentenced and unsentenced prisoners. No sentence extending to death may be executed until approved by the President, although the proposed legislation will remove an anomalous result under the present code by providing that an accused sentenced to death forfeits all pay and allowance, and that the forfeiture may be made effective on the date the sentence is approved by the convening authority.

6. *New trial.*—To better protect the rights of an accused, the proposed legislation extends the time within which an accused may petition for a new trial to 2 years from the date the convening authority approves the sentence. Further, the board of review, the U.S. Court of Military Appeals, and the Judge Advocate General would be permitted to grant more comprehensive relief than is now possible.

7. *Votings and rulings.*—It is anomalous to allow the lay members of a court-martial to overrule the law officer on a question which is purely an issue of law. The proposed bill provides that a law officer shall rule with finality upon a motion for a finding of not guilty.

8. *Punitive articles.*—The present code does not provide specific statutory authority for the prosecution of bad-check offenses. The proposed legislation adds an additional punitive article which contains provisions similar to the bad-check statutes of the District of Columbia and the State of Missouri, including

a provision that a failure to pay the holder of a bad check the amount due within 5 days shall be prima facie evidence of an intent to defraud. One of the difficulties arising under existing law is the necessity to prosecute bad-check offenses under one of three separate articles (121, 133, or 134), none of which may be considered as a bad-check statute. Because of technical difficulties that arise as a result of the unfortunate pleading of the wrong article, an obviously guilty person sometimes escapes punishment. There are many difficulties inherent in obtaining a conviction of an accused for a bad-check offense without proof of specific intent. Because of this, the proposed legislation is desirable to provide specific statutory authority for the prosecution of bad-check offenses.

9. *Nonjudicial punishment.*—Good military discipline requires that a commanding officer be given greater authority in imposing nonjudicial punishment. Consequently, the proposed legislation provides that a commanding officer in a grade of major or lieutenant commander or above may confine an enlisted member of his command for a period of not more than 7 days, or impose a forfeiture of one-half of 1 month's pay. Under article 15, officers may be punished for minor offenses, such as traffic violations, by imposition of forfeitures, and they are thereafter not handicapped professionally by a trial by court-martial. However, in order to achieve an effective monetary punishment for enlisted members in similar cases, it is necessary to resort to a trial by court-martial, resulting in a permanent black mark on the enlisted member's record in the form of a conviction by court-martial. The change contemplated by the proposed legislation would permit prompt and effective disposition of such minor offenses. In addition, a commanding officer exercising general court-martial jurisdiction may impose on an officer or warrant officer of his command forfeiture of one-half of his pay for 2 months, instead of 1 month as now provided in the code. The 1-month limitation has proved unsatisfactory to commanders in the field and is not cured by the fact that an officer may be tried by a special court-martial. An officer's present and future value within his command is seriously and permanently impaired by the publicity attendant to trial by court-martial. When such an event occurs, prompt transfer of the officer after trial is imperative. regardless of the outcome. Such procedure is costly in time, money, and manpower. It is believed to be essential that commanding officers retain their present power to try officers by special court-martial as exceptional circumstances may warrant, and to increase the punitive powers of article 15 so that an adequate punishment can be imposed upon an officer for a relatively minor offense.

10. *Miscellaneous.*—To facilitate administration of confinement facilities under the United Nations or other allied commands, the proposed legislation authorizes the confinement, in U.S. confinement facilities, of members of the Armed Forces of the United States with the members of the armed forces of friendly foreign nations.

11. *Other proposed changes.*—Other proposed changes, of a technical nature, are designed generally to improve the administration of military justice within the framework of the existing code.

GENERAL COURTS-MARTIAL, DEMONSTRATION, 7 P.M.

By: U.S. Naval Reserve Law Unit 3–3.
Audience: Judge advocate officers, Regular and Reserve, and civilian lawyers in the metropolitan area.

---

NEW YORK COUNTY LAWYERS ASSOCIATION,
*New York, N.Y., May 1, 1959.*

ANNUAL REPORT OF COMMITTEE ON MILITARY JUSTICE

Although the association has over 60 committees, Judge Arthur H. Schwartz, our president, found the time and inclination to participate in the work of our committee and attended its conferences. His suggestion that we concern ourselves principally with a study to find and recommend improvements in the administration of military justice was concurred in unanimously by our members.

Military justice deals with military discipline, criminal law, procedure, and the administration of justice. It involves such matters as apprehension and restraint, nonjudicial punishment, military jurisdiction, appointment and composition of courts-martial, pretrial procedure, trial procedure, rules of evidence, sentences, review, and appellate procedures.

The jurisdiction of courts-martial is entirely penal or disciplinary. They have no power to entertain contract actions. They cannot award money judgments. To repeat, for emphasis, their jurisdiction is entirely penal or disciplinary.

Where a military court has jurisdiction of the person and subject matter and does not exceed its powers in the sentence pronounced, its proceedings may not be reviewed by the civil courts. *Grafton* v. *U.S.*, 206 U.S. 333; *Hiatt* v. *Brown*, 339 U.S. 103; *Reaves* v. *Ainsworth*, 219 U.S. 296; *Swaim* v. *U.S.*, 165 U.S. 553; *Dynes* v. *Hoover*, 20 How. 65.

The fifth amendment of the Constitution, which declares that no person shall be held to answer for a capital or other infamous crime, unless on presentment or indictment of a grand jury, expressly excepts cases arising in the land or naval forces. Under section 8, article I of the Constitution, Congress is empowered to make rules for the government and regulation of such forces.

The sixth amendment which guarantees the right to trial by jury of the State and district wherein the crime shall have been committed is inapplicable to courts-martial, the composition of which is a matter for congressional action. *Welchel* v. *McDonald*, 340 U.S. 122.

Civil remedies, except habeas corpus, are not available to a military defendant. This is due to the necessity of preventing interruption of military processes by civil courts beyond the remedy of habeas corpus to determine whether military jurisdiction was exceeded. *Gibson* v. *U.S.*, 329 U.S. 338; *Ex parte Endo*, 323 U.S. 283.

The act of May 5, 1951, effective May 31, 1951, provided 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."

Such code has the force and effect of a Federal statute. *People* v. *Benjamin*, 7 App. Div. 2d 410, 184 NYS 2d 1, March 24, 1959.

An Army court-martial is a competent and duly constituted tribunal under the laws of the United States. The fact that procedure under a court-martial differs from that followed in Federal and State courts does not detract from the forces or competency of its judgments. *Florance* v. *Donovan*, 283 App. Div. 153, 126 NYS 2d 642.

Article 36 of the code provides that the procedure, including modes of proof, in cases before courts-martial * * * may be prescribed by the President by regulations applying the principles of law and rules of evidence generally applied in the trial of criminal cases in the U.S. district courts, but not contrary to or inconsistent with the provisions of the code, and that such rules and regulation shall be reported to the Congress; the intent of Congress being to retain power to amend the code by changing the effect of any regulation which may be abhorent to the Congress.

### THE LAW OFFICER

Pursuant to article 36 of the code, the President prescribed a "Manual for Courts-Martial, United States, 1951" (Executive Order 10214), specifying courts-martial and review procedure, the composition, jurisdiction, and limits of punishment of a general court-martial, a special court-martial, and a summary court-martial. It provides that a general court-martial must have a qualified law officer and that the failure to appoint such law officer renders void any proceeding of such court.

The innovation of having a law officer in every general court-martial is now firmly imbedded in the court-martial system. The code provides for his appointment and the qualifications he must possess (art. 26) and the U.S. Court of Military Appeals has equated him to a trial judge in a civilian court. The U.S. Court of Military Appeals has held that the law officer and not the convening authority is responsible for the proper conduct of a trial once it begins; that the convening authority ultimately reviews the legal correctness of the law officer's rulings, but as an appellate authority the convening authority cannot assume the powers and duties of the trial judge. *U.S.* v. *Stringer*, 5 USCMA 122, 17 CMR 122.

### THE USE OF THE MANUAL BY MEMBERS OF A GENERAL COURT

Before the law officer system was instituted, a general court-martial consisted of a president and four or more additional officers, usually nonlawyers.

For their guidance as to law and procedure they relied solely on a court-martial manual. Each member of the court, the trial judge advocate (now known as trial counsel) and the defense counsel, had this "legal bible" for consultation and guidance before, during, and after the trial. The USCMA has determined that since civilian courts do not permit a jury to consult a law book as the reservoir of all the law, the members of a general court-martial should not be controlled by a prefabricated one-volume law book; that they should be instructed in the law applicable to the facts of the particular case by the law officer of the court in the same manner as a civilian jury receives its instructions from the trial judge and not from the manual. A violation of this requirement has resulted in the reversal of several convictions starting with the case of *U.S.* v. *Rinehart*, 8 USCMA 402, 24 CMR 212, followed by the *Starnes* case, 8 USCMA 427, 24 CMR 237, the *Schwartz* case, 8 USCMA 731, 25 CMR 235, the *Keyes* case, 8 USCMA 730, 25 CMR 234, and others.

A general court-martial consisting of a law officer and five or more members (art. 16), may try persons subject to the code for offenses made punishable by the code and, under such limitations as the president may prescribe, may adjudge any punishment not forbidden by the code (art. 18).

A special court-martial consisting of three or more members (art. 16), cannot adjudge death, dishonorable discharge, dismissal, confinement in excess of 6 months, hard labor without confinement in excess of 3 months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for a period exceeding 6 months. It may adjudge a bad conduct discharge of an enlisted person if a complete record of the proceedings and testimony before the court has been made (art. 19). The members of the court need not be lawyers.

A summary court consisting of one officer (art. 16), may try enlisted men for noncapital offenses. He cannot adjudge death, dismissal, dishonorable or bad conduct discharge, confinement in excess of 1 month, hard labor without confinement in excess of 45 days, restriction to certain specified limits in excess of 2 months, or forfeiture of pay in excess of two-thirds of 1 month's pay. The accused may refuse to be tried by summary court, in which event he must be tried by a special or general court-martial, whichever may be appropriate (art. 20). The summary court officer need not be a lawyer.

## IMPROVEMENTS IN THE ADMINISTRATION OF MILITARY JUSTICE

Appreciating the fallibility of any code devised by man and that future experience may require changes in its original provisions, Congress wisely provided: "The Court of Military Appeals and the Judge Advocates General of the Armed Forces shall meet annually to make a comprehensive survey of the operations of this code and report to the Committees on Armed Services of the Senate and 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. 67(g)).

The court and the Judge Advocate Generals have been submitting their annual reports recommending "further beneficial changes for consideration by the Congress to the end of improving the workings of the code," the quoted words being taken from their 1957 report.

Pending the enactment of legislative changes, the U.S. Court of Military Appeals has improved the workings of the code by interpreting its provisions, by its holdings in the *Rinehart* case (8 U.S.C.M.A. 402, 24 C.M.R. 212), in the *Stringer* case (6 U.S.C.M.A. 122, 17 C.M.R. 122), and many other cases, and the armed services, as far as it lies within their power, have improved the workings of the code notably by the Army Judge Advocate General (1) in devising and operating a circuit court system manned by trained and qualified law officers, thereby reducing the number of convictions theretofore reversed by the U.S. Court of Military Appeals because of prejudicial errors of inexperienced law officers, and (2) in the conduct of graduate or advanced courses at the school at the University of Virginia in Charlottesville.

When we began our task, we were agreeably surprised to discover that all persons in the court-martial system were willing to discuss the workings of the code and to probe with us the merits of every proposal for its improvement regardless of the rank or station in life of the idea's originator.

December 10, 1958, at the New York County Lawyers' Association, 14 Vesey Street, New York City, our committee conducted a conference attended by Col. George K. Hughel, representing the Judge Advocate General of the Air Force,

Col. Alfred C. Bowman, representing the Judge Advocate General of the Army, Capt. George A. Sullivan, representing the Judge Advocate General of the Navy, Hon. Alfred C. Proulx, representing the Chief Judge of the U.S. Court Military Appeals, Capt. Frederick W. Reed, Jr., C.O. Naval Reserve Law Co. 303, Col. Noah L. Lord, Staff Judge Advocate Headquarters, 1st Region, U.S. Air Defense Command, Judge Arthur H. Schwartz, president of the New York County Lawyers' Association, Robyn Dare, Esq., its executive director, Knowlton Durham, Esq., chairman, Committee on Military Justice, New York State Bar Association, and the Committe on Military Justice, New York County Lawyers' Association, to wit: D. George Paston, its chairman, and the following members: Emile Zola Berman, John Cye Cheasty, Sheldon Cohen, Thomas G. Corvan, James E. Foley, Joseph Henig, Earl Q. Kullman, Irving J. Kruz, Lawrence G. Marshall, David Romanoff, and Gen. Charles G. Stevenson. It was agreed at the outset that (1) no stenographic minutes would be taken (2) each conferee would speak frankly on every question without fear of being quoted and anything said would not be a commitment by the individual making the statement, the principal or government agency represented by him at the conference, (3) that the purpose of the conference would be a discussion of the present law and its administration and to see where and how it should be improved. At its conclusion, all agreed that the mission was accomplished to the entire satisfaction of each conferee.

Soon thereafter, we contacted the American Legion's Special Committee on the UCMJ and the USCMA which we learned had prepared an exhaustive report and recommendations which we procured and studied.

Since many of the recommendations of the Legion and those of the armed services were at variance, we suggested a tripartite discussion to be attended by Mr. Finn of the Legion's committee, Colonel Hughel, legislative chief of the office of the Judge Advocate General, U.S. Air Force, which is carrying the ball for the armed services in their current recommendations, and our commitee, to probe the possibility of reconciling opposing views in order to facilitate passage of desirable legislation. They agreed to our suggestion in view of our demonstrated unbiased goal. However, the Legion's representative because of the press of private business, found it difficult to fix a convenient date for the meeting and he finally abandoned the plan in view of the impending hearings scheduled to be hald by the House Armed Service Committee on H.R. 3387 favored by the Department of Defense, and on H.R. 3455 favored by the Legion.

Both bills seek to amend title 10, United States Code, to improve the administration of justice and discipline in the armed services; the Legion bill, H.R. 3455, having 21 printed pages, the Defense Department's bill, H.R. 3387, having 11 printed pages.

The Legion bill, H.R. 3455, seeks three principal objectives:

1. Every court-martial shall have a law officer.
2. Every accused shall have the right of counsel.
3. Command control shall be eradicated from the court-martial system.

We agree that these objectives are desirable. Now, let us see whether H.R. 3455, if enacted, would accomplish these objectives.

### AVAILABILITY OF QUALIFIED LAWYERS

Complete statistics are not yet available for the fiscal year 1958–59. During the fiscal year 1957–58, there were 187,171 court-martial cases in the Armed Forces. The boards of review, composed of qualified lawyers, handled 12,193 of these cases, modifying the findings in 469 cases; 1,616 cases reached the U.S. Court of Military Appeals (three civilian judges) which modified 142 decisions of the boards of review. From 1951 through 1957, there were 1,600,207 court-martial cases in the armed services.

The armed services are woefully short of an adequate number of qualified lawyers under the present system whereby qualified lawyers are employed as law officers in general court-martial trials and not in special or summary court trials. An intensive campaign to retain lawyers now in the armed services and to recruit an adequate number of additional lawyers to join has failed to fill the need.

During fiscal year 1958, 159,646 special and summary courts-martial were held. Assuming that a similar number of accused will have to be dealt with annually hereafter in other than general courts-martial, military justice will stop functioning should the law require that these trial courts be manned by law officers, and defense counsel.

The Legion is right in insisting on a court guided by a legally trained individual, the accused to be represented by counsel because a finding of guilty blots his record for the rest of his life (*People* v. *Benjamin*, 7 App. Div. 2d 410, 184 N.Y.S. 2d 1, Mar. 24, 1959).

The armed services are right in opposing such an amendment because they cannot provide a law officer and defense counsel for these 160,000 trials.

We believe that a consideration of the fundamentals should untie the gordian knot.

*Our solution*

Let there be but one type of court-martial. Abolish the special and summary court. Authority to sentence a convicted accused to a dishonorable or bad conduct discharge shall be vested in this court alone, the rights of the accused being protected by a law officer, defense counsel, a record of the proceedings and the testimony, and the review procedures now extant.

Does this mean that this new court will handle 160,000 cases more than it does now? The answer is "No." We suggest that these cases be handled as nonjudicial punishment pursuant to article 15 of the UCMJ. In this way, a wrongdoer so punished will not be stigmatized by a judicial conviction, yet his punishment will be swifter, an important factor conducive to better discipline. Where a commanding officer, having the benefit of the recommendations of an investigating officer and staff judge advocate, believes that the offense charged, if true, merits an undesirable form of discharge or greater penalty than the maximum permitted by nonjudicial punishment, the accused may be arraigned in the court where, as above shown, his rights will be duly protected.

If the Congress agrees with this proposed solution and adopts it, most of the provisions in both bills will become academic because the fundamental objectives sought by both sides will have been accomplished.

The armed services do not object to extending the powers of the law member of court and to calling the president of the court the senior member, but express a fear that circumscribing the present powers of the president and divesting him of that honorary designation would not substantially enhance the position of the law officer.

A previous suggestion that the law officer be called the judge and the members of the court the jury, is opposed by many who fear it would downgrade the members and lower the dignity with which every court-martial is blessed.

It is possible to call a spade a spade and enhance the prestige of the court and its members by adopting this suggestion: Call the law officer the law judge; the members of the court the fact judges; the senior member the senior fact judge.

COMMAND CONTROL

The Legion seeks to eradicate command control from the courts-martial system. We have been unable to find anyone in favor of command control.

Congress enacted a law forbidding command control (art. 37 of the code) subjecting to such punishment as a court-martial may direct any person who knowingly and intentionally fails to enforce or comply with any provision of the code (art. 98 of the code). The "Court-Martial Manual," section 38, expressly forbids such action or influence. And the USCMA has reversed convictions where command influence was found to exist (*United States* v. *Stringer*, 5 U.S.C.M.A. 122, 17 C.M.R. 122, and other cases).

RULES OF PROCEDURE

The Legion proposes that rules of procedure should be prescribed by the U.S.C.M.A. instead of by the President, and that such rules should follow those of the U.S. District Court for the District of Columbia. This would mean that whenever a district court judge should decide that one of its own rules is invalid, the military court system will be controlled in that regard by the district court and not by the U.S.C.M.A. And, where the two should be in conflict in the interpretation or construction of a rule, we would not know which is to govern.

If the court should promulgate the rules, it may prove embarassing in any case to ask the court to declare invalid one of its own rules. Under the code the President prepares the manual and submits it to Congress which retains the

power to control its provisions. In formulating the manual, the President does not shut himself up in an ivory tower. He may call upon the U.S.C.M.A., the Judge Advocate Generals, and others, for suggestions, and formulates the manual not only from suggestions made by the court but from any other qualified sources which system, it is believed, is better than to lodge the rulemaking power in the hands of the court alone. In any event, the President is authorized to delegate and subdelegate his code authority (art. 140).

SURRENDER OF MILITARY PERSONNEL TO CIVIL COURTS

No fault has been found with the present system. The code now provides for the removal of civil suits to the district courts in appropriate cases (sec. 9 of the code).

*Our conclusions*

1. The pay of judge advocates should be increased to assist the armed services to retain and recruit qualified lawyers in competition with higher pay offered in civilian life. The pay of physicians in the armed services has been increased.
2. To render the service as judge advocates more attractive and to train them to be better qualified to perform their assignments, the commandant of the Judge Advocate General's School at Charlottesville, Va., should be authorized to bestow suitable credits and degrees upon those who successfully complete the required courses at such school (H.R. 6064).
3. Special and summary court-martials should be abolished. Offenses, not serious enough for trial by the court, should be dealt with as nonjudicial punishment under article 15 of the code, so that the individual's rights will be protected and not permanently stigmatize his record by a conviction, and swifter punishment will improve discipline. Such results will benefit the Government and the individual and not harm either. Serious charges will be referred to the one court manned by a law officer and defense counsel, where a record will be made of the proceedings and testimony, and the rights of the accused preserved.
4. Change the respective names as follows:
   Court-martial to Military Court.
   Law officer to the Law Judge.
   Members of court to the Fact Judges
   President of court to the Senior Fact Judge.
5. The New York County Lawyers' Association, the largest local bar association in the country, cognizant of the tremendous number of court-martial cases, too many of them handled by persons without legal training with power to stigmatize civilian, noncareer, soldiers with criminal conviction records, yet aware of the need to maintain discipline in the Armed Forces, has endeavored through its Committee on Military Justice, to study the problem and offer such solutions which may be of aid in the administration of military justice. It is recommended that such excerpts of this annual report as may be deemed appropriate be furnished to the Committee on Armed Services of the House of Representatives and to the Committee on Armed Services of the Senate in connection with consideration of H.R. 3387 and H.R. 3455.

Respectfully submitted.

D. GEORGE PASTON, *Chairman.*

---

NEW YORK COUNTY LAWYERS ASSOCIATION,
*May 1, 1960.*

ANNUAL REPORT OF COMMITTEE ON MILITARY JUSTICE

MILITARY JUSTICE

Last year, we submitted recommendations concerning H.R. 3387 and H.R. 3455, in a desire to be of aid in improving the administration of military justice. But the House and Senate Committees on Armed Services failed to report out these bills. Article 67(g) of the Uniform Code of Military Justice (10 U.S.C. 867(g)) requires the judges of the U.S. Court of Military Appeals, the Judge Advocates General of the Armed Forces, and the General Counsel of the Department of the Treasury to meet annually to survey the operations of the code and to prepare a report to the Committees on Armed Services of the

Senate and House of Representatives, to the Secretary of Defense and Secretary of the Treasury, and to the Secretaries of the Departments of the Army, Navy, and Air Force with regard to the status of military justice and to the manner and means by which it can be improved by legislative enactment. The eighth annual report has been submitted, repeating, essentially, the same proposals for amending the code which have been urged annually since 1953. The Army and Navy have been losing more trained lawyers than they gained during the last fiscal year. Drastic action, including legislation, is needed to supply the incentive for lawyers to seek careers in the services.

The problem of acquiring and retaining an adequate number of trained lawyers is gigantic in view of the large number of court-martial cases handled in a single year. Last year alone, the Army had 58,887 cases, the Navy 46,703, the Air Force 24,035, the Coast Guard 833, a total of 130,458. General Hickman, Judge Advocate General of the Army initiated a program of establishing some senior law officers as circuit riding judges who preside at courts martial but are independent of the commands in which the courts are held, resulting in a higher standard of performance, fewer errors, and less reversals by appellate tribunals. The Judge Advocate General of the Navy is considering a similar program for the Navy. One of the latter's plaints is that new career officers cannot be brought into the Navy before the creation of vacancies in the regular list, the present ceilings on law specialist numbers having permitted only nine young lawyers to be integrated into the regular Navy during fiscal year 1959. Despite the shortage of trained lawyers, General L. L. Lemnitzer, Chief of Staff, U.S. Army, recently declared: "I believe that the Army and the American people can take pride in the positive strides that have been made in the administration and application of military law under the Uniform Code of Military Justice. The Army today has achieved the highest state of discipline and good order in its history." (Department of Army, Pamphlet No. 27–101–18, 7 December 1959).

## RESERVE OFFICERS

To keep the officer personnel young, reserve officers reaching prescribed ages in respective grades are transferred to the Retired Reserve or discharged. Because of the shortage of trained lawyers in the armed services, they should not be discharged or transferred to the Retired Reserve involuntarily. Section 6, H.R. 8186, 86th Congress, if enacted into law, will defer such action until such an officer completes 20 years of service or until he becomes 60 years of age, whichever is earlier.

## CONSTITUTION, NEW YORK STATE

A temporary State commission on the constitutional convention to study and report on proposals for simplification of the constitution has before it a report prepared by the Inter-Law School Committee, composed of faculty members from eight law schools. The report, 225 printed pages, recites the historical background of each section of the constitution, discusses the provisions, and recommends pertinent simplification. Our committee concerned itself solely with article XII, "Militia," which relates to the composition, regulation, and officers of the militia. We agree that the militia article should be amended where found necessary, but only by means of proper constitutional amendments, thereby protecting the militia and its officers against purely political intervention by the legislature and others. The law professors recommend oversimplification by wiping out the entire militia article and substituting the simple phrase: "the legislature shall provide for a militia" or "there shall be a militia," leaving it to the legislature to enact whatever laws it may deem necessary from time to time to regulate the militia. Since a Republican legislature may want a Republican militia and a Democratic legislature may seek a Democratic militia and, if the officers' tenure is made insecure against political inroads, it is necessary that the integrity, the tenure, the proper organization and maintenance of the militia must remain protected by the constitution.

The mission of he militia is to provide Reserve components "adequately organized, trained and equipped, available for mobilization in the event of national emergency or war" and "to provide sufficient organizations so trained and equipped as to enable them to function efficiently in the protection of life and property and the preservation of peace, order and public safety, under competent orders of the State authorities." Official Proceedings, National Guard Association of the United States, 78th General Conference, 1956, following page 387.

In recent years the New York National Guard provided valuable services during flood and hurricane crises. Its role is "an integral part of the first line of defenses of the United States." 32 U.S.C. 102. Shall it continue to be maintained, by constitutional provision, prepared to fill its important role, or shall we permit it to be crippled and frittered away by politicians acting through ever-changing legislative personnel? "The existence and maintenance of the National Guard were not to depend upon the legislative will, but were rendered permanent and certain by a provision of the fundamental law." *Matter of Bryant*, 152 N.Y. 412, 415.

The legislature properly adopted the "military law" to implement the "Militia" provisions of the Constitution. It may, as it has done in the past, amend the military law when necessary. But the fundamental law, the Constitution itself, protecting the very existence and maintenance of the militia must remain inviolate except by constitutional amendment and then only if necessary. We oppose the recommendation of the law professors who recommend wiping out the constitutional provision, article XII, "Militia," with one fell swoop, leaving it to succeeding legislatures to erect, build, maintain, wreck, destroy, and otherwise interfere with the existence and maintenance of the militia.

D. GEORGE PASTON, *Chairman.*

---

NEW YORK COUNTY LAWYERS' ASSOCIATION,
*May 1, 1961.*

REPORT OF COMMITTEE ON MILITARY JUSTICE

UNIFORM CODE OF MILITARY JUSTICE

Article 67g, Uniform Code of Military Justice (title 10, U.S.C.) 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 operations of this code and report to the Committee on Armed Services of the Senate and 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."

The court and the Judge Advocates General have been submitting their annual reports recommending "further beneficial changes for consideration by Congress to the end of improving the workings of the code." The quoted words are taken from their 1957 report.

At the last session of Congress, the Department of Defense favored H.R. 3387, and the American Legion supported H.R. 3455. We discussed these bills in full in our May 1, 1959, report. The Legion insists that every accused be represented by counsel at a courts-martial. The Department of Defense, woefully short of trained lawyers, cannot provide counsel in every case. We concluded: "Our solution: Let there be but one type of court-martial. Abolish the special and summary court. Authority to sentence an accused to a dishonorable or bad conduct discharge shall be vested in this court alone, the rights of the accused being protected by a law officer, defense counsel, a record of the proceedings, the testimony, and the review procedures now extant."

We felt that ordinary disciplinary measures, with fixed limitations, should be imposed by commanders, without foisting a life-time courts-martial stigma on individuals guilty of minor disciplinary infractions.

Our 1959 recommendations were made available to the American Bar Association, local bar associations, the Court of Military Appeals, the Judge Advocates General, the Committee on Armed Services of the Senate and House of Representatives, and others interested.

Finally, on March 1, 1961, the Department of the Army issued a news release announcing that its general officer committee recommended elimination of summary and special courts-martial and that offenses now tried by those courts as disciplinary matters be handled by commanders as corrective action. The report of the general officer committee was approved by the Secretary of the Army. Whether the Congress, at its present session, will take any action, has not been determined.

THE COURT OF MILITARY APPEALS

The general officer committee recommended that the membership of the Court of Military Appeals be increased from three to five, with two of these limited to 4 years' service, one to be appointed every 2 years. H.R. 4352 proposes a chief

judge and two associate judges with life tenure and changing the name of the court to "United States Supreme Court of Military Appeals." A like bill, introduced in the Senate, bears number S. 830. We approve life tenure for the judges as an obviously meritorious need. To indicate its function, we support the proposal to change the name of the court. The word "Supreme" may lead to confusion. The demonstrated ability of the three judges to handle the business of the court efficiently indicates that there is no need for adding to their number.

APPEALS IN MILITARY JUSTICE CASES

In contrast to appeals in civilian criminal cases, convicted defendants in the armed services have a full and fair opportunity to secure a reversal of an unjust or illegal conviction.

A 27-year-old Army second lieutenant was stripped of his rank, dishonorably discharged, and sentenced to 10 years at hard labor. The case of an attempted rape of a WAC captain at Fort Bragg in February 1954 was unsolved. On April 27, the secretary to a visiting Air Force general was assaulted in her quarters on the base. The military investigators charged Lieutenant Collins with both crimes, even though the WAC captain told the investigators Collins was not her assailant. They attempted to persuade her to change her mind. This information was suppressed at the court-martial. He was acquitted of the February assault. Almost 3 years later, he was convicted of the April 27 assault by circumstantial evidence, although the victim was unable to identify him. When the case reached the Judge Advocate General's Office, an analysis of the record revealed that key evidence, a fingerprint of defendant allegedly found on the door of the victim's room, was either a forgery or was placed on the doorknob when the defendant was returned to the scene, purportedly to reenact the escape. The conclusion was that the discovery and lifting of the fingerprint was "incredible"; and that the investigators systematically removed or withheld from the record most of the evidence favorable to the accused. The Army, satisfied that an innocent man was in Fort Leavenworth, freed him on January 21, 1956. Recently, President Kennedy signed a special act of Congress directing the payment of $25,000 to Collins as compensation for his wrongful conviction, imprisonment, etc.

MARRIAGES BY MILITARY PERSONNEL OVERSEAS

Roger M. Wheeler, a Navy fireman apprentice, married a Philippine woman without the written consent of his commanding officer, as required by a prohibitory general regulation. The regulation included a requirement that two persons seeking permission to marry must listen to the advice of a military chaplain, have medical certificates showing both to be free from mental illness and various diseases, and written consent from parents if either party is under 21 years of age. Wheeler received a bad conduct discharge, confinement for 3 months, forfeiture of $25 a month of his pay for said 3 months, and reduction to the lowest grade of fireman recruit. April 29, 1961, the appeal was decided by the U.S. Court of Military Appeals. Chief Judge Quinn held that a military commander may, at least in foreign areas, impose reasonable restrictions on the right of military personnel of his command to marry; that examples of real dangers that might flow from unrestricted marriage of personnel in foreign countries are readily at hand. Judge Latimer concurred. Judge Ferguson, in a dissenting opinion, declared "illegal on its face" any order requiring a commander's permission to marry; that marriage is a matter so personalized and so little related to military and naval affairs that it cannot be regulated by requiring the consent of superior officers. The principle of "reasonable restrictions" upheld by the majority is interpreted as being applicable to all armed services in foreign areas.

MORE LAWYERS

Unable to obtain an adequate number of qualified lawyers, the Army recommends that the restrictive legal-training provision in appropriation bills since 1954 should be removed, to permit the Army to send military personnel to law school at Government expense. The Army points out that procuring a portion of the annual requirement for regular JAG officers, through the legal education of Regular officers in other branches already committed to an Army career, would increase the experience levels in the corps and would have far-reaching effects on the retention rate of junior officers. In 1956, the JAGC total strength was 1,165; in 1957, 1,101; in 1958, 994; in 1959, 994; in 1960, 922. The number

of career Reserve officers on active duty during those years was: 197, 184, 157, 130, and 119, respectively.

We are unconvinced that the Army's suggestion merits approval. (a) It would deprive other branches of personnel trained therein. (b) Upon graduation from law school, they may be attracted by higher pay offered in the practice of civilian law, and resign from the Army, causing a loss of personnel to their basic branches without the expected accretion to JAG personnel. We recommend: (1) Require that the many qualified lawyers now on duty in other branches be assigned to and trained in the JAGC; (2) abolish the present unproductive practice of commissioning only young untrained first lieutenants with the meager pay of that grade; (3) attract and retain by accepting qualified lawyers and give them the grades and pay commensurate with their training and experience; (4) in our May 1, 1959, report we recommended, and we continue to support, a proposal that lawyers in the armed services shall receive the same pay as medical officers of like grades. If higher pay aids in the recruitment and retention of doctors, it may be just as effective with lawyers. And, there is no reason why a qualified lawyer should receive less pay than a qualified doctor.

The framers of the 1958 Pay Act assumed that the way to keep skilled men in service was to set high pay rates at the top of the pay ladders. The theory was that young men would find them attractive goals to work for. The same principle was applied to the enlisted structure with adoption of the supergrades. Doubt has been raised whether this is working out in practice. Many junior officers and men claim that a splendid salary 20 years from now will not fill the grocery bag today. Spotty-to-poor retention of men in critical skills underscore this thinking. An important fringe benefit is retirement pay. Recent suggestions of a contributory system as to retirement pay hurt recruitment and retention of personnel.

FURTHER STUDY

Our committee is continuing its studies with an open mind on these and related subjects involving the improvement of the administration of military justice. We are happy to repeat our appreciation for the aid, cooperation, and advice we have been and are receiving from the Judge Advocates General and the Court of Military Appeals. The Army's Judge Advocate General, Maj. Gen. Charles L. Decker, admits that the problems are very complex and their solution involves many diverse factors. He has offered to devote with us as much time as may be necessary to a discussion of the problems and the pros and cons of the suggested solutions, and we plan to take advantage of the offer. Our chairman, Colonel Paston, having served in World War II with General Decker and his predecessor, General Hickman, our mutual rapport and cooperation is a considerable factor in the accomplishment of our mission.

SUBCOMMITTEES

Our subcommittee A is studying and will report re proposed amendments of the Uniform Code of Military Justice. Our subcommittee B is studying and will report re methods for recruiting and retaining qualified lawyers in competition with higher pay offered in civilian life. Subcommittee A consists of Harold Nordlicht, chairman; Lawrence G. Marshall, Sheldon Cohen, Max Solorsy, Robert E. Delany, and Richard H. Powers. Subcommittee B consists of Earle Qu. Kullman, chairman; Charles G. Stevenson, and Irving J. Kurz.

DISTRIBUTION

We suggest that copies of this report be distributed to the Committee on Armed Services of the Senate and House of Representatives, the U.S. Court of Military Appeals, the Judge Advocates General of the Armed Services, the American Legion, the American Bar Association and local bar associations.

Respectfully submitted.

D. GEORGE PASTON, *Chairman.*

---

NEW YORK COUNTY LAWYER'S ASSOCIATION,
*New York, N.Y., February 7, 1962.*

Hon. SAM J. ERVIN, Jr.,
*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, Washington, D.C.*

HONORABLE SIR: We deeply appreciate your letter of January 26 wherein you acknowledge our committee's long recognized concern with military justice and the experience of our members in the subject.

We are glad to comply with your request that we furnish you a written statement and we accept your invitation to present testimony at your hearings.

Our views on nearly all of the topics being considered by you are covered in our reports of December 10, 1958, May 1, 1959, May 1, 1960, and May 1, 1961, copies of which have been furnished to you.

I. SUMMARY, SPECIAL, AND GENERAL COURT-MARTIAL

The American Legion suggested that every court-martial shall have a law officer and that every accused shall be represented by counsel. Although the Legion's suggestion is obviously meritorious, the armed services do not have an adequate number of qualified lawyers for such purposes. We suggested that the punishing powers of summary and special courts-martial be added to the nonjudicial punishments now prescribed by article 15 of the code, and that these two courts be abolished, leaving only one court-martial for which there should be an adequate number of qualified lawyers to act as law officers, trial counsel, and defense counsel (see p. 6, our report of May 1, 1959).

Our suggestion was adopted by a "Generals Committee." The Army now proposes to abolish the summary court and retain the special and general courts. We are willing to be convinced of the need of retaining a special court. So far, we haven't been apprised of any reasons for retaining a special court.

*Conclusion*

Have only one court which may be called U.S. Military Court, in addition to the USCMA.

If the Congress can be convinced that there is need for a special court also and that it can be staffed by the necessary qualified lawyers, it may be named U.S. Special Military Court.

II. LAWYERS

In our reports of May 1, 1959, and May 1, 1960, we pointed out the inability of the services to obtain and retain an adequate number of qualified lawyers and we proposed certain remedies.

There is grave doubt of the success of the Army's effort to secure such lawyers (Circular 601–11 Headquarters, Department of the Army, July 18, 1961). While it provides that qualified applicants, with or without military status, meeting eligibility requirements for appointment and active duty in the Judge Advocate General's Corps may be commissioned in the grade of captain or higher, the eligibility requirements of 20 years active Federal service prior to attaining 28 years' service at the retirement age of 55, would appear to bar any applicant over the age of 35.

The Army Judge Advocate General said that: "In peacetime, the Judge Advocate General's Corps can provide an adequate number of competent professional law officers to fulfill the needs of the court-martial system" (his answer to question 20 posed by the Senate subcommittee).

He also said that the Army, augmented by the Reserve components, can provide military trial judges for any anticipated expansion of the Army (same reference).

It would appear that greater utilization of the Reserve components would fulfill the needs of the court-martial system.

*Conclusion*

The Judge Advocate General should be given an opportunity to provide an adequate number of qualified lawyers by bringing on active duty a sufficient number of Reserve judge advocates. If this method should fail, we refer to the methods we recommended in our 1959 and 1960 reports. An additional method would be to hire qualified civilian lawyers on a per diem basis.

III. THE ARMY'S PROPOSED A BILL

This bill proposes to amend article 15 UCMJ so as to provide an increase in commanding officers' nonjudicial authority to impose these maximum punishments: Enlisted personnel: 30 days custody, forfeiture of one-half pay per month for 2 months, and reduction to the lowest enlisted grade. Officers: 60 days restriction and 30 days arrest in quarters or forfeiture of one-half pay per month for 2 months (punishment more severe than 60 days restriction requires the approval of a general court-martial authority or general officer in command).

*Conclusion*

The present right of the accused to demand a trial instead of nonjudicial punishment (art. 15b, UCMJ, and paragraph 132, Court Martial Manual) should be written into this bill in unequivocal language.

IV. THE ARMY'S PROPOSED B BILL

This bill abolishes summary courts-martial, provides for a single officer general and special court-martial, retains the present types of general and special courts-martial, and creates a new type of special court-martial, consisting of a law officer and not less than three members.

We disapprove of the proposed article 16(2)(A). We do not favor a court consisting solely of three or more lay members.

We disapprove of the words "unless * * *" in (2)(C) of the same article. If we have a court consisting of a law officer and not less than three members, or a law officer only upon the exercise by the accused of such given right, such right should not be diminished by the "unless * * *" phrase.

On page 9, line 18, the word "subsections" should be changed to the singular and the words "and (c)" omitted, since the words "and summary" do not appear in article 54, subsection (c).

V. THE ARMY'S PROPOSED C BILL

This is the bad check law which, in substance, was recommended by this committee in annex A to its May 1, 1959, report. It is now law, having been approved October 4, 1961, Public Law 87–385, 87th Congress, H.R. 7657).

VI. THE ARMY'S PROPOSED D BILL

This bill proposes to simplify trials by providing pretrial administration of oaths to court personnel, the entry of findings of guilty without a vote on findings, and for the calling of a session by the law officer without the attendance of the court members to dispose of interlocutory motions as to defense and objections, holding the arraignment, and receiving the pleas of the accused.

*Conclusion*

We see no objection to this bill.

VII. COMMAND INFLUENCE

Military justice is the system for enforcing discipline and administering criminal law in the armed services, to prevent our armed services from becoming an uncontrolled mob.

Regulations for the government of the Army have been continuously in force since the time of the Revolution, even before the colonists declared their independence and long before the Constitution was adopted. On June 4, 1775, the Second Continental Congress appointed a committee, of which George Washington was the chairman, to "prepare rules and regulations for the government of the Army."

The first Articles of War were adopted June 30, 1775, 3 days before George Washington took command of the Continental Army. The system of military justice is the product of centuries of experience. While retaining the substance which history has proved sound, Congress has periodically reconsidered and revised the law in the light of new experience.

A court-martial is a court of law and justice, determining each case only after hearing witnesses and receiving evidence. It is bound by certain rules of evidence and the fundamental principles of criminal law, and is empowered to adjudge only such sentences as the Uniform Code of Military Justice permits.

It is undeniable that many commanders believe that a court is an unnecessary impediment to immediate imposition of disciplinary punishment; that we would have a better army if commanders were permitted to impose immediate punishment without a trial. The Constitution, having given Congress the power "To make rules for the Government and regulation of the land and naval forces" (article 1, section 8), and the Congress, by the Act of May 1950, having adopted the Uniform Code of Military Justice, providing for trial safeguards of accuseds in the military services, some commanders have attempted to exercise command influence over members of courts by indicating the findings and sentences de-

sired. The U.S. Court of Military Appeals has reversed convictions and sentences which were found to have been influenced by command interference.

In no unmistakable language, the Congress has provided that there shall be no unlawful influence used against any court or any member, law officer, or counsel thereof (art. 37, UCMJ).

In view of article 37 and the decisions of the U.S. Court of Military Appeals, the services proclaim that, today, no such influence is used.

The Army Judge Advocate General states: "It has been made a matter of published policy that a part of the mission of the corps is the duty of safeguarding the complete independence and freedom of discretion of all persons performing judicial functions under the Uniform Code of Military Justice." (Pamphlet 27-101-87, sec. 11, Jan. 3, 1962).

*Conclusion*

In addition to the safeguards provided by article 37, UCMJ, field commanders should not be permitted any voice in the efficiency reports or promotions of law officers.

"The lawyers, who clarify the ambiguous facts of litigation, and who by the strength of their defensive skill exhibited in both criminal and civil suits rescue other persons in danger of ruin and restore their fortunes, are not less useful to the world than those soldiers who serve their country and their house on the battlefield. We consider that not only soldiers but also lawyers are fighting battles in our state: for the lawyers wielding the weapon of eloquence, protect the hope and lives of persons in distress and their children." [Code of Justinian (534].

Respectfully submitted.

COMMITTEE ON MILITARY JUSTICE,
D. GEORGE PASTON, *Chairman*.

Senator ERVIN. Major, I would infer from your last statement you probably share my views that written statements are very unsatisfactory for use, as evidence in that testimony of George Washington when reduced to cold type looks about the same as that of Benedict Arnold.

Mr. NORDLICHT. Yes.

Senator ERVIN. And the greatest instrument for the discovery of truth is an opportunity to be confronted with witnesses against one and have the privilege of having them cross-examined.

Mr. NORDLICHT. His demeanor and actual statements on being cross-examined would bring out all the details.

Senator ERVIN. Does that complete your statement?

Mr. NORDLICHT. Yes, sir.

Senator ERVIN. Colonel, I appreciate your reference to Mr. Everett. He, incidentally, was the author of a very fine book on military justice.

Mr. PASTON. I will be sure to get hold of it.

Senator ERVIN. He served as a Commissioner of the Court of Military Appeals and, therefore, became very familiar with the Code of Mililtary Justice and since this time he has written this very excellent book.

Mr. CREECH. Colonel, I should like to ask you several questions, sir, with regard to your statement.

I have noted that you state that your committee finds no fault with any of the proposals submitted by the armed services and the Court of Military Appeals.

Sir, with regard to the Uniform Code and the Court of Military Appeals, it has been charged by some individuals and the allegation has been made here during the course of our earlier hearing, that the code is too unwieldy to work effectively during wartime and,

therefore, that it should be repealed, that the Court of Mililtary Appeals should be abolished, and that the more desirable form of miltary justice would be to revert to the provisions of the Elston Act.

I wonder, sir, if you would care to comment on this allegation and this charge.

Mr. PASTON. I can repeat the language that you quote, that I used, that I find no fault with any such recommendation, because everyone is entitled to his own opinion. We said in our report that there are some commanders who believe that they can train a better army and impose better discipline by doing away with all trials and immediately punish the wrongdoer on the spot. They may be right if the commander were a good commander, if he knew that the man really was guilty, and there would be no question about that.

Why don't we carry it further. Why don't we say to people, propose it in civil life, do away with the courts and the moment somebody commits a crime punish him. That would be the best thing to do. I agree, if we are sure we were punishing the guilty person. But we do know that there have been too many cases in and out of the Army and when I use the Army, I am talking about the Department of Defense, any of the services, of people who were convicted even after long deliberation, after testimony of witnesses, who were later found to be innocent.

The celebrated example we had in World War II was General Patton. He saw a soldier in France who was sick and didn't want to go up to the frontlines again. The General slapped him. We all remember that incident. There was a sentence immediately without a trial, but it was later determined that that boy was sick, and that his physical and mental condition prevented the boy from going back into the frontlines.

There is no need for immediate punishment unless we have a proper trial, an endeavor to establish the truth before we punish.

It would have been very easy for General Patton, and I am only using that as an example, to order that boy court-martialed and make an inquiry into the facts and establish the truth before deciding whether the man should be punished or not.

So I certainly disagree, and although that is my opinion, I respect the other man's opinion. I disagree with his conclusion to do away with the Uniform Code of Military Justice. What better example do we need than the *Morris B. Brown* case? Do we want a repetition of that? Do we want to send people away for 99 years when they are being defended by an incompetent who is not a lawyer and give him assistants who were never trained in the law at the same time providing the prosecution with a former district attorney, and with experienced counsel as assistants?

Sure, that is quick administration, but it is not administration of justice.

Mr. CREECH. Sir, with regard to the *Morris B. Brown* case, which you have cited, the subcommitee has received information from a number of former officers who have served in the Judge Advocate General's Corps and other former military personnel. In some of these letters it has been alleged that, even today under the Uniform Code, the military personnel assigned as prosecutors are invariably experienced counsel, whereas in some instances inexperienced lawyers are assigned as defense counsel.

I wonder, sir, if your investigation has brought to light any abuses in this area or if you would care to comment upon these allegations?

Mr. PASTON. There is a provision that the defense counsel must be equally competent with the prosecution counsel assigned. There may or may not be some isolated instances where the authority convening the court has been remiss in that regard. I doubt that it was designedly so. I wouldn't ascribe that to any commanding officer. He may have tripped up, and assigned to the prosecution the more experienced counsel than the defense counsel.

If you have received such letters, I have received some, too, but upon inquiry I find that those letters come from lawyers who are called in to upset a conviction and they cry injustice. Upon deeper investigation we find the injustice in most cases consists of the fact that his client was convicted, but justly so.

And therefore, in most cases, it was not a crying injustice at all.

Senator KEATING. Of course the same thing happens in civil life. If the lawyer loses a case, as I have so frequently, his client usually thinks that it is because the other side had a better lawyer. I know that isn't limited to the military courts.

Mr. PASTON. If we try to compare the civil courts, I will say this and again I say the Army, I don't know about the other services, that their practice can be emulated by many civil courts. When we talk about improving the administration of military justice, it is not because we find too much fault with it at all. We feel like those dedicated individuals in the Judge Advocate General's Corps that, as perfect as it may seem to be, we still are willing to look for further improvements if they can be found, and that is what we are doing here, and I again here would pay a tribute to the U.S. Court of Military Appeals that that gentleman said should be abolished.

When we read those decisions and find such clarity, so convincing, whether they are the prevailing or the dissenting opinions, that one can drink it in and feel happy that we have such a court that renders decisions of that kind which can be emulated by some of our civil courts and should be—we don't find them doing what some civil courts do, to wit, one word "affirmed," "reversed," "granted," or "denied," leaving us in the dark as to how they arrived at such a decision and whether the facts, events, or circumstances, support or invalidate the conclusion.

Senator KEATING. I figured sometimes they didn't know themselves.

Mr. PASTON. Well, their excuse is if they give a reason they may give the wrong reason for the right result whereas if they just say "affirmed" or "denied" there may be many reasons for sustaining their thinking without anybody knowing it.

Senator KEATING. Very frustrating when you lose, isn't it?

Mr. PASTON. Very much so, and very happy when they say "affirmed" and if you are on the prevailing side——

Senator KEATING. Yes.

Mr. PASTON. Keeping the other side in the dark as to what is going on.

Mr. CREECH. Did you have something else to say?

Mr. PASTON. I just wanted to say that the decisions of U.S. Court of Military Appeals as distinguished from some of the civil courts are a departure from judicial cowardice exercised by some civil courts in that respect.

Mr. CREECH. Sir, you have mentioned command influence. Just prior to the beginning of these hearings, the subcommittee was notified by the Department of Army that it was discontinuing its previous procedure of permitting instructions of personnel of the court by the convening officer or the commanding officer, and I wonder, sir, even though we know there is going to be a new procedure there and even though the Navy has indicated also that it intends to do away with this procedure and substitute for it a type of brochure which would be made available to all courts-martial, has your investigation revealed instances of command influence such as that which the Court of Military Appeals made reference to in the *Kitchens* case, which was handed down in late December.

Mr. PASTON. There is no question that command influence has been exercised. It is human nature where a man commands a unit, in the Armed Forces to shortcut the imposition of discipline which he considers a morale builder of his unit for combat efficiency and so on.

And so to bring about those results he is naturally inclined to instruct the members of the court that he will not countenance these offenses inferring to them that he wants a quick conviction and a maximum punishment.

The Army, by issuing its directive, has again apparently taken the initiative as it did several years ago in appointing these law officers but I don't think that is enough, because if we have today General Decker as the Judge Advocate General of the Army, and he has been working in setting up—well, General Hickman preceded him in setting up these law officers, training them properly, and so on, and General Decker now with instructions by directives about no instructions to the courts and so on, we don't know who the judge advocate will be tomorrow. While he is aiming for the proper objectives in his directives, your committee should, and that is our recommendation, take these fine directives and write them into the law, so that there will be no question in the minds of commanders today or tomorrow as to what the intent of Congress is about the absolute eradication as far as we possibly can of command influence.

Mr. CREECH. Sir, you have indicated, of course, that you favor the uniform code as opposed to earlier types of military justice, or provisions for it. I wonder, sir, what are your observations with regard to the manner in which the code is operating at this time and have you observed any improvement in the quality of military justice as a result of the code?

Mr. PASTON. When we try to look back at the time before they had the uniform code, we are immediately impressed by the admirable necessity of the uniform code and the way it's been operating. There have been some abuses already and there will be but they have been insignificant.

The endeavor to improve the code itself will not bring about the result unless the administration of the code is done properly. We try to improve the code as much as we can foresee it should be improved, but those charged with its administration must administer it properly. The Judge Advocates General of the services must supervise the people below who conduct the trials, who appoint the courts, review the findings and sentences, and so on. The human element plays a part in many of these instances against which we cannot provide in advance in every case.

Seepages of personalities, little things of that kind must come in and we can't eradicate them all. We can do the best we can. Beyond that we are human beings, we are not perfect and we can't expect everybody else to be perfect.

Mr. CREECH. Sir, you have spoken of the desire for uniformity in the administration of justice and the problems that occur in administering the uniform code.

Your statement recommends that—

no disciplinary punishment shall be imposed for an offense punishable under this article if the accused has prior to the imposition of such punishment demanded trial by court-martial in lieu of disciplinary punishment.

You go on to state that no member of the Navy or the Coast Guard may demand trial by court-martial and endure punishment under article 15.

Now, you say that the Army and the Air Force provide this. Would you care to comment further with regard to your study and investigation as to whether you feel there would be any additional difficulty if this provision were implemented for all the services? What effect would it have on the Navy and the Coast Guard?

Mr. PASTON. It shouldn't be too difficult for the Navy and the Coast Guard to work out the methods of handling these situations.

Basically, if we say that as to members of the Army or Air Force no disciplinary punishment shall be imposed for an offense punishable under this article if the accused has prior to the imposition of such punishment demanded a trial by court martial in lieu of disciplinary punishment and then go on to say that this does not apply to members of the Navy or the Coast Guard, we are telling the members of the Navy and Coast Guard that "you are not on an equality with the boys in the Army or Air Force. They are given these privileges not to accept non-judicial punishment, but to demand a trial by court-martial, but not you."

We start out taking people into the armed services and downgrade them from civilians because they don't have all the constitutional rights that a civilian has, grand jury, and so on. Then we go further by telling those in the Navy and the Coast Guard, "You are even further down the ladder." We don't think it is right.

Senator ERVIN. In other words, Colonel, by the resort of disciplinary nonjudicial punishment where a man wants to contest the issue of his guilt or innocence he has in effect been found guilty without trial by his commanding officer, isn't that so?

Mr. PASTON. Yes, unquestionably, there is no doubt about it.

Senator ERVIN. And the Army practice has always been to give the man the choice of a summary court or accepting company punishment.

Mr. PASTON. That is correct.

Senator ERVIN. And your position is that this privilege which the Army gives to the man in question to make a selection whether he will take company punishment or a summary court, ought to be expanded to the other branches of the service.

Mr. PASTON. That is the least we ought to give to every man in the armed services.

I can go on and give you cases, actual cases, where I know of individuals who received a letter from the commanding general reading in substance: "because of these facts that were brought to my attention,

I intend to give you disciplinary punishment. Reply by endorsement hereon whether you want that or whether you want to stand court-martial." I prepared a man's reply and said, "I am innocent. I demand a trial by court-martial," and we wound up convincing the commanding general of this man's absolute innocence, and he was not punished.

Every man is entitled to that and we don't believe that there should be any discrimination against the boys in the Navy and the Coast Guard, which this does.

Mr. CREECH. Sir, does your study indicate instances in which you feel there would be justification for different types of administration of justice by the various services?

In other words, provisions comparable to this which might be permitted by one service and not another and where there might be justification for it?

Mr. PASTON. I understand there has been a long cry by the Navy over the years that they are different than the other services, that their boys are out on ships and they can't pull into ports to have trials and they must have their own special courts and everything else special for the Navy.

The Navy forgets the thing that we are all driving for and that is the rights and protection of each individual against unjust convictions and punishments. Having taken away certain rights from him when he was called into the service we shouldn't go beyond that. If they can't try him immediately then, too bad. Try him when you come into port for overhauling your ships or on other occasions when you can do it conveniently. But that man is entitled to a trial, give it to him, and a proper trial, defended by counsel, with a law officer of the court. Let's do it right so that neither he nor his kin can later complain that the armed services gives those in the services a raw deal.

We should not make it convenient for them to make any such accusation, because far and by large most people do get justice. We just want to eliminate, by proper means, the few individuals who spoil it for the greater majority.

Mr. CREECH. Sir, I realize that here you have been speaking of the court-martial and not of administrative discharge. Mr. Nordlicht has spoken about the study which your committee is doing of administrative discharges.

First of all, I should like to inquire as to when you will complete this study?

Mr. PASTON. For the past several years we have been devoting ourselves to proposing changes in the Uniform Code of Military Justice.

Frankly, the administrative discharge and its abuses have not occurred to us until recently when your committee started its hearings here, and we became alive to the need for an investigation into that and the correction of abuses which may be found to exist.

I don't know how much longer your committee will be engaged in its study, but we are at your service. We will be glad to devote ourselves to an intensive investigation and study of that particular subject since we have up to this point completed our studies on the uniform code.

Senator ERVIN. The subcommittee will certainly be glad to have any facts or results of your investigation on the question of discharges

or any recommendation you may make with respect to it. I would infer from what you and Major Nordlicht said that you feel a man ought not to be given less than an honorable discharge, or a discharge under other than honorable conditions, unless he is given at least an option either of accepting such a discharge without a hearing before a board or of having a hearing before a board in which he would have an opportunity to be represented by counsel and an opportunity to present testimony of witnesses.

Mr. PASTON. That is generally true. There are exceptions, of course. Where a man has absented himself without leave for several years, and we can't find him to give him notice to appear before a board, yet we want to get him out of the Army. Or he has been convicted of serious felonies by a proper trial in a civilian court. Things of that kind may not require a hearing, if the facts are there and he cannot disprove them.

Otherwise, we certainly insist on a proper hearing before a board or court at which he may be represented by counsel, et cetera.

Mr. CREECH. Sir, with regard to the statement of the chairman which is somewhat a restatement of an item in your statement, I should like to inquire, sir, what relation, if any, there is between your statement that no nonjudicial punishment should be imposed where the individual requests a court-martial, and the position that the armed services should rid themselves of unworthy persons via the administrative discharge?

We have been told here earlier that the administrative discharge proceeding is not an adversary proceeding. This has consistently been the position of the representatives of the Department of Defense and for this reason, they suggest, the individual is not accorded counsel in many instances and in other instances there is no provision for the subpena or for the receipt of depositions. Also, with regard to what you mentioned just a moment ago, with regard to convictions, it appears that, even where cases are on appeal and no decision has been rendered on the appeal, individuals are still subjected to administrative discharges?

I wonder, sir, if you would care to tell us about that.

Mr. PASTON. If the man is available, and notice is given to him that a board hearing will be held on a certain date, and he is given the privilege of bringing in witnesses or to controvert the charges made against him—let's take an outstanding example, a charge is made against him that he has been convicted of three felonies in civilian life. He should be given the right, if he can, to show that he was not convicted or those convictions were brought about improperly.

In other words, if he can disprove the charges by means of witnesses, or cross-examination, and show that the witnesses against him are not telling the truth, he should be given that opportunity.

But if he defaults on the hearings after being given due notice, if he can be found, thereby in effect admitting that these charges are true, I think the services should have a right to mete out an administrative discharge.

Mr. CREECH. Thank you, sir.

Mr. Everett has some questions he would like to ask at this time.

Mr. EVERETT. If the chairman has no objection, I would like to note for the record in connection with some of Colonel Paston's re-

marks the cooperation that was given by his committee to the staff when I had the occasion to go to New York and confer with his group. They were most cooperative, as were the members of the committee headed by Mr. Frohlich who will appear later, the committee from the Association of the Bar of the City of New York; and at that time they furnished extensive cooperation and extensive material which I am sure the chairman would like noted in some way.

Senator KEATING. We are very grateful to both these organizations for their help to our staff which has been very significant.

Mr. EVERETT. Colonel Paston, in connection with the undersirable discharge, it is our understanding that there are occasions when an undesirable discharge can be given to the person who has a repeated pattern of misconduct, and where in some instances the undesirable discharge would be furnished without his being provided legally trained counsel.

Would this be analogous to the situation mentioned in your statement about the recidivist, the habitual offender, under New York law?

Mr. PASTON. You are perfectly right and that is the reason I mentioned that case.

Mr. EVERETT. Now, in some instances, Colonel Paston, both in connection with officer cases and enlisted men's cases, we have received reports that discharges occurred under other than honorable conditions despite the objections of the person being discharged and despite his request for a trial by court-martial of the misconduct which was to be made the basis of the administrative discharge.

In that type of situation, do you think there should be an absolute right of trial by court-martial if the man is to be discharged under other than honorable conditions?

Mr. PASTON. There is absolutely no question about it because one of the worst stigmas that we can fasten upon any man is to give him a discharge for other than honorable conditions or a dishonorable discharge. He goes throughout life with it; it is a very bad thing and he certainly should have the right to counsel.

We overlook another thing in that regard.

Too many of these boys are very young, and when they are told, "That you can get out of the service by accepting an administrative discharge without honor," too many of them say, "OK, I will take it," because their main object is to get out. The blot on their life doesn't dawn upon them until several years later when it is too late for them to do anything about it.

Senator KEATING. That is right. Several tragic cases were brought to my attention of young boys who were not really bad who did that very thing. They were sick of Army life and so when they had some little minor infraction, they told them they could get out and then they come around several years later it is pretty hard to change that.

Mr. PASTON. That is right. I think we have to protect these boys against themselves. The way to protect them is, before we issue any such paper that is going to smear them for life, is to give them a proper trial. When I say a proper trial, I mean appoint a defense lawyer who can properly represent them, and it ties in again with no command influence, and establish whether the boy is really guilty. If there is any reasonable doubt of his guilt, don't put that tag on him.

Mr. CREECH. Sir, I would like to inquire if you feel it would be

desirable to have as a mandatory requirement that counsel be assigned to any serviceman who is a minor, less than 21 years of age. Is that what you have in mind when you talk about the age of these young men?

Mr. PASTON. Well, when we say minor, if the company commander or some other commander wants to give the man some extra duty, kitchen police or something of that kind, and so on, he shouldn't have defense counsel for that. That is an acceptable disciplinary measure. But where we are going to tack on a dishonorable discharge or a discharge without honor, and so on, in every one of those cases, absolutely, give them a proper trial and let him have defense counsel and let it be properly reviewed, and so on.

Mr. CREECH. Would you make that mandatory, sir, even if he waived it, for a young man who is under 21 years of age who may say, "I waive the right to counsel." Would you still make it mandatory?

Mr. PASTON. I would think so, even in that case.

Now, there may be objection to that. Nevertheless we do know that up until recently where an accused at a court-martial pleaded guilty, the prosecution was still required to prove a prima facie case, and if there was no proof of such prima facie case beyond a reasonable doubt the plea was ordered withdrawn and that the trial proceed as under a "not guilty" plea. He had that protection.

Under the new proposal that is to be done away with. Even if the boy says, "I don't want defense counsel, I don't want anything." If he is a young boy, it is going to be a serious thing, and I think we ought to make it mandatory to require at least a prima facie case and let defense counsel cross-examine the prosecution witnesses.

Mr. EVERETT. Colonel Paston, I gather from your earlier testimony that you favor the Army's law officer plan.

Would it be your opinion that this should be formalized by statute, with the field judiciary man who is a circuit rider and does nothing else but serve as a military judge?

Mr. PASTON. If any of these things that the Army has or proposes are good, and we think they are good, I think they ought to be formalized by statute, so that there will be no question at any time in the future as to what Congress intended here. Unless you formalize it and put it in the statute, a year from today or several years or even sooner than that, no one will know what the thinking of your committee was or what Congress intended, and we may again revert to what obtained before, willy-nilly, or worse yet like in the Brown case. Therefore, I think it is necessary for you to put it right in the statute.

Mr. EVERETT. And the field judiciary would be one of the things that you think is good, I gather?

Mr. PASTON. It has already proven to be a very good thing.

Mr. EVERETT. Now, Colonel Paston, so far as the subcommittee is informed, no criminal punishment is imposed in a civil court without a judge presiding over the trial.

In light of the stigma that attaches to an undesirable discharge, what would be your opinion of proposals that a qualified lawyer similar to the law officer should preside at a board hearing which would consider any proposed undesirable discharge?

Mr. PASTON. An undesirable discharge is so revolting that the first suggestion that you make that a qualified law officer presiding over it

is the least safeguard that we should have, and I think we should search even further to see if we can find even further safeguards to make sure that no one is accorded an undesirable discharge unless the evidence against him is very clear and convincing, and beyond any reasonable doubt.

Mr. EVERETT. Colonel Paston, with reference to some of the earlier questions and answers pertaining to command influence or alleged command influence over defense counsel, I would like to ask your opinion of a situation which has recurred in some of the complaints made to the subcommittee.

The complaint runs along these lines: That X is a defense counsel and he gets several acquittals and light sentences, whereupon either he becomes a trial counsel or he becomes a claims officer or legal assistance officer on a full-time basis.

If this complaint were verified or corroborated, would that, to your mind, constitute a type of command influence?

Mr. PASTON. On those facts alone, I would not say so, because we don't know what really motivated the change. It might have been coincidental that he got a lot of acquittals and then he was transferred to some other duty where he was needed and they wanted to train somebody else as defense counsel in which event, of course, there would be no command influence.

But if upon investigation it is found out that a local commander did that only because he has been securing acquittals when the commander wanted convictions, then undoubtedly something should be done about it.

Mr. EVERETT. Colonel Paston, there have been some proposals that civil-type offenses committed in the United States by military personnel should always be tried in civil courts if there were jurisdiction in a State or Federal civil court, instead of being tried by court-martial even if there were a violation of the Uniform Code of Military Justice.

How do you feel toward these suggestions?

Mr. PASTON. I think that the discretion that we give to the military today should remain, because where a member of the force, the Armed Forces, commits some very serious crime on the outside, and he is brought before the civilian court and given a suspended sentence or a slap on the wrist, the Army, and again I use the term "Army" meaning any Armed Force, should have the right if it sees fit to try him by court-martial, and, if guilty, to mete out a proper sentence because otherwise it will reflect adversely against the Army and harm the morale of the service.

Mr. EVERETT. The Powell committee, as you recall, recommended that military jurisdiction over retired personnel not on active duty be terminated.

Do you have any views on this point? Should retired personnel be subject to military jurisdiction?

Mr. PASTON. You say the Powell committee recommended to do away with it?

Mr. EVERETT. Yes, sir, that is my understanding that the Powell committee report recommended that this jurisdiction be terminated.

Mr. PASTON. What was its purpose, do you remember?

Mr. EVERETT. As I recall, the thought apparently was that the jurisdiction wasn't necessary and it occasionally created problems when the military were asked to exercise this jurisdiction over people who were for many purposes civilians, although they were still drawing military retired pay.

Mr. PASTON. Well, the President still has power to call a retired officer back to active duty, and I don't see any crying need for wiping out military jurisdiction over retired persons for military offenses while on active duty.

Mr. EVERETT. Colonel, last week the subcommittee heard some testimony about the following type of case: A man is convicted in a civil court of a felony which he appeals, and he is given an undesirable discharge pending completion of the appeal, whereupon the appeal is successful and the charges are dismissed.

Under those circumstances if he applies for a change in the undesirable discharge and this is denied, what would be your reactions as an experienced attorney to the result in that type of case?

Mr. PASTON. I assume it was denied by the board for correction?

Mr. EVERETT. Or discharge review board, perhaps both.

Mr. PASTON. We have been very much disheartened by the actions of that board which was set up by Congress to alleviate the task of Congressmen to enact special bills. From our observations that board has been denying applications for relief in too many cases which should be granted. You asked me the question as a lawyer. Some of those cases are appealed to the court of claims which in some instances reverse the decisions of the board for correction.

Mr. EVERETT. Colonel, with reference to command control the subcommittee has heard testimony from some of the earlier witnesses about effectiveness reports or efficiency reports as a possible instrument of command control. Particularly last week the subcommittee heard testimony with reference to a practice in the Army and the Air Force whereunder the senior member of the board of review, the chairman, provides an efficiency rating on the junior member.

What comments, if any, do you have about this type of practice, as it pertains to command control.

Mr. PASTON. I don't think that the senior member of the board should write the efficiency report on his junior members, because it would be like a senior circuit judge writing a report on his associate members to compel unanimous decisions in every case, even though there might otherwise be dissenting opinions.

The remedy there, I think, should be this: that the senior member of the board should make a report to the Judge Advocate General in which he outlines what he considers to be the qualifications of the members of his board, but then let the Judge Advocate General review these reports that come to him from the senior member as well as others, and upon such review and even further investigation and questioning of these people who give him the facts, have the Judge Advocate General only make out the efficiency report.

(Discussion off the record.)

Mr. EVERETT. Colonel, with reference to the recommendations in connection with the special court and the summary court, would it be a correct statement of the New York County Lawyers Association position that both the summary and the special should be abolished,

that as a second most desirable alternative the summary be abolished and the special retained, and if the special is retained a law officer should be made available in connection with the special court-martial?

Mr. PASTON. If we stick to fundamentals and basics we can never go wrong. Every trial should have a law officer and defense counsel.

Army regulation 635–105 prescribes means and procedures to eliminate officers from the Army for alleged substandard performance of duty and for moral or professional dereliction or in the interests of national security.

I

Under section IV, paragraphs 10 a and b, the mere fact that a board has been appointed is a "prima facie" case for elimination, and the respondent has the burden of proof to show why he should retain his status. Section II, paragraph 4a, specifically provides: "The burden of proof rests with the respondent to produce convincing evidence that he should be retained."

This is quite a departure from the rule in civil and criminal cases where the plaintiff and the prosecution, respectively, have the burden of proof. The burden is upon an employer to establish a defense of justifiable discharge and not upon the employee to prove that he was wrongfully discharged. The law will not assume that a servant has been derelict in duty from the fact that his employer has discharged him. The burden is cast upon the employer of proving facts in justification of the dismissal. *Linton* v. *Unexcelled Fireworks Co.*, 124 N.Y. 533, 27 NE 406; *Herreshoff* v. *American & British Mfg. Co.*, 164 App. Div. 238, 149 N.Y.S. 703.

II

Under section V, paragraph 20, the legal adviser "may" be called upon to advise on the admissibility of evidence, arguments, motions, or other contentions of counsel, procedures, "and any other matter determined by the president of the board."

The president of the board is not a lawyer. He rules upon admissibility of evidence and any other matter which he determines and he may or may not call upon the legal adviser for advice, and need not follow such advice even if he asks for it. Since an adversary proceeding is contemplated by the requirement that the recorder and respondent's counsel must be Judge Advocate General's Corps officers (sec. II, par. 4 h, 1, and j), it follows that the president of the board, who makes the legal rulings, should be a lawyer; otherwise, a provision should be made that all such rulings shall be made by the legal adviser. This may be done by eliminating the words "and may be called upon to advise," and to substitute therefor the words "and shall rule."

III

"Legal technicalities" are not permitted (sec. IV, par. 10e). This may mean that objections to hearsay will be overruled, in which event an officer may be eliminated upon records and papers without affording the respondent an opportunity to question the authors of such papers and be cashiered out of the Army upon the flimsiest proof of the charges. The respondent would thereby be deprived of his

right to office, a very valuable right, and be cast in shame. Such procedures do not accord with the fundamental rights of due process of which we rightfully boast.

Mr. EVERETT. And should have what, sir?

Mr. PASTON. Defense counsel and a law officer, every court.

The only reason we recommend that we abolish the special as well as the summary is to have more legal talent available for those purposes.

If the services can convince us that they really need a special court we will go along with it and say: "OK, if we maintain those other fundamentals," but so far we have not been convinced that there is any need for a special court and, therefore, we think that if we wipe out the special and the summary, there will be sufficient legal talent available to man those courts, that court, one court.

Mr. EVERETT. So, then with respect to objections that there would not be enough lawyers to do the job, you feel that the elimination of the summary and the special court would, in the long run, cut down on the needs for lawyers, rather than increase it?

Mr. PASTON. That is correct, because we are increasing nonjudicial punishment under article 15 which in effect is what the summary and special court could do without the BCD's. The Judge Advocate General, as we show in our report of February 7, said that the Judge Advocate General's Corps can provide an adequate and competent number of professional law officers to fulfill the needs of the court-martial system. He apparently knew what he was talking about.

Mr. EVERETT. That is all.

Mr. WATERS. As I understand it then, Colonel Paston, you would favor the increase of discretion of the unit commander to impose nonjudicial punishment through the absence of a summary court?

Mr. PASTON. Yes.

Mr. WATERS. Would there be any safeguard built into this nonjudicial punishment to be imposed by the company commander?

Mr. PASTON. A safeguard as to what, sir?

Mr. WATERS. As to appeal.

Mr. PASTON. Yes, that is provided. If the individual considers the punishment meted out to him too severe and unwarranted he has the right of appeal.

Mr. WATERS. But as I understand the article, meanwhile he has to serve that punishment while he is appealing?

Mr. PASTON. That is correct.

Mr. WATERS. Do you have any suggestion in connection with the fact that an accused serviceman who has an opportunity to select a nonjudicial punishment, declines this and demands a court-martial, might then be tried by a summary court officer appointed by the same commander from whom he declined the nonjudicial punishment and that this might adversely affect the trial?

Mr. PASTON. No, because if we have our judicial system we are trying to set up where the law officers and all judge advocates are absolutely independent of command, then we have no fears that the commanding officer or the convening authority may select John Doe, a qualified law officer and who knows that he must act independently regardless of the commanding officer's desires regarding conviction and punishment, because he takes the position: "You offered to give

this man nonjudicial punishment, he refused it; he demanded a trial by court because he thinks he is absolutely innocent, I, the law officer, as a judge sitting here, now will consider whether the man is innocent or guilty and I will not be influenced by command or anybody else. I will judge the case simply on the facts."

Mr. WATERS. And, colonel, further on in your statement where you discussed the wording that the court be composed of "a" law officer, instead of "the" law officer, did you have in mind something akin to the civilian provision for change of venue?

Mr. PASTON. No. In that proposed bill they say that if the convening authority appoints a court with a law officer the accused may elect to be tried by a court consisting of a law officer—the word "a" that we are afraid of. After the law officer has been identified, you give the accused the right to be tried by that law officer, he considers him to be absolutely honest, you give him the right, however, only to be tried by a court presided over by "a" law officer, it might be somebody who hasn't been identified, and he doesn't know who it is. So we say that the word "a" should be "the" the one who has already been identified to him. You have given him that privilege.

Mr. WATERS. Thank you, Colonel, thank you, Mr. Chairman.

Senator ERVIN. Colonel, we are certainly indebted to you and Major Nordlicht for appearing before us and the subcommittee will welcome any further suggestion at any time either one of you may see fit to make them. I am certain the objectives of this subcommittee are the same as the objectives of your committee and the same as the objectives of the Armed Forces themselves.

We certainly thank you.

Mr. PASTON. Thank you, sir. Having worked over the many years apparently in the dark as to whether there would ever be any fruit to our work and we find that your committee now is working along parallel lines and something may finally come of improving the administration of military justice, we will feel rewarded for the work we have done and it is an impetus for us to continue in the work. We are happy to have been invited here today.

Senator ERVIN. I may say I share your views that we have had improvement under the Uniform Code of Military Justice and we want to see if there is any way to improve it further.

Mr. PASTON. Senator Keating mentioned New York. In New York we have our supreme court with words above the entrance: "The true administration of justice is the firmest pillar of good government"—not abstract justice, it is the true administration of justice that counts.

Senator ERVIN. I think that is a fine inscription. Having spent most of my life in the legal field, I have always maintained that the most sacred obligation of government is the administration of justice.

Mr. PASTON. The true administration of justice.

Thank you.

Mr. NORDLICHT. Thank you.

Senator ERVIN. Call the next witness.

Mr. CREECH. The next witness is Hon. Everett A. Frohlich, chairman of the Special Committee on Military Justice, Association of the Bar of the City of New York.

Mr. Frohlich will introduce to the subcommittee Mr. Burns and perhaps other members of his special subcommittee.

## STATEMENT OF HON. EVERETT A. FROHLICH, CHAIRMAN OF THE SPECIAL COMMITTEE ON MILITARY JUSTICE, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK; ACCOMPANIED BY ARNOLD I. BURNS AND DONALD J. RAPSON, MEMBERS OF THE SPECIAL COMMITTEE ON MILITARY JUSTICE OF THE NEW YORK BAR ASSOCIATION

Mr. FROHLICH. Mr. Chairman, my name is Everett Frohlich.

Senator ERVIN. Gentlemen, we are delighted to welcome you before the committee and we appreciate what you have done.

Mr. FROHLICH. Mr. Chairman, our committee is honored at the invitation to appear. Our association has for many years shown a keen interest in the administration of military justice. We take pride in the fact that we, to a great extent and in large measure aided various organizations which ultimately accomplished the enactment of the Uniform Code of Military Justice. We are lawyers and do not have an ax to grind.

We are dedicated solely to the concepts of justice as we, steeped in Anglo-Saxon law, envisage them.

We did not find find that the administration of military justice during World War II conformed to our concepts of justice and its proper administration and because of that we became dedicated to lending our aid and assistance in improving the administration of justice in the military forces.

We continue to have that dedication and that interest. We have made a study of the code and in our opinion it needs modification. We do not contend that the code is not working. Indeed, we think it is working. But we think it can be improved.

Our association, through the efforts of two particular members, Mr. Arnold Burns and Donald Rapson, both members of the New York bar, Mr. Rapson also is a member of the New Jersey bar, undertook an exhaustive study of the code. We prepared a report which we have submitted to this committee. As a result of our study a bill was introduced in the Senate by Senator Javits as S. 1553 and in the House by Representative Lindsay, H.R. 6255. We think that this bill would improve the administration of justice in the military forces. I should like Mr. Burns and Mr. Rapson to go into explicit detail and tell you of the manner in which this bill or a comparable bill will improve the administration of military justice.

Mr. BURNS. Mr. Chairman, the Uniform Code of Military Justice became effective in May 1951. The Association of the Bar of the City of New York, along with other bar associations, was active in bringing about its enactment.

The association of the bar was then, as it is now, concerned with the protection of the constitutional rights of the members of our armed services and the guarantee to them of due process of law in connection with trial and punishment for offenses committed or alleged to have been committed during tours of military service.

The Uniform Code unquestionably constituted an important piece of ameliorative legislation. Nevertheless, experience has shown that further modification and reform of military law is essential.

Since 1955, the Department of Defense has been sending an omnibus bill to Congress for the purpose of correcting certain deficiencies

which had been experienced by those administering the Uniform Code. In 1958, a legislative proposal was arrived at which had the joint approval of all the services and the judges of the Court of Military Appeals. This proposal was introduced in the 86th Congress as H.R. 3387. Another bill, sponsored by the American Legion was also introduced in the 86th Congress as H.R. 3455.

In October of 1959, the Special Committee of Military Justice of the Association of the Bar of the City of New York undertook to study the omnibus bill and the American Legion bill then pending in Congress and to consider anew and independently whether and to what extent changes in the Uniform Code were necessary.

In its study and evaluation of the Uniform Code's operation, the association of the bar attempted to strike that delicate balance between the peculiar requirements of the Military Establishment in performing its mission, on the one hand, and the importance of providing fundamental judicial guarantees to our servicemen, on the other.

In short, our study of the omnibus bill and the American Legion bill led us to conclude that both contained worthwhile provisions meriting enactment. We thought that the primary objective of the omnibus bill was to facilitate the operation of our system of military justice through the adoption of time-saving and man-saving economy measure; in our view, however, it did not go far enough in enlarging the substantive rights of servicemen and in affording important judicial guarantees which we deemed necessary.

The American Legion bill, we thought, went too far in altering the basic system of military justice and, in our view, if adopted, would undermine the good order, military discipline, and high morale so essential to military effectiveness. We thought the American Legion proposals reflected a basic lack of faith in the integrity and competence of military lawyers in administering the code. For specific views respecting both the omnibus bill and the American Legion bill this subcommittee is respectfully referred to our report, and to the legislation which was introduced in the Congress to which Mr. Frohlich has adverted.

The association's bill is electric in its approach and adopts certain provisions of the omnibus bill and of the American Legion bill which we thought warranted enactment. In addition, new proposals were put forward.

This morning we shall speak of those problems concerning the structure and operation of military tribunals which we think are particularly significant and of the association's suggestions for solving them, and I should like to begin by talking about general courts-martial.

In general, the association concluded that the quality of justice dispensed by general courts-martial is good. It is imperative, however, that certain changes in general court-martial practice be made.

Under the code the law officer—the trial judge presiding—is appointed by the commanding officer who refers criminal charges for trial to a general court-martial and who orders the court convened. This system is inherently bad since the law officer is usually under the command structure of the convening authority and thus subject to pressure, conscious or otherwise, from the very officer who ordered the case tried in the first place.

Moreover, it was my observation during my 3-year tour of active duty as an officer in the Army Judge Advocate General's Corps, rep-

resenting the Government on appeals in Army cases originating in all parts of the world, that judge advocate officers were frequently rotated, sometimes on a case-by-case basis, from service as law officer to trial counsel to defense counsel and to reviewing officer in the office of the staff judge advocate. This sort of rotation militates against the development of an experienced and able judiciary.

Under the association's bill, law officers would be appointed by the Judge Advocate General. They would be under the sole command of that officer and, in effect, would be circuit riders whose sole function would be to preside at courts-martial. This system would in our judgment (*a*) minimize command influence, (*b*) develop an experienced trial judiciary and (*c*) provide the training grounds for the development of judges to sit on boards of review.

This circuit rider system was instituted over 2 years ago by the Army and, we understand, has worked well. The Navy had a pilot program in two judiciary districts, and it is our understanding that there is some discord between various segments of the Navy Department concerning the desirability of the system.

Be that as it may, in our view, that is an essential reform which should be instituted immediately.

It was also the observation of members of the association that all too frequently, law officers had insufficient experience at the bar. The association bill would require a law officer to (*a*) be at least a major or lieutenant commander, (*b*) have at least 5 years at the bar, and (*c*) be certified as qualified and competent by the Judge Advocate General.

By virtue of decisions of the U.S. Court of Military Appeals, the law officer, to the extent consistent with the present provisions of the code, has been given the prerogatives and functions traditionally enjoyed by a civilian trial judge. This trend is desirable but further change in the immediate future is necessary.

Under the association bill, the law officer is given the power to (*a*) punish for contempt, (*b*) rule on challenges, (*c*) rule with finality on motions for findings of not guilty, (*d*) preside, control, direct, and regulate all proceedings, (*e*) supervise the preparation of the record of trial by the trial counsel, (*f*) rule on continuances, and (*g*) rule on all interlocutory questions except the question of sanity.

At the present time the law officer is permitted to consult with members of the court-martial without the presence of the accused or his counsel, on questions respecting the form of findings.

As Senator Keating indicated in his opening remarks the association's bill prohibits any contact whatsoever between the law officer and court members without the presence of the accused, counsel for both sides, and a court reporter.

The association gave consideration to whether the law officer should be given the power to adjudge sentences in general court-martial cases. This is an area which the association has marked for further study.

A special court-martial is empowered under the code to prescribe punishment extending to a bad conduct discharge, confinement for up to 6 months, hard labor without confinement for up to 3 months, and forfeiture of two-thirds pay for up to 6 months.

Yet there is no provision for trial of special court-martial cases to be conducted by legally trained personnel, and the accused can have competent trained counsel only if he, at his own expense, retains civil-

ian counsel. There is no law officer. In effect, the court-martial members—military laymen—are instructed on the law, and evidentiary rulings are made by a senior military line officer, himself untrained in the law. This is truly a case of the blind leading the lame. It is antithetical in our view to fundamental concepts of fairness and due process.

The association has attempted to remedy this serious defect—and to do so consistent with reasonable manpower requirements—with two complementary provisions.

First, a new type of special court-martial consisting only of a qualified law officer is established. This special court-martial would be convened only if the accused requests trial before it instead of before the traditional special court-martial composed of three to five lay members.

Built into this provision is the requirement that the accused know the identity of the law officer who will hear his case and have the advice of counsel prior to making his request for a single-officer special court-martial.

The new single-officer special court-martial would have concurrent jurisdiction with the type of special court-martial now authorized. It would be up to the accused to make his election if he wished trial before a qualified judge. The law officer of the special court-martial would have to have all the qualifications of a law officer presiding at a general court-martial.

The new one-man special court-martial would be similar to a magistrate's proceeding in civilian criminal proceedings, and the accused's right of election is analogous to the right to waive a jury trial.

The one-man special court was included in the omnibus bill. In that bill, however, the accused's right to trial by such a court was conditioned on prior convening authority approval. The association is unwilling so to limit the accused's right of election but, in recognition of military expediency, has proposed that the right be conditioned on convening authority approval only in times of national emergency or in cases of accused persons aboard vessels.

Second, is the complementary provision abolishing the right of special courts-martial, whether of the old type or the new, to adjudge punitive discharges. The association does not think that punishment this severe and far-reaching ought in any case to be administered in the absence of a judicial proceeding containing all the traditional safeguards such as representation by qualified legally trained counsel.

The Army has eliminated punitive discharges by special courts-martial by regulation. The Air Force imposes them only if qualified legal personnel are available to represent both the prosecution and the defense. We note that (after the association bill was prepared), the Court of Military Appeals in its annual report for the calendar year 1960, went on record as favoring this proposal.

Under the code members of boards of review may be and have been rated for efficiency and fitness purposes, as pointed out earlier this morning by the senior member of the board, thus permitting him an opportunity unduly to influence his junior conferees. This is unsatisfactory.

During my tour of duty at the Pentagon, colleagues of mine suggested that individual members of boards of review occasionally voted

different ways on virtually identical questions, depending on the position taken by the senior member of the board. Regardless of the accuracy of these interpretations, it goes without saying that the present system is bad. To insure independence of action by board members, the association bill provides that board members be rated by the Judge Advocate Generals of the services.

The association has marked for future study the mandatory creation of a Judiciary Corps in each of the services from which law officers and board members could be drawn.

During my tour of duty, captains frequently sat as members of the board, and I have seen cases where first lieutenants did so. It is essential that service on a board of review be limited to officers with sufficient experience and maturity. Consequently, the association bill requires that board members have the very same qualifications as law officers.

The association's Special Committee on Military Justice has reason to suspect that if the judicial guarantees and legal procedures incident to trial by court-martial become too stringent, the services may resort to the administrative discharge route to separate undersirables.

In its annual report for 1960, the Court of Military Appeals indicated that Major General Harmon had confirmed in August of 1958, as early as that, that the unusual increase in undesirable discharges by administrative proceedings was the result of efforts of military commanders to avoid the requirements of the uniform code.

The association has not included in its bill any proposed remedy for the administrative discharge problem. However, this should not be construed as a lack of awareness of or interest in the problem. On the contrary, even prior to hearing of the work of your subcommittee, the association's Special Committee on Military Justice constituted a subcommittee with directions that it study this problem and render a full report. That subcommittee's work is now in progress. I think it is fair to say that the association is opposed to the separation of military personnel through administrative proceedings where such proceedings are employed to circumvent the code's requirements and do not afford due process in every sense of the term.

I have been asked to advise your subcommittee that the association of the bar of the city of New York is prepared to assist it in its labors and in the drafting of any legislation it deems necessary.

Mr. Rapson will speak briefly on summary courts-martial, nonjudicial punishment, and extrajudicial review of military convictions.

Thank you.

Senator ERVIN. Thank you, Mr. Burns, and I wish to thank you and the other members of the committee for their assurances to give us further assistance in this field.

Mr. FROHLICH. We are very anxious to be of assistance in this committee.

Senator ERVIN. We will be glad to hear Mr. Rapson.

Mr. RAPSON. As Mr. Burns has suggested, the really glaring deficiency of the Uniform Code of Military Justice is the operation of special and summary courts-martial. I will direct my attention to the latter, and at the same time discuss nonjudicial punishment under the code.

A. Summary courts-martial and nonjudicial punishment: At present summary courts-martial, which have jurisdiction only of enlisted men, may adjudge any punishment except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than 1 month, hard labor without confinement for more than 45 days, restriction to specified limits for more than 2 months, or forfeiture of more than two-thirds of 1 month's pay; provided that confinement, hard labor without confinement or reduction except to the next inferior grade may not be imposed upon enlisted men above the fourth pay grade. As a practical matter, this means that enlisted men of the rank of private and private, first class can be confined up to 30 days by summary courts-martial.

The summary court-martial consists of one commissioned officer, who need not be and usually is not a lawyer. This officer acts as judge, jury, trial counsel, and defense counsel. While there are no *statutory provisions concerning the minimum grade of the summary* court-martial officer, the manual for courts-martial states that "wherever practicable" he should not be below the rank of lieutenant (Navy) or captain (Army, Air Force, Marine Corps). An accused person in the Army and Air Force who has been offered nonjudicial punishment under article 15 has the right to be tried by summary court-martial in lieu thereof, but the right is not available in the Navy or Coast Guard, as was discussed previously this morning.

Summary court-martial records of trial must be reviewed by a judge advocate, but it is impossible for there to be an effective review. A summary court-martial record of trial consists only of a four-page charge sheet, and the only matters required to be recorded therein are the pleas, findings, and sentence, it not being necessary for the evidence to be summarized or attached. It is accordingly quite clear that there can be no review of the question of guilt or innocence, and that corrective action generally is limited to questions of jurisdiction, legal sufficiency of the charge, or legality of the sentence.

Notwithstanding this distinctly unjudicial-like structure, a man convicted by a summary court-martial carries with him the permanent stamp of a criminal conviction by a U.S. court.

Even though a man may eventually be honorably discharged from the service, he must always set forth the fact that he was convicted of a crime against the laws of the United States, whenever he is asked whether he has been convicted of a crime. This question, of course, is often asked in civilian life, for example, job applications, voting registration, jury duty, and so forth.

Only a Presidental pardon can remove this black mark from a man's record. As I will point out later, even the broadly empowered Boards for Correction of Military Records are considered to be without power to remove the fact of conviction, even though a clear injustice may have taken place.

When one considers the fact that in 1959, there were over 50,000 special and summary courts-martial in the Army, the potential for injustice becomes immediately apparent. In 1961 there were over 60,000 special and summary courts-martial in the Army.

Now, under article 15 of the Uniform Code of Military Justice, a commanding officer can impose nonjudicial punishment upon a member of his command. This punishment is usually in the form of extra

duty, withdrawal of privileges, and restriction to limits; although there is also the power to reduce the man in grade. Under present law, (except for a limited situation on board ship in the Navy) there is no power to confine a man or forfeit his pay.

Unlike a summary court-martial, nonjudicial punishment does not go on an enlisted man's record, and therein lies its chief virtue. Thus, a commanding officer can discipline a man for a minor offense, without creating a permanent stigma.

However, according to the services, their experience indicates that many cases are tried by summary courts-martial instead of being disposed of by nonjudicial punishment because commanding officers regard their punishment powers under article 15 as inadequate.

In actual experience, a commanding officer is reluctant to reduce a man in grade for a minor offense because its resulting effect of loss in pay is extremely harsh upon the man and his family.

However, this same commanding officer often regards the alternatives of extra duty, withdrawal of privileges, or restriction to limits as totally inadequate. Thus, the case ends up being tried by a summary court-martial.

To that end, the Department of Defense has been seeking legislation since 1955 that, among other things, would authorize a commanding officer in the grade of major or lieutenant commander or above, to impose upon an enlisted man, confinement for a period of up to 7 days or a forfeiture of up to one-half of 1 month's pay. The association approved this proposal and included it in its bill.

Although it is recognized that, by its very nature, utilization of article 15 authority to punish behavioral infractions results in punitive action without judicial safeguards and is therefore subject to abuse, it is certainly desirable to avoid, wherever possible, resort to courts-martial with their resulting criminal convictions of permananet effect.

On balance, the granting to commanding officers of enlarged power to handle many disciplinary problems paternalistically through the use of nonjudicial punishment seems desirable so long as there is some safety valve to prevent abuse. Under this proposal the new powers of nonjudicial punishment authorized must be administered by an officer who is at least a major or a lieutenant commander, thus increasing the likelihood of maturity and sound judgment in their exercise and correspondingly reducing the chance of abuse. If properly employed, this additional authority will increase the commanding officer's ability through the exercise of mature judgment and strong leadership to implement a program of providing discipline within his command to discourage recurring infractions.

However, as a corollary of the proposal concerning article 15, the association bill would abolish summary courts-martial.

It is readily apparent that if nonjudicial punishment powers are increased so as to permit confinement for up to 7 days or to impose a forfeiture of up to one-half of 1 month's pay, there would be no real difference between the judicial processes and protections of nonjudicial punishment and summary courts-martial, except in the very important respect that a summary court-martial conviction puts a permanent blot on a man's record while nonjudicial punishment does not.

Accordingly, on the premise that the great bulk of minor offenses now being referred to summary courts can and will be disposed of just

as efficiently, if not more so, by nonjudicial punishment in view of the increased powers thereunder, the association sees no need for retaining the summary court-martial and its bill abolishes that forum. The result should be a substantial reduction in the number of criminal convictions for minor offenses. Again, in 1961 there were 38,049 summary courts-martial alone in the Army. If this proposal were adopted, presumably the great majority of these summary courts-martial might be handled through nonjudicial punishment, and you would have that fewer convictions of permanent effect.

The cases that are too serious for nonjudicial punishment but not sufficiently serious to warrant a general court-martial referral can be sent to special courts-martial, at which level the accused will have the additional right of electing trial before a single officer who will be a highly qualified lawyer.

Significantly, the January 3, 1962, issue of the Judge Advocate Legal Service published by the Department of the Army reports that bills are being submitted to Congress by the services that would in part—

> amend article 15, USMJ, by increasing commanders' disciplinary authority, and would change the courts-martial structure by eliminating summary courts-martial.

Although I have not had an opportunity to study these bills, on their face they appear to be along the lines of the association bill.

I wish to direct attention to the subject of extraordinary review of courts-martial, a matter which I became somewhat familiar with in my 3-year tour of duty in the Office of the Judge Advocate General, also in the Pentagon.

The Legislative Reform Act of 1947 created the armed services' Boards for Correction of Military Records in the Department of Defense. The statutory grant of power for the Boards which now appears in 10 USC section 1552 is in the broadest of terms:

> (a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice * * *.

Pursuant to this enabling authority, there are now in existence separate Boards for Correction of Military Records of the Army, Air Force, and Navy.

These Boards were established in order to free Congress of the burden of dealing with matters previously dealt with by private bills and to provide a method for their disposition by administrative action.

One of the earliest questions to arise with respect to the authority of the Boards concerned their power to take corrective actions in court-martial convictions which are—

> final and conclusive * * * (and) binding upon all departments, courts, agencies, and officers of the United States * * *

under article 76 of the code. In a vastly important opinion, the Attorney General concluded that article 76 does not affect the authority of the Secretary of the military department acting through the Board for Correction of Military Records to correct any military

record where in his judgment such action is necessary to correct an error or remove an injustice arising from a court-martial conviction.

As may be expected, the Boards receive a hugh volume of petitions for review of courts-martial, and have been responsible for affirmative relief in many cases. In some of the cases calling for corrective relief, it has been apparent that the accused should never have been convicted, e.g., the facts showed that he was clearly innocent, or the court had no jurisdiction or the act was not an offense, etc. In these cases, the question has arisen whether the Secretary of the department, acting through the Boards, had the authority to take corrective action by removing the fact of conviction itself.

Unfortunately, the services have taken divergent approaches on this question. The Army and Navy hold that the Boards are limited to removing the "punitive consequences" of a conviction, and may not eradicate the conviction. In other words, forfeitures may be returned, grades may be restored, and and discharges may be recharacterized, but the conviction remains. The rationale is that article 76 still precludes any change in the findings of courts-martial and that the Board's authority only extends to clemency with respect to the sentence.

On the other hand, my understanding is that the Air Force is understood as taking the position that the authority "to correct any military record when * * * necessary to correct an error or remove an injustice" clearly includes the power to remove the fact of conviction and its Board will take such action in an appropriate case.

Without commenting upon whether the Army and Navy view, or the Air Force interpretation of the present law is correct, the association believes that the Boards ought to be empowered by statute to remove the fact of conviction in appropriate cases. That is the only meaningful corrective action in a case in which an accused has been unjustly convicted.

Accordingly, the association bill would amend the finality provisions of article 76 of the Uniform Code of Military Justice to make them subject to action by the Boards for Correction of Military Records. This should remove any existing doubts as to the authority of these Boards to take any necessary corrective action in a court-martial case. No system of justice should be powerless to correct an admitted error or injustice.

Conclusion: It is most important for us, of the civilian bar, to continuously review the administration of military justice in the same manner as we review and suggest improvement of the more familiar areas of civilian practice. Unless the civilian bar takes such an active interest, military justice will remain an essentially unknown quantity, as it is today. This lack of knowledge too often produces unfounded criticism by lawyers of the administration of military justice, which in turn undermines public confidence in the system. When one considers the fact that the Armed Forces exercise the largest criminal jurisdiction in the United States, this failure of confidence creates a serious problem.

That is not to say, however, that the system is beyond criticism. The Association of the Bar of the City of New York respectfully submits that the proposals set forth in these statements made today, and contained in the legislation introduced, can produce immediate and effective improvements in the administration of military justice.

I wish to express to you my sincerest appreciation for the opportunity to appear before this committee today.

Thank you.

Mr. CREECH. Thank you.

Mr. Frohlich, Senator Ervin, unfortunately, has been called to another meeting at this time, and he has asked us, if you perceive, to go ahead and to pose such questions as we may have.

Mr. FROHLICH. We will be very happy if you will do so.

Mr. CREECH. Thank you.

Sir, you have mentioned, as have Mr. Burns and Mr. Rapson, I believe, that you feel that the code is working effectively, but you have indicated that you feel it might be improved.

You heard earlier this morning the questions which we posed with regard to testimony which the subcommittee has received that the code is unwieldy, that it would not be effective during the time of war.

I wonder, sir, what is your view with regard to these charges.

Mr. FROHLICH. I am appalled at the mere thought that we should scrap the code and revert back to what most of the members of my association characterize as a very poor form of administration of military justice during World War II and prior thereto. It would be shocking to us.

We can understand where the military would find problems in the administration of justice under the code because of the exigencies of the military mission. But we do not think that they are giving it, the critics or anyone who would suggest going back, we do not think they are giving it a fair appraisal.

It seems to us that there is always a cumbersomeness and a difficulty if you have to deviate from your main objective and put into operation a judicial system or adminster a court—something that is not directly in line with your primary mission.

The military, we realize, have a mission that is different than merely administering justice. I can see where they could be critical of something that would divert their energy and divert their attention.

But I reject the suggestion of going back to the situation that existed prior to the code, where you had a mere semblance of the administration of military justice as far as we, as lawyers, are concerned.

We saw many things personally that shocked our consciences—and that shocked us as lawyers. It was because of that that lawyers, without any reason other than their enthusiasm to see justice properly administered, got on the bandwagon and tried to do something to create the code.

We would be very reluctant to see it eliminated or go back to what had existed before.

Mr. RAPSON. With respect to the time of war situation, I echo everything Mr. Frohlich said.

I would think that there must be somewhere a parcel of emergency legislation designed to be enacted in the event war does break out, and I would suspect if it is not already the case, that this legislation would include proposals to expand the Court of Military Appeals so that it need not be centralized here in Washington.

84154—62——17

Under the present statute, Judge Advocate Generals can certainly create more boards of review, and they can be decentralized throughout the world as need be, just as was the case in World War II.

So I think those two proposals alone would unleash the cumbersomeness of the code as presently constituted.

Mr. BURNS. I would add just two comments:

First, the Uniform Code of Military Justice did operate effectively during the Korean war, and I think that is, in large measure, a complete answer to the suggestion that it won't work.

Second, as we sit here today, the people of New York City are according Colonel Glenn a tremendous welcome for circling the globe.

In this day and age, it seems to me it ill behooves those to say that military logistics cannot be worked out to handle the effective administration of military justice. It is an important part of a democracy.

Mr. CREECH. Mr. Frohlich, during the 10 years that we have had the code, have you observed any improvement in the quality of military justice as demonstrated by the record of trials that your subcommittee has studied?

Mr. FROHLICH. Yes, we have, definitely.

We have observed progressive improvement as each year goes by, in the record of trials. We find less that we can be critical of, as lawyers.

We think that the code has not really been given an opportunity to demonstrate how effective it can be. It is a short period of time, 10 years.

I think that it is proving itself, I think that the record of the trials demonstrates that.

Certainly there are instances which will shock us still, and I am sure that under any code or any form of justice that can be devised, there will always be certain instances that will repel us.

We do think, however, that it has demonstrated that it is a workable code and a good code, and that it is protecting the rights of the persons who are in the Armed Forces. We think it can be improved, as all forms of judicial systems can be improved.

Mr. CREECH. Sir, I wondered if you have observed any trends in military justice that would be significant with respect to the constitutional rights of military personnel?

Mr. FROHLICH. I do not quite see the specific thrust of your question. Can you be more particular with it?

Mr. CREECH. I wonder, sir, if through your study of the trial records you have noted any significant trends showing that perhaps there is a greater recognition on the part of the military of those certain basic, constitutional rights which we recognize for the civilian.

Mr. FROHLICH. I think that there undoubtedly is; it is reflected in the records.

I think the military has learned something; I think it has become educated a little bit. As a matter of fact, I think it is an educational process which has been overdue. The miliary at one time had a very jaundiced view of lawyers. They thought that lawyers interfered with getting the thing done, and perhaps they were right, too. But that does not necessarily mean that you just ignore the administration

of justice. I believe that the military has been made aware of the jealousy with which we guard our constitutional rights in America, and that we do not want them bandied about; we do not want them denied to us, irrespective of whether we are civilians or in the military.

I think the military has become aware of that, and more and more are adhering procedurally and in the conduct of trials to those principles which conform to the lawyer's concept, and the American people's concept, of justice.

Mr. CREECH. We have had a great deal of discussion about the Court of Military Appeals and its impact upon the administration of military justice. Certainly the court, in some of its opinions, has indicated that the serviceman should be entitled to basically the same constitutional guarantees as any other citizen. Just recently the court handed down a decision in which it said, among other things, that 1 year's confinement in a military prison is preferable to any type of discharge other than honorable.

I wonder if you would care to comment further upon the study which you are doing, or with regard to administrative discharges which Mr. Burns has mentioned in his statement, and whether you would give us any target date as to when this study will be available.

Mr. FROHLICH. Our study should be, or at least our report on it should be, available, I would say, within a period of 2 months. We hope to make a comprehensive study of it.

We do need, in order for us to make up our own minds, certain statistical information which we are trying to obtain I suppose, one one of the major points is to ascertain what the effect is in the eyes of the public of a discharge other than an honorable discharge.

If the public is either ignorant or indifferent or finds it insignificant, then I am not sure that I would agree with the Court of Military Appeals that a year's imprisonment is preferable.

But if the public is of the belief that a discharge other than honorable is equal to a dishonorable discharge and carries with it the stigma of a dishonorable discharge, then I think that something should be done to prevent administrative discharges from being lightly given or being given without safeguarding the rights of the persons involved.

I would make this comment, though. I heard this morning the suggestion made that there be lawyers representing the persons who are up before a board for discharge. I can readily see where the military—and this time I would be sympathetic with their point of view would say, "What you are really asking us to do is to set up a second judicial system. If we are going to have a lawyer representing the man, a lawyer on the board, and perhaps an adversary proceeding, then you are really getting down to having a court-martial or something comparable to it," I am not so sure that that would not not be a real problem for the military.

Mr. CREECH. Now, with regard to these administrative discharges, we have been told by the representatives of the Department of Defense that they do not consider them at this time to be adversary proceedings, and that it is not mandatory to have counsel. Also, of course, there is no subpena power. There is no opportunity to bring in witnesses for the accused, or, for that matter, I presume that the

Board cannot either, unless the witnesses are under their immediate jurisdiction.

Would you feel, sir, that this would not be desirable or that it would be desirable to, for instance, have subpena power or to insist on representation by counsel in this type of proceeding? Should it be an adversary proceeding, in your estimation?

Mr. FROHLICH. No. In my estimation it should not be an adversary proceeding because we would then be putting the military in the impossible position where they were forced to have trials of matters which are not necessarily triable.

When I say "trial," I mean a proceeding in the classic sense such as where you have a regular full-blown court-martial.

I think you could very well bring the military to a halt in their basic mission if you imposed upon them another judicial system, which is what it would amount to, and required adversary proceedings in every one of these instances in which a person is up for review.

I think it would be an impossible situation to put the military in. I do think you can strike a happy compromise.

I certainly do think there should be the power of subpena. I think the Board should have a very sophisticated and intelligent person—and I do not mean a young man, either, I mean a mature man with a great deal of experience in the law—to preside. Then, when he sees something that, as a lawyer, or perhaps as a former judge, shocks his conscience as being not admissible as evidence—and I am not talking about the technical rules of evidence—he can disregard it. Or if he sees an area where he thinks a little more inquiry would reveal something that would be important and informative to the Board, he should have the power of subpena.

He should have the power to bring in whatever he thinks is necessary to shed light so that the decision that is reached is based upon the best information that they can have short of getting to an adversary proceeding.

Mr. CREECH. Sir, one of the reasons at this time why administrative discharges are given is because of a conviction in a civil court. I am certain there have been cases in which individuals have received administrative discharges while their cases were on appeal or the appeal was pending, and ultimately the individual was successful. In one case that I am thinking of, the individual case was remanded for a new trial and, I believe, in the absence of a prosecutrix, that he was acquitted.

Now, what, sir, would be your view with regard to administrative discharges in such instances?

Mr. FROHLICH. Well, again, let me preface it by saying that so far as my own views are concerned on administrative discharges, I am speaking personally and not on behalf of our association. We have not yet completed our study and synthesized our thinking.

But in the situation that you have just posed, I think it is deplorable that a man should have the stigma of less than an honorable discharge where the conviction had been reversed and, presumably, he would have gone scot-free. I think that is a shocking situation.

I suppose it could be handled by preventing an administrative discharge, pending any appeal from a court decision.

I think the military should be denied the right to discharge, the minute it goes up on appeal.

Mr. RAPSON. I think the thrust of your inquiry is also whether or not the military should be empowered to make a de novo determination of guilt or innocence for administrative discharge purposes regardless of the ultimate result of the civilian court.

Now, in this case your man was acquitted not by reason of innocence but by reason of lack of prosecution, and the basic issue is whether or not the military, in discharging this man, should be able to make an administrative determination that this man probably had committed this offense and that, therefore, he is an undesirable person who should not be retained in the services. It is a close question.

In my own personal view I would be inclined to say in that situation they should have the authority to administratively discharge him.

Mr. CREECH. Of course, as we understand it, there does not necessarily have to be any presentation of a factual situation in the case. The conviction, as such, is ground for the administrative discharge.

Mr. RAPSON. You are talking about procedure now. I think the procedure should be expanded so that there is a more thorough exposition of the facts. I do not think it should be based on a record itself. I think it should be an independent de novo determination.

Mr. BURNS. Administrative due process is not a new concept in these United States, and so long as administrative due process is followed, I concur with Mr. Rapson in saying that a new determination would certainly be appropriate in cases where conduct falling short of criminal conduct is, under service standards, appropriate standards, known in advance, and grounds for discharge under less than honorable circumstances.

Mr. CREECH. Mr. Frohlich, you mentioned the stigma a few minutes ago of a discharge other than honorable. Has this study which you have already conducted on the administration of military justice and your current study in regard to the administrative discharge gone into the public acceptance, or the public view, of discharges other than honorable?

Mr. FROLICH. Yes. Our study will do that. We have not concluded it by a long shot, but definitely that is one area that we are much concerned about, because that is the key in our judgment.

If there is no stigma, then what are we all getting excited about? If people in the United States of America think one discharge is as good as the other, I think we ought to relax. If there is such a stigma, then I think it is something to get very much excited about, because you can readily see where it could be hurting people and hurting them badly. But we have not concluded our study yet, and we certainly are going into that area.

Mr. RAPSON. It has no evidentiary merit, but the other day I sat around having lunch in Asbury Park, and asked nine lawyers whether they could tell me the difference between an honorable and a dishonorable discharge, only one could, and he had served in the military. As I say, it has no evidentiary value, but it is indicative.

Mr. EVERETT. Are we to understand, then, that the three of you, as individuals, at the present time, without benefit of the survey that you are making, would anticipate that a discharge other than honorable conditions did create a stigma in the public mind and did have severe consequences?

Mr. FROHLICH. I would say yes.

Mr. EVERETT. As part of your survey, are you analyzing the stigma, if any, attached to the general discharge which is under honorable conditions, but which is not an honorable discharge?

Mr. FROHLICH. Yes.

Mr. EVERETT. Now, perhaps we all suffer from the tyranny of labels, but would you subscribe to the principle that, if a stigma is shown to follow from a discharge under other than honorable conditions, then certainly minimal protections should be provided to the respondent, whether we term it an "adversary" proceeding or give it some other label?

Mr. FROHLICH. Absolutely—very much so. If we, as I personally suspect we will, learn that there is a stigma attached to it, then I would think, that it is absolutely mandatory that we have minimum safeguards to protect the individuals and to prevent the occurrence of something that might be deplorable.

Mr. EVERETT. Would it be possible to apply rules of evidence that were less rigid than in a court-martial but which did not let everything come in; in other words, rules of evidence similar to those which are generally followed by administrative tribunals?

Mr. FROHLICH. Precisely. I certainly think it could be done. That is one of the reasons why I would suggest offhand, that the board have somebody who has a pretty good feel for evidence and can say, "Well, look, we don't have to be so technical about this—whether this is hearsay or not. Will it inform me? Let us hear it."

Yes, I think it should be used.

Mr. EVERETT. Would it be desirable from the standpoint of you three gentlemen, as individuals, speaking apart from the conclusions which will result from your meetings later on, would it be desirable to have a type of law officer sit on every board where a discharge under other than honorable conditions was meted out?

Mr. FROHLICH. For myself, I would say yes.

Mr. RAPSON. Yes.

Mr. BURNS. Without such an official you would only increase the number of lawyers necessary to work out an administrative discharge procedure.

Mr. EVERETT. You feel that this would facilitate the disposition of the matter instead of hindering it?

Mr. BURNS. No question about it, in my mind.

Mr. EVERETT. Would you similarly consider it would be appropriate to have a defense counsel, and perhaps a trial counsel, that is, attorneys who were representing the conflicting viewpoints, instead of the present recorder system and with, perhaps, untrained counsel?

Mr. BURNS. Subject to the possibility of creating a Frankenstein, that the military simply cannot handle, by all means, as lawyers, yes.

But this committee and the Congress will have to weigh the military requirements, the manpower requirements, and surely will not want an army of lawyers to be defending our shores. That is a problem. Subject to manpower requirements, if it can be worked out, I, for one, would think it would be desirable.

Mr. EVERETT. I would like to ask you, Mr. Frohlich, and your other two backup witnesses, a question about this situation which has confronted the subcommittee on a number of occasions.

An individual writes that he was in the service as an officer or as an enlisted man, and was accused of some act of misconduct, frequently in sex cases. He maintains his innocence and says that he requested a trial by court-martial which was denied, whereupon he was administratively processed for an undesirable discharge on the basis of the allegations made against him.

In this type of situation, time and again the subcommittee has received the complaint, "Why were they able to give me an undesirable discharge if they would not give me a trial by court-martial?"

What is the proper handling, the proper disposition, of this situation, in your opinion?

Mr. FROHLICH. Well, in my opinion, I think that a man should have the opportunity of having a trial, if that is what he asked for. If that is what he wanted, and said "You made an accusation. I challenge you to prove it. Let's go to court and we will try it. If you are right I will be discharged, but after a trial. If I am right I will go back to duty." He should have that opportunity.

I do not think the court-martial system should be bypassed by the use of the administrative discharge.

Mr. EVERETT. Is that concurred in?

Mr. RAPSON. I have not firmed up my views. But, as I recall, there was a procedure known as resignation in lieu of trial by court-martial where the man consents to this procedure. You are not talking about this? You are talking about a situation where he demands a court-martial, and it is refused to him. He does not sign any consent form or whatever?

Mr. EVERETT. That is right; or he says, "I am innocent and I don't want to be discharged."

Mr. RAPSON. I would be inclined to agree with Mr. Frohlich generally, but I can see where situations exist where, you take a career officer of high public esteem, and you expose the matter to a public trial of a sensational nature, you can run into problems from the military point of view, of adverse publicity, if they have a problem with a homosexual of high rank, and the question is, does it create more of a problem to the general overall morale of your service if you expose such a thing to a full-blown general court-martial proceeding.

Mr. EVERETT. The Navy informed the subcommittee that their practice in this situation is to discharge a man under honorable conditions, trying to compromise, as it were, between the need to get him out immediately and the benefit of the presumption of innocence.

What would you think of this practice?

Mr. FROHLICH. I think it is an expedient practice. But I personally feel quite disturbed for the man who is in the military service—we are not now talking about somebody who is reluctantly dragged in—but the man who volunteered to go into the military service and loves it, loves the military life, and wants to stay in it, and for some reason or other somebody then charged him with misconduct. If he denies it and feels that he is innocent, I think he has the right, or should have the right, in any event to have his day in court and be either sent back to duty where he wanted to go or be discharged to civilian life where the military people wanted him to go. I think he should have that right.

I can see where the Navy is being practical from their point of view. But I am not sure that it is being fair to the man—the man who wants to stay in the Navy and feels he is unjustly accused and wants his day in court.

Mr. RAPSON. I still hesitate in that situation. Take the case of homosexuality where you have clear circumstantial evidence, but perhaps not enough to warrant a conviction, yet the military commanders feel reasonably sure that this man is a homosexual. Should the military be forced to retain this man in the service? I would say "No," that they should have a procedure in order to get rid of him, and if the Navy has adopted this expedient of getting him out with an honorable discharge, I think it is probably a good expedient. I know you disagree.

Mr. FROHLICH. Note my dissent.

Mr. EVERETT. Mr. Burns, this is probably more pertinent to your statement than to that of Mr. Rapson's. Could you comment generally on how you feel the boards of review are operating at the time. As I understand it, you argued dozens of cases before them for the Army?

Mr. BURNS. We argued many, many cases before these boards of review, and I think in terms of personal experience the type of consideration that was given by the board of review went in cycles.

There were peroids when, without directing my attention to the result, there were periods when mature consideration was given to the problems. There were other periods when apparently very little consideration was given to questions appearing before the boards, and when cases were affirmed without any opinion whatsoever.

I would comment generally that in my view, as time has elapsed and as experience with the code has gone on, the quality of the board of review action has improved.

I think the general administration of the code has improved. I think the board has been responsive to decisions of the U.S. Court of Military Appeals, and I think people in the lower hierarchy in the administration of military justice have been responsive to the decisions of the court, and I think the services are to be commended in disseminating to people throughout the world engaged in the administration of military justice the up-to-date information and up-to-date procedure dictated by changes in the law as they are handed down by the court.

With respect to specific board of review action, I can never—I cannot think of a single instance where I thought that any member of the board of review, in my own mind, did not act in the full discharge of his responsibilities.

My statement, directed at the system in which a senior judge can rate his two juniors, was not so much dictated by any evidence that I have that there was anything amiss in the actual practice. I inveigh against a system which is inherently bad and which would permit of an opportunity of undue influence by one member in a tribunal which is supposed to be to decide matters by a vote of two out of three.

Mr. EVERETT. It has been suggested to the subcommittee that it might be desirable to unify the boards of review servicewise and perhaps also the Discharge Review Board and also the Board of Correction of Military Records.

Do you have any comments on whether this would be a desirable step, in your opinion?

Mr. BURNS. Yes; I do. I can see why it has motivated the suggestion, and I can see where uniformity is to be desired.

This association, our association, has not favored that, and I think the reason for it basically is that in any system of justice, whether it be civilian or military, the men sitting in judgment ought to be integrated members of the community, and by that I mean they ought to know what communal life is like and what the society requirements are like, and I believe it was our thought that to the extent possible boards of review would be able to perform their function a lot more intelligently if they are composed of members of the services of the accused involved.

It might be one thing for an old Army line officer to sit in judgment on someone in the ranks, he himself having been through them, and quite another thing to decide a matter involving life on shipboard of which he has no knowledge whatsoever, and I think that was our thinking.

Mr. EVERETT. Would that reasoning apply, Mr. Rapson, to the Discharge Review Board and the Board of Correction of Military Records, as you see it?

Mr. RAPSON. Again, this is my view only, but not necessarily so. The Boards for Correction of Military Records are composed of civilians, so in that respect I see no reason why there could not be one civilian board for correction of military records.

Again, this problem of uniformity, in my 3 years I was sitting in the Office of the Military Justice Division of the Army, and I know I had equals in the Air Force and the Navy Judge Advocates General Office at the same time working on the same problems that I was, and yet there was never an opportunity for us to get together and compare notes, and very often we came up with divergent views and interpretations of the same exact statute or regulation.

It is not right that there should be three different interpretations of the same statute and regulations. But I would not go so far at this time as to recommend unifying the three service boards, but in the Board for Correction, there should be uniformity.

Mr. EVERETT. Going to the Boards of Review for a moment, there have been proposals that civilian members should be substituted entirely for the military members of the Board of Review.

Would you have any comments on that?

Mr. BURNS. I personally do not see any need for it. The motivation behind that type of suggestion is to insure the absolute independence of the character of the judge sitting on the Board of Review. I think the motivation is sound. But I think that we can accomplish that result absolutely independent of the military judiciary without resorting to bringing in civilian judges from the outside.

Mr. EVERETT. Mr. Frohlich, in your experience and in that of Mr. Burns and Mr. Rapson, I wonder if there have ever occurred any instances of some type of command influence exerted over defense counsel, or, for that matter, trial counsel, in the conduct of their responsibilities.

Mr. FROHLICH. I would be prepared to say this: that rarely has there been a member of our Bar Association's Committee on Military Jus-

tice who has not told us that he has seen in the field indications of command influence being exerted on persons involved in trials.

Now, I am talking primarily about during World War II, where, at least as far as the people on our committee are concerned, there were many instances of command influence.

You do not hear so much about it from the younger men, the men who served in the Korean war, and who have been serving since. They do not seem to find that command influence.

I suspect that some of it stems from what I adverted to a while ago, that the military is becoming educated, and that they realize that command influence is wrong, it is bad, and should not be exerted.

My impression, and it is all it can be, it certainly cannot be a statistical analysis, is that less and less command influence is being exerted.

Mr. EVERETT. Mr. Rapson, did you or Mr. Burns have any experience with complaints that defense counsel were subject to the influence of command influence?

Mr. RAPSON. Sitting in the Pentagon, we were isolated from the field, and in the Pentagon I would say we had free and independent scope in the thinking of my work, and I never had any influence imposed upon me.

There were certainly cases that came up, however, through the Court of Military Appeals, which indicated that command influence had been exercised at the trial level on defense counsel, and the Court of Military Appeals took the necessary corrective action in those cases.

There are influences, there are subtle influences, and I am sure they are still existing. However, there have been proposals to build up a separate corps of defense counsel.

Now this, the association has not formed a definite view on. I think the proposal there that there should be a definite group of lawyers, judge advocates who do nothing but defense work, that has been thrust before the services since 1955. My own idea is, it is undesirable to build up a group of men in the Army whose sole work is defending accused persons.

In that way you build up a philosophy, an attitude, in these men which is not healthy, and I think you should not have a group of men in the service whose sole duty is opposing the Government.

Mr. EVERETT. You feel a different approach there would apply than for the field judiciary system and the law officer?

Mr. RAPSON. Oh, yes, we definitely believe in a separate, independent judiciary. I, myself, do not believe in a separate, independent defense counsel corps.

Mr. EVERETT. Mr. Burns, could you answer with respect to that question, and give us your views?

Mr. BURNS. When we conducted our investigation, we did not have any specific instances of command control on defense counsel. I have heard rumors. One never knows whether these are rumors originated by disgruntled accused or dissatisfied attorneys who were dissatisfied with the particular result in a given case.

I would say this: that if evidence was forthcoming indicating that there has been control exerted on defense counsel, interfering with the absolute undivided loyalty and defense with the greatest vigor of a client, I, for one, would think that some attention should be given

to the possibility of establishing a separate defense corps, isolating them in some way. What the mechanics are I do not know.

It was for this reason that our association pinpointed the question in our report but left the answer open.

Mr. EVERETT. Apropos of a separate corps, as I understand it, the Army has a separate JAG Corps which, I would assume, provides some insulation against command influence.

Would it be your view that such a corps would be desirable for the other two services?

Mr. BURNS. I think that is a question that can be best answered by people who are familiar with the requirements of those services.

But from a lawyer's point of view, and a lawyer who has served in the military in administering military justice matters, it is my opinion that it would be absolutely essential, barring some exigency of which I am now unaware.

Mr. EVERETT. Mr. Rapson?

Mr. RAPSON. I will subscribe entirely.

Mr. EVERETT. The Army, as we understand it, instituted the practice of the negotiated plea of guilty a few years ago. To what extent do you think this practice protects the constitutional rights of the soldier?

Mr. BURNS. Bearing in mind that a number of our young men are in the services and are still in their formative years, I would say that I would have no objection to a negotiated plea of guilty, and I think it serves a very useful purpose, an economy purpose, provided that there are safeguards; provided that the accused does have counsel who is fully aware of what the accused's position is, and what the facts of a given case are; and provided that this is all done under the supervision and direction of a fully qualified trial judge, the law officer.

Mr. FROHLICH. I would like to say that that aspect does not shock me. Certainly it is not unusual in the traditional administration of justice to have guilty pleas. All you have to do is walk into a criminal court in any county, city, State, or district, and observe that the major calendar consists of pleas of guilty.

But there they have what Mr. Burns refers to, the accused is represented by a competent lawyer who has first looked into the facts and realizes that if the accused does not plead guilty he is going to be found guilty, and he so advises him.

The court itself will protect an inadvertence or protect an oversight, and I think if you have those safeguards in the military, there is nothing objectionable to it.

Mr. EVERETT. One last question in that connection: Using your civilian experience as a background, would it be your impression that, even though there is no normal negotiation on a sentence in civilian courts, as an informal matter, it does occur; and, perhaps, it is better to have it handled in a formal procedure, as is done by the military.

Mr. FROHLICH. Based on my experience, I incline to the formal procedure. I think it is a safer procedure. I have seen too many instances in civilian life where little deals have been made and a person has been induced to plead based upon one of these deals. Then when the deal does not come through there is very little he can do about it.

I would prefer the formality of it. I think the military is right.

Mr. EVERETT. Mr. Rapson?

Mr. RAPSON. My view of the negotiated plea program while I was in was that it did have the proper safeguards, at least from the general court-martial level, where it is the only level where it is utilized, and I think that the Army is to be commended for facing reality and recognizing that 95 percent of your cases in your civilian courts are guilty plea cases, facing reality and bringing it down to a formal basis, a formalized basis, where there was an actual written agreement between the accused and the convening authority as to the maximum sentence, and I think the program has worked quite well, and that every possible effort has been made to afford the accused the necessary protections in the guilty plea program.

Mr. EVERETT. My final question would be this:

You heard Colonel Paston's testimony this morning. He was not convinced there was need of a special court.

Mr. Frohlich, how do you and the members of your group here feel about the need for a special court-martial?

Mr. FROHLICH. Well, we think that you should have a special court, but it should be modified and not be the one that we have today.

We think that there should be a special court consisting—and this at the option of the accused—of one law officer, a man trained in the law, a single judge sitting in the special court; that the accused should have the right to elect trial by that one-man court or trial by the traditional special court, knowing full well that the trial in the traditional special court will be a trial without law members, and that it will not be administered by men trained in the law.

Mr. EVERETT. Will either court have authority to grant a bad-conduct discharge, or what?

Mr. FROHLICH. No, we would not give a special court that power.

Mr. EVERETT. Thank you.

Mr. CREECH. Gentlemen, Senator Hruska is represented at this session of his legislative assistant, Mr. Kutak. I believe he has some questions which he would like to pose at this time.

Mr. KUTAK. Mr. Burns, I observe from your statement that the accused should know the identity of the law officer. Colonel Paston also touched on that in his earlier statement. If the spirit of the field judiciary is to be retained, not to say encouraged, is this provision essential?

Mr. BURNS. The motivation, Mr. Kutak, behind that provision is to give the accused the additional protection against the possibility, however remote, to use the vernacular, of a hanging judge being brought in as a ringer, and we thought that it was an added protection that was sensible.

Mr. RAPSON. Might I add that that proposal, that aspect of the proposal, actually emanated from the Department of Defense. They were the ones who first made provision that the accused should know the identity of the law officer, and we approved that proposal.

Mr. KUTAK. It struck me as being very odd, but I accept the explanation.

Mr. CREECH. Gentlemen, Senator Ervin has instructed me to say that the subcommittee is very appreciative of your coming here today and for the very fine contribution which you have made to its study.

He feels that your statements were very meaningful, and he regretted that he could not be on hand for questioning, and he asked

me to say also that the subcommittee appreciates the preliminary assistance which you have given the subcommittee in its preparations for the hearing.

Thank you very much for coming.

Pursuant to the order of the chairman, the subcommittee will now recess until 2:15.

(Whereupon, at 1:15 p.m. the subcommittee recessed, to reconvene at 2:15 p.m. the same day.)

AFTERNOON SESSION

Mr. CREECH. Mr. Chairman, the first witness this afternoon is Mr. Fred W. Shields, attorney at law, Washington, D.C.

Senator ERVIN. Mr. Shields, I am glad to welcome you. We thank you for being willing to come here.

## STATEMENT OF FRED W. SHIELDS, ATTORNEY AT LAW, WASHINGTON, D.C.

Mr. SHIELDS. Thank you, Mr. Chairman. I am glad to do it for whatever it is worth.

I submitted a statement to the committee which pretty well expresses my feelings with respect to the administrative discharges in the Navy.

Now, I want you to understand that I am going to limit my remarks I have to make to the Navy procedures, because they are about the only ones I really know anything about.

Now, I understand, of course, that the Army and the Air Force pretty well pattern their procedures after the Navy, or the Navy patterns theirs after them. I am not sure which. The procedures are pretty similar, I understand. But the Navy is the only one that I have had any real experience with.

In appearing here, I am appearing as an individual. I am not representing anybody. I am just representing myself as a lawyer who practices before the Navy a good deal. I am concerned about the administrative discharge procedures.

Now the ones that I particularly take exception to are the ones—the undesirable discharges under other than honorable conditions on the grounds of unfitness.

Now of course there are two basic types: the unsuitability and the unfitness discharges. By and large, the unsuitability discharges are given for physical or mental conditions. I suppose in many instances there is a pretty reasonable basis for getting rid of the man. The only thing I do object to on the unsuitability discharges is sometimes it seems to me it takes the Navy an awful long time to find out that he is unsuitable. In other words, when a man gets 15 or 16 years in, it seems to me if he has got this mental defect or quirk or anything like that or an aptitude or something like that, it should have developed long before he has put in 15 or 16 years in the Navy and perhaps acquired a rating of chief petty officer. It seems to me that he has adapted himself pretty well when he gets along that long in the Navy without them finding anything too wrong with him.

Of course, discharging a man for getting into debt also disturbs me; it partakes of imprisonment for debt in a sense. Certainly in my

experience most of these debt cases are caused by extravagant wives, and if the man does not support the wife the Navy gives him the devil, and if he cannot pay the bills she runs up, they kick him out, and he is sort of caught on the horns of a dilemma. There is not much he can do about it.

I do get disturbed about some of these discharges on account of a failure to pay a debt. For instance, a few years ago I represented a man. He had about 19 years in. The Navy gave him a discharge because he wasn't able to pay his bills. Well, he had a wife who bought three fur coats, when she was in Hawaii, on time; bought a baby grand piano while they were living in a trailer. Now what can you do about a thing like that? Maybe he was not fit for the Navy. But to me, if he had not supported his wife, the Navy would have been right after him. And yet because she went out and incurred those outlandish bills—three fur coats while he was serving in Hawaii, but the Navy could not see his point of view at all—"pay those bills." Now I think that is unreasonable. Of course they only had to put up with him for about another year, and then he would have been transferred to the Fleet Reserve.

But getting down to the ones that I really have some feeling about—the discharges for unfitness—the ones which are given, as I see it, usually for the alleged commission of an offense.

Now unfortunately a lot of the cases involve homosexual activities and the like. Now that is not a nice subject to deal with. We all know they are messy cases and all that. But the fact remains that they are offenses for which a man can be tried and he can be punished under the Uniform Code of Military Justice.

It seems to me that when a man is accused of an offense of that kind, he is entitled to a trial, if he wants it.

Now I do not object to the situation where an accusation is made against a man and they say: "Look, we have this against you, we will give you your choice: You can stand trial or you can take an administrative discharge." If he takes the administrative discharge, I am not going to represent him thereafter, he has had it, he has run the course as far as I am concerned. But when a man says: "No, I did not do it," and they give him an administrative discharge anyhow, I cannot see it. I think the man is entitled to a trial on it if he wants it.

Now I have had, in that connection, a fair number of cases where, so far as I am concerned, they gave the man the discharge because they could not prove the offense. They gave him what they called a field board hearing, which is set up under the Bureau of Personnel Regulations. Now that sounds awfully good. The commanding officer appoints a field board of officers to pass upon the administrative discharge. But I want you to just consider that a little deeper.

That field board is not set up until after the commanding officer has made his wishes known with respect to the discharge. In other words, he tells the board: "We want you to consider this man for an undesirable discharge." He appoints the board. The board sits, and for all practical purposes it is what they call an informal board, and there are no rules of evidence, there are no limitations upon what they can bring in. They can bring in something that happened 15 years ago. They can bring in testimony or statements from the man's wife that could not be admitted against him in any court—any kind of evi-

dence they can bring in. And he can make a statement, and that is about it.

Now that is no standard of justice as I see it, none at all, absolutely none at all.

But even then, if he convinces the field board that he should be retained, they do not have to pay attention to that. The commanding officer or the Bureau of Personnel can just disregard the thing and go ahead and give him a discharge anyhow.

Now I just do not like it. As far as I am concerned, if the man is guilty of something or if they think he is guilty of something, if he wants a trial, give it to him. If he says: "No, I will take the administrative discharge," that's all right. But if he says: "No, give me the trial," I think he should have it.

In any event, if you are going to have any kind of administrative discharge procedures, I think there should be some limitation on what can be brought in. Maybe the rules of evidence should not be as strict as they are in a court-martial, or in a civil trial. But there should be some limitation.

For instance, I do not see any reason why the statute of limitations should not be a bar to such a proceeding. Going back 10, 12, 15 years to get something against the man—that is unreasonable in my view—using the man's wife to testify against him, I think that is unreasonable. There should be some standards controlling the operation of those boards if they are going to be continued.

Now I have expressed my feelings on it. That is about all I have to say. I know that the committee is familiar with the actual regulations and all that.

My own view is that the administrative discharge is being used as a substitute for trial for offenses. I do not think that is right.

I may say that Judge Quinn, of the Court of Military Appeals, apparently feels pretty much the same way.

Now I don't know the Navy's statistics on the thing. I do know that the number of general courts-martial in the Navy has gone down very low in recent years, while administrative discharges have been rising constantly. To me the two things speak for themselves. The discharge procedure is being used as a substitute for trials.

Senator ERVIN. Of course, the primary purpose of the Navy is to be able to defend the country. To them it is highly important to maintain discipline and to get rid of anybody they think is unfit. Of course, normally the primary purpose of the administration of justice in the Navy, as with the Army and the Air Force, is to enforce discipline, I would say, plus getting rid of people who they think are not capable of contributing to the defense of the country as they should.

However, your point is that whenever you undertake to administer justice, there are certain fundamentals that should be observed.

Mr. SHIELDS. That is precisely it. I think a man in the service, just because he is in the service, should not be deprived of his basic constitutional rights, including due process. That is my position exactly. I think Congress has gone a long way toward recognizing that in recent years. The uniform code, for instance, recognizes that these men in the services are entitled to a pretty substantial break insofar as protection of basic rights are concerned.

Senator ERVIN. You say the man should be given an election. If he is so conscious of his guilt that he prefers to take an undesirable discharge, he should have that option.

Mr. SHIELDS. I think so.

Senator ERVIN. But if he wants a hearing to determine the question of his unfitness, you say he should have that.

Mr. SHIELDS. I think he should have that. I think there should be some standards, reasonable standards, covering that hearing. In other words, some rules of evidence certainly should be applicable. I do not like this thing of throwing a man out on evidence which is clearly inadmissible or incompetent evidence, hearsay on hearsay, and that sort of thing.

Senator ERVIN. Of course, in the old days most people that separated from the service were separated as a result of a court-martial and were given a dishonorable discharge.

Mr. SHIELDS. Up until the time of World War II, I would say that, generally speaking, the Navy gave the man the choice between an undesirable discharge and a trial.

Senator ERVIN. Of course, during these later years our Armed Forces have necessarily been expanded with a tremendous personnel, which of course presents problems in more aggravated form than they did in former days when the personnel in the services were much smaller.

I would like to have your idea on this.

Would you be in favor of setting up some kind of a board within the branches of the services to pass purely upon the question of whether a man should be given an undesirable discharge as distinct from being tried by a court-martial; in other words, something in the nature say—you might approximate it to some kind of civil court that would determine that question?

Mr. SHIELDS. Frankly, I do not see where a board is really necessary. I am considering these discharges, where it is given for what is obviously an offense committed. I am not talking about the unsuitability ones. That is something else again. But it seems to me that a board is unnecessary. You are accusing a man of something, and all I am saying is let us prove and prove it in a reasonably decent, legal manner. That is all I think is necessary. I do not see where a board is necessary.

Senator ERVIN. Well, I was just wondering—I'm thinking about the question of whether in attempting to protect the rights of a man's opportunity to be heard, whether there should be a board established, under a congressional act, within the service. Of course, you have a board now. But I mean a board that is required to act in more of a judicial manner; that is, to give notice and opportunity to be heard, an opportunity to confront witnesses, whether you should have a board or whether you should just go back to the old alternative between the court-martial and the discharge.

Mr. SHIELDS. Now, if you have a board I want some standards for the board. We have the board now. The trouble with the board, as I see it, is there are absolutely no standards. I mean they can discharge a man because they do not like the color of his hair. There is nothing you can do about it. They just say discharge, period. And they may have considered all kinds of incompetent evidence.

If you are going to have a board, let's lay down some standards which they have to operate under. That is all I really want on this board deal. Of course, I still come down to the basic proposition—if you are accusing a man of an offense and he says "I didn't do it," try him. I am willing for him to take his chances before a court-martial, if he is willing to do that, and a court-martial is not the easiest thing in the world to beat, let's face it, they are not easy to beat. If he is willing to take his chances, let him have his chance. I don't see anything unreasonable about that. I don't see where discipline is hurt by it.

Senator ERVIN. In other words, what I was just wondering is whether you would say a man ought to be compelled to take his choice between a court-martial and undesirable discharge by administrative process, or whether you are in favor of the creation of some kind of tribunal, either within or without the service, that would give him a hearing with an opportunity to be represented by counsel and an opportunity to be confronted by witnesses and to produce witnesses in his own behalf, should there be a choice between the undesirable discharge and the court-martial alone.

Mr. SHIELDS. I think in most cases he could make the choice very readily. Of course, this idea of compulsory process—now, something else is added in there that intrigues me. I do think any of these boards where you are passing upon the rights of a man or his retention in the service, particularly the career man, and they are the ones I am primarily interested in, the career man. I do think the boards considering those cases certainly should have the right of compulsory process for witnesses. I feel very strongly on that.

Senator ERVIN. Now, how much of an increased burden do you think it would be? Do you think that the average man who is charged with an offense and was offered the alternative of an undesirable discharge or a court-martial, in the case where he admitted his guilt, do you think he would take the undesirable discharge?

Mr. SHIELDS. Well, if he has admitted his guilt, I think he is going to take the undesirable discharge.

Senator ERVIN. It is your opinion that a hearing would be requested chiefly by those who either felt themselves innocent or that there were certain mitigating circumstances which the party in question believed would be of such a nature as to induce a court-martial not to punish him by bad conduct or dishonorable discharge.

Mr. SHIELDS. Of course there is that situation. Sometimes this latter phase that you just mentioned—there are a number of cases where the man has done something and the evidence of guilt is pretty clear, and still you feel that a court-martial would probably not dismiss him or give him a punitive discharge. In those circumstances, I think the man should be given a break and see what a court-martial would do.

But basically, I think that the choice, the choice as to whether to take the discharge or stand trial is not going to be too difficult a problem for the man. He usually knows pretty well, particularly if he has consulted counsel—he knows pretty well what his chances are going to be in a court-martial, at least. A man who is willing to gamble and just put it on a gambling element if nothing else, if he is

willing to gamble on a court martial, I think he should be entitled to do so.

Senator ERVIN. I am trying to get your opinion on the question as to what extra burden it would put upon the Navy.

Mr. SHIELDS. I do not think it would put much on them. They went through World War II on basically that situation. The man was for all practical purposes, at least that was my experience, and I was practicing then, the man was given the choice as to whether he wanted to take an administrative discharge or stand trial. If he took the administrative discharge, that was the end of it.

Senator ERVIN. Of course, in a great majority of criminal charges tried in the civil courts, the defendants, I would say, a very substantial percentage, pleaded guilty and do not demand trial by jury.

Mr. SHIELDS. Yes, sir.

Senator ERVIN. And you think the same thing, or a comparable situation, would exist in the Navy if the man was given an option of going out with an undesirable discharge or standing trial by court-martial?

Mr. SHIELDS. I think in a vast majority of cases if the man was aware of the fact of guilt, had a knowledge of his own guilt and also knew it could be proved—I will add that to it—knew it could be proved, or thought it could be proved, he would take the undesirable discharge rather than the court-martial.

Senator ERVIN. Do you have any questions?

Mr. CREECH. Mr. Shields, if I may, I would like to ask you about your statement that the boards which give administrative discharges have no standards.

The Assistant Secretary of Defense for Manpower, Mr. Runge, told the subcommittee last week, and I am quoting from his statement:

> The undesirable discharge is issued only by the authority of properly approved administrative action during which specific procedures and safeguards must be observed. These provisions are so important that I shall quote verbatim from the directive.

And then he lists the requirements of a regulation.

> (1) The individual, if subject to such discharge, will, if his whereabouts is known, be properly advised of the basis for the contemplated action and afforded an opportunity to request or waive, in writing, the following privileges:
>
> (*a*) To have his case heard by a board of not less than three officers. In the case of nonregular component members, all boards so convened shall include appropriate members from the Reserve components. In the case of female members, all boards so convened shall include at least one female officer.
>
> (*b*) To appear in person before such board, subject to his availability, for example, not in civil confinement.
>
> (*c*) To be represented by counsel, who, if reasonably available, should be a lawyer.
>
> (*d*) To submit statements in his own behalf.

Now, sir——

Mr. SHIELDS. I will concede that that basic procedure is given the Navy personnel, too.

Mr. CREECH. Well, now, do you feel, sir, that these safeguards, as they have been identified by the Secretary, are adhered to stringently by the Navy?

Mr. SHIELDS. Yes, I do not think there is any question that they give those. But what do they amount to?

Mr. CREECH. That is my next question.

Mr. SHIELDS. Not a thing if they can consider incompetent evidence and hearsay evidence and matters that the man is in no position to rebut.

Mr. CREECH. Sir, how about item (*c*), the representation by counsel, who, if reasonably available, should be a lawyer. Doesn't he object to the introduction of such testimony?

Mr. SHIELDS. Yes, sir. What they do is say the objection is noted—period. Now, that may be protection, but it does not help the man. Your lawyer has done a good job, he has objected when he is supposed to object. But when they go ahead and consider the evidence anyhow, what good does it do the man? That's my point. I want them to comply to something that approximates the accepted rules of evidence. And they do not do that. That is where I begin to scream. They do not do it. All I can do, when I get up before a board, is say "I object." And they say that the objection is noted. Then they go ahead and consider the evidence to which I have objected.

Mr. CREECH. Sir, with regard to notice, do you have any problem with your client being given adequate notice as to the time of his appearance before the board? Do you have any difficulty in obtaining extensions of time?

Mr. SHIELDS. I have had, yes. On occasion, I have had. Of course in so many of my cases, I am out-of-town counsel, and sometimes they do not like the fact that out-of-town counsel cannot be there on a half hour's notice. I do have that trouble. But I do not have too much trouble in that line. I usually get it adjusted. But I have had some trouble in that line.

Mr. CREECH. Now, with regard to the appearance of the individual, "subject to his availability, for example, if not in civil confinement."

Mr. SHIELDS. I have had no problem on that.

Mr. CREECH. This apparently refers to servicemen who have been convicted of a crime in a civil court, who of course would not be available, and the administrative action would be taken in his absence, is that correct?

Mr. SHIELDS. Yes, sir.

Mr. CREECH. Have you had occasion to appear as counsel for anyone who could not appear himself?

Mr. SHIELDS. Not at this time. I do have one man whose case I have in the Court of Claims where that perhaps was true. I'm not quite sure of the facts on that. But personally, so far as any case in which I have appeared personally on behalf of the man, I have had no trouble in that respect.

Mr. CREECH. Senator Ervin asked you about the compulsory process. You indicated that you felt that would be desirable.

Mr. SHIELDS. I think it would be desirable. I may add I have not had any particular trouble in that respect, either. But I think perhaps I could have done a better job in some cases had I had the right of compulsory process. But I have not had any particular trouble there.

Mr. CREECH. Sir, the Navy witnesses have indicated to us that they do not consider these board actions as adversary proceedings, and therefore they do not see the necessity for some of the safeguards that we think of as constitutional safeguards in criminal cases in the civil courts. What are your views with regard to this?

Mr. SHIELDS. Well, I think it may be a matter of semantics. I don't care whether it is an adversary proceeding or not. I want my man's rights protected whether they want to call it an adversary proceeding or not makes no difference to me as long as the man's rights are given some reasonable degree of protection.

Senator ERVIN. In other words, you want an advocate there—an advocate will be an adversary in what he is trying to do to those who may hold a contrary opinion.

Mr. SHIELDS. That is it precisely. I want to be in a position to protect the man's rights. I do not care what they call it.

Senator ERVIN. Now, if you were setting up some system where we would have notice and opportunity to be heard, an opportunity to produce witnesses of your own and cross-examine adverse witnesses, would you think you could justifiably make an exception in the case where the person had been convicted in a civilian court, and the evidence proved guilt beyond a reasonable doubt on trial in a civilian court?

Mr. SHIELDS. If he is convicted in a civil court, and they use that as a basis for his discharge, I don't see where the man has too much complaint about it. However, I do sort of take a dim view of these cases where the man is convicted at the trial level and appeals the case and the conviction is set aside. Meanwhile they have gone ahead and kicked him out of the service, and then when he comes back and says "no, I wasn't convicted," they say "well, you're out of the service anyhow."

Senator ERVIN. In other words, you would require them to make an exception in that case.

Mr. SHIELDS. Well, I would say that the service should be compelled to consider the situation de novo if the conviction is set aside. I would just put it on that basis.

Senator ERVIN. Would you make an exception also in case the man was AWOL, after a period of time his whereabouts were not known?

Mr. SHIELDS. Well, of course, you might run into a mental situation there. Except for a mental case, I don't think I would get too excited about a man that just took off and was gone for 6 months or so and they didn't hear from him, if they threw him out. If it later developed he was insane or something of that kind, I think again, on that showing, they should reopen the case. They should be required to reopen the case. But aside from that, I don't see where the man—he has brought it on himself. Let's put it that way. I do not see where he is in any condition to complain of the action they take, except on a mental condition or something of that kind. I can visualize other situations. But the one that comes immediately to mind is the mental situation.

Mr. CREECH. Mr. Shields, at the time Mr. Fay, the Undersecretary of the Navy, appeared before this subcommittee, he said and I am quoting from his statement, "at the outset, let me say that the administrative discharge for cause fills a vital need which can be satisfied by no other means." And then he alludes to the classes of individuals who are covered by these discharges—the individual who has been tried and convicted in a civil court of a serious crime, the admitted participant in homosexual acts, and the classification involving administrative separation for misbehavior concerning the chronic military offender, et cetera.

Now, he says in some of these cases, specifically in the case of the homosexual, that the justification for the administrative discharge is that a trial by court-martial is not always feasible because of lack of corroborating evidence or refusal of witness to testify.

Now, in view of what you said here this afternoon, sir, I wonder if you feel that these statements of the Under Secretary have merit.

Mr. SHIELDS. Well, of course first of all under the interpretation of the necessity of corroboration in military law, the law, as I understand it, in these sexual offenses is that corroboration is not necessary unless the testimony of the witness, the complaining witness, is evasive, vague, or there is some other provision on the thing—the term escapes me at the moment. But in other words, the necessity for corroboration under military law is severely limited. For instance, it is much less than is required in the District of Columbia. It is not required unless the witness is evasive, vague, or something else that I cannot think of.

So I do not think he is quite accurate on that first statement. I would just take exception to the accuracy of that remark.

So far as the other is concerned, a court-martial does have subpena powers, and they can bring the witness in, and he will either testify or he can be cited for contempt.

Now, I don't see anything wrong with that. A witness cannot just get up in a court-martial and say "I decline to testify". He is in trouble if he does that. He must have a basis for it. Now of course he can plead self-incrimination. But I do not see anything wrong with that. That is one of the basic rights which a witness has. If that is true, I don't see where the Navy can complain about that situation. That is true in all courts.

Mr. CREECH. Well, sir, do I gather from what you are saying that you feel that administrative discharges for cause should not be available to the Navy at all?

Mr. SHIELDS. I didn't say that; no, sir.

Mr. CREECH. I am asking you.

Mr. SHIELDS. I beg your pardon?

Mr. CREECH. I am asking you.

Mr. SHIELDS. No, I don't. I say that for cause, that is for an offense—is that my understanding of your question?

Mr. CREECH. Yes.

Mr. SHIELDS. I don't think that the Navy should be entitled to give the man a discharge administratively under other than honorable conditions for the commission of an alleged offense unless he is willing to accept it. I think if they accuse him of an offense and he denies it, he is entitled to a trial on it.

Mr. CREECH. Now, sir, with regard to the man who is willing to accept an administrative discharge, would you permit this in a situation where you have a young man who is a minor, who is under the age of 21, and is not represented by counsel? Would you permit him to make this determination?

Mr. SHIELDS. Well, I think he should be given counsel. I don't think there is any doubt about that. He should be given counsel. Certainly I think that he should be given an opportunity to consult with the members of his family before making that election. I think any juvenile should be given that sort of protection.

Mr. CREECH. Would you make it mandatory?

Mr. SHIELDS. I would make it mandatory; yes, sir.

Mr. EVERETT. Mr. Shields, in connection with the corroboration requirement, I believe you must be referring to paragraph 153 of the Manual for Courts-Martial. I think the words are "uncertain, self-contradictory, or improbable".

Mr. SHIELDS. That's right, I just had a mental block there. But you knew what I was talking about.

Mr. EVERETT. What would be your view on granting an absolute right to trial by court-martial on any allegation of misconduct that was proposed to be used for a discharge other than honorable? Am I to understand that you would give an absolute right to such trial?

Mr. SHIELDS. I think the man should have it; yes, sir. That is, if he wants it. Understand, if he says, "No, I will take it"—I'm not complaining about that situation.

Mr. EVERETT. The Navy, in answer to question 12 on a questionnaire that was submitted by the subcommittee to the Navy in December, indicated that almost invariably when a man demands a trial by court-martial—those were their words—by reason of misconduct, which they propose to use for discharge, they would, if they did not try him by court-martial, discharge him under honorable conditions. A little earlier today, outside of the committee hearings, I heard this questioned. What is your understanding as to the Navy practice in that regard?

Mr. SHIELDS. I cannot say—I don't know what the general proposition is. I am inclined to think that the Navy is tending in that direction. Without refreshing my memory on some cases—I am reasonably sure they have not always pursued that policy. But I do think they are tending in that direction. But I am quite sure they do not always follow it up.

Mr. EVERETT. Their wording, I believe, was "almost invariably". You would indicate that they are tending toward almost invariably.

Mr. SHIELDS. I think they have. I know I have had cases where the man was given an undesirable discharge under other than honorable conditions and has taken the case to the Board for Correction of Naval Records, and the Navy has not opposed changing the discharge to one under honorable conditions. That is why I say I think they are tending in that direction.

Mr. EVERETT. To what extent, if at all, do you consider that the services tend to discharge a serviceman by reason of what amounts to simple inability to pay his debts, where he is making the best effort that he can? You had one example. I just wondered how much of a general practice there is to discharge because of what amounts to financial adversity?

Mr. SHIELDS. I am in no position to give you statistics on that. I have heard a good many people in the Navy tell me that that was one of their very real problems, the debt situation. The case that I do know—that always comes to my mind—was that poor dope who married the girl who bought the three fur coats in Hawaii and the baby grand piano while they were living in a trailer, and the Navy threw him out because he couldn't pay for them. Frankly, I have no sympathy for the creditor under those circumstances. I would like to have been handling that case from the Navy's position. I wouldn't have helped the creditors a bit.

Mr. EVERETT. Mr. Shields, let me ask you this: In your statement you referred to the board proceedings, field boards, and indicate that they are very frail reeds to rely on, do you think there would be a more substantial protection if there were a requirement that a qualified lawyer, similar to the law officer of a general court, presided over such hearings?

Mr. SHIELDS. Well, yes, I think it would be an improvement. Now, of course, if he was a qualified lawyer and still was not really interested in abiding by the rules of evidence or anything like that, he would not afford any protection. But I would feel better having a lawyer there. At least I could look him in the eye and say, "Look, fellow, let's get down to earth." But I would feel better with a qualified lawyer there. But unless he complied with the law, that doesn't do you any good.

Mr. EVERETT. Well I am sure you have practiced before many administrative tribunals and have encountered situations where the traditional court rules of evidence are not followed in their entirety, where the criterion of admissibility is the relevancy of the evidence and its materiality, rather than some of the hearsay exceptions. Do you think it would be desirable to combine a law officer, as it were, with the administrative rules of evidence, like those used in many administrative agencies?

Mr. SHIELDS. Well, you know, frankly I am not so sure I am too well qualified to talk on that subject because most of my work is before tribunals which do comply with the rules of evidence—I mean in court-martial work they comply with the rules of evidence, and we expect them to. The rest of my practice is largely courtwork.

Now I will admit that some of these administrative boards in the Navy are not too strict on the technical rules. But, even then, I think they make a pretty conscientious effort to give at least a reasonable compliance with rules of evidence. I refer to boards like the correction boards and the discharge review boards and that sort of thing. I think they really make a pretty sincere effort to comply with the rules of evidence, including the hearsay rules. You mentioned that. I think most of them give more than just token compliance with it. I would not say it is strict compliance, but there is a reasonable compliance.

Mr. EVERETT. In other words, they keep you within some channels anyhow. Isn't is almost impossible for those boards to apply the rules of evidence as they would be applied in a court having a subpena power so they can bring in witnesses, even recalcitrant witnesses, to make them testify?

Mr. SHIELDS. They do not have subpena powers. Well, maybe my impression of the board is wrong, but I have always thought they complied pretty reasonably with the rules of evidence. Now I will admit they relax the rules on proof of authenticity and that sort of thing. They do not require strict proof of documents and that sort of thing. But they give some compliance with the hearsay rule—not strict, perhaps, but some. Anyhow, I do not complain about the way the correction board or the discharge boards are operating. I think they handle themselves pretty well.

Mr. EVERETT. Simply at the trial level—the field board——

Mr. SHIELDS. Field boards, as far as I am concerned, anything seems to go, absolutely anything, and that I don't like.

Mr. CREECH. I believe Mr. Waters has some questions.

Mr. WATERS. Mr. Shields, as I understand it, in your conception, the administrative tribunal before which you appear ought then to have a record made showing the evidence which is admitted and excluded, and if there are objections taken by counsel, these objections will be noted so that you will have a record on which you can appeal to some court. Is that correct?

Mr. SHIELDS. Well, under the present situation you have no appeal to any court, unless perhaps you could show a complete deprivation of constitutional rights, and get in on that theory. I am not sure that you could do that. I understand there is a case in the Supreme Court now, which may test that, but I do not know whether certiorari has been granted. But I think it has been applied for.

Mr. WATERS. As I understand it, then, when you talk about the congressional standards to guide these tribunals, you refer to such standards as would apply to evidence which is properly admissible, so in the event there was a total lack of due process, you would have something on which to appeal, is that correct?

Mr. SHIELDS. I certainly think we should have that.

Mr. WATERS. Do you have any other suggestions to be incorporated into such standards?

Mr. SHIELDS. Well, I haven't worked anything out. I perhaps could draft up something that I think should be incorporated in the standards. Of course, you get into difficulty when you do try to lay down the standards, because just as soon as you lay them down, some situation arises that you never give any thought to. But I do think that there should be some standard laid down, and perhaps some other person could lay them down better than I can. But right now my complaint is anything seems to go.

Mr. WATERS. Do you feel that essential to those standards would be a record within which the framework of due process might be protected?

Mr. SHIELDS. Yes, I think that is essential.

Mr. WATERS. In connection with your comment on the impossibility of obtaining a conviction of an individual under the provisions of the Uniform Code, do you feel that those individuals, inasmuch as they cannot be convicted, ought to be given some kind of honorable discharge rather than an undesirable discharge?

Mr. SHIELDS. Well I have always assumed that if you cannot convict a man, you have got to assume he is innocent.

Mr. WATERS. Do you feel that congressional standards might be appropriate to that kind of proceeding also?

Mr. SHIELDS. I think so. These undesirable discharges can be just as hard on a man as a punitive discharge. You cannot give a punitive discharge except through court-martial proceedings. I don't see why you should—why an administrative board should be allowed to give a discharge which can hurt a man just as much as a punitive discharge without having any standards to control it.

Mr. WATERS. Has your experience also touched on a representation of officers who have to show cause why they should be retained in the service?

Mr. SHIELDS. I have been working on one over the weekend.

Mr. WATERS. Have you found that the standards under which this show-cause type of proceeding is held could stand some improvement?

Mr. SHIELDS. Well, I have not had too much experience in this. The case I was working on—frankly I thought the officer brought a good deal of the trouble on himself, because he would not answer anything fairly or squarely. He was about as evasive as the charges which were made against him. You just ended up with a mishmosh which nobody could make any sense out of. So I blame him pretty much for getting into his own trouble.

Mr. WATERS. That's the only such case you handled?

Mr. SHIELDS. That's the only one I have had in some time, anyhow, the only one that comes to mind.

Mr. WATERS. Thank you very much, sir. Thank you, Mr. Chairman.

Senator ERVIN. Mr. Shields, the committee wants to thank you for giving us the benefit of your experience in this field. If at any time something occurs to you, we would be glad if you would just communicate it to the committee in the form of a letter.

Mr. SHIELDS. Thank you, sir. I appreciate having been given the opportunity of appearing before the committee. I do want the committee to know that I do represent many men in the services, primarily enlisted men. I am interested in seeing that those men are given some degree of protection. I have felt that for many, many years.

I do think that the committee should know that I think that since I have been practicing law the improvement has been marked. I mean the man now has many more rights and many more protections than he had when I started practicing law in 1934.

I cannot say that I have seen any deterioration in morale or discipline because the men have been given protection. I don't think giving men basic protections is going to affect adversely morale or discipline. I think it is going to improve it.

Senator ERVIN. Thank you very much.

(The full statement of Mr. Shields follows:)

STATEMENT BY FRED W. SHIELDS, WASHINGTON, D.C., CONCERNING ADMINISTRATIVE DISCHARGE PROCEEDINGS

I am Fred W. Shields, an attorney at law practicing in the city of Washington, D.C., and am a member of the firm of King & King. My firm is general counsel for the Fleet Reserve Association, an organization whose members are career men in the U.S. Navy. However, I am appearing here in a personal capacity and not as a representative of the Fleet Reserve Association. I understand that the committee wishes to have my views concerning the administrative discharge proceedings in the armed services. I, however, am going to confine my remarks largely to the administrative discharge proceedings in the Department of the Navy as that is the field in which I have had virtually all my experience.

I imagine that the committee is familiar with the authority under which administrative discharges are given by the Department of the Navy. In any event, I wish to state that so far as I have been able to determine, there is no statutory authority for administrative discharges although there can be little doubt but what Congress is aware of the fact that such discharges are given. The administrative discharge procedure in the Department of the Navy is authorized and controlled by regulations issued by the Bureau of Personnel. As I understand the situation, the Chief of Naval Personnel is the promulgating officer of the regulations or instructions of the Bureau and his regulations need not be approved or specifically authorized by the Secretary of the Department. The latest and controlling directive on the subject of administrative discharges is BuPer Notice 1910 of March 20, 1959, which announced changes in articles C-10310—C-10316 of the Bureau of Personnel Manual, all of which relate to

discharges of enlisted personnel from the Navy. I assume that the committee is generally familiar with the present provisions of these articles in the Bureau of Naval Personnel Manual so I will not here attempt to set them out in any detail. I do feel that the committee is primarily interested in ascertaining what protection is given men who are discharged administratively from the service by reason of unsuitability and perhaps unfitness, which discharges are authorized under the provisions of articles C-10310 and C-10311.

Insofar as unsuitability discharges are concerned, they are authorized for such matters as inaptitude, character and behavior disorders, apathy, defective attitudes, enuresis, alcoholism, homosexual tendencies and, finally, "other good and sufficient reasons, as determined by the Chief of Naval Personnel." It will be noted that with the possible exception of the last three causes for such discharges that all relate to either mental or physical conditions which presumably render a man unfit for service. Actually, alcoholism and homosexual tendencies might also well be considered as medical conditions although my experience has been that when discharges are made on the basis of these two conditions there is usually an actual criminal offense or offenses involved or at least suspected.

Discharges because of unfitness are authorized under C-10311 and may be based upon such matters as frequent involvement of a discreditable nature with civil or military authorities, sexual perversion of all sorts and kinds, drug addiction or the unauthorized use or possession of habit-forming narcotic drugs or marihuana, an established pattern for shirking, an established pattern showing dishonorable failure to pay just debts, and the all inclusive "other good and sufficient reasons as determined by the Chief of Naval Personnel." While the article, itself, specifically provides that a discharge by reason of unfitness will not be issued in lieu of disciplinary action except upon the determination by the Chief of Naval Personnel that the interests of the service, as well as the individual, will best be served by administrative discharge, the fact remains that at least three of the causes for such discharge definitely involve action which is of a criminal nature and properly punishable under the provisions of the Uniform Code of Military Justice when committed by military personnel.

At this point, I feel that I can say with considerable justification that the services do use the administrative discharge procedures as a substitute for and in lieu of disciplinary action as provided by the Uniform Code on frequent occasions. I am satisfied in my own mind at least that the administrative discharge is quite frequently given because of the difficulty or impossibility of obtaining a conviction of an individual under the provisions of the Uniform Code. I am not alone in this suspicion. Chief Judge Quinn has, on several occasions, voiced the same opinion and certainly it is significant that while disciplinary actions under the provisions of the Uniform Code have diminished greatly in numbers in the past few years, separations under the administrative discharge procedures have increased in number over the same period. It should be reasonably apparent from this that the services are using the discharge procedures as a substitute for and in lieu of disciplinary action.

Only recently I had occasion to represent a young marine, John Smith,[1] who was separated from the Marine Corps with an undesirable discharge under other than honorable conditions for the sole reason that he had been involved in a serious automobile accident in Haiti. He was not represented in the investigation in Haiti. He was not accorded any rights in that investigation. However, he was almost immediately after the accident transferred to the Marine Corps Headquarters at Henderson Hall, Arlington, Va., where he was first given administrative punishment under the provisions of "Article 15: Uniform Code of Military Justice," which is applicable only in the cases involving minor offenses. He was then given a hearing before a field board of officers and on the basis of the evidence adduced in the completely ex parte investigation held in Haiti was given an undesirable discharge under other than honorable conditions. In my experience with the naval services, I have never seen an instance where a man was more completely denied anything that even resembled due process of law.

Persons separated with an administrative discharge because of unsuitability are ordinarily given either an honorable or general discharge while those separated by reason of unfitness are generally given an undesirable discharge or, in some instances, a higher type discharge. The undesirable discharge is given under other than honorable conditions. In either type of discharge, that is for unsuitability or for unfitness, a brief is to be prepared setting forth the

[1] Fictitious name used.

relevant portions of the individual's service record and those facts which are supposed to afford the reason for the discharge. The individual may, if he wishes, have his case heard by a field board of officers convened by the commanding officer and he has the right to appear before such board in person unless he is held in civil confinement or is otherwise unavailable, and he has the right to be represented by counsel and to submit statements in his own behalf.

It is in the operations of the field boards that most but by no means all of the injustices occur so far as I am concerned. My dissatisfaction with the field board hearings arise primarily from the following factors: First, the proceedings looking toward the issuance of the discharge are initiated in the first instance by the commanding officer; the commanding officer appoints all of the personnel connected with the field board hearings and ordinarily such personnel will be junior to him. Under the circumstances, the average board member probably is more inclined to follow or accept the recommendation of his commanding officer than to take steps to see that the individual appearing before the board is accorded any great degree of protection insofar as basic rights are concerned.

More important is the fact that the board is by no means limited to what has been set forth in the brief as a basis for the contemplated discharge. The members of the board have access to the individual's service record prior to the hearing and presumably are acquainted with various Navy directives or instructions which they may well feel are binding upon them as individuals insofar as their action with respect to the contemplated discharge is concerned.

Finally, the board is not bound by any rules of evidence. It may consider sworn or unsworn testimony and statements. It may consider statements which would be privileged and not admissible in any legal proceedings against an accused person. It is not bound by any statute of limitations and may consider instances or acts which occurred in preceding terms of enlistment, acts for which prosecution would obviously be barred by the statute of limitations and in fact acts or incidents which occurred long before the individual entered the service.

The board need not keep a verbatim record of the proceedings and the individual affected by its action need not be given a copy of the proceedings although he may request a copy of the proceedings and the convening authority may give it to him if he wishes but is not required to do so.

Finally, the findings of the board are not conclusive or final. That is to say that should the board recommend the retention of the individual in the service its recommendation may be reversed by the convening authority, or if approved by the convening authority it can, nevertheless, be reversed in the Bureau of Personnel.

Under the circumstances, my own opinion is that the field board of officers serves no really useful purpose. It only divides responsibility for the action taken and presents the appearance of protection of the rights of naval personnel. In fact, little or no protection is actually given the individual.

It may not be amiss to point out that an undesirable discharge under other than honorable conditions is a very serious punishment in and of itself. It follows the man throughout the rest of his life and greatly limits his ability to obtain any responsible position. In fact, in many instances it prevents him from entering fields of employment completely. In my opinion, the effect of an undesirable discharge under other than honorable conditions has just as serious consequences to the individual involved as does a bad conduct or dishonorable discharge. I propose to refer to a number of cases with which I have been personally familiar where I feel that regardless of whether or not the individual involved was guilty of committing some offense, the naval authorities effected his separation through the administrative discharge route only because he could not otherwise have been punished for the offense which he was suspected of having committed. Unfortunately, a good many of these cases have involved alleged homosexual acts and as such they are not calculated to arouse any great degree of sympathy for the individual. However, I feel that the committee should bear in mind the fact that such acts are very easily charged and it is difficult to establish innocence. The law courts certainly have always required a high degree of proof before a conviction of this type of offense will be upheld. The naval authorities have resorted to the administrative discharge in this type of offense in many instances simply because a criminal prosecution could not be successfully maintained.

Richard Roe,[1] seaman apprentice, was given an administrative discharge at Norfolk, Va., after he had been held in confinement in the brig for a considerable time awaiting trial on a charge and specification alleging homosexual activities on his part. When it became apparent that the charge could not be successfully prosecuted he was given an undesirable discharge.

Harold Ferguson,[1] a first-class petty officer in the Navy, was given an undesirable discharge under other than honorable conditions after having served for more than 14 years in the Navy. His discharge was based primarily upon a repudiated confession made by him and upon an alleged civil conviction for a homosexual act which had occurred approximately 10 years prior to the date of his discharge. The Navy had been fully aware of his conviction at the time it occurred and, nevertheless, reenlisted him for two or three additional terms of enlistment before discharging him. His Navy record was clear and the discharge was effected against the recommendation of his commanding officer who wished to have him retained in the service. The Board for Correction of Naval Records subsequently changed his discharge to one under honorable conditions but that, of course, did not suffice to reinstate him in the Navy.

George Nelson,[1] another first class petty officer, who was discharged from the U.S. Navy with an administrative discharge after having served honorably for more than 18 years, was accused of homosexual activities which he denied and demanded trial before a court-martial. His demands for trial were simply ignored and he was given an undesirable discharge without any pretense of a hearing.

Raymond Burke,[1] Master Sergeant, USMC, was discharged after having completed more than 18 years of honorable service for alleged immoral conduct. The evidence upon which he was discharged could not possibly have been sufficient to have justified his conviction before any court. In this case I was informed by appointed counsel, who represented Burke before the field board at Camp LeJeune, N.C., that the board had recommended Burke's retention in the service but an order came from Marine Corps Headquarters directing his discharge.

Charles Hanson[1] was discharged from the U.S. Navy upon an alleged homosexual offense. I have read the record before the field board in his case, and, frankly, do not feel that the commission of the offense was established by competent evidence. He was represented at the field board hearing by a lawyer from Norfolk, Va., who concurs with my opinion that the evidence would not have established guilt of the offense. Nevertheless, he was administratively discharged.

Robert Wyatt,[1] YNSN, USN, was discharged after a field board hearing at Bainbridge, Md. This boy was an obvious victim of a homosexual attack by another older sailor. He promptly reported the matter to naval authorities and he was strongly recommended for retention in the service by his immediate commanding officer, as well as the chief petty officer under whom he served and by many other persons who knew him in the service. Despite these facts he was administratively discharged.

Carl Fitzsimmons,[1] a chief petty officer in the U.S. Navy, was discharged administratively without a field board hearing after having served, as I recall it, between 18 and 19 years in the Navy. His offense was an alleged dishonorable failure to pay his debts. Actually he was married to a woman who kept him constantly in debt. She incurred the debts in question and he made every effort possible to pay the debts but could not do so and so the Navy discharged him administratively.

Undoubtedly other cases can be brought out of my files where the individual has not been given what I consider fair or equitable treatment. However, these cases are all comparatively recent and come to my mind immediately. They are illustrative of what can be done through the administrative discharge proceeding and the unfairness of the proceeding to the individuals involved.

I would suggest to the committee that a very excellent discussion of the operation of the administrative discharge system in the Navy has been prepared by two young officers at the Naval Station, Norfolk, Va., who have had a considerable experience with the actual operation of the system. I am not at liberty to give the committee a copy of the report of these two officers as they are on active duty and their article has not been cleared by the naval authorities. However, if the committee can obtain clearance from the naval authorities for this article I will be pleased to furnish copies of it to the committee as I feel that the article points out the defects in the system as clearly and lucidly as anything I have seen on the subject.

---

[1] Fictitious name used.

Mr. CREECH. The next witness is Lawrence Speiser, director of the Washington office of the American Civil Liberties Union.

## STATEMENT OF LAWRENCE SPEISER, DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

Mr. SPEISER. Mr. Chairman, I am, as Mr. Creech just said, the director of the Washington office of the American Civil Liberties Union. I am a member of the bars of California, the District of Columbia, and the U.S. Supreme Court.

The American Civil Liberties Union has had a continuing concern about administrative discharges, particularly in connection with administrative discharges which have been given under the security programs which have existed in the services.

The legal director of the American Civil Liberties Union, Mr. Rowland Watts, made a study of how draftees were affected by the security program a number of years ago. He appeared before this subcommittee when it held hearings, I believe, back in 1955 on this subject.

I have set forth a number of examples in my statement but I will not read through it. However, I would like to cover a number of high points.

First of all, apparently at this time the military security programs which have existed are not now taking into account preinduction activities as a basis for determining the nature of a discharge. This was on the basis of the Supreme Court decision of *Harmon* v. *Brucker*. Some questions have been raised as to whether the services were attempting to circumvent this decision. For example, when an individual failed to disclose preinduction activities that were required on the form DD-398, the services in some cases attempted to discharge the individuals for failing to reveal the information.

But this practice now seems to be barred. The latest decision on this, by the circuit court of the District of Columbia, *Davis* v. *Stahr*, held that this might not be utilized as a criterion in determining what sort of discharge an individual should have.

The services have a right to determine who they want to retain in the service, and they may discharge any individual. But the discharge we, and I feel the courts, hold should be based on the character of the service that is rendered while the person is in the service and not on the basis of what associations he may have had prior to the time he was in the service.

Now, another area that is also covered by a recent court decision, although we still do not have the final word on it, is whether political activities and associations, membership in organizations, or contact with individuals by an individual who is on inactive status, may be utilized in determining the character of the discharge granted. The Court of Appeals in the District of Columbia, in *Bland* v. *Connally*, did not quite reach that question. It held, though, that if the services are going to utilize these factors in determining what sort of a discharge an individual should have, that they are going to have to provide cross-examination. They can take their choice.

Now, this matter has not yet been settled because the Government did not choose to appeal or petition for certiorari in either of the two cases, *Davis* v. *Stahr* or *Bland* v. *Connally*. I don't know the reason

for this. It may have been because the services did not want the Supreme Court to put its stamp of approval on either one of the two decisions. It may have been because of conflicts within the Government itself, between various departments. It may have been because the Government acknowledged the correctness of the decisions. However, as far as I have been able to determine the services are not yet implementing these decisions. As a matter of fact, the matter is still in abeyance because both of the cases were remanded back to the district court and I do not believe the district court has issued orders in either of the two cases as yet. However, as far as I have been able to determine, none of the services plan to initiate a wholesale review of the discharges given under the security program and to either grant cross-examination in these cases or to change the character of the discharges to honorable discharges. This is still up in the air.

Just recently, on contact with the representative of the Navy Discharge Review Board concerning the case of a Naval Reserve officer it was indicated that any individual who had received some discharge other than honorable, who wanted to have it corrected, was still going to have to file an application with the Navy Discharge Review Board; presumably the same procedure would also be required with the other discharge review boards as well, and process it in that fashion, but there was not going to be any wholesale self-initiated review by the services themselves.

I pointed out in my statement one of the punitive effects that has resulted from the administrative discharge program, particularly in the security area, where general discharges have been given. For quite a while, the services were taking the position that general discharges had absolutely no punitive effect whatsoever. This, I feel, was being somewhat unrealistic. A number of benefits, veterans' benefits, for example, are dependent on receiving an honorable discharge, and general discharges did not qualify for benefits of that kind. Veterans' Administration, for example, would make a determination whether a general discharge had been granted under such conditions that it would warrant giving veterans' benefits. In one case to which I have referred, a soldier had received an undesirable discharge in 1954 on security grounds and appealed to the Army Discharge Review Board in 1955 unsuccessfully. However, in the late spring of 1957, on an appeal to the Board of Correction of Military Records, he received a general discharge under honorable conditions.

But it was not until October 1959 that the Veterans' Administration made a determination that he was entitled to educational benefits. So, from 1954 until October 1959, he did not receive educational benefits, about 5 years, and then it was determined that he should have had educational benefits, retroactive to 1958. So he obviously had been placed in a position where he was not able to take advantage of the educational benefit that all other veterans were getting, unfairly, as it was determined to be. Luckily he did go back to school, but there was a good period of his life during which he was not able to take advantage of the benefits that other veterans had.

When Mr. Watts testified in 1955 he made some recommendations which were aimed toward the Army in particular, since his study was mainly involved with the selective service program, and draftees, and at that time most of them were going into the Army.

His recommendations, which I would like to reemphasize, were as follows:

1. The Army is responsible for persons subject to the selective service law only during the period of their active duty in the Army; therefor, the Army repudiates the responsibility unwittingly imposed upon it by the Congress to assume jurisdiction over the political and social life of an inductee for a period of 6 years after he has completed such active duty.

2. The Army is not the administrator of the selective service law but only its beneficiary; therefore, responsibility for its effective operation rests with the Congress, the courts, and the Selective Service System, and the Army will not permit itself to be used as an instrument for punishment of those who try to evade their duties under the law.

3. Within the limits of established standards of eligibility and procedure, the Army must be the sole judge of whom it will permit to serve in its ranks and that judgment will be based solely on its military needs; therefore, the Army will not accept into service anyone who is not in a position to be permitted to serve fully in accordance with his capabilities.

4. The Army will accord to each man within its ranks, in security cases, the same full hearing rights that are guaranteed him by the Uniform Code of Military Justice, in defending himself against any other charge.

5. In accordance with traditional policy, the Army, if it decides that it does not choose to retain a man on either active or reserve duty, will accord him a discharge based solely on the character of the service he has rendered.

As I said, these recommendations would apply to a great extent to the other services as well.

I noticed in your questioning of the previous witness that you were concerned with the question of homosexuals and how they were treated. Essentially it seems to me that where there is an act of misconduct or acts of misconduct that are the basis of a branch of the military services attempting to rid itself of a particular person, then it should be under the obligation to present evidence to sustain the charge against the individual.

I recognize that, under civilian criminal law, individuals who are charged with crimes are often offered the opportunity to plead to a lesser offense in order to avoid being charged and tried with the greater offense. This is a type of convenience, I suppose, to the State. I am rather unhappy about it. I am unhappy about the military services doing the same thing—they will offer the individual the choice of accepting an administrative discharge and, if he doesn't take it, they will court-martial him, in which case the penalty which may be imposed if he gambles wrongly will be much greater than the administrative discharge that he could have taken in the first place.

I don't believe this is a fair way of determining whether or not an individual should have received an administrative discharge. I think that an individual, if he is to be given a choice of avoiding a court-martial or avoiding a situation in which the services present evidence against him, should not be placed in a worse condition than he was before. Now, that may require the services making some sort of

choice in advance—if they are going to make an offer to him—either to offer him an administrative discharge, and if he chooses not to accept the administrative discharge, then I think that they probably should be bound not to give him anything stiffer than what he refused to accept without having a trial.

Now, this may obviously mean more work for the services. An individual will say, "What have I got to lose? I have a fighting chance. I can't come out any worse." But I don't think that this is such a tremendous disadvantage for the services to undertake. There are a lot of individuals who would be willing to accept the administrative discharge without putting the Government, in effect, to the burden of proving the facts, merely because they may not want the full facts to be developed. They may have all sorts of reasons why they might be willing to accept an administrative discharge without a hearing. But I think there is something basically unfair in presenting a person with such a dilemma—take an administrative discharge, in which the penalties that go with it are somewhat limited, or we will court-martial you, in which the penalties that can be imposed are fairly unlimited.

Senator ERVIN. Of course, as a result of the trial and investigation they might find the man was a whole lot worse than they thought in the first place.

Mr. SPEISER. I recognize this is a problem, Mr. Chairman. As I understand it, under the Uniform Code, they give defendants a fairly detailed statement of the charges, and a bill of particulars. They also get the investigative reports. I would think that the situation you described would be a somewhat unique one. First of all, it would seem to me the defense attorney would be able to object to anything else coming in which is worse because it is irrelevant, beyond the scope of the charges that he had received notice that he was going to have to defend against. Now, it may be that during the course of the trial that leads are obtained by the service which would warrant further investigation and further charges. But I think this is a more unlikely and unique situation.

Senator ERVIN. There is much to be said in favor of the proposition you advance, but at the same time I think there is much to be said against it also. It would be a difficult thing to handle.

Mr. SPEISER. I recognize certainly within criminal law prevalence of the practice of bargaining for a plea so that a defendant could limit the penalty that might be imposed. This, I recognize, is a well-defined function of defense lawyers involved in criminal cases.

Senator ERVIN. I think sometimes the prosecution lawyer charges a man with a higher degree of offense in order to coerce him to plead guilty of a lesser.

Mr. SPEISER. Yes, it certainly is utilized in that fashion too.

Senator ERVIN. But I certainly agree with you on the fundamental proposition that all of us charged with the administration of justice, military justice or civilian justice, should certainly try to see that every person had the advantage of at least the minimum requirements of due process.

Mr. SPEISER. I might suggest this, Mr. Chairman. Recognizing the fine art of bargaining for a plea that has gone on for centuries within our common law, it seems to me that we have never really had an opportunity to experiment within our judicial systems on this, and

that the military services may be the very best place in order to experiment with this sort of limitation.

First of all, there are a limited number of individuals. It is not the entire population. You do have some fairly good, strict controls, because they are set out within the Uniform Code of Military Justice. It would be, it seems to me, a worthwhile experiment without any great danger to either the military disciplinary system or to the country to experiment on this basis. An individual who is going to be faced with the alternative of accepting some sort of discharge can refuse to accept the discharge and force the Government to go ahead and try him with the understanding he cannot be hit with any greater penalty than that offered to him in the first place——

Senator ERVIN. That's a very interesting observation. Of course I think that the most sacred and important function of society, any civilian society, is the administration of justice.

Of course, I don't think that is true of the naval or the military services. In other words, their primary purpose is to be prepared to defend the country against an enemy.

Mr. SPEISER. I think you are right. You may say why foist the experiment on the military services where it is really a sideline.

Senator ERVIN. In other words, they administer military justice for a twofold purpose, as I see it. One is to maintain discipline and the other is to rid the service of undesirable personnel. Therefore their purpose is not just meting out punishment. I think for that reason you have made an interesting observation—that it is a laboratory more or less free from hazard to society in general.

Mr. SPEISER. As a matter of fact, they have done that in a couple of areas I can think offhand. One is in court-martials, giving the investigative reports to a defendant which he would not get at any civilian trial, and yet they have been able to function with a fairly good system of justice there. Second, there is the rigid system of requiring the warning of article 31 before statements are taken, which we do not yet have in any civilian system right now. Still they have been able to operate with those. I recognize the rationale for them, because of the fact that the individuals are in a certain authoritarian atmosphere, and there is a question of whether they are being ordered to answer questions, and there is a penalty if they don't. But what I am saying is that they have developed these two rather unique features that are not yet accepted fully in our civilian criminal court system, and have been able to operate and have a fairly high rate of conviction, I think, matching that within the civilian courts.

Senator ERVIN. Any questions?

Mr. CREECH. Mr. Speiser, you indicated that the American Civil Liberties Union has had a continuing concern with the administration of military justice.

Now I wonder, sir what the experience of the American Civil Liberties Union has been with regard to the manner in which the Uniform Code of Military Justice is operating at this time?

Mr. SPEISER. I am afraid I could not answer that question. We have a certain degree of autonomy—what you might call States rights—within the American Civil Liberties Union. We have affiliates who operate in different fashion. Some of them do get involved in court cases in courts-marital. Others do not. We don't have any

regular central reporting system on this. The cases that I cited here I obtained from our national headquarters in New York. At the time I did not feel I had time to circularize our affiliates and ask for their experiences. So I do not have that information.

I think over a period of time I could probably accumulate it and give it to the committee.

Mr. CREECH. Speaking of the administrative discharges and mentioning the work of Mr. Rowland Watts that has been done previously in the recommendations which he made to the Secretary of the Army, is there any contemplated additional study in this specific field of administrative discharges by the American Civil Liberties Union?

Mr. SPEISER. I do not believe so. One of the reasons for Mr. Watts' study was the fact that he had obtained a grant from the Fund for the Republic to finance it, and the Fund for the Republic has not been financing studies of this kind for the past 3 or 4 years.

There are no foundation grants that I know of, and the American Civil Liberties Union as such is not planning to make a study.

Mr. CREECH. The Defense Department witnesses who appeared before this subcommittee last week indicated that they do not feel that the proceedings, the board proceedings, at which administrative discharges are given are necessarily adversary proceedings. Based on this, they feel that there is not always a pressing necessity for counsel, though of course there is a provision for counsel if reasonably available and, in instances where there is no counsel, for a recorder to be in charge and perhaps adduce testimony. Also they point out of course there is no subpena power, though some of them have indicated that that power would be helpful.

I wonder if you would care to discuss this aspect of the administrative procedure, and whether you feel there should be an adversary proceeding.

Mr. SPEISER. Well whether they choose to acknowledge it as an adversary proceeding, I think it is. In the security cases I have handled there were specific charges which were conceived to be charges of wrongdoing which were made by the services. The Government did not attempt to put on any proof to sustain them. I had no access to the Government's files. I had no way of knowing if the Government really know whether the charges that were made against the individual were substantiated or not.

One of the defects that has existed in the security programs all the way through is that often the hearing boards really were not in a position to evaluate the reliability of the information. They were not able to evaluate accurately the weight of it. They were pretty much flying blind in many cases.

The accusations against individuals were made by so-called unnamed accusers. They were adversary proceedings in a sense that on one side there were charges made against the individual and he had to defend himself. He defended himself with one hand tied behind his back and his eyes blindfolded in many cases.

The Government was not under any obligation to substantiate the charges. There was no opportunity for cross-examination.

I think that this idea that it was not an adversary proceeding—that it was merely a hearing to get at the facts—is a figment of someone's imagination. The adversary proceedings are proceedings to get

at the facts. We developed a judicial system which is based on the idea that an adversary proceeding is the best way at getting at the facts.

Senator ERVIN. That is certainly a fundamental basis of Anglo-Saxon jurisprudence. Experience has taught us that the best way to find the truth is to have partisans on each side, and the best way to get a fair judgment is to have an impartial body provided to do the judging as between the partisans.

Mr. SPEISER. There is another defect, it seems to me, of these so-called hearing boards: There is not a division of functions. You have a body that sits as a judge and also acts as a prosecutor. In the security proceedings that I have been involved in, the chairman of the hearing board was not a lawyer. The so-called—I think the term was a legal officer, who acted as a prosecutor—was also the legal adviser to the chairman of the board. So all the objections that I would make were ruled on, in effect, by the prosecutor advising the judge how to rule on my objections.

Needless to say, I did not win on my objections very often.

Mr. CREECH. Was this gentleman the recorder?

Mr. SPEISER. Right. It has been a number of years since I handled some security cases. The recorder was the title he had, you are right.

Mr. CREECH. Mr. Shields, who testified just before you, advocated that perhaps administrative discharges should be narrowed down somewhat to a circumscribed smaller area than they are at the present time. Now last week Mr. Fay, the Under Secretary of the Navy, told the subcommittee that administrative discharges for cause fill a vital need which can be satisfied by no other means.

Then he indicated that individuals fall generally into three types for discharges; one being those who have been convicted in a civil court of a serious crime, the second group being that group which has admittedly participated in homosexual acts, where trial by courts-martial is not feasible because of lack of corroborating evidence or refusal of witnesses to testify; and then the third classification involving separation for misbehavior and concerning cronic military offenders whose acts may not warrant punitive discharge, where the total number of them is considered in aggregate.

There was mention of individuals whose retention might lead to further disciplinary involvement and punitive discharge.

I wonder if, based upon your experience with the administrative discharge, you feel that the case, for instance, of the homosexual can only be handled successfully by administrative discharge, or if you feel that he should also be permitted a court-martial if he requested it.

Mr. SPEISER. Well, I think he should be entitled to a court-martial if he requests it. Again, I throw forth the suggestion I made that he should not be faced with the dilemma of taking an administrative discharge or faced with a court-martial in which he may get a much worse type of discharge if he chooses to fight it.

It seems to me he should not be put into that position when the Government's position is "We are doing this because we may not be able to prove the case against him."

I have always thought that this is not a very valid argument for any government to make—that you take an easy out because you might

have some difficulty proving the case. I think that this is true, certainly, with allegations of homosexuality. The same cautions which the civilian criminal courts have developed toward charges of sexual crimes I think should apply here; that is, sexual crimes generally are committed in private, generally only two individuals are present, and it is easy to make such a charge.

I have a file in which a serviceman contended that he was in effect blamed by two homosexuals that he discovered and they, in order to cover themselves up, made charges against him. He was faced with the dilemma as to whether to take an administrative discharge or not. It was their word against his. He took the administrative discharge, and he has been fighting ever since trying to change it.

I don't think the difficulties of the Government in proving the case should be any reason for continuing with administrative discharges. There may be other reasons. I don't think this is a valid one.

Now, what were the other two situations you suggested?

Mr. CREECH. The other two situations, one in which an individual has been convicted of a serious crime. The third category is the chronic troublemaker, someone who consistently is in trouble but whose acts are not sufficiently wrong to justify a court-martial.

Mr. SPEISER. Well, with regard to the first I think he should be entitled to some hearing in which he can put in facts in mitigation which would be aimed at the military services interest. It doesn't seem to me that merely because an individual has been convicted of a crime this should automatically knock him out of the military service.

There may be all sorts of extenuating circumstances. It seems to me he should be entitled to a hearing. I suppose if he has had a due process hearing in a civilian court, or has pleaded guilty, that you probably cannot object to the record, the judgment being brought into a military discharge situation, without the military having to prove it over again with witnesses and cross-examination.

But I think that he should have an opportunity to bring in evidence on mitigation.

Now, on your third category, someone who is sort of a perennial troublemaker, it seems to me that, if what he is really being charged with is a series of rather small, minor acts, that you could develop some sort of system, I suppose on a point basis, to determine if he should be given an administrative discharge. Although he has had due process for each of the minor infractions, if he wants to challenge them before an administrative discharge is finally given on an accumulated basis I don't think the services should have to prove each one of them at a new hearing. The services should be able to say, "We are going to give you an administrative discharge," and not have to prove each one of the things in the past, when they have already been proven once. But I think that he should be entitled to due process along the line for each one of these minor things if he so desires.

Now, I recognize there is an area here of so-called company punishment, in which there is really no due process, and I suppose they are talking of something on that order.

I suppose, not being a military commander, I'd be willing to take the chance of keeping a chronic troublemaker until he gets into some major trouble, to where he gets due process before you discharge him out of the service with a punitive discharge. The Government,

as I have said before, always has the opportunity, if he really is a chronic troublemaker, to give him an honorable discharge and get rid of him.

But we are only talking about giving a punitive discharge. If they want to give him an honorable discharge at any point, they can get rid of him.

There is one caveat I suppose I have here—although I don't know of any specific cases. I suppose in a rash of economy that if the military services started giving honorable discharges to men with over 19 years service, who would be able to retire after 20 years, I think that I would probably have some concern about saying that the services have a right to discharge anybody any time they want to, to give them an honorable discharge in a situation like that, after a man has invested 15 to 20 years of his life. I think there may be greater limitations on the Government being able to get rid of a man just on its own say-so, in a case like that, without putting on some sort of case against him.

Mr. CREECH. If a man is faced with the alternative of either accepting an administrative discharge, a less than honorable discharge of some type, or else having a court-martial, and he elects to accept the discharge other than honorable, do you feel that an individual who is a minor, some young serviceman, should be permitted to make this determination without the advice of counsel?

Mr. SPEISER. No. As a matter of fact, I would like to see, before anyone is permitted to make a choice of that kind, I think he ought to have the right to counsel automatically, whether a minor or not.

It seems to me that many of them who have taken these discharges have not been fully aware of the repercussions that are involved; and, secondly, they also were not able to judge whether the services could make a court-martial stick.

I think they need advice from counsel in any situation where they are being given a choice of that kind, and I think the service should be in a position to provide it.

Mr. CREECH. You mentioned a serviceman with a number of years of service being subjected to, perhaps, an administrative discharge or less than an honorable discharge.

Have you heard any charges or has your investigation revealed any instances in which units of the armed services had quotas for administrative discharges? Have you encountered anything of that sort?

Mr. SPEISER. No, I have not heard anything about this.

Mr. CREECH. Mr. Everett has some questions.

Mr. EVERETT. When some of the witnesses testified this morning, it was brought out that the association of the bar of the city of New York is currently trying to determine the effects on the public mind of a discharge under other than honorable conditions, and of a discharge, a general discharge, which is technically under honorable conditions, but which is not an honorable discharge.

Could you enlighten us on the basis of your experience as to the effects of the general discharge and the undesirable discharge?

I realize this is partially covered in your statement.

Mr. SPEISER. Yes. At first, under the security program, when servicemen lost their cases they received undesirable discharges. But

then if they were persistent, and also under *Harmon* v. *Brucker* many of them raised their discharges up to the general discharge level.

Nevertheless, for most of the individuals who had general discharges, they had a time delay in getting, if they did get, their Veterans' Administration benefits, generally educational benefits.

If you received a general discharge there was a good deal of sweating to be done, and as far as private employment, I do not know how I can tell whether there were any disadvantages. You never know whether someone did not get a job because he had a general discharge.

I suppose the longer period of time away from the military service, the less effect it does have. I am sure that for many people who have general discharges but got them some 15 years ago and have jobs, probably their effects have faded away. But you never can tell whether it is going to have an effect on a promotion or when it will crop up in some fashion.

I know in criminal cases that the type of discharge a person gets, no matter how many years before, always pops up in probation reports where the probation officer searches this out.

If it is a general discharge, I would say it counts against the individual.

Senator ERVIN. If I may interrupt, if my recollection serves me right, the services say the reason they established an undesirable discharge and a discharge under honorable conditions was to make the distinction which the Veterans' Administration used to have to make under the blue discharges, and that they made this different classification in order to avoid the necessity for the Veterans' Administration to make that investigation which they used to have to make when they were given a discharge without any rating.

Mr. SPEISER. Well, in my experience, the Veterans' Administration, as I recall, determines that a person is entitled to certain benefits if he is honorably discharged, and they do not accept a general discharge under honorable conditions automatically as being honorably discharged. They conduct their investigation and make their own evaluation.

So if this is what the services thought they were doing, I am afraid this is not the way the Veterans' Administration views it.

Senator ERVIN. Yes, sir. There has been testimony to that effect here last week, when they had a discharge which did not make any specification as to whether it was honorable or dishonorable, but left the matter uncertain, then the Veterans' Administration had to come in, in a sense, and investigate each particular case, to see what the exact nature of his service was, and which category he was supposed to fall into.

Mr. SPEISER. Well, the general discharge says "General discharge under honorable conditions."

Senator ERVIN. I was thinking about the one we used to call a blue discharge.

Mr. SPEISER. Yes, which, I think, is that the undesirable or bad conduct discharge? I am not clear on it.

Senator ERVIN. In other words, they used to have a discharge, a blue discharge, which did not specify anything. In place of the blue discharge they substituted the discharge under honorable conditions, and a discharge, undesirable discharge, to cover the category that

theretofore had been a discharge without any specification, to keep the Veterans' Administration from having to try the case over again and find out which category the man came under, depending on——

Mr. SPEISER. For certain types of benefits, as I say, in that article in the JAG Journal, which I would urge be included perhaps in your hearing record, for certain types of Veterans' Administration benefits. If you get something other than an honorable discharge, a nice, clean-cut honorable discharge, the Veterans' Administration will go back of the discharge to determine whether or not they will grant veterans' benefits.

Senator ERVIN. The services also explained that they reserved the honorable discharge because of the veneration throughout generations of the American people toward granting an honorable discharge. They make the distinction between that and the general discharge under honorable conditions because they do not feel that those who turn out to be unsuitable should receive the same honor as those who turned out to be A-1 soldiers, sailors, or airmen. It seems to me there is some basis for that distinction, because when we go to college and we do extra well, we are elected to Phi Beta Kappa, and they give us a degree of cum laude, and then there are others who are lucky to get by at all, as I was.

Mr. SPEISER. I agree. There is a certain logic to making these distinctions. Unfortunately, though, the whole problem of the discharge has been so colored by the practices during the past 10 and 15 years, particularly with the security program, I think, being used in giving discharges as a type of penalty. It was not a question of suitability in a sense that most people think of suitability that he could not march or he was perhaps dim-witted or was medically discharged. This whole problem has been so colored now that it is recognized that a general discharge is something less than honorable. It is not a question of being unsuitable for the service, but instead, of not deserving to be honorably discharged.

There is a penalty aspect. I think that is involved with it. I suppose one suggestion, to avoid the hardships as far as individuals who are really medically unsuited, would be that they should be given something that is denoted as a medical discharge. They do not have anything like that now.

They give, I believe, a general discharge under honorable conditions for someone who is medically unsuitable. Maybe the answer is, let us separate that, and for a person who is medically discharged, give him a medical discharge, or perhaps give him an honorable discharge and note the real reason on his form 20, I guess you would call it now, as to the specific reasons for the discharge.

Mr. EVERETT. Your comments about the general discharge, and the effects on veterans' benefits particularly, are interesting in view of the fact that the Veterans' Administration had furnished some written information which gave the impression that the general discharge from their standpoint was identical with the honorable discharge, and tomorrow a Veterans' Administration representative will be testifying.

Mr. SPEISER. I will be glad to let you look at the file. I think I have that file with me on the fellow who took over 2 years before he got the Veterans' Administration to approve his educational benefits after he

received a general discharge. It does not take 2 years usually for anyone else.

Mr. EVERETT. This would certainly be of assistance in clarifying what is at this moment a source of confusion, from our standpoint.

With reference to the bargaining out of pleas of guilty, the Army has devised a practice of negotiated pleas which are negotiated in writing on the initiative of the defense counsel, the lawyer for the accused.

If there is to be any type of bargaining on pleas of guilty, would you think it more desirable to have it formalized in this manner as the Army and Navy are doing, or do you think it should be left to informal discussions as it typically is in civilian practice?

Mr. SPEISER. I do not know. I am unfamiliar with the practice of the negotiated plea on a formal basis. For example, I do not know if this can in any way be utilized in the event that the negotiations break down.

Mr. EVERETT. No, it could not, as I understand the practice.

Mr. SPEISER. I do not know. I think I had better not comment on it.

Mr. EVERETT. Would it be your experience in civilian practice that typically there is informal bargaining that surrounds any type of plea of guilty?

Mr. SPEISER. Yes, there is.

Mr. EVERETT. Now, in one of the illustrative cases which you described in answer to one of the questions, you referred to a situation where it was one man's word that he had not participated in a homosexual act against the word of two other people who were trying to frame him.

In that situation the Government would have to have corroboration, corrobative evidence, to try the man if it became necessary to take the case to a court-martial.

How do you think this sort of situation should be disposed of? A serviceman makes a voluntary confession of a number of homosexual activities with persons who are not sufficiently identified so that they can be located or be used at a court-martial. There is no question about the voluntariness of the confession. But there is no possibility of trying him by court-martial because of the absence of the requisite corpus delicti.

In that situation should the services be free to give the man an undesirable discharge?

Mr. SPEISER. Well, if there is no question of the voluntariness, I suppose so. I can see that this might be a way of getting out of the service without too much difficulty.

Mr. EVERETT. Would your answer be the same if the serviceman, with the advice of counsel, said, "I don't want an undesirable discharge and I demand a trial by court-martial," knowing it was impossible to be convicted?

Mr. SPEISER. Well, you raised the question as to why he voluntarily confessed. I suppose it was during an investigation of some kind.

Mr. EVERETT. Perhaps incident to a security clearance, something of that type, where a lot of background material is obtained.

I think there have been cases of that very type where incriminating admissions were obtained in a security clearance investigation, but the identifying material was not sufficient to permit of prosecution by court-martial.

Mr. SPEISER. Well, I think if he wants to insist on being court-martialed with the probability that the services could not prove the case against him, then I think he should have that right. There are certain disadvantages, I suppose you might say, in having any due process of law. But we have obviously learned to live with them for centuries, and there is no reason why you could not in a situation like that.

Mr. EVERETT. One last question: An Army proposal is that military jurisdiction over retired personnel not on active duty be completely eliminated. Do you feel that the military jurisdiction over retired personnel that currently exists is any threat to civil liberties of those personnel?

Mr. SPEISER. Well, I do not know. I do not know whether there is an attempt to cut off any retired serviceman's pension because of, say, political activities or associations or anything of that kind, I just do not know.

If there were, I would say, yes, it is a danger, and I do not think it is a proper concern.

Mr. EVERETT. But you have received no complaints that you know of?

Mr. SPEISER. No.

Mr. EVERETT. I have no further questions.

Senator ERVIN. Mr. Speiser, the committee wants to thank you for giving them the benefit of your experience and observations on problems with respect to which the committee is interested, and I would like to say that the organization which you represent is an organization which has a very laudable record for fighting to protect the basic fundamental rights of unpopular causes, and which other organizations are not much concerned about.

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

(The prepared statement of Mr. Speiser follows:)

STATEMENT BY LAWRENCE SPEISER, DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

RIGHTS OF THE MILITARY IN ADMINISTRATIVE DISCHARGES

I am the director of the Washington office of the American Civil Liberties Union. I am a member of the bars of California, the District of Columbia, and the U.S. Supreme Court.

The American Civil Liberties Union has had a continuing concern that no person should be deprived of life or liberty without due process of law. Because of that concern, the union has been involved in a number of cases challenging the giving of administrative discharges for alleged misconduct and the denial of due process inherent in some of the hearing procedures which have been utilized by the military services.

We do not feel the problem is a unique nor isolated one and we welcome the opportunity to appear.

The character of the discharge accorded a man released from the service is ordinarily determined by the character of the service rendered. At the present time there are five types of discharges: Honorable, general (under honorable conditions), undesirable (or for officers, "under other than honorable conditions."), bad conduct (not issued to officers), and dishonorable (officers are "dismissed"). Bad conduct and dishonorable discharges may be issued only after trial by a court-martial; honorable, general, and undesirable discharges are issued administratively pursuant to service regulations. In court-martial proceedings, substantial due process rights are protected by the Uniform Code of Military Justice. No such similar protections are provided for hearings to determine if administrative discharges shall be issued. The military services have assumed they have had the

power to hold such hearings and to deny the individual involved the right to know who his accusers were, and the right to cross-examine the individuals upon whose information the discharges are based.

The most recent ruling by any court on this subject has held that the military services are wrong in this assumption of statutory power to hold such hearings, particularly in the security field, without these procedural safeguards. The Court of Appeals of the District of Columbia in *Bland* v. *Connally* (293 F. 2d 852) and *Davis* v. *Stahr* (293 F. 2d 860), decided on June 15, 1961.

It is to be noted that the Government decided not to appeal either of these two cases. Whether this decision was reached because of a governmental conclusion that the cases were correctly decided, or because of a governmental unwillingness to risk having the Supreme Court put its stamp of approval on the *Bland* and *Davis* decisions, we cannot say. In any case these cases are the latest court rulings on the subject. As yet, the district court to which the cases were remanded has not conducted further proceedings in either of these two cases. As far as we know, neither have the Departments of the Navy and the Army as yet changed their procedures, nor revised any discharges heretofore given because of the *Bland* and *Davis* decisions.

Even without further proceedings there are several conclusions we can make about the entire security discharge program based on these cases and *Harmon* v. *Brucker* (355 U.S. 579 (1958)).

(1) Consideration of preinduction activities may not be utilized in determining the nature of a discharge.

A related problem arising from preinduction security investigations occurred in 1960. The facts in this are set forth in the following news story:

"NEW YORK, N.Y., July 7.—An end to Army harassment of soldiers who have been subjected to preinduction security investigation by the Central Intelligence Corps was urged today by the American Civil Liberties Union and the Workers Defense League. The two organizations charged that many such persons are not allowed to serve their legally imposed tours of duty in the normal way despite the fact that security probes had found their political views and actions 'clearly consistent with the interest of national security.'

"One example of such discriminatory treatment, cited by Rowland Watts, legal director of the ACLU, and Norman Thomas, vice chairman of the Workers Defense League, in a letter to Secretary of the Army Wilbur M. Brucker, concerns Pvt. Melvin Stack, of New York City, now stationed in Fort Knox, Ky. Stack, a member of the Socialist Party—Social Democratic Federation—had been, prior to induction, fully questioned by the CIC regarding his political career and had been drafted into the Army after the agency had found he was not a 'security risk.'

"Since his induction he has not been permitted to serve normally, the letter asserted, but has been moved from base to base and denied the opportunity to serve continuously in any one position for which he might be qualified. In a little over a year Stack has served at four different posts: Fort Dix, N.J., Fort Sam Houston, Tex.; Edgewood Arsenal, Md., and is now at Fort Knox, Ky. Recently Stack has been questioned by the CIC concerning the political views and associations of a civilian who attended a series of discussion groups arranged by the Unitarian Church in San Antonio, Tex., discussions which Stack also attended while he was at Fort Sam Houston.

" 'The CIC has the right, and perhaps the duty, to investigate the degree of association that members of the Armed Forces have with a civilian suspected of being a "subversive," ' the ACLU–WDL letter stated. The intelligence agency cannot, however, force Stack to make value judgments concerning another person's political beliefs or any other subject, it said. The CIC may investigate civilians in their relationships to the Armed Forces, but only after such persons have been definitely established as being 'subversive' by independent CIC investigation, the letter stated.

"The new interrogation, it continued, is plainly another instance of the harassment which Stack has suffered because of the preinduction security investigation on his record. Such investigation, the ACLU–WDL said, however 'voluntary,' is part of the military's intrusion into civilian life. The two organizations recognized there is a conflict between the Army's responsibility to draft soldiers and still weed out persons who, in sensitive positions, might be security risks. Despite this difficulty, the letter emphasized, once the individual has been inducted he should be permitted to serve normally. Such persons 'are merely performing their legally imposed duty. They have not

sought out the Army; the Army should not seek out a way to degrade them by permitting them to serve but not normally, or by seeking to stigmatize them for life by finding a way to give them a less than "honorable" discharge.' The ACLU–WDL urged Brucker to authorize a review of Stack's case and a comprehensive survey of all those who have been subjected to preinduction security investigation with a view to correcting Army practices with regard to such persons."

(2) Failure to disclose allegedly subversive preinduction activities may not be utilized in determining the nature of a discharge.

As was stated in *Davis* v. *Stahr:*

"With the substantive preinduction conduct removed from the case, the Board would hardly be entitled to consider, as an independent ground, the failure to disclose such conduct.

"This would allow the prohibition of *Harmon* v. *Brucker* to be circumvented by indirection * * *. Since preinduction conduct is irrelevant to the character of discharge which the Secretary may issue, compliance with proper administrative standards would require that the Army Board for Correction of Military Records not base its action upon appellant's failure to reveal his preinduction contacts and associations."

I have the file of a young man from New York who enlisted in the Air Force on January 26, 1954, and served 3 years and 6 months until his discharge on August 7, 1957, with a general discharge which was issued under the provisions of AFR 39–21 which provides for discharging airmen when retention "is not clearly consistent with interests of national security." When he had enlisted he failed to list on the loyalty certificate, DD–98, some prior political associations he had. During 1956, he voluntarily disclosed to his squadron commander that he had attended classes at the Jefferson School of Social Research and had some association with individuals connected with the American Labor Party, the Labor Youth League, and the Negro Labor Council. Eight months later he was given a general discharge on security grounds with no hearing at all. At a hearing before the Air Force Discharge Review Board in October 1959, in which he was represented by Rowland Watts, legal director of the American Civil Liberties Union, his local selective service board submitted the following letter on its own initiative:

"It is our understanding, through hearsay only and not officially, that you propose to hold a hearing sometime in the near future with regard to * * *, discharged on August 7, 1957, under honorable conditions, but under AFR 39–21.

"The members of this board, consisting of five, were called upon to classify registrant * * * based upon the evidence submitted to us consisting of statements both written and oral.

"We are extremely loath to stigmatize any citizen of the United States who has served in the Armed Forces without discredit by retaining him in class IV–F as suggested by National Headquarters, Selective Service System, Washington, D.C., in their letter dated October 16, 1957, addressed to the director of selective service system in New York, a copy of which was forwarded to us.

"Placing a registrant in class IV–F can be of irreparable damage in his relationship with society as well as in employment, which no doubt you are fully aware of.

"We feel that when a person, who on his own initiative, freely makes a disclosure voluntarily to his superiors of his past associations, that person should indeed be given serious consideration before he is discredited.

"Subject registrant has appeared before this board on numerous occasions and we have found him forthright, cooperative, displaying candor without evasion.

"Board has no evidence before it that Mr. ——— has any subversive associations. Further he informs us that he has been before the Federal Bureau of Investigation, made statements, one of which was: 'I am not now a Communist nor have I ever been a Communist.' These same words were repeated by Mr. ——— when he appeared before this board on the evening of October 14, 1959.

"It is hoped that the previous type of discharge be changed thus enabling this board to change the present classification so that subject person may seek gainful employment, which he has been unable to secure up to the present time."

A number of affidavits were also submitted on his behalf.

On January 6, 1960, the Air Force Discharge Review Board and the Secretary of the Air Force refused to change his discharge.

(3) The court of appeals did not decide whether political activities during inactive status could be utilized to determine the character of the discharge to be given, but instead merely decided that if it were to be considered, the Government had to give the right of confrontation to the reservist. It did, however, express grave reservations about such a power. We feel that the court should have reached this ultimate question and in the negative. We agree that the services may decide who they want to retain either on active or inactive duty, but that the character of the discharge be based on the service rendered while on active duty. The price that we would pay by quarantining a sizable portion of our male population while on inactive reserve status from full utilization of their political freedoms is just too much, on any basis, to pay. Present selective service laws provide for 6 years of reserve status after active duty.

We have contacted the Navy Discharge Review Board concerning the case of a naval officer who was given a discharge under other than honorable conditions based on conduct while on inactive status, and were informed that the Navy Department does not plan any self-initiated review of all discharges on the basis of *Bland* v. *Connally*, but will require each individual to apply on his own to the Navy Discharge Review Board. This seems to be a needless waste of time and effort. Either the Navy will give confrontation hearings or it will not. If it will not, then it should, on its own volition, change the discharges which were illegally given.

It is not necessary to set forth the disadvantages of discharges other than honorable. They are set forth at length in an article, "The Results of the Punitive Discharge" in January-February 1961 issue of the JAG Journal, volume XV, No. 1.

I should point out the punitive effect of the time element in cases where benefits are denied until a determination is made as to whether a discharge was granted under other than dishonorable conditions.

For example, we know of the case of a soldier who received an undesirable discharge on May 29, 1954, on security grounds. An appeal to the Army Discharge Review Board in 1955 was unsuccessful. However, a further appeal to the Board for Correction of Military Records resulted in a general discharge under honorable conditions in the late spring of 1957. However it was not until October 1959 that the Veterans' Administration decided that he was entitled to educational benefits. For 5 years, he was not eligible for educational benefits which all other servicemen were getting.

When a general discharge is awarded, the services sometimes will recoup a serviceman's enlistment bonus from the accrued leave time and pay that the particular man has on the books at the time of his discharge. Thus, in effect, the services levy a fine at the time a man is discharged by means of a general discharge. This fine is extremely onerous because it comes at a time when a man has been discharged from his job and must look for a new job. The services generally concede that a general discharge creates problems finding suitable employment. This is no small wonder since about 90 percent of the men discharged from the services receive fully honorable discharges. Thus, a general discharge even though it is under honorable conditions places the recipient of a general discharge in the 10-percent "outer class." It is particularly noteworthy that here, in Washington at the U.S. naval station, men awarded general discharges are, at the time of discharge, escorted to the gate by the master at arms.

Furthermore Navy regulations provide that a man receiving a general discharge is not entitled to wear the uniform at any future veterans' or other celebrations. As to the extremely arbitrary tactics that may be used when a man is faced with a general discharge and the attempts to fight it, the committee might find interesting reading, the two court jackets here in the District of Columbia; namely, *Bach* v. *Franke* (U.S.D.C.D.C., civil action No. 194–60) (interestingly enough when the administrative discharge procedure was challenged, the Navy mooted the case by granting the man an honorable discharge) and *Grant* v. *United States* (U.S.D.C.D.C., civil action No. 3659–60).

In conclusion, I would like to reiterate the recommendations made by Rowland Watts, legal director of the American Civil Liberties Union and formerly national secretary of the Workers Defense League, when he testified before this subcommittee in its hearings on security and constitutional rights in November

1955. Mr. Watts is the author of "The Draftee and Internal Security," a study submitted to the Secretary of the Army in 1955. His recommendations then were as follows:

"1. The Army is responsible for persons subject to the selective service law only during the period of their active duty in the Army, therefore, the Army repudiates the responsibility unwittingly imposed upon it by the Congress to assume jurisdiction over the political and social life of an inductee for a period of 6 years after he has completed such active duty.

"2. The Army is not the administrator of the selective service law but only its beneficiary; therefore responsibility for its effective operation rests with the Congress, the courts, and the Selective Service System, and the Army will not permit itself to be used as an instrument for punishment of those who try to evade their duties under the law.

"3. Within the limits of established standards of eligibility and procedure, the Army must be the sole judge of whom it will permit to serve in its ranks and that judgment will be based solely on its military needs; therefore, the Army will not accept into service anyone who is not in a position to be permitted to serve fully in accordance with his capabilities.

"4. The Army will accord to each man within its ranks, in security cases, the same full hearing rights that are guaranteed him by the Uniform Code of Military Justice, in defending himself against any other charge.

"5. In accordance with traditional policy, the Army, if it decides that it does not choose to retain a man on either Active or Reserve duty, will accord him a discharge based solely on the character of the service he has rendered."

They will, of course, apply to a great extent to the other services as well. We heartily commend this subcommittee for its consideration of this most important problem.

Mr. CREECH. Mr. Chairman, the next witness is Mr. Zeigel Neff, the civilian member of the Navy Board of Review. Mr. Neff.

## STATEMENT OF ZEIGEL W. NEFF, CIVILIAN MEMBER, NAVY BOARD OF REVIEW

Mr. NEFF. Mr. Chairman, I am Zeigel W. Neff, civilian member of one of the Navy's five boards of review. The opportunity to present my views to this distinguished committee in the matters relating to your investigation is appreciated.

I have been engaged in the practice of military law since enactment of the Uniform Code of Military Justice. I served in World War II as a Navy carrier fighter pilot. During the Korean crisis, I was recalled to active duty as a law specialist, and for the following 4 years participated in hundreds of courts-martial as trial and defense counsel and as law officer of general courts-martial. In April 1955, I returned to inactive duty to accept a position as commissioner on the Court of Military Appeals. In the early part of 1957, I left the court to become a special assistant to Rear Adm. Chester Ward, the then Navy Judge Advocate General; subsequently, I replaced a retiring civilian member of Navy Board of Review No. 1 where I am presently located. I have written numerous articles on military law and for 1 year edited and wrote a monthly column in the Federal Bar News on developments in military justice.

I would like to state at the inception that I have no responsibility as to administrative discharges. Furthermore, the ideas expressed here are strictly my own and not necessarily those of the Navy Department.

As you are aware, boards of review are intermediate appellate tribunals. We hold hearings in a courtroom in much the same manner as any other appellate court. Pursuant to article 66 of the

code, it is mandatory that we review all cases wherein the sentence, as approved, affects a general or flag officer, extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for 1 year or more. In addition, the Judge Advocate General may forward to a board of review pursuant to article 69 of the code any case involving conviction by a general court-martial and not falling within the above category.

When the boards were set up, the Navy, for purposes of continuity, appointed one civilian member to each of its boards. This is permitted by article 66, which states that the boards are to be constituted of not less than three officers or civilians. All must be attorneys, of course. The Army and Air Force appointed military personnel. At the present time the Navy has seven civilians on its five boards of review. Appointment of civilians has the advantage of continuity and insures to such individuals added experience as military judges.

There is one matter, however, which I feel deserves special mention. Although the following might appear to be more properly the concern of the Armed Services Committee, it has been brought to their attention by the annual report of the Court of Military Appeals, and I believe it is a matter certainly falling within the purview of this subcommittee. That is, the administration of military justice and a more uniform protection of an accused's constitutional rights would result from consolidating the various service boards into one court of review, with panels appointed by the respective services. The name "board" is a misnomer. Boards of review are, in fact, appellate courts in the military and they should be so designated.

The civilian members should be appointed during good behavior and the military members for a definite term of, say, 5 years. All members should be known as military judges while so serving. The court of review would hear all military cases irrespective of service in the same fashion as the Court of Military Appeals. It is felt that this would do much to increase the prestige of these tribunals and, besides insuring a uniform administration of military justice, would effect savings in time and money. It should make the jobs among the most esteemed in the military justice picture, which is what such a position should demand. It would be noted in this connection that changing the boards into courts has been recommended by the Court of Military Appeals in its last three annual reports.

One final observation as to the boards of review should be made: The Navy boards as presently constituted are completely independent. No one has ever attempted to influence a decision of mine and insofar as I know the same is true of my colleagues on the other Navy boards.

As a matter of fact, if I might digress for a moment, I am positive that the present Judge Advocate General of the Navy, Admiral Mott, would not countenance such a thing for an instant.

Further, I would like to state that the Navy does not have the practice of having the senior member or the chairman of the board sign efficiency or fitness reports on the other members. That is not done in the Navy.

I would like to make a preliminary observation. Overall an accused in the military today, especially in the general courts-martial,

receives as fair, if not a fairer, trial than his civilian counterpart. This protection of the accused's basic constitutional rights is due in great measure to the Uniform Code of Military Justice as interpreted by the Court of Military Appeals and the boards of review, plus the intelligent cooperation of the service members charged with responsibility in this area.

The foregoing does not mean, however, that the system is perfect and cannot stand improvement. Since the second year of the code's existence, some 17 recommendations to amend the code have been urged by the judges of the Court of Military Appeals and the service Judge Advocate Generals. Additional recommendations have been raised since, some of which have been unanimously adopted, others not. Many of the unanimous recommendations would speed up and streamline the administration of military justice and thus add to rather than detract from an accused's fundamental rights, for justice too long delayed is justice denied. I would like to discuss some of these recommendations in which it is felt that this committee might be interested.

1. The punishment limitations of commanding officers under article 15 of the code should be increased to include punishment reserved for the summary court-martial, and the summary court should be abolished. This change has been recommended by the judges on the Court of Military Appeals, the service Judge Advocate Generals, and other individuals who have studied the matter. The commanding officer needs this additional authority so that he can correct a youngster by taking him out to the woodshed, so to speak, without being forced to give him a summary court-martial for a minor infraction. Conviction by summary court becomes a conviction of record. Two such convictions will support a punitive discharge in a special or general court and in any event will follow an accused for the remainder of his life. Before a summary court, an accused has no right to qualified counsel as such, yet he may come out with a relatively serious conviction of record, involving such derelictions as insubordination, assault, petty larceny, et cetera.

With respect to increasing the commanding officer's authority under article 15, it is believed that possibly some benefit may result from studying the English Naval Code, the Naval Discipline Act of 1957, which permits a commanding officer to adjudge confinement up to 90 days and also, under certain circumstances, a senior grade commanding officer may dismiss a man without disgrace—the idea being since the enlistment is voluntary that if a man cannot, or will not, live up to the obligations of the service the commanding officer, like any other employer, can fire him—in other words, put him back in civilian life with no stigma of punitive discharge attached. Perhaps it would be feasible to increase the punishment limitations of the commanding officer to the extent that he could handle minor military offenses by nonjudicial punishment, reserving the serious crimes to the general court. This would permit abolishing the summary court and perhaps even the special court-martial. An accused could be given the option of taking commanding officer punishment or requesting court-martial. These are only suggestions which I believe merit study. In passing, however, as to permitting a commanding officer to dismiss without disgrace, it is well to keep in mind

that we should not make it too easy for an accused in times as critical as these to circumvent his obligations to serve his country. Far too many accused, nowadays, come up before a court-martial and demand a discharge, saying in effect that if returned to duty they will not serve. There is no merit in letting the most undesirable escape military service, which places a greater burden and, in wartime, danger on the more conscientious members of the service.

2. Another soft spot in the present system is the authority of a special court-martial to adjudge a punitive discharge without the mandatory requirement that the accused be represented by qualified counsel, certified within the meaning of article 27(b). The code as now written only requires a lawyer for the accused if trial counsel is so qualified (art. 27, Uniform Code of Military Justice). It is not uncommon—pursuant to the manual injunction that an accused be tried by the lowest court which can adequately assign punishment for the offense—that felony-type offenses are referred to special courts. Thus, a man may be convicted of a serious crime and be sentenced to a punitive discharge without having been represented by counsel, within the meaning of the sixth amendment of the Constitution, that counsel, as that amendment has been interpreted by the Supreme Court means one trained in the law. (*Johnson* v. *Zerbst*, 304 U.S. 458; *Powell* v. *Alabama*, 287 U.S. 45, 68, 69.)

It must be recognized that the Navy has a difficult problem in furnishing lawyers in special courts where a punitive discharge can be anticipated because of the wide dispersal of its ships and stations. Nevertheless, a considerable number of Navy and Marine Corps commands do provide lawyers in special courts. The shortage of lawyers in the Navy could probably be alleviated to a large extent by creating a Navy Judge Advocate General Corps. A bill to achieve that result is now before the House Armed Services Committee.

If you will recall from previous witnesses, the Army has approximately 1,000 lawyers on active duty; the Air Force has approximately 1,200 lawyers on active duty, and the Navy has less than 500.

The Army has a Judge Advocate General Corps. The Air Force has a department, a Legal Department which, to all intents and purposes, I believe, is analogous to a corps, and the Navy does not have a corps.

It has been recommended that all the services adopt the Army judiciary program for law officers sitting in general courts-martial. The Navy has already adopted a pilot program which is working out very well. It has reduced the number of law officer errors significantly. Speaking from experience as a board member, I can state that the records coming in from commands having these experienced law officers are less difficult to review and the prejudicial errors have been substantially reduced.

4. The question has been raised with respect to the effectiveness of the pretrial agreement. In my opinion, it has resulted in great savings in time and manpower without detracting from any of the accused's substantial rights. The few cases which have posed any problem have resulted from inexperienced counsel and this situation, to my knowledge, has always been speedily remedied by replacing the defense counsel concerned and by rectifying any injustice to the accused at the board of review level.

Finally, there have been recommendations that jurisdiction over nonmilitary offenses be transferred to the Federal and State courts. It is felt that this would be disruptive of discipline and morale in the services. The dockets of most of these courts are crowded, which would mean long delays, and it is imperative to morale and discipline within the services that offenders be tried as speedily as possible. Moreover, the real problem in the military is with minor offenses. The serious nonmilitary offense committed in the service is usually handled by a general court-martial where the rights of an accused are fully protected. In addition, even though convicted of a relatively serious offense, many of the service accused, due to the service rehabilitation training, are returned to duty without the stigma which would attach to a civilian conviction.

I will be glad to attempt to answer any questions, Mr. Chairman, the committee might have.

Mr. CREECH. Mr. Neff, you have indicated in your statement that the Judge Advocate General may forward to a board of review any cases involving conviction by a general court-martial, and not falling within the category you have already indicated automatically reviewed by a board of review.

Mr. NEFF. Right.

Mr. CREECH. I wonder, sir, what percentage of the courts-martial, other than these which you review mandatorily, are received back for review?

Mr. NEFF. Now, due to our decreased workload, practically all of them.

Mr. CREECH. Practically all of them?

Mr. NEFF. Practically all of them.

Mr. CREECH. How many of these are cases in which the defendants request review by the board?

Mr. NEFF. I do not have the figures on that, but I could make sort of an educated guess; I would say relatively a small number. I think they figure that if they did not get a punitive discharge or have a confinement in a general court-martial case, or relatively serious like confinement, they have come off rather well. But if there is a legal matter involved we get the case.

Mr. CREECH. But in a small number of the cases the individuals actually request their case be reviewed?

Mr. NEFF. Right; and many of them are sent over by the Judge Advocate General just as a precautionary measure to insure the man that he received a full and adequate review.

Mr. CREECH. Yes, sir.

What percentage of those who request review are actually reviewed by you, the small percentage who request the cases?

Mr. NEFF. I think substantially all of them.

Mr. CREECH. Substantially all of them?

Mr. NEFF. Yes.

Mr. CREECH. But it is a small number of the total percentage?

Mr. NEFF. I believe so, and I do not have those figures.

Mr. CREECH. Sir, with regard to the trying of military personnel for nonmilitary offenses, you say that it is felt that not to do this would be disruptive of discipline and morale in the services.

Is it not true, sir, that this was the procedure in this country up until more or less contemporary times, say, World War I?

Mr. NEFF. That is true. However, you must remember that we have retained in the armed services approximately 3 million men, a tremendous number; that we have never been confronted with the problem prior to World War II, to the problem that we are confronted with now at the present time. I believe by having large numbers of people tried in the civil courts and with no bail provisions in the service and whatnot, I believe the man would come out far worse than he would if he were tried within our system.

Mr. CREECH. Sir, in your statement, you say that it has been recommended that all services adopt the Army's judiciary program, and that the Navy has a pilot program which is working out very well. If the pilot program is working out well why is it that the Navy has not adopted this program?

Mr. NEFF. This program has only been in effect, I think, approximately 1 year, and I assume that it is a question of time. They have not considered that it has gone on long enough to make an educated judgment.

Mr. CREECH. I realize that you have indicated that you are not directly concerned with administrative discharges; they are not reviewable by you.

Mr. NEFF. That is correct.

Mr. CREECH. But I wonder, sir, in view of your vast experience in military justice, if you feel it would be advantageous to have in such proceedings as the board proceedings which give administrative discharges, an assurance that the individual be represented by counsel if he so desires, an attorney by training; and I wonder also what your feeling is with regard to compulsory process.

Mr. NEFF. I think with respect to the undesirable discharge, which is of a punitive nature, he should have the advice of qualified counsel, and I believe that possibly he should have the right of compulsory service on witnesses, subpena power.

Mr. CREECH. Sir, last week the subcommittee received evidence from the judges of the Court of Military Appeals, and at that time we were told by one of the judges that it was his feeling that it would be desirable to have these administrative actions reviewable by, perhaps, either a court to be established or some appellate organization which would review these discharges.

I wonder if you have given this some thought, and whether you would tell us what your views are?

Mr. NEFF. Well, I think, perhaps, it might be advisable to have some sort of a judicial review.

However, I should think that if the Navy gives a man a right to demand a trial, and he waives that right, and they give him an honorable discharge—I mean a general discharge under honorable conditions, that might be sufficient.

I do not think we should establish a separate judicial system for administrative-type discharges. I do think the rights of the man with respect to an undesirable discharge should be protected.

Mr. CREECH. Do you feel, sir, since you are not, as you say, in favor of the establishment of a second type of judiciary to deal with these types of discharges, do you feel that the administrative discharge pro-

cedure today is sufficiently stringent so that it is circumscribed to a sufficiently small area, or should it be further reduced so that fewer cases are reviewed in this manner?

Mr. NEFF. I think it can stand improvement. I think that will be one of the benefits that will arise out of a hearing of this type. I think the services will do a great deal of this themselves.

Mr. CREECH. Sir, do you think in the case of a youthful serviceman, perhaps in the case of a minor, that he should be permitted to make the determination to accept an administrative discharge rather than a court-martial without the advice of counsel?

Mr. NEFF. I think he should have the advice of counsel.

Mr. CREECH. Would you feel, sir, that any serviceman should have the advice of counsel in making this decision or only minors?

Mr. NEFF. I think any serviceman.

Mr. CREECH. Would you favor this being a mandatory requirement, sir?

Mr. NEFF. My personal opinion?

Mr. CREECH. Yes, sir.

Mr. NEFF. Yes, I would.

Mr. CREECH. Sir, you mention that the shortage of lawyers in the Navy could probably be alleviated to a large extent by creating a Navy JAG Corps, and you mention, of course, that there is a bill pending at this time.

Has the Navy actively campaigned for this type of legislation?

Mr. NEFF. The prior Secretary of the Navy, Secretary Gates, subscribed to it. I do not know, I do not think that the present Secretary of the Navy has made up his mind. There has been some resistance to the JAG Corps on the part of line officers, and I am sure that within their own thinking they have got good reason for it. But that is about the only way that I can answer.

I do believe it will result in the Navy being able to secure additional lawyers to help them out in the situations in special courts, and so forth.

Mr. CREECH. With regard to the special courts-martial which it has been suggested might be abolished, I wonder, sir, is this something on which the Navy has officially taken a position on?

Mr. NEFF. To my knowledge, the Navy position is that the special court-martial should not be abolished in view of the dispersal of its ships and stations, and so forth.

I believe that that proposal was put forth in the Powell amendment, and the New York County Bar Association, and I do not think the Navy has subscribed to it.

The Navy subscribes to increasing nonjudicial punishment up to and including that now given by the summary court, which can be administered by the summary court.

Mr. CREECH. But, based on your experience, notwithstanding the representations made to the subcommittee by other witnesses, is it your feeling that it would be desirable?

Mr. NEFF. I believe—are you talking about the abolition of the special court?

Mr. CREECH. Yes, sir.

Mr. NEFF. I put that in as a matter of study for the committee. I am not sure that it would be. I think that it would be desirable to

have lawyers representing the accused in special court-martial cases. But I am not sure that we should now go all the way to the abolition of the special court-martial and increasing nonjudicial punishment up to 3 months. I think you would get a great deal of resistance from the people, the citizenry, on that score.

Mr. CREECH. But it is your position that, if the special court-martial is retained, then a man must be represented by counsel.

Mr. NEFF. Yes. I think that can be worked out.

Mr. CREECH. Is there a movement afoot to guarantee this in the Navy?

Mr. NEFF. The Navy in the last 2 or 3 years—and it is a constantly increasing thing, as the numbers of courts-martial have declined—has been assigning lawyers to special courts.

There are still a great number we do not have attorneys for, and in those cases therein lies our greatest difficulty, because asking a man, an officer, to defend somebody in a felony type case, fairly serious case, who is not a lawyer, is like asking a plumber to take out your appendix, and I just do not think he can do an effective job, although some of them do a fairly good job.

Mr. CREECH. Sir, you mentioned the recommendations of the Court of Military Appeals with regard to making the Board of Review a court, military court, and you indicated here, sir, that the civilian members should be appointed during good behavior. I presume this would be for life?

Mr. NEFF. Yes, sir.

Mr. CREECH. And the military members for a definite term of, say, 5 years?

Mr. NEFF. Yes.

Mr. CREECH. The requirement with regard to the members on the board, there is a minimum tenure, is there not, required with regard to membership of a bar or practicing before the highest court of the jurisdiction?

Mr. NEFF. Yes.

Mr. CREECH. What is that, sir?

Mr. NEFF. Before the Board of Review a member of the Board of Review has to be, of course, an attorney, and a member of the Supreme Court or the highest court of his State.

So far as I know, there are no requirements that he have a certain length of time in military justice now. I think that should be a condition precedent.

In the Navy, after all, this is a court where over 90 percent of the cases stop, and in my opinion, this is the single most important link in the chain of military justice.

You should only have individuals on the Boards of Review who have experience, have had experience, and who have judicial temperament.

After all, they can overrule, remand a case, they have fact-finding powers, they can overrule a commanding general or an admiral. They have tremendous powers, and the idea of putting a junior officer or someone who is not qualified on such a board which is, in fact, an intermediate appellate court is repugnant to my sense of justice.

The Navy only appoints captains or experienced civilians to the boards.

Mr. CREECH. Sir, inasmuch as the members of the Board of Review are, as you have pointed out, the equivalent of the judges, and perhaps should be called judges, and I think that is the recommendation of the Court of Military Appeals, if it were implemented, would you favor, sir, the same type of procedure for nominating members of the Boards of Review as we now have with regard to the Federal courts, in which case, the bar association usually indicates whether it feels an individual is qualified for the post?

Mr. NEFF. Since this is a highly specialized area, I do not think we need go that far at this time.

I would say that the Judge Advocates General of the services would be qualified to appoint these members.

I can see no reason, however, why this court should not review all the cases from the various services. I worked on the Court of Military Appeals, I had no more difficulty reviewing a case from the Air Force and the Army than I did from the Navy.

I do not think any lawyer experienced in military justice would have any difficulty. After all, we do have a uniform code, and we are seeking uniformity, and I believe that is the only way you will get it.

Senator ERVIN. That would do much to insure their absolute independence.

Mr. NEFF. That is right, Mr. Chairman, absolutely, and they should be completely independent.

Mr. CREECH. With regard to the appointment being made by the Judge Advocate General, in times past, even within the military organizations, have there not been some disagreements about the qualifications for the post of Judge Advocate General? Didn't some of the line officers hold out for appointments of former line officers who, perhaps, had not had very much experience in the actual practice of law, although they might have law degrees, as opposed to other individuals who were being, shall I say, sponsored or proposed by members of the Judge Advocate General's staff?

Mr. NEFF. That was true at one time. It is no longer true now. All the Judge Advocates General are experienced attorneys who have been in the area for a long time.

There was that initial resistance, if you might call it that, but that is no longer true now, and the Navy Judge Advocate General is a law specialist, and the other Judge Advocates General arise in their department or in their corps.

Mr. CREECH. Sir, with regard to the cases which you review, have you had an occasion to or rather have you encountered in many of the cases, or any of the cases, instances in which you felt that there had been undue command influence over the court-martial or over counsel?

Mr. NEFF. We have encountered a few. In every case where we encountered it we slap it down and reverse the case. One area of that has been in the Secretary of the Navy's instructions, in which he said that a thief had to be separated from the service.

In a few cases the trial counsel would get up and call this to the attention of the court. We reversed those cases; the court of Military Appeals reversed them. Every place we see it we strike it out.

But human beings being what they are, you always have some cases like this. You will have arbitrary civilian judges, and all we can do is strike the golden mean, as the Greeks used to say.

Mr. CREECH. The Navy informed the subcommittee last week that it proposes to issue a brochure which will be distributed to courts-martial members. Do you feel this will alienate the possibility of command influence?

Mr. NEFF. I certainly do, because the defense counsel will have the opportunity to look at this brochure and enter it into the record if he thinks it is improper.

Mr. CREECH. Mr. Everett, I believe, has some questions.

Mr. EVERETT. I gather then, Mr. Neff, from your answers to the last questions that you do not see any harm to naval discipline and morale by abolishing the right of the commanding officers to instruct the court members before the trial, as is authorized in paragraph 38 of the Manual for Courts-Martial?

Mr. NEFF. No, I see no harm, real harm, to the morale. Actually, I do not believe the Navy has been a great offender in that respect.

Mr. EVERETT. So any problem of that sort could be handled by some type of handbook?

Mr. NEFF. Yes, that is correct.

Mr. EVERETT. Aren't you on record in your judicial opinions, as a member of the board of review to the effect that it is unconstitutional to give a bad conduct discharge without counsel?

Mr. NEFF. I have inferred that in some of my opinions; yes, sir.

Mr. EVERETT. With reference to the problem of special courts-martial, if a lawyer is to be provided for the accused, and presumably for the Government in a special court-martial, won't there be a factor of delay in trying the case which will possibly defeat justice?

Mr. NEFF. You are speaking of the Navy ships?

Mr. EVERETT. In the Navy, particularly where you have a ship out in the middle of the ocean. How are you going to get a lawyer there?

Mr. NEFF. It is a problem. One thing might be the establishment of the dockside court. Another thing might be assigning lawyers to the large task forces, the large carriers, and whatnot that operate.

I do not believe it is insurmountable because I do not believe the ships are out that long that they could not get back to port, and in the large operating units you could have lawyers aboard these large ships who could take care of the problem.

Mr. EVERETT. What is a dockside court that you refer to? I am not sure we have the same thing in mind.

Mr. NEFF. Dockside court is a court set up in various shore installations who are in the business of trying cases and who would have counsel, qualified counsel, available, so that when the ships came in they would be able to turn these individuals over to this court, which would be in operation and would be able to afford the man the right of counsel.

Mr. EVERETT. Would there be the same opportunity to have a dockside administrative board, a discharge board, for purposes of processing administrative discharges in lieu of having them processed at sea?

Mr. NEFF. Yes, I assume that that could also be done.

Mr. EVERETT. So then there would be no insurmountable obstacle from the Navy's standpoint in any requirement that a respondent in an administrative discharge proceeding be furnished with qualified legal counsel?

Mr. NEFF. That would be my personal opinion, providing the Navy is able to get the adequate number of lawyers, which they have been unable to get so far.

Mr. EVERETT. You feel then that one of the keys to the adequacy of the number of attorneys is the creation of a separate JAG Corps for the Navy?

Mr. NEFF. I think it would help; possibly to increase pay for lawyers like doctors and veterinarians and dentists get.

Mr. EVERETT. Would the creation of an independent JAG Corps have a tendency to lessen command influence or would it have any effect one way or the other?

Mr. NEFF. I suppose it would have a tendency to lessen it, but I honestly believe in my experience in the Navy there is not a great deal of command influence in the Navy. That has been my experience.

Mr. EVERETT. According to the statistics which have been furnished to the subcommittee, the dishonorable discharge is virtually obsolete in the Navy. What is the reason for that, or is that a correct characterization on my part?

Mr. NEFF. It is a correct characterization, and it just indicates the brand of justice that the Navy administers; the dishonorable discharge is only reserved for the most serious felony type convictions. It is not given willy-nilly in the Navy, and when it is given it is given to an individual for murder, rape, or something of that type. Otherwise it just is not administered. The courts do not even administer it.

The convening authority would strike it out if they did, and the Board of Review would get it if it got by them.

Mr. EVERETT. In one of your answers to a question by Mr. Creech, you made reference to a decreasing workload of the boards of review. What is the reason for this decrease in your workload?

Mr. NEFF. Well, I think one thing has been the leadership program in the Navy and the tremendous effort they have made to weed out undesirables, and of what we call the low GCT types, and the attempt to weed them out by not even recruiting them in the first instance or if they do get them, why, they will weed them out in the boot training, and I think that has been the gradual elevation of the intellectual capacity of the average Navy man now in order to operate a ship or the electronic portion of the Navy, to have at least the average IQ.

Mr. EVERETT. In some of the earlier testimony there was reference, I believe, on your part, to the situation of the sailor who was trying to evade his obligations to his country by actually seeking a punitive discharge, or undesirable discharge.

Is this a prevalent problem or is it the exception?

Mr. NEFF. It is not at all uncommon, and it is a very disturbing thing to me to see these young men get up before a court-martial where they have been given opportunity after opportunity to rehabilitate themselves and say, "If you do this again and if you don't give me a punitive discharge or if you suspend it I'm going over the hill again, and I'm going to commit more offenses, and I simply am not going to serve," and it is not uncommon.

Mr. EVERETT. In connection with your service on the board of review where you are at the present time the civilian and the other two members are naval personnel, do you find that there is any difficulty

in obtaining maximum cooperation between the civilian and military personnel?

Mr. NEFF. I would like to make a correction. The three Navy boards of review sitting here in Washington have two civilians and one military personnel. There is no difficulty at all in cooperation.

Mr. EVERETT. Would you feel that the ideal situation for a Board of Review would be all civilian, all military or half-and-half, as it were?

Mr. NEFF. I do not believe at the present time that it is necessary to have all civilians. I think if you were to set up an all-civilian court you should certainly provide that the members should have had, say, 8 years' experience in military justice, and you should make those jobs available to retired judge advocates and law specialists, and you should have a provision which would take them out from under the dual employment and the dual compensation.

Mr. EVERETT. With reference to allegations that the Uniform Code is too unwieldy to work in wartime, would it be your opinion that these allegations are true, and do you consider that some special provisions are needed in the Uniform Code in order to cope with problems of wartime national emergency?

Mr. NEFF. I do not agree that it would not operate in wartime. Admiral Radford made a study after Korea. He came up with the conclusion that it worked very well during Korea.

I do think in the case of an all-out war that you would perhaps, need to streamline some of the procedures. I think you would have to increase the number of boards of review and probably disperse them in the field.

I think you would probably have to add to the number of the judges on the U.S. Court of Military Appeals. But I see no insurmountable problem, no.

Mr. EVERETT. That is all.

Mr. CREECH. Mr. Waters has some questions.

Mr. WATERS. Just one, Mr. Neff. Are you aware of any study that has ever been made touching on the effect in later civilian life of the effect of the bad-service discharge or dishonorable discharge?

Mr. NEFF. Yes. It has a very adverse effect, and when I was defending accused in the court-martial I spent a great deal of time trying to talk any, as we called them, BCD striker out of following that path and, unfortunately, these youngsters come in who think they want to take the easy road, and when they go out and get a little added experience in life, they find out, they found out, this punitive discharge can indeed be a very serious thing.

Mr. WATERS. Thank you, Mr. Neff. Thank you, Mr. Chairman.

Senator ERVIN. There are now five boards of review?

Mr. NEFF. The Navy has five, yes, sir, Mr. Chairman.

Senator ERVIN. Do all of them sit in Washington or do some of them sit elsewhere?

Mr. NEFF. Three sit in Washington, two in San Francisco.

Senator ERVIN. Is it not a fact that the average commanding officer is glad to be rid of his responsibility? In the old days he used to—as I understand it, the most serious court-martial, there was a review by the commanding officer of the unit.

Mr. NEFF. That is right.

Senator ERVIN. Now the boards of review have taken over that function, have they not?

Mr. NEFF. Yes. The convening authority still reviews, but the boards of review, in effect, get the last crack at it.

Senator ERVIN. Yes. But the other boards, in other words, if a person in a court-martial has been dealt with rather severely there are at least two chances where there may be some ameliorating action taken.

Mr. NEFF. There are two, and, possibly three. The convening authorities in the Navy in 50 percent of the cases reduce the sentences, and the boards of review in approximately 20 percent of the specials, we will say, reduce the sentence, and he can then petition the Court of Military Appeals, and they may reverse the case and send it back again, and he might get a further reduction or it might be dismissed.

Senator ERVIN. Virtually in all cases of—most always the serious offenses in the Navy—there is a mandatory review by a board of review?

Mr. NEFF. In all serious cases; yes, sir.

Senator ERVIN. And then the Judge Advocate General exercises the power he has, discretionary power, to turn over the other cases that he may feel shall be considered to the board of review?

Mr. NEFF. Yes, sir. He does that, as I say, in many cases.

Senator ERVIN. I would infer from your testimony that you share my view that experience is the most efficient of all teachers, including the efficient administration of justice?

Mr. NEFF. There is no question about it, Mr. Chairman.

Senator ERVIN. I would like to know something about the continuity of service upon the boards of review, both with respect to the civilian members and with respect to the Navy members.

Mr. NEFF. The civilian members on the board of review, seven civilian members, outside of myself, I believe all have been on the boards since the inception of the boards, since the enactment of the code.

The military personnel do not, of course, enjoy that length of tenure. My experience on my board has been that I think in the 4 years I have been on the board we have had four military personnel.

However, one finished his 3-year tour, and then two others filled in one summer while another was being assigned, and the two individuals who filled in had had previous experience on a board of review, and the present board member, Captain Bodziak, is finishing a full tour of duty.

Senator ERVIN. You expressed an opinion that it would not be desirable or wise at this time to supplant the military, Navy personnel, rather, on boards of review with civilians.

I just wonder, as a matter of fact, is it not a fact that a naval officer might eventually have an opportunity, who has had the legal education, eventually have a tendency to encourage lawyers to come into the service, to remain in the service if they were interested peculiarily in legal matters?

Mr. NEFF. That is a possibility, Mr. Chairman. However, I do not think it would be any great——

Senator ERVIN. Of course, there are such few places on the boards of review comparative to the number who come into the service——

Mr. NEFF. Right. I do believe a civilian member on the board has a very desirable effect in that he does insure continuity.

Senator ERVIN. Now, as I understand you, it was the tradition of all of the services that a commissioned officer ought to be able to perform every function that was required in the service. I wonder if that tradition has contributed to the fact that we have so few lawyers comparatively in the Navy?

Mr. NEFF. Well that, I believe, might have been the experience in the past in the Navy. But under the code they have to have lawyers now in the general courts-martial, and I think the Navy is getting away from that.

The Navy is getting more specialized all the time even in the line. They have specialists of all types, electronics specialists and all types, so that I think they are getting away from that a little.

However, they feel that a naval commander should have a pretty good idea of the entire administration of the Navy, and I am not sure that is a bad thing.

Senator ERVIN. Yes.

Of course, the functions of the services are to increase their weapons and methods of discharging their functions, and these have become increasingly complicated.

Mr. NEFF. No question of that, Mr. Chairman. We are going into that electronic period, and it is increasingly specialized and increasingly complicated.

Senator ERVIN. What would you think of the desirability of establishing some method of having review by boards of review or by an intermediate appellate court in case the recommendations of the Court of Military Appeals are carried into effect with respect to undesirable discharges?

Mr. NEFF. Well, I believe that if you were going to have them set up some type of a judicial review—and I am not sure that it is necessary—that the Board of Review would be the one that would be set up to handle it.

I think, however, if you give the man an option to demand a trial, and you do not give him a trial, and then you give him a discharge under honorable conditions, I cannot see that his rights have been taken from him to any large extent.

Senator ERVIN. Of course, as I see it, where a man could possibly be deprived of his constitutional rights is where he has an undesirable discharge forced upon him when he wants to stand trial, and take the chances on it rather than take the discharge.

Mr. NEFF. Yes.

Senator ERVIN. Should there be some way, some system, set up by which he could be given the opinion between taking an undesirable discharge and demanding a trial, have that right as a matter of right?

Mr. NEFF. Yes, I think so, or, as the Navy says, if he demands a court-martial and he does not get it, then give him an honorable type discharge, a general discharge under honorable conditions; yes, sir.

Senator ERVIN. Do you accept as valid the view of the service that it is highly desirable to retain the difference between an honorable discharge and a general discharge under honorable conditions?

Mr. NEFF. I most certainly do.

Senator ERVIN. That is a distinction we have in the academic world, as I mentioned a while ago.

Mr. NEFF. Yes, sir.

Senator ERVIN. And in almost every other activity.

Mr. NEFF. That is correct. I think a man who has served his Nation honorably for 15 and 20 years deserves an honorable discharge which carries with it some real significance.

Senator ERVIN. I would like to observe that I share the very high opinion that you expressed concerning Admiral Mott, and I would like to say that in my contacts with Admiral Ward and my contacts with the judge advocates of the Army that I think they are doing an exceedingly fine job, and they have a very high conception that will equal that of anybody in civilian life as to the essentials of the administration of justice.

Mr. NEFF. Yes, sir; I think they are very fine gentlemen.

Senator ERVIN. We have some difficulties in the service as compared with civilian life in setting up a legal system.

Mr. NEFF. Yes, sir.

Senator ERVIN. Also the function of government is quite different, civilian government, in many respects from the services, because the services' function is primarily to defend the country, and the administration of justice is incidental to that, having, as I conceive it, either the necessity of maintaining discipline or the necessity of removing from the service some man who has manifested his unfitness for service.

Mr. NEFF. There is no question about it, Mr. Chairman.

Senator ERVIN. The committee is certainly indebted to you, Mr. Neff, for the very fine presentation you have given us today, and I am certain it will be of much service in reaching some conclusions about the problems in this field.

Mr. NEFF. It has been my pleasure, Mr. Chairman.

Senator ERVIN. The subcommittee will stand in recess until 10:30 in the morning when it will convene in room 357, which is directly under this room.

(Whereupon, at 5:10 p.m., a recess was taken until 10:30 a.m., Friday, March 2, 1962.)

# CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL

---

**FRIDAY, MARCH 2, 1962**

U. S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
*Washington, D. C.*

The subcommittee met, pursuant to notice, at 10:45 a.m., in room 357, Old Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee), presiding.

Present: Senator Ervin.

Also present: William A. Creech, chief counsel and staff director; Robinson O. Everett, counsel; and Bernard Waters, minority counsel.

Senator ERVIN. The committee will come to order.

Call the first witness.

Mr. CREECH. Mr. Chairman, the first witness this morning is Hon. Clyde Doyle, Congressman from California.

Mr. Doyle.

Senator ERVIN. Congressman Doyle, the committee is delighted to have you here. The chairman has been aware for some time of your long interest in this field and your efforts to do something to do away with the misfortunes arising out of these discharges, so we are delighted to have you here.

## STATEMENT OF HON. CLYDE DOYLE, A CONGRESSMAN FROM THE STATE OF CALIFORNIA

Mr. DOYLE. Thank you, Mr. Chairman, and members of the committee. I first wish to say I am naturally pleased to accept your invitation to be here and as briefly as I may, without taking too much of your time, give you some, perhaps a little bit of the earlier history of this subject showing how it came about on the House side.

I want to, Mr. Chairman, to publicly thank your fine staff, your committee staff, for their great courtesies to me on your behalf. They have been very generous and very courteous to me.

I think, perhaps, I should say this so you will understand how I came by my great interest in the subject. Possibly, Mr. Chairman, you knew Curtis D. Wilbur when he was Secretary of the Navy, under President Hoover. Well, I was his chief juvenile court officer for 2 years in the Los Angeles juvenile court, so consequently I met thousands of young American boys and girls who were before that court, which at that time, I believe, was the second court in the Nation in numbers of alleged delinquents.

And then in my law practice, which I later got into, I had a couple of cases come to me in which fairly young men were involved who had been discharged with undesirable discharges from the Military

Establishment for what appeared to me, and they were, minor offenses. In civilian life, I, myself, might have been fired from the military if it had been in civilian life for raising mischief, and for things no more serious than these boys, and in these two cases they had done. A clash of temperaments, clash of other elements, unfitness to serve in the military, no desire to serve in the military, and this was all in peacetime, Mr. Chairman.

I found in those two matters that unless you could prove that it was the original error of the military there was no chance to get any correction, no chance to get any relief even where there had been no court-martial, where there had been no crime, where there had been no statutory offense.

And therefore, the combination of my experience with the courts and these two cases, I naturally continued my interest when I came to Congress some 16 years ago.

On the armed services the Honorable Carl Vinson, whom you, of course, all know, became interested in the subject as I reported it to him. He gave me pretty much a courteous freedom—he always does when he is interested in a matter—and so I began work with the military departments to have them give me what their records showed and I will mention some of those records in a few minutes.

There were four bills involved, Mr. Chairman. The first bill, in the 85th Congress was filed August 9, 1957.

The second bill—correct that, it is the second bill, the first bill was January 3, 1957, H.R. 1108.

The second bill was August 9, 1957, H.R. 8772.

The third bill was H.R. 88 filed January 7, 1959, and the last bill, by me, was H.R. 1935 filed January 6, 1961.

I call your attention to the date of the first bill because that was not filed until there had been some more than 2 years of work by some of us on the House side on this important subject and not until we had completed our work and reported to the Honorable Carl Vinson did he appoint a special committee to hold public hearings. That special committee consisted of myself, Mr. Bray of Indiana, Mr. Huddleston of Alabama, Mr. Gubser of California, Mr. Paul Kitchin of North Carolina, and we held public hearings which I will refer to a bit later.

The record shows that some 35 other Members of the House filed similar bills either exactly the same or substantially the same. I have a list here.

Now, the first bill we filed grew out of the committee hearings, H.R. 1108, and we had trouble to designate so as to avoid conflict with already existing types of discharges, what we would recommend the document we were recommending be named.

Well, perhaps that was one of the most difficult problems we had, and so in this first bill we recommended it be a discharge under honorable conditions, and that wasn't satisfactory we soon learned, either to the military or to ourselves, and so we filed another bill naming the document we proposed to have issued by the military, a general discharge limited, and that caused confusion, and so we then filed another bill to correct that in name, and that bill, and the last bill recommended that the document we recommended in the Legislature be issued we designated as an exemplary rehabilitation certificate, and that is the document I would like to discuss briefly with you under H.R. 1935, filed January 6, 1961.

We have never had, Mr. Chairman, a military officer of any rank or station who has countered our position taken that any type of a discharge less than honorable is a stigma on the recipient. It is not only a stigma, but it is a life sentence unless it is changed. It's punishment for life and there are very few cases where that can be changed after it is once issued.

I wish to say in the first instance I recognize in the last few years the military, especially the Air Force, has substantially improved its procedures and its attitude toward undesirable discharges, and I have here in my possession a written communication from the Department indicating that the Air Force has no objection to H.R. 1935.

I am also advised, and I believe it is the fact that the Army and Navy still continue their objections. That development, however, has only come about in the last year, where the Air Force has changed its position, and recommended that the other departments change. The Air Force was assigned to write the Department report.

The testimony of Stephen S. Jackson, Deputy Assistant Secretary of Defense, before our committee June 24, 1957, on H.R. 1108, he said:

> We in the Department of Defense have long been aware of the seriousness attached to the separation of a member of the Armed Forces with less than an honorable discharge. This is especially true in those cases in which the individual was young and relatively immature when he entered the armed services, ofttimes involuntarily.

Your own distinguished counsel, in his remarks the other day on February 20, said:

> On the basis of its studies, the subcommittee is aware that an undesirable discharge in addition to its effect on veterans' benefits creates a stigma which often blocks employment and might have consequences far worse than those of confinement in a guardhouse or prison.

In this connection, I wish to say the effort on the House side was to try to get a document which would become statute by which the boy having received an undesirable discharge without a court-martial, without having been evil, without having been a criminal, without being a homosexual or any of those items that are enumerated by the military, we are trying to find a way to make these boys assets instead of having them continue through their lives as liabilities, which every boy is in the community to himself, to his family, to his country, if he carries with him the stigma of any type of discharge less than honorable.

We made a little poll, Mr. Chairman, and I asked this question of industry: Will you grant an interview to a boy formerly in the military who has any type of discharge less than honorable, and the answer was universally, "No."

Then I asked the companion question: Would you grant an interview to a boy who presents to you an exemplary rehabilitation certificate from the military, saying in their judgment, based upon the evidence furnished them it appears to them that this boy has led an exemplary life for not less than 3 years, and the great bulk of the answers from industry on that question were "Yes, we will interview him."

Now, Mr. Chairman, we take this position, if industry will interview a boy with a rehabilitation certificate, an exemplary rehabilitation certificate, some percentage of those boys are going to get employment;

what percentage is a problem. But the problem now is that these lads can't get an interview with heavy industry, nor with ordinary industry, because the minute they show their discharge, "We haven't got time for you," is what industry says.

So we contend that basically if some document can be given by the military such as this exemplary rehabilitation certificate, that industry will grant an interview as a result of, it is hoped that a large percentage of these 200,000 boys who have been given undesirable discharges will get a chance for employment which they now don't get.

I have here a comment of your own distinguished self, Mr. Chairman. I know you remember it but I would like the record to show that we in the House concur absolutely with you when you said:

> On the basis of studies the subcommittee is aware that an undesirable discharge in addition to its effect on veterans' benefits creates a stigma which often blocks employment and might have consequences far worse than those of confinement in the guardhouse or prison. Thus, it becomes important to determine under what circumstances these discharges are being issued and whether safeguards afforded by court-martial might be bypassed through the use of administrative discharges.

In that connection, I will not take time to read it all because I know it is in your record already, but I have before me the annual report of the U.S. Court of Military Appeals showing the report on page 3 of the Judge Advocate General of the Army—a few words:

> There has been a steady decrease in the number of general courts-martial per thousands during the past several years. The reduction has been attributed to such factors as the higher standard now required by the Army of personnel inducted and enlisted, and the fact that numbers of the misfits and malcontents are being administratively separated.

So here you have the military deliberately as a matter of convenience, violating their own code which doesn't sound good to me.

They are making misfits for their own convenience by violating their own Uniform Military Code according to this report right here and they are still continuing to do it in many cases although they have sharply improved.

Then I have also here the Judge Advocate Journal published by Judge Advocate Association, Washington, D.C., and on page 5 thereof reporting the annual meeting, referring to General Harmon, who made a wonderful statement before this committee, commenting on General Harmon's report:

> He did point out, however, that in the military society we are dealing with young offenders who often do foolish things even as all of us might have done in our youth. Therefore, he feels we have a special duty in the military service to afford the opportunity of rehabilitation.

And that is what our bills are aiming at. We believe there is a moral, a very definite moral obligation on the part of the military toward these young men who have not been court-martialed, who have not committed any crime, no serious offense. We believe there is a definite moral obligation on the part of the military to cooperate to the limit to correct their own mistakes, their own misjudgments. They have made thousands of them liabilities as a matter of convenience forgetting what they were in their own youth, many of them.

Then General Harmon says:

> I was also concerned at some of the statistics available to me which showed substantial increase in the number of undesirable discharges being given ad-

ministratively at the same time that the number of cases and the number of discharges signed by court-martial were steadily decreasing.

As I remarked, we had public hearings as the committee knows, beginning back on April 3, 1957. I call that date to the committee's attention because the military here accurately testified, I think, from the record that they began their substantial improvement about 1959.

I read on page 2370 in these hearings before the House, Special House Committee, Special Committee of Armed Services of the House:

Mr. DOYLE (to Deputy Secretary Jackson). May I address a few questions to the Secretary? I think the subcommittee recognizes or has been informed prior to the time you came into the service the very splendid service you rendered to our country. May I ask a couple of questions: There is no question in your mind then, Mr. Secretary, but that any discharge less than honorable does, as you said in your statement and in your answers to questions, leave the holder or the recipient thereof with a stigmatized condition, is that true?

Mr. JACKSON. That is correct, sir.

Mr. DOYLE. Both as to the social standing in the community and as to ready ability to obtain dignified and commensurate employment. Would you agree with me?

Mr. JACKSON. Yes, sir.

Now, I think, therefore, my reference to these documents has pretty well substantiated the fact that there is the stigma that attaches and it attaches for life and it is a liability.

Now, I have here a copy of a directive signed by Stephen S. Jackson, Deputy Assistant Secretary, August 7, 1957, and so that you will get the connection between this directive and the action in the House, this directive was issued the very day the bill was passed unanimously in the House and more or less by agreement, and I will just read to identify the fact that the language of the directive is substantially the language of the bill.

In other words, the military incorporated in this directive on August 7, 1957, the substantial language of the bill that the House passed that very day.

"In determining the acceptability of such applicant for reenlistment" this directive only gave the boy the right to reenlist. We found in our hearings, Mr. Chairman, that these lads had no reasonable opportunity to reenlist even. Not only did we find that the great majority of cases they had no right to counsel, they were never told they had the right to counsel. It was a one-man firing, a one-man discharge in thousands of cases, and those thousands of cases, Mr. Chairman, are now men, many of them, they are out in civilian life, they are begging for a chance to get something that will help them get a better job and remove a little of the life stigma, and we have received hundreds of letters from men with families who received such discharges.

Your committee has received some from these men with families. Also the directive I referred to a minute ago provided:

In determining the acceptability of such application for reenlistment the following, among other factors, should be carefully evaluated:

(1) The nature, seriousness, and circumstances surrounding the offense or conduct for which previously discharged.

(2) Age and military experience at the time of the commission of the offense.

(3) Civilian background, situation, employment record, and general reputation in the community.

Now, notice this "before and after military service" so here you have a directive by the military back in 1957 in which they take into account the conduct in the community by a boy they fired with an undesirable discharge to determine whether or not they shall let him reenlist. But they now claim they should not be obligated to consider his conduct after discharge.

Now, our contention is that this directive is sound in that particular. They made the right directive. They were chargeable with taking into consideration the after exemplary conduct of an applicant who wanted to reenlist and thereby earn an honorable discharge and change from his undesirable discharge or even his bad conduct.

Now, I emphasize that, Mr. Chairman, because I know the basic objection to the position of the House by the Army and Navy, at least, is that they shouldn't be concerned, they shouldn't be chargeable with doing anything about a boy who had had an exemplary conduct for not less than 3 years after he was discharged from the military, but they did it in this directive, in order to consider whether or not they should let him reenlist. What is the difference? Basically it is the same. It is conduct after discharge in both cases.

I want to put that very clearly in the record that they themselves have agreed with the committee back in 1957, when they agreed to take the after conduct and reputation in the community before and after military service, in order to determine whether or not a boy should be entitled to reenlist.

Now, at this point I want to also emphasize this: I think that all but one member of our special committee, the Honorable Carl Vinson appointed were lawyers. It naturally worried us to find thousands of lads discharged without having counsel although that wasn't the main area of our investigation. It naturally worried us, and we discussed it thoroughly and we naturally discussed it to no end to find there were thousands of boys given undesirable or unsuitable discharges without even being told they had the right to counsel; they didn't have under the procedures then because there was no review of these undesirable, unsuitable discharges.

It was a one-man activity when the lads I refer to were fired. And it worried us because we felt at the time it was an abhorrent thing for any American boy to be deprived of what we contended was his constitutional right, the right of counsel, the right of impartial advice instead of being fired as a result of a temperamental clash or some desire to get out of the service, or to get rid of him by the action of one person for some reason, and we contend, Mr. Chairman, that there ought to be some statute to prohibit such discharges.

You, from your thorough study of this whole subject will know best whether or not there should be a controlling statute or what there should be. We know that General Kuhfeld of the Air Force and some of these other witnesses before you advocate some sort of statute and our committee does so as to make it prohibitive that any American boy shall be fired from his military, many times as a result of temperamental upsets even by officers, as well as the lad fired with undesirable or unsuitable discharges with consideration by more than one person.

I learned of cases where it was the officer who was upset, or the officer who had too much beer under his belt and he got into a clash with a private, and the boy was fired but the officer wasn't.

Now, let me refer to a brief discussion of the Doyle bill, H.R. 1935. I here refer to my special committee report which was approved. I want to tell you that the House Armed Services Committee approved this bill unanimously twice and also the House of Representatives twice, and, of course, the bill now pends before your own distinguished Senate Committee on Armed Services. We in the House are hopeful that out of that committee will come some good result from the fact that the House passed the bill twice and the House has referred it to that Senate committee twice now.

Now, here is a comment on page 8 referring to the DOD directive 1332.24 on January 14, 1959. I am sure you have a copy of that. Here is the comment of my special committee approved by the full Armed Services Committee of the House:

> This is a step in the right direction. It does nothing, however, for the more than 130,576 personnel who have received undesirable discharges from the uniformed services since fiscal 1954. More than 130,576 undesirable discharges from the uniformed services since fiscal 1954.

Now, this is the finding based on the report of the military to our committee. They gave us the figures.

> It does nothing—

now listen to this—

> it does nothing for more than 278,000 individuals who have received undesirable discharges since 1950.

These figures, again, are from the military files.

One of the top military men when this was called to his attention, and I use his exact language back to me, he said, "Well, Congressman Doyle, that isn't chickenfeed, 278,000 since 1950."

And 130,000 plus since 1954.

Now, I want to emphasize again we recognize the military, chiefly the Air Force, has sharply improved its procedures but there are many thousands of these boys who have received undesirable or unsuitable discharges, never court-martialed, never any proof of evil design, never any proof of badness as you and I understand that term in boy life or even in military experience. But there are many thousands of boys, Mr. Chairman, still with the life stigma and life penalty of undesirable, unsuitable discharges who have no relief under any of these recent directives. These directives look only to the future cases. I want to place a burden upon your hearts this way: If any of these boys now grown into manhood happen to be the sons or the nephews or the grandsons of some of the Military Establishment they might look at this subject differently. I don't know how many thousands, Mr. Chairman, of these boys there are who are now men, who are begging to get out of the liability class and into the asset class. It isn't all they rightly deserve, but Deputy Secretary Jackson wrote me a letter and said the military would fight this bill in the Senate if it got to the Senate. They are surely doing it. So we recognize that it has been difficult to go as far as we have on the Senate side. Both of these times the House has passed this bill and sent it to the Senate.

It isn't all the boys should get, but it is something. And I think the military ought to be ashamed of itself that it isn't willing to go a little step for these several thousand boys who never had legal advice, never had a hearing, never had a review, never were told they had any rights except to be fired without further hearing.

I want to read, I have stated——

Senator ERVIN. Your bill does not undertake to change the provisions with reference to the rights of these persons?

Mr. DOYLE. No, Mr. Chairman.

Senator ERVIN. With respect to veterans' benefits?

Mr. DOYLE. No, let me just briefly state what this bill does do and I am glad you called it to my attention.

It provides that any boy who has had less than an undesirable discharge given him may after 3 years of exemplary conduct, if he can prove that to the satisfaction of the military, if he can prove it to them alone, Mr. Chairman. The applicant carries the burden of proof to the military at all times. It is entirely up to them solely to decide whether or not the burden of proof has been assumed and met. It is optional with them as to what they do, if anything. You don't find the word "shall" in this bill anyplace.

The military may issue the certificate or refuse to. The board though must take into consideration the reasons that the type of discharge originally issued was given. For instance the conditions prevailing at the time of the incident, the age of the person receiving the discharge, the normal punishment that might have been adjudged had that incident been made in civilian life and the moral turpitude, if any, that is involved.

Now, then the bill specifies that the boy, now a grown man, of course, he can prove to the military that by affidavit, notarized by the chief law officer is in his community. He can prove it by a notarized statement from his employer. He also can undertake to prove it by a notarized statement of not less than five responsible persons who have known him for more than 3 years.

And then, of course, it reserves the right in the military to make an independent investigation if it desires to do so.

Then, on page 4, subdivision J, of the bill it expressly provides that this boy, if he gets the exemplary rehabilitation certificate shall not be entitled to any Government benefits of any sort as a result of that issuance of the certificate.

I wish to make this crystal clear. There is no change in the type of the original discharge issued in the case. It does not change the undesirable unsuitable discharge on the military records. But then it does this, because we have confidence in the judgment of our military boards: It makes a provision that the military boards can review any application and if they find that any type of discharge should be changed, if they find that instead of an exemplary rehabilitation certificate be issued that he ought to be given an honorable discharge they have that authority under this bill, but it is their own existing boards, not a new board. We want proven mistakes to be corrected.

We feel perfectly confident from the record that the military board, the Board of Corrections and Review, would never think of giving a boy an honorable discharge unless he was rightly entitled to it. So that is in the bill, and we think there should be no objection to it. But it is not designed to give him a new or a different type of discharge in any case, Mr. Chairman.

To hurry along and I will not refer to all these records before me for I do have here the records of the House working back those years beginning in 1957. With your permission, I will furnish to your

staff the page and the date of these records so we will not now take the time of your committee. It may help them in their complete study and analysis of this urgent problem.

But I do have here something I know you will be pleased to hear. We men in the House not only learned to love Paul Kilday, now Judge Paul Kilday in the military court. But we recognized his brilliance and his fairness. On August 5, 1957, there appears in the Congressional Record, page 12427, a speech by Paul Kilday, now Judge Kilday. In 1957 he said about the Doyle bill.

Mr. Kilday—this was on the floor of the House:

Mr. Speaker, this is a most difficult situation and one that needs some action taken to correct it. Of course, the situation is not improved any by the demand position of the military department that nothing be done. As the gentleman from California, Mr. Doyle, said there are hundreds of thousands of young men in the Nation who have been released from military service with discharges other than honorable. We should remember that hundreds and thousands of those have been issued by purely administrative action of some military officer or group of military officers without any judicial proceeding of any kind to sustain it. Many others were issued during the time of war when it was urgent to get troops into combat shape to be sent overseas when a little sympathy should have been given to those who would not cooperate and make themselves soldiers to participate.

A system should be provided under which those cases can be reviewed and some relief given from the opprobrium which is attached to the discharges they now have. If a man is convicted of felony in a Federal court of the United States and serves his time and comes out and behaves himself he can file an application for pardon and a restoration of citizenship and it is almost the common routine practice that when the application comes in and the report of the FBI indicates that the man has properly demeaned himself for approximately the period of time after the termination of his sentence as constituted his sentence he is guaranteed a pardon and his rights of citizenship restored. That is in a case where there has been indictment by a civil grand jury trial and criminal court sentence and imprisonment. Still, if a man serves his time, demeans himself properly, then relief as far as parole can be given and his citizenship is restored.

But in these cases, hundreds of thousands, there is no effective means of accomplishing that end.

Now listen to this:

The bill is the best the committee has been able to report out based on its study. I hope the rules will be suspended and the bill passed.

And it was by unanimous vote.

Now, let me quote a distinguished Virginian, Porter Hardy, whom we all respect, on page 12429 of the Congressional Record. I will just read one paragraph. Mr. Hardy's speech on the floor of the House, August 5, 1957:

Mr. Speaker, I think it is important we pass this legislation at this time. It does not go as far as most of us would like but it is a step we need to take at this time and I personally believe that unless we do something pretty soon we are going to see the problem aggravated.

I will not here quote the other floor speeches supporting the principle of this bill.

Now, as I say, Mr. Chairman, I will furnish your staff, with your permission, reference to figures as given to us. They may be different than the figures in these later years; I think they are. I will pass that to save your time. I will pass this one.

I have here a group of figures, I think, that are pertinent to present to you as furnished me by the military if I can quickly put my hand

on them. This came to me from the Department of the Air Force, July 8, 1957.

Service discharges, fiscal year dates, and I will just read the two types of discharges for comparison: Army, dishonorable discharges between 1940 and 1956, 65,000; undesirable discharges between 1940 and 1956, Army, 164,000.

Navy, same years, dishonorable discharges 8,063; undesirable discharges, 38,157.

Marine Corps, the same period of years, dishonorable discharges, 1,961; undesirable discharges, 13,536.

Air Force, same period of years, dishonorable discharges, 5,300; undesirable discharges, 32,750.

In closing I want to read one paragraph of a letter of October 13, 1961, to me from Mr. Jackson, Deputy Secretary in the Defense Department to whom I referred before. We had always understood that the position of the military, the three departments, was unanimous, in opposition to the House bills. But you know how those things are, sometimes you have friends in court and so it was suggested to me that maybe that wasn't an accurate report. I won't tell you from which department personnel I received that suggestion but it was one of the three military departments. So I wrote the military and said this had come to my attention, and if it was true that it was not unanimous now I thought that Congress ought to know that there was a difference of opinion. They answered my demand for the facts and said in part:

> The Department of the Air Force proposed a revision of the previous position of the Defense Department—

now the Air Force was assigned the responsibility of writing the final report on this H.R. 1935.

I will read again:

> The Department of the Air Force proposed a revision of the previous position of the Defense Department bill, still adhering to the position that could most appropriately be issued by a civilian agency, this service strongly recommends that the Department's position be modified to "interpose no further objection to the principles submitted in H.R. 1935." The other two services opposed this change. Signed Stephen Jackson, Deputy.

Now, as to whether or not some other agency like the welfare department or police department or some other department in the community should issue this certificate you will note that their language is that they don't object to the certificate being issued, but they don' want to issue it. They recognize the merit of such certificates.

But, Mr. Chairman, they are not obliged to issue it unless they feel comfortable about the evidence before them in issuing it. That is my point. I want to urge that to your attention. The burden is on the applicant at all times. I think it was General Kuhfeld the other day before this committee said—I think it was he who said it—that the agency that issued it should be—originally issued the discharge should be the one who issues the certificate. And that is true, Mr. Chairman.

Of what use would a certificate be to a boy to take it from the welfare department, for instance, of the city of Long Beach to Douglas Aircraft, or in my city of South Gate or take it to Aerojet, General Dynamics, in Downey, a certificate by the welfare department that he had been an exemplary citizen for more than 3 years

in the judgment of that welfare department. What good would that be? No good, and the military admits it.

But the thing that would be good and deserved help for the man would be for them to issue that kind of a certificate when they themselves were satisfied from the evidence the applicant furnishes them. They should not quibble and they should seek means to correct their own mistakes and errors, Mr. Chairman. There wouldn't be many thousands of these certificates issued immediately nor soon. There might be 5,000, 6,000, 10,000 in your lifetime and mine but if there is even only 1 that should be issued then it should be issued. Patriotic American men deserving it should have the opportunity to get it because every American is important, especially where his constitutional rights have been deprived and where he has earned it. And so I think with that I will not now speak longer except to present this editorial in Stars and Stripes. I could present many editorials for your record, which will show you the attitude of the military press or the press dealing with military departments and I could file records of approval by all the major veterans groups and many other groups.

Senator ERVIN. The editorial will be received and made a part of the record at this point.

(The information referred to follows:)

[From the Stars and Stripes, Washington, D.C., June 22, 1961]

EDITORIAL—THEY DESERVE CONSIDERATION

Representative Clyde Doyle of California has introduced in the Congress H.R. 1935 and the bill has been reported by the House Armed Services Committee. (As we go to press, we have learned that the House of Representatives has approved H.R. 1935. We sincerely hope it will be similarly passed by the Senate.)

H.R. 1935 deals with the subject of less-than-honorable discharge for those in military service.

Representative Doyle states that he is concerned over the thousands of men who have been dismissed from the military service in the past with less-than-honorable discharges and, as a consequence, have not been able to secure gainful employment in civilian life.

Not only has this type of discharge affected the person discharged but it has also worked to the disadvantage of whole families who are frowned upon by the neighbors because the boy temporarily in the service in thousands of cases got less than an honorable discharge. Representative Doyle explains that his bill was not designed to apply to any former man in military service who was found to be of criminal intent, habits, or tendencies.

The California Representative emphasized that unfortunately this type of discharge was not given to just a few discharged from service but it ran into many thousands and, as a result, caused considerable distress. Doyle is asking in his bill that boards of civilians be appointed by the Secretary of Defense to review all cases of this kind with particular emphasis on the conditions prevailing at the time of the incident, the age of the person at the time, whether or not any question of moral turpitude is involved, and what the normal punishment might have been adjudged had the incident occurred in civilian life.

It appears to us that the provisions of this bill are just and equitable. Certainly no agency of the U.S. Government should have the authority to condemn any person to a perpetual blacklist because of some perhaps insignificant incident that occurred while the person was in service.

It is a known and accepted fact that thousands and thousands of our American youth cannot adjust themselves to the discipline and regimentation of military life. Certainly they should not be branded as little better than a deserter or criminal because they do not happen to fit a prescribed pattern. Surely, as Representative Doyle points out, "the military services should want to help

establish these former military personnel as economic assets and remove them from their present status which is an economic liability."

We are of the opinion that this bill should receive favorable action by the Congress so that these unfortunate lads may be given an opportunity to rectify previous errors and mistakes.

The full text of H.R. 1935 appears in other columns of this week's edition of the National Tribune and the Stars and Stripes.

Mr. DOYLE. I will be glad to answer any question if there is any.

Senator ERVIN. As I understand it, the procedures which are now established by law and regulation for the correction of military records and the substitution of honorable discharges for undesirable discharges or other discharges less than honorable are based solely upon the conduct of the man prior to his separation from the service; is that not correct?

Mr. DOYLE. That is true.

Senator ERVIN. And I take it that the Army and the Navy base their objection to issuing a certificate under your bill, H.R. 1935——

Mr. DOYLE. 1935.

Senator Ervin (continuing). Rests on the premise that they ought not to be charged with any legal concern in respect to the conduct of the man after his separation from service?

Mr. DOYLE. That is true.

Senator ERVIN. Except in the case covered by the directive—where they are considering permitting one of these persons who received an undesirable discharge to reenlist?

Mr. DOYLE. That is as far as they have yet gone. But I want to emphasize again, Mr. Chairman, that they would not be required to issue any such certificate unless the proof before them was adequate in their sole judgment to justify them in issuing that certificate.

Senator ERVIN. If I construe your bill right, this bill merely authorizes the Armed Forces, in the discretion of the Secretaries——

Mr. DOYLE. That is right; it is optional.

Senator Ervin (continuing). To set up boards?

Mr. DOYLE. That is right.

Senator ERVIN. The initial boards to pass on this matter?

Mr. DOYLE. That is right; not a new board.

Senator ERVIN. And if I construe it right, the only mandatory provision in there is one that, where this is done, there shall be review?

Mr. DOYLE. That is right, and they shall take into account the four factors, the age and circumstances under which the incident occurred, those factors which now they don't have to, at least they didn't have to when the bill was filed.

Senator ERVIN. There have been some suggestions made by witnesses before this subcommittee that perhaps there should be congressional action to give a person who is under consideration as a possible recipient of an undesirable discharge for misconduct a right to demand a court-martial in lieu of such administrative discharge—in other words, give him the option of receiving a trial, rather than taking an administrative discharge.

What do you think of that?

Mr. DOYLE. I think that might be a very sound procedure.

As a matter of fact, one of the witnesses, I read in the transcript before your committee said that an undesirable discharge might be more serious in the boy's life than court-martial under some circum-

stances. But I do insist that nothing less than a boy being fully and frankly advised of his constitutional rights and getting legal counsel if he wants it, either private or within the service and getting an adequate hearing, that is a must, Mr. Chairman, and I believe that should be statutory or in the Uniform Code. It should be there.

I think I understand, I am sure even the military admits that now and then some of them themselves, have temperamental upsets and just like the rest of us who are not in the military, and the result of which makes them unfair and unjust, temporarily at least in some given state of circumstances. No American boy in the military who is drafted or volunteered ought to be put up against that kind of a situation. It should be mandatory, in my judgment, before any type of discharge less then honorable should obtain that there should be a required review of some sort by military personnel who haven't been in touch with the incident, who are removed from it, who have no bias or personal interest in it.

There shouldn't be any direct relationship to the sergeant or the noncommissioned officer or the commissioned officer who has recommended a discharge. It should be someone removed from any command obligation or any personal relationship to the officer, commissioned or not, who proposes to get rid of some boy.

Senator ERVIN. I think perhaps counsel would have some questions.

Mr. CREECH. Thank you, Mr. Chairman.

Sir, you mentioned in citing the performance of the services since your investigation began back in 1956 that you felt that they had made progress; and you specifically cited the Air Force as having made a great deal of progress.

I wonder, sir, why you feel the Air Force has made greater progress than the other services? Did this have anything to do with their having further to go in this direction, or have they taken greater interest in this area?

Mr. DOYLE. Well, I think the numbers do show that for whatever the reason there were more undesirable discharges given by the Air Force in a given period but I don't think that was the reason. I am not willing to assess it on that basis.

I think that men like General Kuhfeld and those men caught the vision that something had to be done. They moved ahead faster than other men in other departments to correct the bad condition. All credit to them and all credit to the other departments, too. I don't mean to minimize a bit that the other departments haven't improved because they have. But I wish to say this: We in the House didn't think they moved along fast enough in the field, because it was so shocking, the whole situaton was so shocking and the cases so numerous, but we recognize they made great improvement. I think that would be my answer. But they didn't move more then a very little until the House moved very far.

Mr. CREECH. I wonder, sir, do you have any additional information on reenlistees, those who want to reenlist; under the 1959 directive do you have any information with regard to the ease with which this is done?

Mr. DOYLE. I don't have that information, counsel. In these Congressional Records, however, dating back a few years there are some

facts and figures and I will furnish those to you. It will help answer that question, I believe.

Mr. CREECH. Thank you, sir.

Sir, last week, as you know the subcommittee heard from the Deputy Under Secretary of the Army, Mr. Fitt, and he was accompanied by Brigadier General Todd, the Judge Advocate General of the Army.

General Todd was asked by a member of the subcommittee about the administrative discharges; and specifically he was asked whether he thought the regulations giving administrative discharges should be broadened by statute and did he think that it would be administratively bad if Congress began to outline how it felt these administrative hearings should be conducted.

His response was:

> I think that you have to consider that there are thousands of these boards. Necessarily, they would involve the man's character. Many of them are convened overseas. The man would want to call many character witnesses and they would have to have subpena power, be authorized to call those people wherever the boards sat and would be a tremendous problem where you have thousands of board cases and, of course, it would be a tremendous cost.

I wonder, sir, if you would care to comment on that statement?

Mr. DOYLE. Well, I think it would be a tremendous cost, and it will be a matter of great inconvenience and great trouble, there is no question about that. But when my boy was in the service for the Air Force I wasn't worried about what the cost was as a taxpayer for him or any other boy to have his constitutional rights always given him. I don't think the taxpayers of the country would begrudge the money involved within reasonable limits and reasonable procedures to make sure that every boy who is in the military is treated as every boy who is not in the military is treated, as every American boy must be treated.

Many of these boys are only there temporarily, most of them for a few years under the draft or voluntarily and then they return to civilian life. Now, thousands of them are ruined for life while in the military temporarily.

I want to say this: I don't think I have said it, under this directive which I have mentioned which is good, that is the directive which takes into consideration the conduct and general reputation in the community before and after military service. Shortly after that directive date I was sent to Europe for the Armed Services Committee and was there for some time. Naturally I inquired about this directive but you couldn't find hide nor hair of it. No one in Europe had ever heard of it. This was some months after it was issued. Directives are not as permanent as statutes.

Then I was a guest of Admiral "Cat" Brown of the Navy, on one of the great carriers and no one there had ever heard of it.

My point is this: I am constrained to feel that directives can be changed pretty easily with administrations or change in policy, change in the personnel in charge of an administration. I think the constitutional rights of every American soldier require as much statutory provision as is sound and sensible within our system of laws in order that if Congress declares that this shall be done, it shall be done and in order that some man any place in the administration can't change it overnight if it happens to be his own individual thinking.

I wish to emphasize that this directive, I couldn't find any place in the world except in Washington. I only mention that because that

illustrated to me and I reported it to the military, it illustrates to me that a directive is only as good as the military makes wide use of it and follows it.

Are there any other questions?

Mr. CREECH. Yes, sir. You have mentioned, sir, the desirability in your estimation of having counsel available to young men, to the serviceman when he appears before a board which has the authority to give him an administrative discharge.

I wonder, sir, what would be your feeling with regard to young men who are minors, who are under 21 years of age, and the right to counsel.

Would you feel that they should have the right, these young men, to waive the right to counsel, or should counsel be made mandatory in dealing with such young servicemen?

Mr. DOYLE. I think counsel should be mandatory. As long as our law doesn't recognize a boy under 21 as an adult with the qualifications to vote and make those determinations, I think he shouldn't be placed in a position under 21 years of age to waive his constitutional right. There should be some guard there against haste and against the desire to get rid of a boy for convenience or for some other reason; the boy should not be put in any such position.

I want to call your attention to the fact that in these directives, and they are fine as far as they go, there is always a very broad paragraph in those directives, a sort of a catchall and what is included in that catchall isn't itemized very often. It leaves too wide an undefined area.

Now, that leaves too much room for discretion when you are dealing with a boy 17, 18, 19 and the individual officer or sergeant. I don't favor a boy under 21 waiving. He should have advice and counsel who are interested in him primarily as a client less than as an adult.

Now, it might be that instead of waiving his right to counsel maybe some board should interview the boy thoroughly, I don't mean one man, I mean a board of three, say, advise him of the situation, of his rights. That might change the picture some but I am afraid for any minor boy being placed in a position where he waives his right to legal advice, without having legal advice.

Mr. CREECH. Thank you.

Mr. EVERETT. You referred earlier to the inquiry, the poll, that you had made in industry and otherwise to determine community reaction to the undesirable discharge.

I wonder whether you found that in the public mind there was some confusion between a dishonorable discharge given by a general court-martial and an undesirable discharge given administratively?

Does the public understand the difference between these two types of discharges?

Mr. DOYLE. I don't think they do. I don't think they do. As a matter of fact, I doubt if most of the Members of Congress understand the technical difference unless they have studied the subject. But I do think this, that the general public has in mind that a dishonorable discharge means just that. It is discharge with dishonor. He has let the country down in a military way. He has not served honorably for some reason. They don't understand that it might have been a matter of personal conduct for which he gets the discharge in spite of the fact that he has been a pretty good soldier, because very often these

discharges, if I recall, are given men who are pretty good soldiers but they are ranked for misbehavior or disobedience or civil misconduct or poor payers of their debts and other things that enter into these discharges. These are not criminals nor evil men.

As Judge Paul Kilday said the other day, and if I read his testimony correctly there, under our judicial system it is quite a responsibility for one man to judge another man's character and many of these discharges that used to be given, undesirable, were by one man judging a young man's character in what he might do or what he might be in the future, or saying, "well, you are no good, you never will amount to anything, you are no use to your country. We don't want you."

It is a pretty risky responsibility that a man assumes to judge another man's character and another man's future.

Mr. EVERETT. Then would it be your feeling that the stigma created by an undesirable discharge, which is not under honorable conditions, would in the eyes of many be almost equivalent to that of a dishonorable discharge?

Mr. DOYLE. I think it would, because with the ordinary person you will say a man is an undesirable citizen in civilian life, that is a life stigma. He is an undesirable. You don't want to have anything to do with him. You don't go into detail to find out what makes him undesirable. You think he may be a thief, he may be a homosexual, he may not be supporting his children, his family in the minds of some people, but he is undesirable, you don't want him around. And I think the ordinary patriotic, sound thinking American citizen doesn't want to have anything to do with an undesirable man and that applies to an undesirable man from the military, something has occurred there in the military for which he has gotten an undesirable discharge; it is a stigma. It is a liability, and a heavy one.

Mr. EVERETT. The subcommittee has received statistics and information on the general discharge, which is under honorable conditions but is not an honorable discharge.

Has your committee made any inquiry into this type of discharge and do you have any comments on the general discharge?

Mr. DOYLE. No, we didn't go into that thoroughly, Counsel. On the face of it, it is a limitation that there is something seriously lacking in the boy or he would have been given an honorable discharge instead of a general, in the minds of people.

In other words, there is something serious missing in his conduct. Why didn't he get an honorable discharge, why did they give him a general under honorable conditions, and the general public doesn't know the finesse and the technicality of these different discharges and there is no way they can find out generally.

Mr. EVERETT. Thank you.

Mr. DOYLE. Mr. Chairman, in brief summary then, a few more comments about the bill, H.R. 1935 itself, may I state for the record that:

1. The bill does not propose to change the type of original discharge, nor the wording therein.
2. It proposes to issue an exemplary rehabilitation certificate to the applicant for such certificate.
3. It does not provide for, or allow, any Government benefits.
4. The provisions of the bill are optional at the discretion of the military excepting as follows: to wit, that in the case of any indi-

vidual discharged or dismissed from any of the Armed Forces under any conditions other than honorable, the Board shall take under consideration in each case the reasons for the type of the original discharge or dismissal, including, but not limited to:

(*a*) The conditions that prevailed at the time of the incident, statement, attitude, or act which led to the original discharge or dismissal;
(*b*) The age of the individual at the time of the incident, statement, attitude, or act which led to the original discharge or dismissal;
(*c*) The normal punishment that might have been adjudged had the act or incident been committed in civilian life; and
(*d*) The moral turpitude, if any, involved in the incident, statement, attitude, or act which led to the discharge or dismissal.

5. The certificate may be issued if it is established to the satisfaction of the Board by oral or written evidence, or both, including but not limited to:

(*a*) A notarized statement from the chief law enforcement officer of the city, town, or county in which the individual resides attesting to the individual's general reputation insofar as police and court records are concerned;
(*b*) A notarized statement from the individual's employer, if employed, attesting to the individual's general reputation and employment record; and
(*c*) Notarized statements from not less than five persons, attesting to the fact that they have personally known the individual for not less than 3 years as a person of good reputation and exemplary conduct, and further attesting as to the actual extent of personal contact with the individual concerned.

6. H.R. 1935 amends existing law.

Mr. Chairman, granted the Military Establishment has in fact made encouraging and substantial improvements in their methods and in the manner in which they discharge military personnel with any type of discharge less than honorable—since the House of Representatives began urging them so to do in late 1957, and especially since the House of Representatives Special Subcommittee of the Armed Services Committee held hearings on the subject. But, Mr. Chairman, these directives and improvements do not reach back retroactively to the several thousand cases in point where former military personnel received less than honorable discharges, such as primarily unsuitable or undesirable, without court-martial, without having committed a crime, without hearings before a board, without legal advice as to their rights—just discharged by one officer, many times noncommissioned. These thousands of men thus discharged for minor offenses and errors are, thousands of them, now married men with families and they have already carried for years the stain and stigma which automatically attached to their type of discharge received. Admittedly this type of discharge has made them economic liabilities, as well as their families in many cases also being held in chains.

The main purpose of this bill, H.R. 1935, is to help—at least a little bit—to remove the stigma of a life sentence which automatically attached and also to help at least some percentage thereof to be able to become economic assets by reason of this exemplary rehabilitation certificate enabling them to a better chance of obtaining decent working positions and employment; such exemplary certificate cannot take the place of an honorable discharge as relates to employment offers but it will help some percentage of the many thousands involved to obtain at least an interview with possible employers and

such interview cannot be obtained with a veteran presenting any type of less than honorable discharge.

Mr. Chairman, a long time ago the distinguished chairman of the Senate Armed Services Committee, Senator Russell, told me in his office that if the bill only assisted one deserving man, it was still a good bill.

Senator ERVIN. Thank you very much, Congressman. The subcommittee appreciates your appearance; for giving us the benefit of your study in this field which has been quite a time in study, I know.

Mr. DOYLE. Thank you, Mr. Chairman.

Mr. CREECH. The next witness will be Mr. Charles H. Mayer, attorney at law, Washington, D.C.

Mr. Mayer.

Senator ERVIN. Mr. Mayer, we are glad to have you with us.

Mr. MAYER. Thank you, Senator. I appreciate the opportunity to be here and the invitation for me to attend.

Senator ERVIN. You may proceed.

## STATEMENT OF CHARLES H. MAYER, ATTORNEY AT LAW, WASHINGTON, D.C.

Mr. MAYER. Mr. Chairman and other members of the committee and committee staff, my name is Charles H. Mayer, and since 1953 I have been an attorney in private practice in Washington, D.C.

Prior to that I have had both military and civilian service in the Federal Government. From September 1941, to February, 1946, I was on active duty in the Army of the United States during World War II.

In the summer of 1947, following graduation from law school, I became employed as an attorney in the Office of the General Counsel in the Navy Department. In 1948 I was appointed special assistant to the Under Secretary of the Navy.

After approximately 1 year in that position I became an attorney in the Office of the General Counsel, Office of the Secretary of Defense, Thereafter, I was special assistant and counsel to the Chief of the ECA Special Mission to the United Kingdom for approximately 1 year.

From 1950 to 1953 I was special assistant to two or three Assistant Secretaries of the Navy. While I was serving as special assistant to the Under Secretary I participated actively in what was known as the Morgan Committee in drafting the Uniform Code of Military Justice. I give you this background because it will explain to you why I am interested in the subject matter that is under study.

Now, the case that I am here to discuss with you today is one that came to me as a lawyer a few years ago, and is a case in which a former servicewoman in the Marine Corps received a less-than-honorable discharge solely on the ground that her grade for proficiency did not exceed 40 percent of all other Marines. This may be a startling statement but I think I can back it up.

During all the time that I served in the Army as well as a civilian employee in the military agencies of the Government, I gained the firm impression that all servicemen receive an honorable discharge as a regular matter upon leaving the service unless there is some record of

misbehavior on their part in the service. I think this is the general public view of the situation.

I think the general public equates an honorable discharge with normal adequate service rather than exemplary service. I think that in the public mind there are only two kinds of discharges, honorable discharges and other discharges.

When this young lady came to my office in 1958, as a result of investigating her case, I learned that the Marine Corps had started the practice, I believe sometime in 1945, of conditioning the award of an honorable discharge on the proficiency of the service rendered as well as on the conduct of the serviceman.

Now, I have already provided committee counsel with copies of the briefs and the decisions in this case and I won't go into all those details.

However, I do think it is important to point out that in the case of this young lady her grade for conduct as described in the Marine Corps regulation was as follows:

> No offenses; demonstrated reliability, good moral influence, sober, obedient, and industrious.

In spite of that grade, of that adjectival grade, she was still denied an honorable discharge.

This case came on before the U.S. Court of Appeals for the District of Columbia. I represented this young lady as appellant and it was affirmed two to one. The Supreme Court denied certiorari and, although I respect both of these decisions, I continue to feel strongly that it is improper to use the criterion of proficiency in awarding honorable discharges. I think both historically and logically proficiency has nothing whatsoever to do with honor or honorableness.

Many people may suffer from a lack of ability. Nevertheless, they can render the best service of which they are capable and these people in my view are entitled to an honorable discharge.

If a serviceman exerts the best effort of which he is capable, has no black marks on his record, he should be entitled to an honorable discharge regardless of the skill with which he has performed his duties.

Now, the regulations under which this young lady received her general discharge were deficient in other respects. They are clearly discriminatory as between officers and enlisted persons.

With respect to officers, a general discharge instead of an honorable discharge is issued if the failure of proficiency is in some way due to lack of effort on the officer's part.

If he fails in proficiency but exerts his best efforts he will get an honorable discharge. But there is no such exemption provided for the enlisted marine. They must either obtain this final mark or fail to get an honorable discharge.

Secondly, I am confident that the regulations themselves are not consistently adhered to by the Marine Corps. Based on their regulation and the grading standard set up in that regulation, the mark of 5 which is required, the mark of 5 in proficiency which is required to obtain an honorable discharge, is to be given to a marine who exceeds at least 40 percent, excels at least 40 percent but not more than 60 percent of all other marines of similar grade performing similar duties.

Now, I am certain that the Marine Corps is not sending back into civilian life 40 percent of all its people with less than an honorable discharge. I think that this regulation is arbitrary and obviously

isn't being carried out, but that it exists and can be relied upon or fallen back on as a justification by the Marine Corps for awarding a less-than-honorable discharge in certain cases.

The courts, I am glad to say, have taken an interest in military discharges lately. For a long time they would not look into it at all but since *Harmon* v. *Brucker* they have gotten interested in the subject matter and since the case that I handled which unfortunately did not end up satisfactorily to my client, the same court has decided another case in which they seemed to take an entirely different view of the effect of a general discharge.

I would like at this point to read two short passages from these two opinions.

In the case of *Ives* v. *Franke*, the court said with respect to this point:

> We see no reason to forbid classification of discharges according to degrees of proficiency, especially since there is no connotation of dishonor in a general discharge which expressly recites that it is "under honorable conditions."

In a later case, *Bland* v. *Connally*, 110 U.S. App. D.C. 375, in a footnote at page 376, the court said:

> Since about 90 percent of all discharges issued are honorable, a discharge of that type is commonly regarded as indicating acceptable, rather than exemplary service. *In consequence, anything less than an honorable discharge is viewed as* derogatory, and inevitably stigmatizes the recipient.

And on page 381 in the body of the opinion the court had this to say:

> We think it must be conceded that any discharge characterized as "less than honorable" will result in serious injury. It not only means the loss of numerous benefits in both the Federal and State systems, but it also results in an unmistakable social stigma which greatly limits the opportunities for both public and private civilian employment.

It seems to me that the decision in *Bland* v. *Connally* is about 180° away from the decision in *Ives* v. *Franke* and I am very glad to see this.

Nevertheless the military services remain free to grant, to award, to issue general discharges on the basis of proficiency.

As a matter of fact, the Department of Defense promulgated a directive shortly after the district court decision in my case making that criterion uniformly applicable to all three services.

I think another basis for the argument that a general discharge should not be awarded on the basis of lack of proficiency is the fact that it is also used for such things as homosexual conduct, and I have referred in my statement that I have given to your committee a story in the Washington Star and in the Washington Post in December 1961, regarding such a case.

My feeling, Mr. Chairman, is that proficiency has nothing to do with honor, and that the services should be prevented from conditioning the award of an honorable discharge on the proficiency of the service rendered.

(The statement of Mr. Mayer follows:)

STATEMENT OF CHARLES H. MAYER

My name is Charles H. Mayer. Since June 1953, I have been an attorney engaged in private practice in Washington, D.C. Prior to that I have had both military and civilian service in the Federal Government. From September 1941 to February 1946, I was on active duty in the Army of the United States. In

the summer of 1947, following my graduation from law school, I became employed as an attorney in the Office of the General Counsel in the Navy Department. In 1948 I was appointed special assistant to the Under Secretary of the Navy. After approximately 1 year in that position I became an attorney in the Office of the General Counsel, Office of the Secretary of Defense. Thereafter, I was special assistant and counsel to the Chief of the E.C.A. Special Mission to the United Kingdom for approximately 1 year. From 1950 to 1953 I was special assistant to two of the Assistant Secretaries of the Navy. While I was serving as special assistant to the Under Secretary I participated actively in the drafting of the Uniform Code of Military Justice. During all the time I served in the Army as well as during my civilian employment in the military agencies of the Government, it was my firm impression, which I believe to be based on fact, that all persons serving in the Armed Forces were regularly given an honorable discharge upon being separated unless there was some record of misbehavior on their part while in the service. This tradition has been in effect for so long that in the minds of the general public an honorable discharge is automatically equated with normal, adequate service, and anything other than an honorable discharge is regarded as a black mark which creates a serious disadvantage to a former serviceman.

In 1958, however, I learned that it had become the practice in the Marine Corps to condition the award of an honorable discharge on the proficiency of the service rendered as well as on the conduct of the servicemen. This came to my attention as a result of being retained by a former woman marine who had been discharged for medical disability and who was issued a general discharge rather than an honorable discharge solely because her average mark for proficiency was slightly under that prescribed in Marine Corps regulations. I have already provided your committee counsel with copies of the brief and decisions in this case and therefore will not repeat the details at this time. However, I would like to emphasize the unfairness of the discharge given to this woman by pointing out to the committee that although her mark for conduct was described in Marine Corps regulations by the following words—"No offenses. Demonstrated reliability, good morale influence, sober, obedient, and industrious."—she was still denied an honorable discharge.

Although I naturally respect the decision of the court upholding the action of the Navy Department in issuing this former servicewoman a general discharge rather than an honorable discharge I continue to feel strongly that it is improper and unfair to use the criterion of proficiency in determining whether a serviceman is entitled to an honorable discharge. Proficiency has nothing to do with honor. Historically, honorable discharges have been based upon such factors as faithful and obedient service rather than particularly skillful service. If an individual exerts the best effort of which he is capable and is not involved in any misconduct he should be entitled to an honorable discharge regardless of whether the skill with which he has performed his duties measures up to arbitrary standards of proficiency.

Apart from the impropriety of including the criterion of proficiency as a prerequisite to an honorable discharge the Marine Corps regulations on this subject were deficient in other ways. First, they were discriminatory as between officers and enlisted persons. With respect to officers, the lower grade of discharge was to be issued only if the failure in proficiency was due to some lack of effort on the part of the officer. No such exemption was provided in the case of enlisted personnel. They had either to meet the required standard or fail to get an honorable discharge, regardless of the amount of effort that might have been exerted. Second, the regulations themselves were obviously not consistently adhered to by the Marine Corps. By their own terms these regulations would have resulted in at least 40 percent of all enlisted marines receiving less than an honorable discharge. Clearly, the Marine Corps has not been sending 40 percent of its people back into civilian life with less than an honorable discharge. Therefore, the inference seems to be that the regulations exist as a justification for the awarding of less than honorable discharges in certain cases rather than for uniform and literal application.

The history of legal actions with respect to discharges to Armed Forces personnel has shown a healthy development in recent years. The courts have naturally had a considerable reluctance to get involved in the daily administration of the Armed Forces. It was not until recently that the courts have recognized that the character of discharge taken into civilian life involved legal rights upon which the courts could pass. However, recent decisions

have shown an increasing awareness on the part of the courts that anything less than an honorable discharge is a serious detriment to the serviceman for the rest of his life. Some excerpts from the case I handled, which was decided by the U.S. Court of Appeals for the District of Columbia in 1959, and from another case decided by the same court in 1961, well illustrate this trend. In *Ives* v. *Franke*, 106 U.S. App. D.C. 203 at 205, the court said: "We see no reason to forbid classification of discharges according to degrees of proficiency, especially since there is no connotation of dishonor in a general discharge which expressly recites that it is 'under honorable conditions.' "

However, in *Bland* v. *Connally*, 110 U.S. App. D.C. 375 at 376 footnote 1, the court said: "Since about 90 percent of all discharges issued are honorable, a discharge of that type is commonly regarded as indicating acceptable, rather than exemplary service. In consequence, anything less than an honorable discharge is viewed as derogatory, and inevitably stigmatizes the recipient."

And in the same case the court at page 381 said: "We think it must be conceded that any discharge characterized as less than honorable will result in serious injury. It not only means the loss of numerous benefits in both the Federal and State systems, but it also results in an unmistakable social stigma which greatly limits the opportunities for both public and private civilian employment."

It is heartening to see that the courts now take judicial notice that anything less than an honorable discharge is a serious detriment in civilian life. In spite of this, however, the military services are still free, under the decision in *Ives* v. *Franke*, to award less than honorable discharges merely for a failure of proficiency. The unfairness of giving such discharges for lack of proficiency is emphasized by the fact that this same character of discharge is also given for such things as homosexual activities. A case of this nature was reported in the Washington Post and the Washington Evening Star for December 19, 1961, wherein a three-judge court in the District of Columbia upheld the issuance of a general discharge under honorable conditions to an officer who was allegedly involved in a homosexual incident. When general discharges are used for cases of this nature they clearly should not be used in cases of failure of proficiency.

It is my opinion that the Armed Forces should be prohibited from issuing less than honorable discharges solely because an individual has failed to obtain a certain mark in proficiency. Since the courts have not declared this practice illegal, it appears that legislative action by the Congress is called for.

Senator ERVIN. Is this the fair inference of your position that historically honorable discharges have been granted to reflect fidelity to the country and essentially character rather than intellectual attainments?

Mr. MAYER. That is correct, sir.

Senator ERVIN. And any discharge which is based upon an intellectual capacity as distinguished from fidelity and character is a discharge which places its recipient under disadvantages?

Mr. MAYER. There is no question about it.

As a matter of fact, the discharge certificate itself has often been worded, "Honorable discharge awarded as a testimonial of fidelity and obedience," fidelity and obedience being the criteria upon which this type of discharge is issued.

Now, the Government argued in the *Ives* case that there was no reason to forbid the military from classifying it based on proficiency, and they used the analogy of the fact that in educational fields universities grant degrees with honors.

I don't think that this is a good analogy. I think that the granting of a degree, which is the normal thing you get at the conclusion of college, should be equated with the granting of an honorable discharge, which is the normal thing which you get when you finish your military service.

The Government brief says, "The appellant served with honor but not the highest degree of proficiency." Although she served with honor she has not gotten an honorable discharge.

Senator ERVIN. I would say the notation on the discharge as to the character of service was dignified, she was—in my judgment had done a very honorable job in terms of her service.

Mr. MAYER. Certainly, with respect to conduct. The girl was discharged because of a physical disability. She had suffered an emotional or nervous disorder and she was determined to be physically disabled for further service.

In spite of that fact, in spite of the fact that one would think that this emotional and nervous disorder would have some effect on her proficiency she only failed to achieve this minimum proficiency grade by a few percentage points. Her final mark was 4.25 instead of 5. Her final mark for conduct was 4.25 and the required grade for conduct is only 4.

Senator ERVIN. Your position also, I believe can be stated by saying if the Marine Corps wished to make a distinction on the ground of intellectual capacity or proficiency as distinguished from essentially moral character that it ought to be done by a notation of some character on the discharge rather than by a change in the character of the discharge itself.

Mr. MAYER. Yes. Perhaps an honorable discharge could have added to it, summa cum laude or something of that sort for those people who did exceed or excel the normal grade of proficiency.

But not to go the other way and say that if you don't measure up to a certain arbitrary standard of proficiency, you haven't been honorable in your service.

Senator ERVIN. If my recollection serves me right, the Army used to distinguish in the gradations of a man's service. They would give him an honorable discharge and in some cases they would put either character, excellent; character, very good; or character, good; and all soldiers got the same character of discharge, an honorable discharge, with any one of those three classifications.

There was an honorable discharge, which was on white paper; a blue discharge; and a yellow discharge, which was dishonorable.

The blue discharge was given for misfits of some sort or another, such as homosexuals and so on. But anybody else who had no active misfeasance, so to speak, got an honorable discharge.

Of course, I am inclined to think it is desirable to have something to give an incentive to a person to strive his utmost; but I am certainly inclined to agree with you in the observation that it should be in some way other than in the character of a discharge.

Mr. MAYER. I think so, because anybody who comes out with a general discharge, even though it says under honorable conditions, who has to explain when they are applying for employment and who is asked what kind of discharge do you have, the mere fact that you have to explain that you don't have an honorable discharge and why you don't, is in itself a disadvantage.

And I think Congressman Doyle is right. People don't know the fine points of these five different grades of discharge and they are not going to take the time to learn about them.

Senator ERVIN. We have testimony before us from some of the services to the effect that they have two classifications for discharge under honorable conditions, the honorable discharge and the general discharge, which also is under honorable conditions; and they say that they use the latter to separate from the service persons concerning whose character there is no complaint but who are unsuitable for one reason or the other; and they feel they ought to make that distinction between a person who is unsuitable through no willful fault of his own, and those who reach the highest standards of service before their separation.

I think there may be some solid basis for something like that. But I do think that the honorable character of the discharge ought to depend largely upon the character of a person.

Mr. MAYER. Or the conduct.

Senator ERVIN. The character and the conduct during service, rather than the state of their intellectual attainments.

Mr. MAYER. I think that the concept of an honorable discharge has become so firmly fixed in the minds of the American public as being the kind of discharge that just anybody gets when he gets out of the service, unless he has been in trouble or done something wrong, that this now should not be tampered with by the military and changed in some way or another and altered, because it works, as the court now recognizes, it works a distinct disadvantage to people, which can't be overcome.

As Congressman Doyle said, it is a life sentence. It is referred to in another case in this same court as a second-class discharge.

Mr. CREECH. Mr. Mayer, you have indicated that the Marine Corps began using the general discharge back in 1945, based upon proficiency and service.

Do you know, sir, was there any reason to have different standards for peacetime as opposed to wartime?

Mr. MAYER. I don't know the answer to that. This is a point which has never come up in my study of this matter, and as far as I know, the Government has never explained its reasons for it. It just says, "We have started to do it and there is nothing to forbid our doing it. This is an administrative matter within the discretion of the Secretary of the Navy."

Mr. CREECH. Has the question of the alleged discrimination against enlisted personnel been made an issue in any cases?

Mr. MAYER. Well, I tried to make it an issue in the case that I handled. I certainly argued that issue, and in the joint appendix of my brief you will find the Marine Corps regulations on this subject which I think pretty clearly demonstrate that there is a very sharp discrimination.

I can briefly call it to your attention, if I may.

In Marine Corps manual, paragraph 10001, types of discharges relating to discharges for officers, under paragraph 3(a) headed "Honorable Discharge" there are five reasons or bases for being given an honorable discharge.

No. 4 is—

Discharge because of failure to pass professional examination for promotion or failure of selection for promotion.

And No. 5 is—

Separation for administrative reasons such as academic failures despite honest effort; (2) personality defects or physical deficiencies despite which the individual concerned is believed to have performed service to the best of his ability.

Now, then under general discharges, this is still relating to officers, this is 3(b). There are several bases for being issued a general discharge; (a) as follows:

Academic failures due at least in part to lack of effort.

(b) Personality defects or physical deficiencies unaccompanied by a record of performance deemed to represent the best of which the individual is capable.

So in the case of officers we have the honorable discharge either for academic failure or for personality defects where the officer has been deemed to put out his best effort, and a general discharge if it is partly his own fault; that is, if he, himself, is suspected of not putting out his best effort. But in the case of enlisted personnel under Marine Corps manual, paragraph 10269, this is an honorable discharge for disability.

An enlisted person discharged as a result of a disability whether or not incurred in line of duty, provided not own misconduct whose final average marks are 5 in proficiency and 4 in conduct and who has not been convicted by general court-martial or more than once by special court-martial shall be given an honorable discharge.

Under paragraph 10270, "General discharge for disability," the following provision:

Disability whether or not incurred in line of duty provided not own misconduct where final average marks are less than 5 in proficiency and 5 in conduct—

there is no escape provision here for effort on the part of the enlisted personnel. They are—either they have met the standard or they don't get the honorable discharge.

Mr. CREECH. Sir, has your study indicated that there are other instances of discrimination against enlisted personnel, or for that matter against officers, with regard to issuance of the administrative discharge?

Mr. MAYER. My study has not taken me into that field.

Mr. CREECH. The subcommittee has received a great deal of information earlier on the Uniform Code and the Court of Military Appeals. We have had some allegations made about the effectiveness of the code, charges that it is unwieldy, that perhaps it would not work in time of war; and, by the same token, we have had statements to the contrary and also that the Court of Military Appeals has had a salutary effect upon the administration of military justice.

I wonder, sir, if you would care to give us your views on the performance under the code, and also the advances, if any, that you have observed in the administration of military justice?

Mr. MAYER. Well, my practice has not been helpful in the military field since I left the Government.

However, I know from personal experience that the code was hammered out by the Department of Defense before it was submitted to Congress over a long period of time, and it had the best brains available in the three military departments as well as the Secretary of Defense's office as well as being chaired by Professor Morgan who is a distinguished authority in the law.

It went up to Congress and I am sure it was very exhaustively studied here before it was passed and I think it is a very outstanding improvement in military justice and as far as I know it is working very well.

Mr. CREECH. Thank you.

Mr. EVERETT. Isn't it correct that *Harmon* v. *Brucker*, at the time it was decided by the Supreme Court, involved a general discharge and that this was the type of discharge that the Supreme Court there ruled to be unauthorized and illegal?

Mr. MAYER. *Harmon* v. *Brucker*, I think did involve a general discharge. The ground of decision in that case was that the serviceman was given a less than honorable discharge because of preinduction activities, preinduction associations with leftwing or Communist-front groups. That was the charge, whether true or not, I don't know.

The holding in that case, and this is speaking from memory now, was that it was improper to take into consideration something the serviceman had done or been involved in prior to being in the service in connection with determining what kind of discharge to issue him.

Mr. EVERETT. My recollection was that the man started with an undesirable discharge and at the time it reached the Supreme Court it had been changed to a general discharge.

Mr. MAYER. I believe that is right.

They had toned it down, so to speak.

Mr. EVERETT. Are you familiar with the case in the Court of Claims, *Murray* v. *United States* where the Court of Claims held that a general discharge was unauthorized?

Mr. MAYER. Sorry, I am not.

Mr. EVERETT. This is another case where a general discharge was reviewed, and we have been furnished information on it by the Air Force.

In the case where you represented the woman Marine had there been any type of board hearing?

Mr. MAYER. Several. Oh, yes, we had exhausted not only our administrative remedies but her counsel as well by the time we went into court. [Laughter.]

Mr. EVERETT. What I was thinking of was whether in the first instance, before she was handed the general discharge, there was any type of board action?

Mr. MAYER. Oh, no, no, there was not.

As a matter of fact, one of the allegations in her complaint and incidentally, the Government never answered this complaint, they just filed a motion for summary judgment, was she had not been told at the time she was offered the alternative of taking a physical disability discharge or going through a board of medical survey which she had the right to do.

In other words, there was a board—this was on the question of whether she should be discharged for physical disability or not. The Medical Corps had made a preliminary determination she was physically disabled. At that point she was offered a physical disability discharge or, if she didn't feel she wanted to be discharged for physical disability, a board of medical survey. She took the disability discharge.

Nothing was said to her as to the character of the discharge, whether it would be honorable, dishonorable, or anything of that sort. She assumed she would get an honorable discharge for physical disability. It was only after the discharge was issued that she began a number of administrative proceedings.

Mr. EVERETT. Was it your experience and your client's experience that this general discharge created a stigma for her as a veteran?

Mr. MAYER. It certainly did. And as a matter of fact, when I advised her of my coming appearance before this committee she wrote me back and she said she still feels very much harmed to some extent by this discharge. This happened in 1952, as I recall, 10 years ago, and I don't think she would have pursued it with this vigor if she didn't feel it was something of a burden for her to carry.

Mr. EVERETT. In the course of the arguments was there an explanation to you of the logic in characterizing a discharge as under honorable conditions but not being honorable, was that line of distinction explained?

Mr. MAYER. Well, I think the Government argued that they didn't see anything wrong with a general discharge which says that it is under honorable conditions. It is really not bad at all to have that kind of discharge.

And they felt that after all, colleges, as I have already referred to give degrees with honors and there is nothing to prevent the Navy or the services from doing it that way.

Mr. EVERETT. Is there any statutory division between a general discharge and an honorable discharge so far as you know?

Mr. MAYER. So far as I know there is not a statute that uses the word general discharge. In the brief I think that I quoted or showed all the statutes on the question of discharges that were pertinent to this case, and my recollection is that at least as of the time that this case was heard, there was no statute at all that described general discharge.

The statutes describe honorable discharges and then the Code of Military Justice empowers dishonorable discharges as the result of sentence of general court-martial.

But the statutes bearing on the case spoke only in terms of discharge or honorable discharge.

Mr. EVERETT. In the statutes governing veterans benefits, isn't the only distinction between a discharge under honorable conditions and a discharge not under honorable conditions, so far as you know?

Mr. MAYER. I don't know. I just don't know, but I think from what the court has said in the *Bland* v. *Connally* case there is some distinction between an honorable discharge and any other kind.

Mr. EVERETT. Well then, in the course of your investigation preparing for this case and the argument thereon, have you ever been shown any legislative material, statutes, hearings, or any other document which indicated that the attention of the Congress had been called to the distinction between the general discharge and the honorable discharge?

Mr. MAYER. No, I don't think so.

Mr. EVERETT. In your opinion, after your inquiry into this matter, is there any need for a general discharge as such?

Were you convinced there is a need for that fifth category of discharge, a general discharge?

Mr. MAYER. I don't know that I can answer that question.

My attention has been focused on the unfairness of categorizing a discharge as other than honorable based on proficiency. Now, whether there are some other reasons that might justify this category of general discharge or not, I am not really qualified to say. Possibly there are.

Mr. EVERETT. Assuming that there is some reason that would justify a general discharge, would it be your feeling that, in light of the consequences thereof, some type of board or other protection should be provided to the serviceman at the time the discharge is being issued?

Mr. MAYER. I would think that when any discharge other than an honorable discharge is going to be issued there should be some protection, some form of hearing, because many servicemen don't realize what this will mean to them in later life, and for life.

Mr. EVERETT. Would you consider the right of counsel at that time, that is not just access to counsel, but being furnished counsel, as being necessary prior to servicemen's receiving a discharge under other than honorable conditions?

Mr. MAYER. I am all for anything that will give employment to counsel. [Laughter.]

Mr. EVERETT. I have no further questions.

Mr. WATERS. Mr. Mayer, perhaps you can tell us in view of the fact that some 10 years have elapsed since this lady was discharged, what particular type of problems she has encountered as a result of this discharge?

Mr. MAYER. According to her correspondence with me she has had problems in employment, in getting the kind of employment that she wanted, and generally feelings of perhaps, embarrassment isn't the right word, but discomfort in having to explain away this general discharge in social contacts, employment contacts and so on.

Mr. WATERS. Did she seek out a discharge or was this a discharge which was given to her involuntarily?

Mr. MAYER. Well, as I said she had been hospitalized for a nervous or emotional disorder and after some 6 weeks in the hospital the medical department decided she was suffering from a physical disability and should not stay in the service and at that point suggested to her she could either have a physical disability discharge or if she felt she wanted to try to stay in go before a board of medical survey and she accepted the physical disability discharge.

Mr. WATERS. Did you ever learn whether or not her proficiency rating was given prior to her hospitalization?

Mr. MAYER. Well, you get a proficiency rating in each duty assignment.

Now, she had a number of duty assignments. She was only in the Marine Corps a matter of, I think. 8 or 10 months. Interestingly enough, she, of course, was medically examined before she went in, apparently they found nothing wrong with her then although after she became ill they decided this illness existed before she enlisted. She had a number of duty assignments and she got a proficiency grade for each one.

There is another interesting thing about this. These duty assignments varied in length. She had one duty assignment for a month, say, and then she would have another one for 2 months or so, and she had one for 5 days or 6 days. Now, each duty assignment got a grade, and when the grades were added up there was no weight given to the length of the duty assignment for which the particular grade was given.

In other words, a duty assignment of 5 days with a grade of 3 counted in the average as much as a duty assignment of a month or 6 weeks with a grade of 5. They were just totaled up, the number of grades she got were added together and divided by the number to get the average.

Mr. WATERS. Do you feel that the interest of the service might be served just as well by giving similar individuals an honorable discharge and incorporating onto the face of the discharge or at some other point an allegation of substandard proficiency inasmuch as no misconduct was involved?

Mr. MAYER. I wouldn't call this girl's proficiency substandard, because——

Mr. WATERS. They have referred to it as an allegation.

Mr. MAYER. No, I wouldn't think that would be a very fair procedure. I don't think this girl's proficiency was substandard because according to the grading rank which goes from one to nine, to get a mark of five she's got to excel 40 percent of all other Marines.

Now that is a lot of Marines, and what is substandard about that?

Mr. WATERS. You have indicated she was only in the Corps for approximately 10 months?

Mr. MAYER. That is right.

Mr. WATERS. Thank you.

Thank you, Mr. Chairman.

Senator ERVIN. The committee is grateful to you for appearing before the committee and giving us the benefit of your experience and observation on this very important subject.

Mr. MAYER. Thank you very much, Senator and gentlemen.

Mr. CREECH. Mr. Chairman, the next witness is Mr. Shelden D. Elliott, professor of law, New York University Law School. Mr. Elliott is representing the American Bar Association.

## STATEMENT OF SHELDEN D. ELLIOTT, PROFESSOR OF LAW, NEW YORK UNIVERSITY, REPRESENTING THE AMERICAN BAR ASSOCIATION

Mr. ELLIOTT. Mr. Chairman, it is with considerable trepidation that I follow these knowledgeable witnesses who have preceded me, particularly the distinguished Congressman from my old home city of Long Beach.

If you will bear with me, I have a very brief statement. I have sent copies ahead but it is only four paragraphs and I think it may lay the groundwork for possible questions.

I can't assume the knowledge firsthand that these others have, but it has been cleared with the American Bar Association committee and others.

Senator ERVIN. The committee is glad to have you with us.

Mr. ELLIOTT. Thank you sir. My name is Shelden D. Elliott and I am a professor of law at New York University and director of the Institute of Judicial Administration.

I am also currently serving as chairman of the American Bar Association's special committee on military justice and am a member of the association's council of the section on legal education and admissions to the bar.

The present special committee on military justice met in Washington on December 9, 1961, and reviewed the American Bar Association's compilation of "Policy Resolutions on Federal Legislation and National Issues, 1936–61" with special reference to those resolutions coming within the purview of the special committee.

As indicated in the attached interim report of the special committee (A), certain of the resolutions, adopted during the period of 1948 to 1951, were rendered obsolete by the enactment of the Uniform Code of Military Justice.

The remaining three resolutions, adopted in 1958, 1959, and 1960, respectively, represent, in the committee's opinion, the American Bar Association's current point of view. The 1960 resolution disapproving the American Legion bill, and approving the Department of Defense bill, H.R. 3387, as set forth in the American Bar Association's compilation, is attached to this statement as an exhibit (B). Also attached is a list of the current membership of the special committee on military justice and of its advisory committee (C).

I should like to comment briefly on another aspect of military justice with which I am somewhat familiar, namely the Judge Advocate General's School, U.S. Army, at Charlottesville, Va.

As fellow members of the American Bar Association's Council of the Section of Legal Education, the late Judge Paul Brosman of the Court of Military Appeals and I were designated to visit the school and to report to the council on its administration, curriculum, facilities, and program.

Following our visit, report, and council action, the House of Delegates of the American Bar Association adopted a resolution in February 1955, approving the school's graduate program as being in compliance with the association's standards of legal education.

I have since visited the school both under its first commandant, now Maj. Gen. Charles L. Decker, the Judge Advocate General, U.S. Army, and his successor commandants, on a number of occasions and have been constantly impressed with the outstanding excellence of its program of providing instruction and training for military lawyers.

As a legal educator, I feel that the school is one of the fundamental safeguards and assurances of competent legal representation in problems pertaining to the military services and their members.

Finally, as director of the Institute of Judicial Administration, an organzation which for the past 9 years has been actively and intensively concerned with the structure, operation, and procedure of courts throughout the United States and in some 60 foreign countries, I should like to add a few words of commendation on the Army's field judiciary system, inaugurated in 1958.

It is providing both expertise and independence in the trial of general courts-martial and is setting an example which represents high standards for counterpart civilian criminal courts.

It was my privilege to attend the First Army Judicial Conference, held at Charlottesville in September 1961, participated in by a number of judicial officers and members of boards of review, and I was truly impressed both with the nature of their discussions and with the caliber of those present.

I feel that this development, too, augurs well for the future of military justice in the U.S. Military Establishment.

(The report referred to follows:)

EXHIBIT A

INTERIM REPORT OF AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON MILITARY JUSTICE, JANUARY 10, 1962

The American Bar Association Special Committee on Military Justice met in Washington on December 9, 1961, and reviewed the policy resolutions on Federal legislation and national issues with respect to military justice. These appear at pages 232 to 239 of the consolidated report. Our committee's recommendations with respect to them are as follows:

Resolution of 1948, separating from command and investing final reviewing authority in the Judge Advocate General's Department. This resolution is obsolete and should be deleted (p. 232).

Resolution of 1949, separating from command and investing final reviewing authority in the Judge Advocate General's Department. This resolution is obsolete and should be deleted (p. 232).

Resolution of 1950, recommending elimination of command control of courts-martial with proper representatives of U.S. Court of Military Appeals as established by the Uniform Code of Military Justice. This resolution is obsolete and should be deleted (p. 234).

Resolution of 1951 on separation of command from control of courts-martial. This resolution is obsolete and should be deleted (p. 236).

(The above resolutions were considered to be obsolete as the present Uniform Code of Military Justice incorporates the essential elements of such resolutions.)

Resolution of 1958, recommending service of subpenas by military authorities upon civilians and the making of bodily arrests in such instances by the U.S. marshals. This resolution should remain in effect as it represents the current point of view (p. 237).

Resolution of 1959, supporting a bill entitled "A bill to amend title 10, United States Code as related to the Uniform Code of Military Justice (DOD bill)." This resolution should remain in effect as it represents the current point of view (p. 237).

Resolution of 1960, disapproving the American Legion bill and endorsing the Department of Defense bill H.R. 3387. This resolution should remain in effect as it represents the current point of view (p. 238).

In addition, one of the specific provisions of the Department of Defense bill, previously approved by the American Bar Association; namely, the amendment adding article 123A, was separately enacted by Congress in 1961. It relates to bad check offenses, and was enacted on October 4, 1961, to become effective 5 months thereafter, as Public Law 87-385.

SHELDEN D. ELLIOTT,
*Chairman, Committee on Military Justice.*

---

EXHIBIT B

POLICY RESOLUTIONS ON FEDERAL LEGISLATION AND NATIONAL ISSUES, 1936-61
MILITARY JUSTICE (P. 238)

* * * * * * *

1960

(Disapproval of American Legion bill and endorsement of Department of Defense bill, H.R. 3387:)

*Resolved*, that the house of delegates of the association reject the endorsement of H.R. 3455 and the basic principles of the bill sponsored by the American

Legion and that the house reaffirms its endorsement of the Department of Defense bill H.R. 3387, which has the approval of the services, the Department of the Treasury, and the U.S. Court of Military Appeals, with the further recommendation that the latter bill be implemented through the recommendation of the Department of Defense, as a result of analysis and study being currently conducted, and that the special committee be authorized to appear before committees of Congress to present the views of the association upon the proposed legislation—60:138.

NOTE.—American Legion bill (H.R. 3455) entitled, "A bill to amend title 10, United States Code, in order to improve the administration of justice and discipline in the Armed Forces." This bill is designed to accomplish two basic objectives:

1. To insure that every court-martial, regardless of type, has a qualified law officer thereon and that accused has the right to services of counsel; and
2. The creation of an atmosphere completely free from any possibility of command control.

Department of Defense bill, H.R. 3387. A legislative proposal providing omnibus amendments to the Uniform Code of Military Justice. This was the product of several years' study by Defense Department, Treasury, and the Court of Military Appeals. It provides for prompt and efficient administration of justice, both from the standpoint of individual and the Government and is urged by the Defense Department.

The objective of the American Legion bill and the Department of Defense bill were identical, in that both were designed for fair treatment and consideration. The vital difference was in the methods of accomplishing those objectives.

The American Legion bill overemphasized the adversary system of trial in minor offenses, whereas, the Defense Department bill gave the disciplinary responsibility to the commanding officer. It was also felt that the Legion bill was too drastic in its emphasis on the position of command as controlling the activity of judge advocates in the service. However, an orderly improvement in the latter area would be considered under the Defense bill. The Leigon bill took a great deal of authority from military personnel by placing articles 118 to 132 of the Military Code more in civilian hands. The Defense bill would leave treatment of servicemen within the discretionary jurisdiction of the military. A tremendous increase in the Judge Advocate Departments of the services would be necessary to implement the Legion bill—60: 137–138.

---

## EXHIBIT C

### MILITARY JUSTICE COMMITTEE

Shelden D. Elliott, chairman, 40 Washington Square South, New York, N.Y.
Lynn M. Ewing, Jr., 223 West Cherry Street, Nevada, Mo.
James Garnett, staff judge advocate, Fort Riley, Kans.
Mason Ladd, State University of Iowa, Iowa City, Iowa.
Joseph A. McClain, Jr., First National Bank Building, Tampa, Fla.
Joseph F. O'Connell, Jr., 31 Milk Street, Boston, Mass.
Franklin Riter, Kearns Building, Salt Lake City, Utah.

#### ADVISORY COMMITTEE

Maj. Gen. Charles L. Decker, Judge Advocate General of the Army, Department of the Army, Washington, D.C.
Rear Adm. William C. Mott, Judge Advocate General of the Navy, Department of the Navy, Washington, D.C.
Maj. Gen. Albert M. Kuhfeld, Judge Advocate General of the Air Force, Department of the Air Force, Washington, D.C.
Lt. Col. Robert A .Scherr, U.S. Marine Corps, Washington, D.C.
Robert H. Knight, General Counsel, Department of the Treasury, Washington, D.C.

Senator ERVIN. I would like to say that my son, who is a member of the judge advocates of the 3d Division, National Guard, of North Carolina, attended that school about a year or so ago. When I visited

him at that time, I was very much impressed by the work they were doing at the Judge Advocate General's school in Charlottesville.

Mr. ELLIOTT. I am sure he appreciates the benefit of the training they are trying to provide down there.

We in law school do our best to lay the groundwork. But for military justice, the graduate program that they are giving, I think, is impressively doing a job which will benefit the administration of military justice.

Senator ERVIN. I reached that conclusion although my opportunity to know exactly what the school was doing was less than yours.

Mr. ELLIOTT. Thank you.

Senator ERVIN. Do you have some questions?

Mr. CREECH. Yes, Mr. Chairman.

Mr. Elliott, your biographical statement is very modest and very brief.

I wonder, sir, have you also had experience in the Judge Advocate General Corps?

Mr. ELLIOTT. Experience in the sense of actual practice as a military lawyer, no.

Senator Carroll, I think, is a member of this committee, and he and I both entered the Army through the school of military government.

Through my services with Headquarters, 7th Army, and then with the 103d Infantry Division, I was not in a judge advocate position. Thereafter in the Reserves my duties were primarily executive, either as G–3 or as Chief of Staff of a Reserve logistical command.

So, I can't frankly bring the knowledge that the previous witnesses have brought to you of firsthand contact in the — either the discharge problem or the trial of cases.

Now, with that disclaimer which the Senator indicated in his letter so kindly, I have kept in touch with military justice from the standpoint of the operations of the Judge Advocate General's Office, U.S. Army, from the standpoint of the Judge Advocate General's school which I have just indicated and from some review of the decisions of the Court of Military Appeals. But on that voir dire I think you will probably feel that I could not give direct answers to some of the questions you have asked some of the previous witnesses.

I rely on the statistical information which they have so adequately supplied.

Mr. CREECH. Sir, in your statement you incorporate the 1960 resolution disapproving the American Legion bill and approving the Defense Department bill.

Mr. ELLIOTT. Yes, sir.

Mr. CREECH. And, of course, this policy resolution gives very succinctly the reasons for this decision without a great deal of specification.

I wonder, sir, if you would care to elaborate?

Mr. ELLIOTT. I would, except again I have to give a plea of confession and avoidance. I was not in the house of delegates nor was I a member of the committee at the time this action was taken, Mr. Creech. I was out of the country at the time, in fact.

The American Legion bill came up in the summer meeting of 1959, and I was then a member of the house of delegates and I

moved as representative of the Judge Advocates Association, I moved at that time that the matter go over study.

Dean Mason Ladd of the University of Iowa, who was then chairman of the Committee on Military Justice, and Dean John Ritchie of Northwestern, who was then a delegate to the association's house of delegates, fought the battle, and I was out of the country, and consequently, do not have the full benefit of what went on except as I read it and as you have probably read it in the reports of the February proceedings of 1960.

I did not actually become a member of this committee until last August, after the midwinter meeting, and President Satterfield asked me to serve and so I have to bypass the actual action that was taken.

All I did was to suggest a possible holding tactic until we could study it. The study was done by others, and the specific reasons for the action I could not personally testify to.

Mr. CREECH. Thank you, sir.

Sir, the subcommittee has received from previous witnesses a great deal of information relating to the Uniform Code.

Among the statements which have been made here is one that the code is unwieldy, and that during time of war it probably would not work well. Also, there has been the suggestion that it would be in the best interests of military justice to repeal the code, abolish the Court of Military Appeals, and revert to the situation which existed under the previous Elston Act.

I wonder if you would care to address any remarks to these statements?

Mr. ELLIOTT. With the same caveat that I offered earlier; that is, that my experience has been outside of the actual practice of military law, but on the basis of considerable work that I have done in civilian procedure, both civil and criminal, I think the code represents a very effective and workmanlike job.

I can't say it is perfect, but I can't point even to the Federal Rules of Criminal Procedure as being absolutely perfect.

I would counterpose this question: Would any of our civilian codes work in the event of a national emergency or disaster?

This is a problem which some of us are now currently considering.

I think the Code of Military Justice, just by basis of comparison with its civilian counterparts, represents a thoughtful, and I think workable, effort toward providing fair administration of justice under peacetime and wartime considerations.

Mr. CREECH. Based on your long experience as a former member of the armed services, as a practitioner, as a law professor, and as a member of the American Bar Association's Committee on Military Justice, has your study indicated to you any trends in the development of military justice? By that I mean, sir, have you perceived any improvement through the years, or conversely have you observed any lack of improvement?

Mr. ELLIOTT. Again, speaking as an outsider, Mr. Creech, going back to the early decisions of Court of Military Appeals, the code as interpreted and applied has come to achieve to a large degree the objectives with which the American Bar Association was concerned before its adoption. I am thinking particularly of the command control problem, and I go back to some of the opinions, more particularly the late Judge Brosman.

If you combine those two, that is, judicial interpretation of the code, and the language which is being interpreted, then I think it comes pretty well within the purview of what the American Bar Association, and I am speaking without authority for them, what they hoped for in those resolutions of 1948 and later.

Mr. CREECH. Sir, has your study produced evidence, at this time or recently, of command influence or command control?

Mr. ELLIOTT. No, sir, I have only the reports, copies of which you have in response to the questionnaire which the Senator sent out, giving specific illustrations. Of course, that would be hearsay as far as I am concerned. I have no firsthand information on it.

Mr. CREECH. Sir, has your committee investigated the administrative discharges? Have you looked into the procedure?

Mr. ELLIOTT. Not during the brief period, sir, in which I have been chairman of the committee, and I don't find anything in the records that were transmitted to me by the previous chairman that indicates that they have considered this problem of administrative discharges.

Again, I tried to make that point at the outset. It may be that they will wish to take it up; we have a meeting scheduled for May of this year here in Washington. But so far I have nothing in the record nor in the minutes of any meetings which I have attended that apply to the subject.

Mr. CREECH. And your present committee has not on its own gone into this?

Mr. ELLIOTT. Not as a committee, no.

Mr. CREECH. Do you have, sir, any views as an individual on these administrative discharges?

Mr. ELLIOTT. I do not. I have listened with a great deal of interest to the testimony this morning. These people who have had firsthand contact with that can speak much more effectively than I. I have read again the answers to the questionnaire which Senator Ervin sent out, and I would simply fall back on those as my authority for what the statistical information is, and what the procedures are.

Mr. CREECH. I noted in your statement that you felt that the Judge Advocate Generals School of the Army was doing a commendable job, and I wonder, sir, if you have had an occasion to review the judiciary pilot program which the Navy has had for approximately a year?

Mr. ELLIOTT. You are speaking about the field judiciary program of the Navy?

Mr. CREECH. Yes.

Mr. ELLIOTT. Or the training program.

Mr. CREECH. As I understand it, it is a training program.

Mr. ELLIOTT. Yes. The Judge Advocate Generals School is a separate entity and when I spoke of that in one paragraph I was speaking as an educator or at least hopefully as an educator. In connection with the field judiciary program, the Army started in 1958. As I understand it, though I have had no firsthand observation, the Navy started as of about January 1, 1961, with its pilot field judiciary program, that is, there were two areas, three possibly, in which the Navy initiated it.

Last summer I inquired as to the experience over the then about 7 months that the Navy had had, and the report I got was that they were favorably impressed. As my own statement indicates, the Army field judiciary program which has now been in existence for a considerably

longer period, is certainly proving its virtue, and I have worked with judiciary systems of 50 States now, and have, I think, a little basis of comparison with civilian judiciary systems.

I would like to suggest that there are valuable lessons to be learned from what the Army has done, and how it has done it in the effective, efficient administration of determination of military disputes, I will put it on a civilian counterpart basis. If we had the assurance of caliber of adjudicator, and the flexibility of administration in some of our civilian systems congestion, delay, problems of that sort, I think could be reduced considerably. I am not picking any jurisdiction by way of invidious comparison, you understand.

Mr. CREECH. Sir, you mentioned among other things, that you feel that this field judiciary system is providing independence in the trial of general courts-martial. Has your study, your investigation, indicated to you whether this same type of system, or some very similar judiciary system, might be applicable to or might be used by the Navy?

Mr. ELLIOTT. Well, I should think it could. I don't want to take over Admiral Mott's job, and speak for him because as you know, my branch of the service is the Army.

There may be some physical or technical factors entering in, but if the pilot program proves up as I think it will, then I think the Navy might well expand it.

Mr. CREECH. You will be interested in knowing that Admiral Mott is going to appear here again later this afternoon and we propose to ask him about this also.

Mr. ELLIOTT. And I would defer to his superior rank and judgment.

Mr. CREECH. I wonder, sir, what would be your view with regard to the Air Force? The reason I am posing these questions is to inquire as to whether you feel there are sufficient differences among the services so that this type of field judiciary system which the Army has developed will not be applicable or will not be as effective in the other services?

Mr. ELLIOTT. Well, speaking purely as, shall we say, a judicial administrator because that is the hat I am also wearing here, I see no reason why it shouldn't apply with equal efficacy on the Air Force but again General Kuhfeld is the one who could offer the authoritative views on that.

Mr. CREECH. I presume from what you said, sir, that your feeling is that the field judiciary will provide the same beneficial results for each of the services that you feel the Army has received?

Mr. ELLIOTT. I think it should, yes, Mr. Creech.

Mr. CREECH. Sir, has your committee gone into the types of discharges which are used by the military service?

Have you studied them with a view to determining if the five discharges which are now used are sufficient, or whether there should be fewer types of discharges?

Have you gone into that subject matter?

Mr. ELLIOTT. I believe I answered that or tried to answer that earlier, Mr. Creech. During my brief tenure as chairman of the committee, as well as in the records which have come to me, I have no evidence, I have no knowledge of that. It has not been considered at our recent meetings and I do not see any evidence that

it has been considered in recent meetings, the records of which have been forwarded to me.

Mr. CREECH. Do you have any views that you would care to make known to the subcommittee?

Mr. ELLIOTT. No, I do not, sir, because my experience as I have indicated earlier has been in other branches of the service.

Mr. CREECH. I see.

Mr. ELLIOTT. That is in other activities than in connection with the Judge Advocate General's Corps.

Mr. CREECH. Would you care to comment on the types of courts-martial?

Mr. ELLIOTT. I am in sympathy with the action the American Bar Association took in supporting the Department of Defense bill, and I spoke in support of it at the time it came up as I indicated in 1959, and to that extent I am in accord with it, shall we say, something of a simplification of the court-martial structure.

Personally, and I am speaking not now from either the chairmanship of the committee or in a representative capacity, I should like to see a law-trained man in a special court-martial, I should like to see the possibility of a one-man general court if, with appropriate advice of counsel, elected by the accused.

As to summary, I agree, I think, with some of the others who have spoken that it might well be displaced and as to article 15 authorize some enlargement of jurisdiction there in lieu of the summary.

Senator ERVIN. If I may interrupt at this point?

Mr. ELLIOTT. Yes, Senator.

Senator ERVIN. I infer from your statement concerning the attitude of your committee that your committee recognizes a distinction between the place which the administration of justice occupies in civilian life and the place it occupies in the armed service. The administration of justice is one of the primary functions of any civil government and may be classified as perhaps its most sacred function. Whereas the administration of justice in the armed services is designed to be disciplinary in purpose or to lay down the basis for separation of persons unsuitable or unfit for military service from the armed services. Is that not true?

Mr. ELLIOTT. I am not sure, Senator, I could speak for the other members of the committee, because this has not been discussed specifically.

If you will let me speak as an individual, I think that the administration of justice in the armed services should serve the same high purpose that it serves in civilian life, that is to see that due process of law is given to each person who appears before a military tribunal.

Now, what the ultimate result of that is, either in civilian life or military life, is, I think, something to be reached by orderly procedures, fair procedures, and with all of the safeguards that we can give them.

Senator ERVIN. I agree that everybody in every station ought to have at least the basic fundamentals of due process; I think that is unquestioned.

Mr. ELLIOTT. Right.

Senator ERVIN. I notice that the Department of Defense bill seeks to place considerable emphasis upon the use of disciplinary measures

in lesser offenses as contrasted with judicial procedures. I infer that your committee has considered that and stands for approval of the Department of Defense bill because of that.

Mr. ELLIOTT. I assume this is so, Senator. As I said, the committee itself made its recommendation to the house of delegates in advance of the February 1960 meeting at which time I was out of the country, and that they gave due consideration to that provision. Knowing the membership of the committee at that time, I think I can answer with assurance that they did.

Senator ERVIN. Now, of course, the people that the military service has to deal with ordinarily are fairly young people.

Mr. ELLIOTT. Yes, sir.

Senator ERVIN. Who have a lot of energy and a lot of that very precious possession of youth. Do you agree with me in the observation that there is a considerable amount of wisdom in the feeling of the services that many of their minor infractions should be dealt with from the standpoint of discipline, rather than through the agency of judicial proceedings, because of the fact that there is no record made when discipline is enforced without judicial proceedings.

Mr. ELLIOTT. Well, I am concerned with the matter of the record and I think if it can be disposed of effectively for the benefit of the service without putting a blot on the lad's escutcheon, that is the way to do it. We don't have, Senator, and I have been groping for it for some time now, a counterpart situation in civilian life except possibly, let us say, in intraindustry procedures for dealing with its employees short of judicial action. But it seems to me that anything that will keep a stigma from the enlisted man's or the officer's record, up to the point where the conduct is severely adverse to our mores, anything up to that point probably should be dealt with within the establishment and not go down permanently on the record as something that would be held against him in later life.

Senator ERVIN. In the Army, they have what they call company punishment, as you know.

Mr. ELLIOTT. Yes.

Senator ERVIN. And ordinarily the company commander who can administer it gives the supposed offender the option of choosing whether to take company punishment or a summary court. Do you agree that this option is a very good thing——

Mr. ELLIOTT. If you continue the summary court; yes. But if we dispose of it or dispense with it, then I think he still ought to be given the option as between that and some intermediate or higher court. I think this is a fairer safeguard.

Senator ERVIN. Now, during the course of our testimony one or more witnesses have expressed the view that the Uniform Code of Military Justice should be repealed because, in the opinion of such witnesses, it may not operate in an all-out war. It seems to me—and I would like to know whether you agree or disagree with me—that, assuming most of the testimony indicates that the Uniform Code of Military Justice has operated very well under present conditions, which can be described either as peacetime or cold war, it is a very unsound argument that we should abolish something which works very well in peace merely because it may not work very well in war.

Mr. ELLIOTT. Mr. Chairman, in the event of an all-out war, will any code of procedure work? It depends on how all-out it is, but if anything will work, including our Federal Rules of Civil Procedure or Federal Rules of Criminal Procedure, then I feel equal confidence in the workability of the Uniform Code of Military Justice.

Senator ERVIN. Even if this assumption on the part of these particular witnesses were true, it seems to me that it would not be wise to abolish it in peacetime for fear it might not work in war?

Mr. ELLIOTT. Speaking as an individual, Senator, I concur with your views.

Mr. CREECH. The Powell committee recommended that the Uniform Code be amended to eliminate jurisdiction over retired members not on active duty. What are your views with regard to that recommendation?

Mr. ELLIOTT. I have no personal views. I may soon be a retired member not on active duty and I may have different views then, Mr. Creech, but at the moment I don't have any profound thoughts on it.

Mr. EVERETT. Mr. Elliott, in your capacity as director of the Institute of Judicial Administration, have you discovered whether there is any relationship between specialization of function and experience on the part of judges and their efficiency in doing the job called for?

Mr. ELLIOTT. This is a difficult question in the sense that I have been advocating what I have called the integrated court structure. Senator Ervin has served in the courts and I think he would agree that a judge can try a civil case one day and a criminal case the next and a probate case the next.

However, I do think that some judges do have proficiency in certain areas, and I think a competent presiding judge, managing the court, will assign the round peg to the round hole wherever it is feasible in terms of manpower.

Now, in the military, at least so far as I have observed it, I think any one of the members of the field judiciary would be competent to try or to serve as law officer in any case coming within the purview of the code, and if you are thinking of specialization in courts-martial, then I don't believe it would be necessary.

You do get into areas of legal activity, such as international law, taxation, procurement where you might want to develop specialists.

Mr. EVERETT. What I was thinking of more was whether on the basis of your observation of numerous judicial systems, you would think that a specialized law officer, a military judge as in the Army field judiciary system, would tend to be more, less, or equally efficient as, let's say, the law officer in the Air Force, who may be a law officer one day, a trial counsel the next day, a claims officer the third day and a defense counsel the fourth day?

Mr. ELLIOTT. Well, to the extent, Mr. Everett, that the volume of judicial business warrants it, that is the volume of adjudicative business warrants it, I think a man could well be assigned full time to that. I think it would make for improved efficiency on his part, and would insure the potential of independence that we are, I think, to some degree concerned with here.

Now, if the volume of business doesn't warrant it that is something else again, but you can adapt the number of "judicial officers" to the

potential judicial business that the branch of the service requires.

Mr. EVERETT. Did you confer with the Army in connection with its setting up of the field judiciary?

Mr. ELLIOTT. Not with the setting up of the field judiciary. I did have some connection with the first Army judicial conference which was held in September, as I indicated, of 1961. Having attended judicial conferences on the civilian side, and I don't say that I can take any credit for it, but the first order that General Decker, as the Judge Advocate General of the Army issued when he took office on January 1, 1961, was to establish the judicial conference, and the September conference emanated from it.

Now remember, that the field judiciary had already been established in 1958. There had been, prior to the Charlottesville conference area judicial conferences. You remember the Army is divided into areas with circuits within those areas and I had the opportunity to review the transcripts of some of those area judicial conferences, in which the judicial officers in the areas around the globe exchanged their views on how to do it.

You get this kind of problem, what do you do, and so on. And it seemed to me there was a great deal of valuable interchange there, and then my opportunity to attend the meeting in Charlottesville confirmed this impression when they came from the areas into a central group with members of the boards of review, and exchanged on an even broader basis their experiences and their recommendations and their suggestions.

Mr. EVERETT. It was suggested by one or two of the witnesses who testified earlier that, because of the peculiarities of each service, it might be difficult for an Army law officer to try a Navy case or an Air Force law officer to try an Army case.

Would you subscribe to this impression or do you think there is enough unformity to permit this?

Mr. ELLIOTT. Speaking purely as an individual again I don't think there is that much difference among the problems arising under the same Uniform Code of Military Justice involving service personnel. I can't confirm this except from observation, for example, in Turkey and some of the foreign countries where you have several services in the area, but one judge advocate officer advising on legal assistance and other matters for the several services there combined, I haven't found that it didn't work, at least that was my impression.

Mr. EVERETT. You testified about the quality of military justice as compared with counterpart civilian justice.

In light of your observations of both systems, how would you, as an individual, feel about some of the proposals, including those of American Legion, that all civil-type offenses be turned over to civilian courts in order to better protect the rights of the serviceman.

Do you feel this is a sound position?

Mr. ELLIOTT. I will have to stand with my committee on the position in support of the Department of Defense bill and in opposition to the American Legion bill.

I have great confidence in the administration of military justice as it is now set up, particularly if it continues in the trend that I have just mentioned, of competent individuals doing the adjudicating, the training of personnel at Charlottesville and counterpart schools for

military assistance, legal advice, and so on. I want to switch over to the other side for just a minute.

We have good civilian courts, we have mediocre civilian courts, and we have poor civilian courts. And I can't offer a guarantee that transplanting the adjudication of the rights of individuals from one system to another would be an improvement if you put it on the civilian side.

It would have to be put in the right court.

Finally, one of our continuing complexities is congestion and delay. I am not advocating administrative tribunals as a substitute for pure judicial determination of disputes between individual and individual or between Government and individual.

I am, however, concerned that if we can provide a good adjudicative body, specialized as it may be, to take care of these things then let them do it and not add to the load which is getting tremendous, of our civilian courts.

That is my civilian answer to your question.

Mr. EVERETT. In connection with the right to speedy trial, has it been your experience that criminal cases are tried more rapidly in the service or in civilian courts?

Mr. ELLIOTT. Well, I only have the figures which vary widely from jurisdiction to jurisdiction. I think if you would lay the civilian experience alongside the military tribunals, the military tribunals will stand up pretty well. It depends on how long a period you take, whether you start with the apprehension all the way through to the final determination by the Court of Military Appeals, but on the civilian side if you take the time from arrest until the time of an ultimate disposition by the U.S. Supreme Court, I don't think you would find that the military suffers by comparison.

Mr. EVERETT. With reference to the Army field judiciary system, could you see any fundamental objection to extending that system, as it were, to the administrative area, so that a qualified military judge, if I may use that term, of maturity and experience, would be available to pass on the legal issues arising in connection with the discharge of a soldier, sailor or airman with an undesirable discharge?

Mr. ELLIOTT. You are speaking of a military judge or putting this over in the civilian field?

Mr. EVERETT. Well, I am speaking of someone similar to the law officer in the Army.

Mr. ELLIOTT. Personally I don't know, and I don't purport to speak for my committee or for a branch of the service on that.

Mr. EVERETT. You refer to the Judge Advocate General's school at Charlottesville.

Is there any similar school or educational effort being made by the other services?

Mr. ELLIOTT. I do not know of any, Mr. Everett, at least none that I think has the comprehensiveness and thorough program that the Judge Advocate General's school at Charlottesville has.

Mr. EVERETT. My last question is this: Professor Elliott, I am sure in your study of judicial administration you have become acquainted with different practices as to guilty pleas in civilian life. How does the guilty plea practice in the courts that you have studied compare

with that in the Army and the Navy in terms of protection of the rights of the accused person?

Mr. ELLIOTT. This is a hard question to answer, Mr. Everett. I have had a study recently done of the minor courts in one of our States in which I suspect the guilty plea is a considerably abused device and this is particularly true in metropolitan areas where the individual who is the accused in civilian life does not speak our language, doesn't understand our customs, is perhaps apt to be intimidated.

In other jurisdictions, I think that the conscientious prosecuting authorities do take care that the guilty plea is entered knowingly.

Now, in the spectrum between those two, I think the military services would stand pretty high. I don't think, at least from the information I have received, that there is anything to be compared disfavorably with the civilian practice.

Mr. EVERETT. That is all.

Senator ERVIN. The committee is deeply grateful to you for your appearance here and for giving the committee the benefit of your experience and the observations on these very important matters.

We will stand in recess until 2:30.

Mr. ELLIOTT. Thank you, Senator.

(Whereupon, at 1:20 p.m., the committee recessed, to reconvene at 2:30 p.m. the same day.)

AFTERNOON SESSION

Mr. CREECH. Pursuant to the instruction of the chairman, we shall proceed at this time.

The first witness this afternoon will be Mr. Charles Peckarsky, Assistant Director of Policy and Planning, Veterans' Benefits, Veterans' Administration, accompanied by Mr. Timothy F. Daley, Assistant General Counsel of the Veterans' Administration.

## STATEMENT OF CHARLES PECKARSKY, ASSISTANT DIRECTOR, POLICY AND PLANNING, DEPARTMENT OF VETERANS' BENEFITS, VETERANS' ADMINISTRATION; ACCOMPANIED BY TIMOTHY F. DALEY, ASSISTANT GENERAL COUNSEL; HARRY LERNER, STAFF ATTORNEY, OFFICE OF GENERAL COUNSEL; AND O. B. CALLAWAY, LEGAL CONSULTANT, POLICY AND PLANNING, DEPARTMENT OF VETERANS' BENEFITS

Mr. PECKARSKY. Mr. Chairman and members of the committee, with me today are Mr. Timothy F. Daley, Assistant General Counsel; Mr. Harry Lerner, an attorney in the Office of the General Counsel; and Mr. O. B. Callaway, who is legal consultant to our policy staff.

We are happy to appear today to give you the information that your committee has requested concerning the effects on veterans' benefits of the five types of military discharges, and my statement will follow, in general, the report of January 29, 1962, that the Administrator rendered to your committee.

The discharge or dismissal from the service is given by the Service Department, but its effect with respect to veterans' benefits is governed

by the provisions of title 38 of the United States Code on the general subject of "Veterans' Benefits."

Section 101, subdivision (2) of that title, defines a veteran as:

A person who served in the active military, naval, or air service and who was discharged or released therefrom under conditions other than dishonorable.

The key words here are "discharged or released under conditions other than dishonorable." A serviceman who meets this definition may nevertheless be barred from benefits by the provisions of section 3103 of title 38 which provides in five categories for certain discharges to be a bar to benefits: The discharge or dismissal by sentence of a general court-martial of any person from the Armed Forces, or the discharge of any person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority; or as a deserter or of an officer by the acceptance of his resignation for the good of the service or, except as later provided in the same section, the discharge of any individual during a period of hostilities as an alien, and these shall bar all rights of any such person under laws administered by the Veterans' Administration based upon the period of service from which discharged or dismissed.

Now, there are two qualifications to this general rule. First, if it is established to the satisfaction of the Administrator that at the time of the commission of an offense leading to his court-martial discharge or resignation, any person was insane, such person shall not be precluded from benefits under laws administered by the Veterans' Administration based upon the period of service in which he was separated.

The next exception pertains to the enemy alien discharges, and provides that subsection (a) shall not apply to any alien whose service was honest and faithful, and who was not discharged on his own application or solicitation as an alien. No individual shall be considered as having been discharged on his own application or solicitation as an alien in the absence of affirmative evidence establishing that he was so discharged.

These prohibitions do not apply to war risk insurance, Government or national service life insurance policies, since they are based on contract and are not gratuitous benefits.

In the event of discharge of any type for one of the reasons I have just given, benefits other than insurance are barred unless the case is within the provisions of the exceptions; that is, the one regarding insanity and the exception regarding aliens.

Rights to national life insurance can be forfeited under section 711 of title 38 where the individual is guilty of mutiny, treason, spying or desertion or who, because of conscientious objections, refused to perform service in the Armed Forces of the United States, or refused to wear the uniform.

The service disabled veterans' insurance program provided under section 722 of title 38 prescribes that such insurance is not available to an otherwise eligible person unless he was released under other than dishonorable conditions.

Now, subject to these statutory qualifications, the five types of service discharges are treated as follows:

1. An honorable discharge entitles an individual to benefits, if he is otherwise entitled.

2. A general discharge has the same effect as an honorable discharge and, perhaps, it would be well to repeat, and in view of what I heard this morning, that there is no difference as far as veterans' benefits between the effect of a general discharge and that of an honorable discharge. Both confer full benefits.

(Senator Ervin is now presiding.)

Mr. PECKARSKY. Three. An undesirable discharge is a bar to benefits if issued for one of the following reasons, subject, of course, to the exception if the veteran was insane at the time, and that is to escape trial by general court-martial; because of willful and persistent misconduct, because of an offense involving moral turpitude or mutiny or spying; or because of an overt act of homosexuality. A bad conduct discharge is treated under our rules the same as an undesirable discharge; and a dishonorable discharge is generally, a bar to all benefits.

We have previously submitted to the committee copies of our regulations Nos. 1012 and 1354 which deal with the subject, plus copies of chapter 14 of our procedural manual used in the adjudication of our claims.

The regulations that we submitted are undergoing one revision with regard to 1012(7). That is the section regarding alien discharges to give effect to the law that was recently enacted which shifted the burden of proof to requiring an affirmative showing that the man solicited his discharge as an alien.

If there are any questions we will be glad to try to answer them.

(The prepared statement of Mr. Peckarsky follows:)

STATEMENT OF THE VETERANS' ADMINISTRATION

Mr. Chairman and members of the committee, we are happy to appear here today to give information to your committee regarding the effects on veterans benefits of the five types of military discharges. On January 29, 1962, the Administrator of Veterans' Affairs reported on the subject and my statement will follow that report.

The discharge or dismissal from the service is given by the service department, but the effect of that discharge or dismissal with respect to veterans benefits is governed by the provisions of title 38, United States Code: Veterans Benefits.

Section 101(2) of title 38 provides: "The term 'veteran' means a person who served in the active military, naval or air service and who was discharged or released therefrom under conditions other than dishonorable." The key words here are discharged or released "under conditions other than dishonorable." A serviceman who meets this definition may nevertheless be barred from benefits by the provisions of 38 U.S.C. 3103, as amended, which provides:

"(a) The discharge or dismissal by reason of the sentence of a general court-martial of any person from the Armed Forces, or the discharge of any such person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, or as a deserter, or of an officer by the acceptance of his resignation for the good of the service, or (except as provided in subsection (c)) the discharge of any individual during a period of hostilities as an alien, shall bar all rights of such person under laws administered by the Veterans' Administration based upon the period of service from which discharged or dismissed.

"(b) Notwithstanding subsection (a), if it is established to the satisfaction of the Administrator that, at the time of the commission of an offense leading to his court-martial, discharge, or resignation, any person was insane, such person shall not be precluded from benefits under laws administered by the Veterans' Administration based upon the period of service from which he was separated.

"(c) Subsection (a) shall not apply to any alien whose service was honest and faithful, and who was not discharged on his own application or solicitation as an alien. No individual shall be considered as having been discharged on his

own application or solicitation as an alien in the absence of affirmative evidence establishing that he was so discharged.

"(d) This section shall not apply to any war-risk insurance, Government (converted) or national service life insurance policy."

In the event of discharge of any type for one of the reasons given in section 3103(a), just quoted, benefits other than insurance are barred unless the case is within the provisions of 3103(b) regarding insanity or 3103(c) regarding aliens. Rights to national service life insurance are forfeited by 38 U.S.C. 711 where the individual is "guilty of mutiny, treason, spying, or desertion, or who, because of conscientious objections, refused to perform service in the Armed Forces of the United States or refused to wear the uniform * * *." The service-disabled veterans' insurance program provided under 38 U.S.C. 722 prescribes that such insurance is not available to an otherwise eligible person unless he was "released * * * under other than dishonorable conditions."

Subject to the foregoing, the five types of discharges are treated as follows:

1. An honorable discharge entitles an individual to benefits, if otherwise eligible.
2. A general discharge: Same as honorable.
3. An undesirable discharge is a bar to benefits if issued for one of the following reasons unless the individual was insane:
   (*a*) To escape trial by general court-martial;
   (*b*) Willful and persistent misconduct, an offense involving moral turpitude, or mutiny or spying;
   (*c*) Overt act of homosexuality.
4. A bad conduct discharge: same as undesirable.
5. A dishonorable discharge bars benefits.

I have with me copies of Veterans' Administration Regulations 1012 and 1354 dealing with the subject plus copies of chapter 14, Manual 21-1, which is used in our adjudication and which were furnished with Mr. Gleason's letter of January 29. A revision of Regulation 1012(7) regarding aliens is in process to bring it in line with Public Law 86-113. This recently liberalized 38 U.S.C. 3103 regarding aliens by providing that a discharge for alienage during hostilities would not be a bar to benefits unless there was affirmative evidence that the discharge was at the solicitation of the serviceman.

If there are any questions, I will be glad to try to answer them.

Senator ERVIN. Mr. Creech.

Mr. CREECH. Mr. Peckarsky, yesterday the subcommittee was told by a witness appearing here that in one case, at least, in which this gentleman appeared as counsel, I believe, it required 2 years for a recipient to have clarified his status under a general discharge so as to be declared eligible for VA educational benefits.

I wonder, sir, if you would care to comment on that.

Mr. PECKARSKY. It would be very difficult for me to comment on an individual case without actually seeing the case.

There is nothing in our rules nor in our procedures which do require or permit such a 2-year delay. It is required that we be informed through the presentation of a claim that there has been a change in the character of discharge and, possibly, a delay on the part of the claimant contributed to this. I cannot say that without seeing the case.

Mr. CREECH. But normally a general discharge is processed by the Veterans' Administration for benefits in the same way as if the individual had an honorable discharge?

Mr. PECKARSKY. Yes, sir. There is no distinction.

Mr. CREECH. Now, with regard to the undesirable discharge, you indicate that it is a bar to benefits if issued for one of certain reasons. Now, I presume that you do not go beyond the information which is contained on the face of the discharge; is that correct?

Mr. PECKARSKY. No, sir. Quite the contrary. With regard to undesirable and bad-conduct discharges, we are required to make a formal

determination, and we try to base this formal determination on all available facts in the case, so that the mere face of the discharge alone, unless it recited one of the specific acts such as mutiny or spying, which constitute a bar, would not be sufficient.

We would require that a report of the proccedings be sent to us or if this were pursuant to a special court-martial, we would ask for a transcript of the proceedings of the special court-marital. But in any case we would want a full picture of the evidence in the case.

Mr. CREECH. Do you also receive the reports from the boards in case of the administrative discharges?

Mr. PECKARSKY. Where they are pertinent to the case; yes, sir.

Mr. CREECH. And to what extent do you receive the record of the board; is it complete?

Mr. PECKARSKY. This would depend on what was necessary for our purposes. We instruct our people to follow all pertinent leads to develop what is essential to a determination of the case. In some instances an excerpt of the record is sufficient; in others the complete record is required.

Mr. CREECH. Sir, have there been cases in which a man had received an undesirable discharge—just for the sake of example, a man who had been found guilty of willful and persistent conduct by the military—and where the Veterans' Administration, upon its investigation, has found this was not the case?

Mr. PECKARSKY. Yes, sir.

Mr. CREECH. There have been such instances?

Mr. PECKARSKY. Yes, sir; many.

Mr. CREECH. Many.

What is the procedure followed in such cases? Do you just award that individual his veterans' benefits; is that right?

Mr. PECKARSKY. That is correct, sir.

Mr. CREECH. And in a situation such as you describe and of which you say there have been many cases, does he receive the same benefits then as though he had received a general or honorable discharge?

Mr. PECKARSKY. That is right, sir.

The law merely requires that his discharge be other than dishonorable. Once we have made the determination, as in the case you cite, this undesirable discharge was not under dishonorable conditions, he then is a fully qualified veteran and entitled to all benefits to which his service would entitle him regardless of whether he had received an honorable or a general discharge.

Mr. CREECH. I note in your statement under item 3, (a) "to escape trial by general court-martial," are there many of those cases which you review and make a finding, contrary to that of the military authorities?

Mr. PECKARSKY. No.

Mr. CREECH. Not in that category?

Mr. PECKARSKY. I do not recall that we received very many in that category, but I have no statistics in this area.

Mr. CREECH. How about offenses involving moral turpitude?

Mr. PECKARSKY. Is your question whether we receive many such or whether we reverse the service department determination?

Mr. CREECH. Whether you reverse the service determinations.

Mr. PECKARSKY. We make an independent determination.

Mr. CREECH. Yes. I realize you do make an independent determination.

Mr. PECKARSKY. Indeed.

Mr. CREECH. And in such cases are your determinations frequently different from those which were made by the military?

Mr. PECKARSKY. Yes, sir.

Mr. CREECH. Cases involving moral turpitude?

Mr. PECKARSKY. Yes, sir.

Mr. CREECH. I imagine—I do not know—you do not have too many cases involving mutiny or spying. But do you have any experience in that area, sir, that you would care to comment on?

Mr. PECKARSKY. I have never seen such a case in my experience with the VA, so I would be unable to offer a comment on this area.

Mr. CREECH. Now, sir, with regard to the homosexual or the individual accused of homosexuality, I note here that you have "overt act of homosexuality."

Mr. PECKARSKY. That is right, sir.

Mr. CREECH. Now, are there many instances in which your determination differs from that of the armed services?

Mr. PECKARSKY. Yes, sir; particularly where the armed service determination is based on homosexual tendencies; and our regulation now requires an affirmative showing of an overt act of homosexuality.

Mr. CREECH. How many of these cases—I am just curious, if you have ever made a study or anyone in your office has ever made a study—what percentage of the veterans who receive undesirable discharges apply for veterans benefits?

Mr. PECKARSKY. No, sir; we have not.

Mr. CREECH. So you really do not know what percentage of these cases you review?

Mr. PECKARSKY. No. I can tell you the percentage of initial claims of veterans that are filed each year, that involve a determination by us that discharge is a bar to benefits; but what that percentage constitutes of the total universe of those who have received other than honorable discharges, I would not know.

Mr. CREECH. Also it would not mean that because you have received the request for determination for any particular year, then this was the same year in which the discharge was had.

Mr. PECKARSKY. That is right, sir; because there is no limitation on the time of filing of the claim.

Mr. CREECH. Yes. I believe, with the exception of, perhaps, educational benefits, there are some limitations, aren't there?

Mr. PECKARSKY. Yes, and there also are with regard to loan guarantee. I was speaking specifically with regard to compensation and pension.

Mr. CREECH. I see.

Well, sir, your regulations then appear to be somewhat more liberal with regard to the determination of these criteria than the military, is that correct? Would you feel that was a correct statement, from your experience?

Mr. PECKARSKY. I would not like to compare them on the basis of liberality. I think rather we have different criteria to go by, perhaps because we have different aims and different legal structures that we are perforce compelled to abide by.

But I do not know that our criteria for willful misconduct are the same as that of the services. We wrote our own criteria, and we apply them.

Mr. CREECH. Have you compared the criteria which you have used with those of the various services?

Mr. PECKARSKY. No, sir; I have not.

Mr. CREECH. Do you have any figures which you could give the subcommittee on the percentage differences, in other words, the number of cases which come before you for review falling into these categories, the number or percentage in which you allow the individual to receive benefits?

Mr. PECKARSKY. I can give you figures that show from 1955 to 1961, for example, that we received on the average 211,333 original disability claims per year from live veterans; that we allowed 91,793 on the average; disallowed 119,540, and the number disallowed because their discharge is a bar is 1,843. That is nine-tenths of 1 percent of those claims filed, and about 1½ percent of the disallowed claims in which the character of the discharge is the reason for disallowance.

Senator ERVIN. What are your criteria which determine whether the crime for which a person has been convicted involves moral turpitude?

Mr. PECKARSKY. Generally, sir, those offenses which are evil in themselves, those which fall into the general category of felonies in most State courts.

Senator ERVIN. That is the general test then as to a felony, as a rule, in most States.

Mr. PECKARSKY. In most States.

Senator ERVIN. I notice you have in a separate category an act of overt homosexuality.

Mr. PECKARSKY. Yes, sir.

Senator ERVIN. Wouldn't that be a crime that involved moral turpitude?

Mr. PECKARSKY. Well, this is a matter on which the medical specialists speculated at great length, and I do not think we would want to get involved in that controversy as to whether it is a disease entity that impels homosexuality or whether it is immoral. Under our regulations overt acts of homosexuality constitute a bar to benefits if they result in the discharge.

Senator ERVIN. In other words, you keep from being involved in controversy, you make your regulation clear and you avoid the controversy.

Under the law of most States it is a felony, and I would think that, unless you could adopt the theory you have adopted, it would certainly involve moral turpitude. Thank you.

Mr. CREECH. Mr. Peckarsky, I would like to inquire again about these figures you have just given us. You indicated that less than 2 percent, I believe, of the cases which come before you are concerned with the type of discharge which the individual received as a bar to the receipt of veterans' benefits.

Mr. PECKARSKY. Every case that is in this category of 211,000 that I cited, the question of the character of discharge is at issue.

Of all these cases in which the question is at issue, we disallowed in the average year over the last 7 years less than 1 percent of all of

these cases, and it constituted the reason for disallowance in only 1.5 percent of all the cases that were disallowed.

Mr. CREECH. Do your figures indicate a breakdown as to these two general types that you have listed here under item 3?

Mr. PECKARSKY. No, sir.

Mr. CREECH. Yours are aggregate figures, no breakdown?

Mr. PECKARSKY. That is an aggregate figure which includes those in which we make the administrative determination and those which we are required to consider a bar under the law.

They are all included in these figures. We have no separate breakdowns on them.

Mr. CREECH. No separate breakdowns.

Mr. PECKARSKY. No, sir.

Mr. EVERETT. May I ask a question about the honorable or general discharge. I want to make sure that I am correct in my understanding of this.

If I walked into the VA office at, let us say, Winston-Salem, N.C., which is my regional office, with a general discharge in one hand and an honorable discharge in the other, let us say they were from different enlistments, insofar as the veterans' benefits are concerned, what I would receive and when I would receive them would be indistinguishable under these discharges; is that correct?

Mr. PECKARSKY. That is right.

Mr. EVERETT. Now, from your processing of discharges of one type or another, your view of them, do you have any opinion as to whether the general discharge and the honorable discharge are indistinguishable in the minds of the community, that is apart from veterans' benefits?

Mr. PECKARSKY. I am afraid I would not have any basis on which to form such a conclusion or opinion.

Mr. EVERETT. You have not heard any complaints from people holding a general discharge that they constituted a bar to employment or various types of activities?

Mr. PECKARSKY. No, sir. The complaints we receive are in an entirely different sphere.

Mr. EVERETT. As to the undesirable discharge, have you heard any complaints about effects of that type of discharge other than the effect on veterans' benefits? In other words, does it tend to create a stigma or have any other effect?

Mr. PECKARSKY. I am afraid I would not be in a position to hear such a complaint. We do hear complaints as to its effect on rights to veterans' benefits. But that is our consideration which is confined to that area.

Mr. EVERETT. With reference to category 3 listed in your statement, let's suppose I was in the service and was convicted by a civilian court of some felony, such as, let us say, burglary, and got an undesirable discharge by reason of a civilian court conviction.

Where would that fit into the category that you have here or would I be able to draw veterans' benefits?

Mr. PECKARSKY. That would probably fit into the category of a discharge for an offense involving moral turpitude.

Mr. EVERETT. I see.

So any type of offense involving moral turpitude, even if there is no hearing in the military itself, would be sufficient to justify the cutting off of veterans' benefits.

Mr. PECKARSKY. If it results in a discharge other than honorable.

Mr. EVERETT. Now, the statute which you quote in your statement refers to release "under other than dishonorable conditions."

Mr. PECKARSKY. That is right, sir.

Mr. EVERETT. And our understanding is that the undesirable discharge, the bad-conduct discharge, and the dishonorable discharge are all discharges other than under honorable conditions.

Is there some intermediate zone between a discharge under dishonorable conditions and a discharge under honorable conditions?

Mr. PECKARSKY. Precisely. It is the two categories, the bad-conduct discharge and the undesirable discharge, that fall in this zone and require an affirmative determination by the VA.

Mr. EVERETT. According to some of the earlier testimony that was heard by the subcommittee last week, the old blue discharge created difficulties because it required adjudication by the VA to determine the circumstances.

Couldn't the same thing be said of the undesirable discharge and the bad-conduct discharge?

Mr. PECKARSKY. They generate workload; yes, sir.

Mr. EVERETT. I mean, isn't the same problem confronted with those types of discharges which existed concerning the blue discharge?

Mr. PECKARSKY. Yes, sir.

Mr. EVERETT. Then is the substitution of the undesirable discharge for the blue discharge any sort of improvement insofar as your position is concerned in the VA processing of veterans' benefits?

Mr. PECKARSKY. From our point there is only the difference of the availability of evidence, and I do not recall any significant difference in that area. The services are very cooperative and ordinarily have very complete records.

Mr. EVERETT. My purpose in asking the question was with reference to the reason that was assigned to the subcommittee last week for the origination of the undesirable discharge in the first place and the abolition of the blue discharge.

It seems that the replacement of the blue discharge could not cope with the problem that it was supposed to cope with.

Mr. PECKARSKY. Well, to the extent that a certain percentage of the cases that were previously given the blue discharges now come into the category of the general or honorable discharge, to that extent our workload has been decreased; and the issuance of the undesirable discharge would then pinpoint more clearly those cases in which there was a specific issue for our adjudication.

Mr. EVERETT. Do you have any estimate or any statistics available with reference to the percentage of cases in which a bad conduct or undesirable discharge is made the basis of the claim and in which you have granted veterans' benefits?

Mr. PECKARSKY. No, sir; I have no current statistics.

A study was made about 7 or 8 years ago on a very small sampling with results that may or may not be valid today, I do not know. But there is nothing more recent than that.

Mr. EVERETT. Do you recall the results of that survey, approximately?

Mr. PECKARSKY. As I recall, at that time approximately 8 percent of the cases given an undesirable discharge in this sample group were held to be entitled to benefits by the VA.

Mr. EVERETT. Was a similar study made on the bad-conduct discharge?

Mr. PECKARSKY. Yes, and there as I recall, it was somewhere in the neighborhood of 3 percent.

Mr. EVERETT. Would it be your estimate that similar percentages obtain today or do you have any opinion or estimate in that regard?

Mr. PECKARSKY. I could not give an estimate nor even an opinion. It would, I think, require a sampling today, and preferably one under a broader spectrum, a more random type of sampling, that could, perhaps, be more representative.

Mr. EVERETT. It would be true, would it not, Mr. Peckarsky, that the serviceman who received the undesirable discharge or the bad-conduct discharge might not know of the possibility of obtaining veterans' benefits with that type of discharge; wouldn't that be a distinct possibility?

Mr. PECKARSKY. Yes, sir.

Mr. EVERETT. In order that the subcommittee may have clearly in mind the procedure used in adjudicating the type of matter covered in categories 3 and 4, in your statement; that is, dealing with the undesirable discharge and the bad-conduct discharge, could you explain exactly what rights I would have as a serviceman or ex-serviceman if I came into the regional office, let us say again in Winston-Salem, with either an undesirable discharge or a bad-conduct discharge in my hand and said, "I have this discharge, but I feel that I am entitled to veterans' benefits."

How would I go about maintaining my position or would it just be a question of an ex parte investigation by the VA?

Mr. PECKARSKY. You, sir, would file a claim, and let us assume this is a claim for compensation for a service-incurred injury, and this claim would be filed in the same manner as if you had an honorable discharge.

We would then request from the Service Department a verification of your period of service, the disability that you allegedly incurred, and the treatment rendered for it, and for any other disability in the service; your examination at induction and your examination at discharge, and we would then be notified that you had the bad-conduct or the undesirable discharge.

At that point we would request full records on the basis for the issuance of that discharge, and let us assume it was for a willful and persistent misconduct.

We would then, after gathering all of the evidence, weigh, on the one hand, the character of your service; was it otherwise honest, faithful, meritorious? What was the length of it? Were you in combat? Were you not in combat?

Then we would weigh the types of offenses that constituted the misconduct. Were they mere minor violations of technical orders or did they go to something more basic? Were they actually willful

misconduct and were they persistent; and just one or two minor offenses certainly would not constitute persistent misconduct.

At that point the adjudicator would prepare a formal decision setting forth the issue, the complete statement of the facts, the discussion of the pertinent law and the conclusion that the discharge is or is not a bar, and this, together with the entire file, then would go to one of our reviewers who would review the decision.

If he concurred in the decision, that would become the decision. You, as the veteran, would then be notified of that decision and of your right to appeal, and have a complete separate review by our Board of Veterans Appeals or you could submit additional evidence and appear before a board at our office to present your side of the case and any additional evidence you might have.

Any new and material evidence presented would constitute a reopening, and we would go through the entire record again and redetermine.

Mr. EVERETT. Now, if, on the other hand, I appeared at that same regional office with a bad-conduct discharge or dishonorable discharge from a general court-martial, I gather that right then and there they could say, "There is no eligibility."

Mr. PECKARSKY. No, sir. We would still verify with the service department that the piece of paper you had actually represented their determination of what your character of discharge was, that is, the basis for your discharge.

Mr. EVERETT. Now for another hypothetical situation: Assuming I had an undesirable discharge or bad-conduct or dishonorable discharge, and obtained a correction. What would be the outcome of a correction by the Board for Correction of Military Records? Would I have an entitlement on the basis of the correction or would I be cut out by the original discharge?

Mr. PECKARSKY. No. The entitlement is determined by the record as corrected.

Mr. WATERS. Could you and the other witnesses, based upon your examination that is some time removed from these types of discharges, express any opinion whether or not any improvement is in order in their issuance?

Mr. PECKARSKY. No, sir; I would not have an opinion on that.

Mr. WATERS. That is all, thank you, Mr. Creech.

Mr. CREECH. Mr. Peckarsky, if you would be so kind as to remain with us for just a moment I will see if in just a moment the chairman, perhaps, would have some questions.

Mr. Chairman, Mr. Peckarsky has completed his statement, and we have asked him questions we wished.

Senator ERVIN. On behalf of the committee I want to thank you for making your appearance here and giving us some light on some issues that were, until you came, somewhat cloudy.

I appreciate the aid you have given the committee, I appreciate that very much.

Mr. PECKARSKY. It has been a pleasure to be here.

Mr. CREECH. The next witness will be Mr. Francis Stover, director of the national legislative service, Veterans of Foreign Wars of the United States. Mr. Stover?

**STATEMENT OF FRANCIS W. STOVER, DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES; ACCOMPANIED BY NORMAN D. JONES, DIRECTOR OF THE NATIONAL REHABILITATION SERVICE; GEORGE S. PARISH, LEGAL CONSULTANT; AND BEN LLOYD, CHIEF, ARMED FORCES CLAIMS, VETERANS OF FOREIGN WARS**

Mr. STOVER. Mr. Chairman, I have with me at the table Mr. Norman D. Jones, director of the national rehabilitation service; and also with us in the audience is Mr. George Parish, our legal consultant, and Mr. Ben Lloyd who is our chief of Armed Forces claims.

These are the gentlemen who represent our members and other veterans before the discharge review boards over in the Pentagon.

Senator ERVIN. We are delighted to have you gentlemen with us and we appreciate very much your coming.

Mr. STOVER. Thank you, sir.

May I express my deep appreciation for the privilege and honor of appearing before this distinguished subcommittee in behalf of the Veterans of Foreign Wars of the United States. For the record, my name is Francis W. Stover and I am the director of the national legislative service. The membership of the Veterans of Foreign Wars is presently 1,300,000, located in approximately 8,500 local posts in every State in the Union and the District of Columbia, and several foreign countries.

The Veterans of Foreign Wars is proud of its record of assisting and representing veterans and their dependents, and surviving widows, children, and dependent parents in obtaining rights and benefits granted by Congress in recognition of the extraordinary service performed by veterans during wartime.

In this capacity the Veterans of Foreign Wars represents veterans who have been issued discharge certificates less than honorable and have the opportunity and right to have these discharge certificates reviewed before the discharge review boards and the Board of Correction of Military Records. As a result of this experience our last national convention, which was held in Miami Beach, Fla., August 20–25, 1961, adopted the following resolution which is most pertinent to the hearings being held here today. This is Resolution No. 244 and reads as follows:

SUPPORT H.R. 1935—ISSUANCE OF EXEMPLARY REHABILITATION

CERTIFICATES TO EX-SERVICEMEN

Whereas thousands of members of the Armed Forces have received discharges under conditions other than honorable; and

Whereas these discharges were administratively issued for minor offenses which were too insignificant to warrant court-martial, and would be considered as less than a misdemeanor in civilian life; and

Whereas these ex-servicemen were young, immature, away from home for the first time, and not fully aware of the strict discipline of military life; and

Whereas a discharge other than honorable becomes a stigma in these veterans attempt to obtain employment and readjust to civilian life; and

Whereas H.R. 1935 or similar legislation would provide the issuance of an exemplary rehabilitation certificate after proof of exemplary conduct in civilian

life for a period of 3 years from date of discharge thus removing this lifelong stigma of a less than honorable discharge: Now, therefore, be it

*Resolved, by the 62d National Convention of Veterans of Foreign Wars of the United States,* That we support H.R. 1935 or similar legislation so that these ex-servicemen can in a small way remove the stigma of a discharge less than honorable.

In addition to this resolution our national convention also expressed its views on another matter which is germane to this hearing. This is Resolution 11-h which reads as follows:

In determining the question of continuous service as related to the effect of a subsequent discharge of a character not acceptable for VA benefit purposes, the Department of Defense should advise the VA whether the individual concerned did or did not complete his obligated period of service under provisions of law, regulations or enlistment commitment prior to issuance of the unsatisfactory discharge. The VA should consider the termination date of such obligatory period of service to be a break in service even though it may have occurred after reenlistment or other change of status under circumstances not permitting the individual concerned to voluntarily terminate his active duty service as of the date of such reenlistment or other change of status.

These two resolutions, or mandates, as we call them, represent the only two expressions of national policy concerning discharge certificates from the Armed Forces which were handed down at our most recent national convention. On a day to day basis our national rehabilitation service is representing veterans before the discharge review boards in the Pentagon, counseling and assisting those veterans who desire to have their discharge certificates reviewed.

As our mandate states, a less-than-honorable discharge is a lifelong stigma. These less-than-honorable discharges are repulsive in the civilian world and in many instances are an insurmountable barrier to civilian employment. Discharge review boards occasionally eradicate this stigma or the boards of correction of records when the records are proved erroneous. For most the burden of a discharge less than honorable must be borne for life. This is a serious matter—especially if the issuance of such a discharge has contravened the serviceman's constitutional right, of a full and fair hearing and due process of law.

What are the situations in which constitutional rights are violated? One category is in the issuance of administrative discharges for alleged misconduct for the express purpose of bypassing the procedures for a discharge by a court-martial. This administrative discharge route ignores the right of counsel. It may include pretrial confinement or the threat of pretrial confinement. It is used to persuade a serviceman to waive a board hearing.

This procedure may be the method to induce or convince a serviceman that it would be more advantageous to take an administrative discharge. The Veterans of Foreign Wars is disturbed with this procedure where the facts indicate that the serviceman would not have accepted an administrative discharge had he been furnished the right of counsel and realized the full consequences of what he was doing.

Another area in which the constitutional rights of servicemen are violated is command influence. The VFW has experience with many cases where undue command influence has been the determining or controlling factor in the court-martial board decision. Command influence violates the very basis of a fair trial and because it is "off the record" there is no opportunity for appellate authority to properly

review whatever contribution command influence has made to the decision.

A negotiated "guilty" plea is another route used to bypass a full and impartial hearing. A negotiated plea of "guilty" should be undertaken only under circumstances which will assure the serviceman of adequate counsel and fully advised of the nature of his plea with all possible consequences. There should be a uniform procedure with built-in safeguards to follow before a "guilty" plea is accepted. In no event should the serviceman be permitted to negotiate a "guilty" plea where undue persuasion or false assurances are a part of the negotiation.

These are a few of the practices which the Veterans of Foreign Wars is firmly convinced are representative of violation of the rights of servicemen. The Veterans of Foreign Wars hopes that the Congress will approve legislation to relieve those cases where less-than-honorable discharges have been rendered and are such a detriment to the veterans in civilian society.

In addition to the above, the VFW is also disturbed concerning disability retirement policies and procedures of the Armed Forces. Again, many of the servicemen have little or no knowledge of the way disabilities are rated. Since the serviceman in the service generally must rely on service personnel for counsel, there is little opportunity for veteran organizations to represent these cases until after they have been retired.

Numerous cases have come to the attention of the Veterans of Foreign Wars where the servicemen have agreed to a percentage of disability even though it would have been obvious that such a percentage of disability was far below or less than the rating provided for under existing law. One notorious case that comes to mind is where a serviceman suffering from an advanced case of Hodgkins disease—an obvious 100 percent—was evaluated at only 30 percent. In the same vein, there are other instances where veterans are waiving their legal rights either because of undue persuasion or inducing servicemen to sign statements against their own interests, such as obtaining information that a certain condition existed prior to service.

Another consequence of these less-than-honorable discharges is found in the policy of the Veterans' Administration which results in a denial of benefits administered by this agency. The VFW maintains the obligated period of service should constitute a break in service for benefit purposes and that a discharge of a character not acceptable for VA benefit purposes during a subsequent reenlistment period should be disregarded.

For example, a long period of wartime service, combat, and highly commended service should not be nullified by a discharge many years later which is construed by the VA to be unacceptable for veterans' benefits. Honorable combat service through an obligated or original enlistment period, and particularly a wartime period, is sufficient basis for benefits administered by the Veterans' Administration.

In summary, the Veterans of Foreign Wars hopes these views will be helpful to this subcommittee in its review of the constitutional rights of the military. Attached to this statement is a list of cases which have come to the attention of the Veterans of Foreign Wars which our national rehabilitation service believes constitute repre-

sentative cases where constitutional rights may have been violated or due process of law was denied. It is respectfully requested that these cases be made a part of the record.

Again, may I extend the deepest appreciation and thanks of the Veterans of Foreign Wars for the opportunity to appear here today.

I will be glad to answer any questions you may have, Mr. Chairman.

Senator ERVIN. The services say that their function is to provide an adequate national defense, and that they should not be charged with any responsibility in connection with making any determination of the behavior of a man subsequent to his separation from the service, except in the limited case where a man who has received a discharge less than honorable applies for reenlistment.

Now, what do you say about that? In other words, is this not quite a departure to say that these services should be charged with even discretionary responsibility for taking action on the basis of a man's conduct in civilian life after the services have ceased to have any jurisdiction over him.

Mr. STOVER. I think I would like to ask Mr. Jones if he would care to comment on that. He is closer to this situation.

Mr. JONES. I believe there are two points involved in this discussion. One is the question of whether there should be certificates issued for exemplary conduct subsequent to the service.

We would not argue that the character of discharge should be changed at all because of conduct after release from active duty; not in the least.

But we do think it wholly proper that some of these men be given some kind of a certificate showing exemplary conduct to help them in obtaining employment in other civilian activities where the character of discharge may be very damaging.

Mr. Stover has commented on the longtime service cases where the service in the Armed Forces was actually continuous for as long as 20 years, with two or three discharges during that period. Each of the periods of service was terminated on a date on which the man was not free to go home. Maybe he went through combat in World War II and in Korea and got a discharge as recently as 2 or 3 years ago. After a long period of good service, but right toward the last he may have misbehaved a little bit and got a discharge that was ruled as a bar to veterans' benefits.

We think, of course, that is grossly unfair, and we think something should be done to cause a determination to be made to honor that prior service, particularly combat service.

Senator ERVIN. Well, the services, as I understand it, would be perfectly willing for a man to receive some kind of a rehabilitation certificate based upon his conduct after his separation from the services. But the services take the position that they have no jurisdiction over the man under those circumstances when he is in civilian life, and that the issuance of such a certificate should be by some civilian agency of the Government, rather than by the military or naval.

Mr. JONES. I think to us that would be immaterial as to the place of the jurisdiction.

Mr. STOVER. The only comment I would make, Mr. Chairman, is that the Armed Forces originally granted this certificate, and I think

that is the main reason why we have been supporting Mr. Doyle's bill, H.R. 1935. The VFW feels that the same agency which issued the certificate should make the determination that the veteran has sort of redeemed himself, that he is in a position to be pardoned for his previous behavior which brought about this bad discharge certificate.

Senator ERVIN. Of course, this is a tragic condition, there is no question about that, and I think many of us have got the milk of human kindness in us, and we would like to see the recording angel drop a tear and wipe out our iniquity.

But here is the military which separates a man from the service. Then, under this proposal it is charged, in effect, to review the man's subsequent conduct after he has passed out of the military. The military has no control over him, no jurisdiction over him, and it is adding to the military the duty of passing upon the man's conduct after he is entirely separated from the military.

Wouldn't it be better to have some provision for review of these discharges on the basis of the man's military service or naval service, plus all of the mitigating circumstances, including their youth, and whether they had any adequate legal advice or whether they had been put in a position where there was the possibility of a violation of their constitutional rights to a fair hearing?

Mr. JONES. I would say that is correct except of course, that would not take care of all the cases.

Senator ERVIN. No, it would not.

Mr. JONES. Some would be denied a change in discharge based on that, and this brings up a point I would like to mention.

It is well known that the Record Corrections Boards have a right to deny hearings. I recognize there have been some imperfections in military justice in the past, and I think there still is. We feel that these men should have a right to a hearing before the Record Corrections Board if the petition alleges an injustice affecting the character of release and the right to benefits.

We have had many cases where servicemen are willing to pay their own expenses clear across the country for a hearing. Surely they are convinced as to the merits of their own case, and yet often they are denied hearings by the Record Corrections Board in the service departments.

We believe that is an area which should be given some attention, and that would lead toward somewhat, as you mentioned, the idea of having a review of these cases based on the acts that did take place in the service that led to this discharge.

Senator ERVIN. Of course, it comes down to a question of whether the military should be charged with passing upon the character of a man's conduct after they have ended any connection with him. I mean, that is, Congressman Doyle's bill, essentially, which is a bill that, after a man has been severed from the service, operates on his conduct in civilian life, as contradistinguished from his conduct in the military service.

Of course, it is a tragic situation here because, as the resolution of the VFW points out, so many of these boys are just teenagers without any experience and any maturity.

It has been suggested here by a number of witnesses, and I would like to have your thoughts on this subject, that whenever any of the

services contemplate separating a serviceman from the service by any discharge under less than honorable conditions, then he should have, or be given, an option, an absolute option, either to take the undesirable discharge or to demand that he be tried by a court-martial; and, if he is a young man of immature years, that he be given an absolute right to have the advice of someone learned in military or naval law before he is required to make that election.

What do you think about some procedure of that nature?

Mr. STOVER. I personally would think that would be a very worthwhile procedure, and it would have many safeguards that probably do not exist now. However, I would like to hear Mr. Jones on that.

Mr. JONES. I would like to say further that we would prefer that he have that advice by legal counsel but, of course, we recognize the problem of furnishing legal counsel at all stages of every procedure in the service unless the service departments are permitted to have within their services a much greater number of attorneys.

Senator ERVIN. There is no question in my mind but what they need more, because we have evidence here that the number of lawyers, particularly in the naval service, is inadequate; and it is very difficult for the Navy under some circumstances to provide sufficient legal counsel or legally qualified men to serve on the lesser courts.

Your representative case briefs will be inserted in the record at this point.

(The document referred to follows:)

## REPRESENTATIVE CASE BRIEFS

### 1. USE OF BOARD IN LIEU OF COURT-MARTIAL

Failure to pay debts—Punishable under Article 134 of UCMJ.

Prior service, 4 years. Current enlistment, A/1C December 10, 1955. Promoted to S/Sgt. September 1956. Over a period of 4 years he was rated once excellent, once as a good airman and 4 times as a very good airman.

In January 1960, his commanding officer requested a board for dishonorable failure to pay just debts; indicated many hours spent in counseling applicant; that vague attempts have been made to liquidate debts, never followed through. Recommended honorable discharge. Applicant chose to have case heard by board. Board convened January 21, 1960, and recommended a general discharge. A legal review of the proceedings attested its legal sufficiency and further cited at various times 7 accounts had been delinquent, but at the time of the board all but two had been liquidated. Further, that his car was involved in an accident with someone else driving, causing additional financial burden of $300. Appropriate to separate for unfitness, but honorable recommended.

Discharge Review Board (Air Force) denied case on June 29, 1961.

### 2. EFFECT OF COURTS-MARTIAL ON ADMINISTRATIVE DISCHARGES

Army Discharge Review case, docket No. 54049.

Applicant had 5 years prior honorable service. He reenlisted on October 17, 1957. Was transferred to Europe on February 21, 1958.

On March 18, 1958, was given a summary court-martial for 4½ hours absence without leave (after bed check) and disorderly in MP station. This was his first offense. He was sentenced to hard labor, without confinement, for 1 month and forfeiture of $50.

On April 9, 1958, he was given a summary court-martial for absence without leave 5 days. Sentenced to confinement at hard labor for 30 days and forfeiture of $50.

Nine days after the second court-martial his commanding officer requested a board because of repeated violations and infractions of regulations and orders. Commanding officer stated knew applicant 6 weeks; that he was court-martialed twice and counseled twice; that he could not stay out of trouble; must be closely

supervised during duty hours; seems to be a chronic AWOL and a chronic drinker. M/Sgt states he is a constant disciplinary problem. Applicant elected to remain silent. Board recommended and he was issued an undesirable discharge for habits and traits of character.

### 3. TWO COURTS-MARTIAL USED AS BASIS FOR TYPE SEPARATION

Army Discharge Review case, docket No. 54360.

Applicant had 2 years prior honorable service. He reenlisted on June 3, 1955. Service rated him excellent from date of entry until August 1957, with exception of a period of 5 months in 1956, when he was rated in character and efficiency as fair.

On December 16, 1957, he was given a summary court-martial for being disrespectful in language toward a superior noncommissioned officer. This was his first offense of record. He was reduced to private and forfeited $40 a month for 1 month and restricted to the battery area for 30 days.

On December 23, he was given a summary court-martial for absence without official leave 2 days and and breaking restriction. Sentenced to confinement at hard labor.

On January 6, 1958, only 13 days after his last court-martial, while still in confinement, his commanding officer recommended that he be separated for unfitness. Commanding officer stated he committed numerous petty offenses, general disregard for authority, insubordination, absence without official leave and threat of assault. Board convened on January 9, 1958, at which time was brought out that applicant's wife was pregnant at that time as a result of an adulterous act and neither parental families will or are capable of taking interest or action in applicant's behalf. Attempts to have applicant returned to States were unsuccessful. Sergeant testified there were several petty incidents for which he was not punished. Applicant elected to remain silent. Board recommended and he was issued an undesirable discharge.

Discharge Review Board denied case September 17, 1958.

### 4. ONE COURT-MARTIAL AND COMPANY PUNISHMENTS AS BASIS FOR TYPE SEPARATION

Inducted October 4, 1956. Served for 13½ months. In Germany from May to December 1957.

On June 2, 1957, was given a company punishment for failing to make bed check. On June 27, 1957, was given company punishment for entering a Kaserne illegally through hole in fence. On October 6, 1957, was given a summary court-martial for absence without official leave for 22 hours.

In October 1957, commanding officer requested a board because of repeated commission of petty offenses. Testimony at the board was to the effect that he had missed bed check several times, that he was a potential source of trouble, that he was sloppy. Applicant stated he had been a good soldier before, that he should be retained and if given another chance would be a good soldier. Board recommended and he was issued an undesirable discharge.

### 5. COMMAND INFLUENCE ON THE BOARD

Disapproval of first board recommendation by convening authority is indication to second board what decision is expected, regardless of facts in case:

Army discharge review case, docket No. 56170.

Applicant had 2½ years prior honorable service. He reenlisted on July 20, 1957.

In October 1957, he was given a special court-martial for absence without official leave 9 days. In May 1958, he was given a summary court-martial for operating a vehicle while drunk and on July 5, 1958, a company punishment was administered for absence without official leave.

On July 22, 1958, his commanding officer requested board. Board convened on August 1, 1958. It was brought out that the applicant had combat service in Korea. This, coupled with other facts, led the board to the conclusion he should be recommended for retention. They further stated the three offenses spread over a period of 9 months. The serviceman was transferred to the 157th Ordnance Company. On August 25, the board proceedings were set aside by the convening authority and another 208 board was ordered, stating that applicant's off-duty conduct renders him undesirable. On September 8, he was transferred back to his old unit. The board convened on September 11. His commanding officer stated his efficiency ratings were good, but his conduct unsatisfactory;

had not counseled applicant at any time; that he was under the influence of a man by the name of Poole who had already been given an undesirable discharge. The serviceman had his commanding officer from the 157th Ordnance, appear as a witness, along with a Sergeant Harper. These individuals stated they saw him on the job every day; that he did a good job and had been recommended for a promotion to private, first class. Defense counsel cited his combat service; pointed out he had no counseling before the 208 board was recommended; that the regulations of AR 635–208 had not been met and that the reason he had been boarded was due to a local regulation which states he will be considered for 208 board after two convictions by court-martial. Second board recommended undesirable discharge.

#### 6. ADMINISTRATIVE DISCHARGE BASED ON CONVICTION BY CIVIL COURT

Applicant had 17 years prior honorable service. Reenlisted November 23, 1956. Service ratings excellent and a good airman.

In February 1959, was convicted in a civil court in Massachusetts for (1) drunkenness (2) violation of auto law, endangering public and (3) under the influence of liquor. Maximum sentence in this case could have been 2 years confinement on the second and third charges; however, the court saw fit to fine him $100. His commanding officer requested an undesirable discharge for conviction by civil court. Due to the long years of service rendered, his commanding officer could have recommended his retention.

Army Discharge Review Board denied case May 18, 1959.

#### 7. USE OF BOARD IN LIEU OF A COURT-MARTIAL

Court-martial charges preferred, but when found legally insufficient, same evidence used to administratively separate man:

Army discharge review case, docket No. 57795.

Applicant had 15 years prior honorable service. He reenlisted on September 4, 1957.

This serviceman was involved in an investigation for absconding with various food items and whisky from the commissary. He was questioned five different times by the criminal investigators—each time he changed his story slightly. On May 12, 1958, his commanding officer forwarded court-martial charges recommending trial by general court-martial and that the man should be eliminated from the service. On May 26, applicant requested counsel. The commanding officer requested board on July 17, 1958, on the basis of habits and traits of character, with a tendency toward criminalism. In his statement he indicated he had been the unit commander only 3 days; that the request was made on the case history only; that he recommended the board because appropriate disciplinary action could not be taken according to the Uniform Code of Military Justice. There was a question as to whether there was sufficient evidence to support the charges. From the commanding officer's testimony, it was apparent they did not intend to press the case. Defense counsel submitted an endorsement to the request for trial by general court, which states it was not deemed appropriate to proceed further with the general court-martial. Board recommended undesirable discharge.

Discharge Review Board denied case (Army) June 29, 1959.

#### 8. IMPOSITION OF MAXIMUM SENTENCE

This veteran had over 13 years of service. The only offense of record prior to the special court-martial was an absence without official leave of 3 days sometime in 1948. He reenlisted on September 13, 1957, in the grade of staff sergeant.

He was tried by special court-martial for failing to repair to appointed place of duty (four specifications) and failing to post an orderly roster on the barracks bulletin board. For this, he was sentenced to a bad conduct discharge, forfeited $70 per month for 3 months and confinement at hard labor for 3 months and reduction to airman basic.

The squadron commander in the clemency report brings up the question of indebtedness, even indicating that he checked with the creditors to find out if the man was paying his just debts; further stated action under AFR 39–17 will be initiated in the event he is not discharged as a result of the court-martial. Veteran was issued a bad conduct discharge on July 25, 1960.

### 9. WAIVER OF CONSTITUTIONAL RIGHTS (OUR FILE REF C–10 757 383)

Applicant had three periods of military service, the last ending March 25, 1960, at which time he was discharged for physical disability existing prior to term of service.

This man met a medical board, whose diagnosis was schizophrenic reaction, latent, chronic, severe, manifested by maladjustment in civilian and military life, ideas of reference since age 14, difficulty distinguishing fantasies from reality, one previous and recent suicidal attempt, impaired judgment and insight, impairment for further military duty, severe. Line of duty—no, EPTS. Patient is mentally competent to manage his own financial affairs.

The records contain a letter signed by the veteran addressed to the commanding officer of Walter Reed Army Hospital requesting that he be discharged for the convenience of the Government for physical disability, that he is considered unfit on account of a physical disability which is considered to have existed prior to April 1946, and which appears to be not incident to or aggravated by prior or subsequent service. He waives his right to a hearing before a PEB, further that he be discharged for the convenience of the Government and will be without disability retirement or severance pay; however, *it does not preclude his applying for benefits administered by the Veterans' Administration.*

The Veterans of Foreign Wars took issue with this practice, bringing it to the attention of the Secretary of the Army on the basis that we feel anyone suffering with the condition as diagnosed does not realize the significance of signing such a letter. His signing of this letter is an admission that the military doctor's findings are correct. Granted, he is not barred from filing to the Veterans' Administration, but with such a letter in the file, the possibility of a successful claim with the VA is practically nil. A reply was received from the Assistant Secretary of the Army condoning these actions.

### 10. EFFECT OF COURTS-MARTIAL ON ADMINISTRATIVE SEPARATION

Enlisted June 18, 1957. Sent to Germany on October 18, 1956.

Given a company punishment in December 1956, for missing bed check, given 14 days extra duty. In April 1947, given a summary court-martial for absence without official leave 5 hours, (apparently after bed check). Sentenced to perform hard labor without confinement for 15 days and forfeiture of $50.

Date of court-martial was April 29, 1957. Commanding officer requested board on May 3, 1957, because it is felt he is unfit for military service. Evidence submitted was the summary court-martial and company punishment. Commanding officer stated he was tried in several jobs without effect; was a constant problem; tried to counsel him; while in messhall he performed his duty in satisfactory manner; never gives trouble on duty, always off duty; lazy; sloppy dresser. Three noncommissioned officers testified essentially the same. Defense counsel brought two witnesses before board who stated he was doing a good job in the kitchen. Defense counsel says there has been a lot of conflicting testimony. This man has been a good soldier, but sometimes has become involved in trouble because of his youth; feels he has constantly been switched around and hasn't had a chance to prove himself; his pride has deflated in the face of infantile treatment; he likes his job and doesn't want out of the Army. Board recommended and he was issued an undesirable discharge.

Army Discharge Review Board changed to general on October 20, 1958.

### 11. ABUSE BY BOARD ACTION TO CIRCUMVENT COURT-MARTIAL PROCEDURES

The accused was serving as a specialist 5 in the 5th Training Regiment at Fort Jackson, S.C. On February 28, 1959, he was apprehended by a member of the military police while leaving the Fort Jackson reservation. The military police searched his car without his permission. They ordered him to get out of his car, opened the trunk and found various foodstuffs therein.

On the 29th day of June 1959, another person executed an affidavit stating, inter alia, "near the close of my working day the person for whom I worked that day gave me some items of food. I took this food to the company area of Company B, 10th Battalion, 2d Training Regiment and placed them in the automobile owned by the accused."

On March 4, 1959, the commanding officer of Company B, sent a letter to the regimental commander, "Subject: Court-Martial Charges." He referred 4 enclosures for court-martial charges to his regimental commander against the

accused. However, on March 20, 1959, the regimental commander abjured the court-martial charges of the company commander and circumvented the court-martial procedure by reducing the accused under provisions of paragraph 28b, AR 624–200. Instead of trying the accused by court-martial, the colonel stated, "It has been ascertained that on or about February 28, 1959, you had in your possession certain foodstuffs which were removed by you without authority from the messhall of Company B, 10th Battalion, 2d Training Regiment, Fort Jackson, S.C." Thus, the accused had no chance to bring the affiant into court and prove the colonel's statement false. The colonel had no proof whatsoever that the accused had, in fact, removed the foodstuffs.

In a letter dated March 24, 1960, the regimental adjutant stated that, "the accused was not tried by court-martial, nor were charges preferred against him for a trial by court-martial." This statement was made despite the letter from the company commander. The regimental adjutant continued, "he was reduced under an Army regulation that does not require a trial either to prove inefficiency or appeal a decision." The colonel commanding the regiment, however, stated in his letter of March 20, 1959, that the accused was permitted to appeal his case in accordance with paragraph 134, Manual for Courts-Martial 1951.

Article 138 of the Uniform Code of Military Justice gives any member of the Armed Forces who believes himself wronged by his commanding officer the right to complain. The trouble with this action is that it is referred to the inspector general who serves the same commander who commands the Training Center. The accused did apply for this administrative appeal, but this proved futile.

On October 31, 1961, the Army Board for Correction of Military Records found that "insufficient evidence has been presented to indicate probable material error or injustice." The denial of this appeal by the Army Board for Correction of Military Records clearly indicates that the Army Board for Correction of Military Records has knowingly condoned a circumvention of the courts-martial system.

As outlined above, the applicant was precluded from defending himself in a court-martial where he could have presented evidence in his own behalf.

Senator ERVIN. I will say that by my questions I am not indicating any opinion about the bill of Congressman Doyle or anybody else. Congressman Doyle has rendered a great deal of service and he has given a great deal of thought to study of this problem; and there is no doubt in my mind that undesirable discharges do place the ex-serviceman under rather considerable handicaps.

Mr. CREECH. Mr. Stover, you have stated in your statement that in some instances the administrative discharge is used as a means of bypassing a court-martial; that the individual involved has in some instances waived a board hearing; and that your organization has been disturbed about this procedure where the facts indicate that the serviceman would not have accepted an administrative discharge had he been furnished the right of counsel and realized the full consequences of what he was doing.

I should like to inquire, sir, what have been the results when your organization has gone before boards seeking correction of the military records of such individuals? Does the board look favorably upon this type of approach?

Mr. STOVER. I think I will ask Mr. Jones if he has any answer to that. He has the statistics.

Mr. JONES. We would contend that we have reasonably good success in representing petitioners before the records correction boards, and also the discharge review boards.

But certainly we are unhappy with the board's decisions in many cases in which we feel there has been an injustice.

Due process or the lack of it is not always the issue. Sometimes there are disagreements on the evaluation of the facts and the judgment exercised, not on the procedures prior to the release of the man.

Mr. CREECH. Are many of these former servicemen whom you are representing young men? You have indicated earlier in your statement that you endorse Representative Doyle's bill, and that one of the reasons for doing so is because many of these young men are immature and have not had experience and are, perhaps, not aware of the consequences of their acts ofttimes.

Now, what have been the results of your representation with regard to men who were former servicemen and who you feel were not given adequate counsel or who had the facts misrepresented to them?

Mr. JONES. Well, it is our opinion that the youthfulness of the person at the time, his inexperience, is sometimes a factor which the boards consider and give some weight to.

I am thinking particularly of the alleged abnormal sexual tendency cases, the perversion cases, where there is no proof of any act at all; where, perhaps, the serviceman is led into circumstances in which there is an indication that there was something of that nature, but no proof of involvement.

Sometimes we are able by having the man appear and displaying his own sincerity to persuade the board that he was not involved, and sometimes not even have a tendency in that direction.

Mr. CREECH. Does either the discharge review board or the board for correction of military records, either one of them, indicate at the time they make their determination that these are factors which they have found or which they have considered; namely, that the man did not have the benefit of counsel, or that he was young and immature and did not realize the consequences of what he was doing?

Mr. JONES. We have seen evidence where they have considered the youthfulness of the serviceman. In fact, in the briefs prepared by the examiners at the boards sometimes that factor is emphasized. Particularly that is true when we point it out in our original petition. We believe that sometimes the boards give strong weight to the points emphasized in the examiner's brief, on both sides of the issues if they are very pertinent points.

Mr. CREECH. Sir, I should like to ask you a question also with regard to command influence. You mentioned that this is another area in which you feel the constitutional rights of the serviceman were violated. What has been your success in representing clients in cases in which you feel there was evidence of command influence?

Mr. JONES. Well, I am sure you recognize that is a difficult thing to prove in most instances. We also think there is an extreme reluctance to admit it. I believe one or two of the service departments recently have eliminated the general instruction given to boards. I think that is a great improvement.

I think the shining example I have had in this matter of command influence is where a man got 5 years and who had been 19 days AWOL in wartime, reported back in uniform voluntarily, and he actually got a dishonorable discharge. One member of the board said they were told this would be an example case; there were too many AWOL's at this post.

Now, normally you do not have that much of what I would call "proof of command influence" to use to your advantage in representing the petitioner.

Mr. CREECH. You mean the commanding officer instructed the board that they were to make this case an example?

Mr. JONES. One member of the board told us to that effect. We have nothing more, of course, than his word for it.

This brings up—excuse me, I will refer to it later.

Mr. CREECH. You mentioned, of course, the recent rescinding by the Army of the procedure permitting a commanding officer to give instructions to the court-martial, and the Navy has told us they are going to issue a brochure which is going to be distributed and will also eliminate the occasion for pretrial instruction of court-martial members.

I wonder if you have noticed any trends in recent years in regard to command influence? Do you think it is greater or less, and in what form? Is there any particular form that it usually takes?

Mr. JONES. I have not been in the service, of course, since World War II, and I do not have experience except from my observation and experience with petitioners.

It would be my opinion that insofar as approval, the instances have been less.

My experience in World War II service has indicated; that is, my indication of command influence was the dissolution of court-martial boards long before you normally expect a dissolution and the appointment of new boards.

That indicated to me that the boards were not issuing decisions in accordance with the desires, the general desires, of the appointing or convening authority. I have not seen any of that in recent years, but possibly because I am not in the service at this time.

Mr. CREECH. This was your observation when, during World War II?

Mr. JONES. Yes.

Mr. CREECH. That the boards were dissolved more frequently than would be——

Mr. JONES. That was my opinion at the time.

Mr. CREECH. Now, with regard to this rotation of the court membership, did you observe, and is this something with which you have been confronted in the cases which you have had, the rotation of defense counsel who have proved particularly effective in defending servicemen?

Mr. JONES. Colonel Parish—might we ask Colonel Parish to comment on it—on this matter of rotating defense counsel? Colonel Parish has had recent military service experience in this field.

Mr. PARISH. Sir, could you repeat the question.

Mr. CREECH. Colonel, we have received complaints and allegations of various sorts, the subcommittee has received complaints from some former servicemen, and in some instances from former defense counsel, that when they became too effective they were transferred and given other positions.

Mr. PARISH. Well, sir, that is quite true because if you have a trial counsel who is very effective, as a regimental commander I would take that bright young lieutenant and put him on as trial counsel, put him on trial counsel work and, as an enlisted man I defended cases before general courts and I found the Army to be very fair toward giving me plenty of time to defend my client.

But as a commanding officer, I could not afford to have a winner on the defense side, so I would have him shipped over to my side, to the command side, and have him prosecute the cases.

When I was a commander at Fort Riley, I did that, and so did all the other regimental commanders, and I am sure that my general would not permit some bright young attorney to defend the cases.

If I had one that was that bright I would put him on the range or on my own trial team, and I am not impugning myself as being an exception to that. I am relating the facts the way I saw them in the Army up to 18 months ago.

Mr. CREECH. So in your estimation the counsel who is provided the defendant is not comparable to the prosecution?

Mr. PARISH. The defense counsel was in some instances the dumbest lieutenant in the regiment. I don't mean to be facetious, but I am telling you that the game wasn't always played fairly.

Mr. CREECH. Colonel, in your experience have you had occasion to observe similar procedures in the other services, in the Navy or in the Air Force, or the Marine Corps?

Mr. PARISH. Well, sir, in the petitions that I have handled for the VFW I have noticed that the defense counsel assigned are not the same people, of the same caliber that the trial counsel people are. And the same thing applies to these boards. The man that is recorder, that lays out the charges—and I have been a sergeant and prepared these charges—is an articulate individual that would probably be an assistant adjutant, he is not the fellow that I would bring in off the range or out of the motor pool to offer the accused as the defense counsel.

Mr. CREECH. I would just like to ask you a question based on information which we received earlier. The gist of the statement which we have received is that the recorder really is a neutral party in the administrative discharge proceedings when the defendant is not represented by counsel, and that, if anything, he is there to assist the defendant in presenting his case adequately. Would you feel that this is not the case?

Mr. PARISH. Well, sir, my experience was he is a prosecution man, he is a district attorney type, he is not the neutral at all. When we pick out our recorders for a 208 board or a 209 board or an 89 board, we pick out someone that is a bright young lieutenant or a captain who can successfully prosecute the case. A commander would never pick a recorder, for example, who would foul up the prosecution of the case, and if he did he wouldn't put him on that job the next time.

Mr. CREECH. Then you would say, sir, that the information which we received in that regard is not correct, based on your experience in the Army?

Mr. PARISH. Well, sir, I don't know who would try to tell you that the recorder should be a neutral. He is there because the commanding officer placed him there to do a job. When I put a recorder on a board or a court I expected him to convict. And when my commanding officer asked me who we should pick for a recorder or a board, I went down the roster of lieutenants and captains and picked out the brightest one I could and recommended him to my colonel when I was a sergeant.

Mr. CREECH. And in your view is this consistently done?

Mr. PARISH. Yes, sir. I never saw any commander pick a recorder that was neutral.

Mr. CREECH. I realize that you are speaking on the basis of your experience in the Army. Do you have any reason to believe or any information to indicate that the same type system is employed in the Navy or in the Air Force?

Mr. PARISH. Sir, the only knowledge I have of that is the petitions I have reviewed in the Air Force. I have no personal knowledge that the Air Force would pick a neutral as a recorder, in fact the recorders that I have noted in the Air Force petitions are very competent people, because they obtain convictions. I don't know much about the Navy except that I served with the Navy in the amphibious operations, and they were too busy at that time to be prosecuting people in courts or boards.

Mr. CREECH. The subcommittee was told this morning that the Army's Judge Advocate School down at Charlottesville is doing a very fine job, and also the field judiciary program of the Army was commended. I wonder if you are familiar with the school and with the program.

Mr. PARISH. Well, sir, I have not been at the school. Their products have come on the line to help us with legal troubles. And the attorney in the Army is usually a very competent officer. The trouble is that there aren't enough of them. In all these board regulations you will always see "counsel will be provided, if available."

For example, out here at Fort Mead you might find 1 or 2 for 8,000 or 10,000 troops. So this attorney is too busy doing paperwork, reviewing and prosecuting general court cases to ever come down on the line and defend the lowly GI that is up against a board or a court.

This school in Virginia is comparable to our JAG School at Indianapolis, and it is something that the JAG should have done years ago. This circuit rider system that I believe you mentioned works rather well from the attorney's point of view, but some of the commanders don't like it, because the circuit rider is not under their jurisdiction, and if I am a commander, I can't fill out his efficiency report like I could if, say, Major Stover were under my command and he didn't get enough convictions, then I could throw him out.

Mr. CREECH. I would like to go back to the point that you just made about the availability of counsel, the defendant will have counsel reasonably available, and when reasonably available he will be an attorney. What was the situation under your command when servicemen wanted counsel, insisted upon counsel being an attorney, and the counsel was not readily available? Were the hearings postponed to make available trained counsel?

Mr. PARISH. No, sir. The petitioner was merely told that "We have no attorneys available, we only have two here for the whole post, we only have five here for the 10th Division and all the other post people"—as, for example, at Fort Riley. At Fort Riley we had about 20,000 troops, and maybe a dozen attorneys that were in the Judge Advocate General Corps. These people were busy doing the primary mission of prosecuting general courts, reviewing contracts, and defending the Army in tort cases that may have arisen. They didn't have time to go down and defend some GI that was in trouble. Now, when it is a general court, of course, then the CG would, through his

JAG, appoint a competent legal counsel under the provisions of paragraph 27(b) in the MCM. But otherwise trying to find an attorney would be very remote.

Mr. CREECH. Well, how was the determination made, or how was it made during the time that you were in service as recently as 8 months ago?

Mr. PARISH. We just told them that they didn't have any, so.

Mr. CREECH. I would like to ask this. When you have a number of boards with a number of cases and you have some counsel there, how is the determination made as to which individual will receive representation by trained legal counsel?

Mr. PARISH. We just told them none will, because the attorneys are busy on the general courts. We also had a form, sir, we would push this under the accused's nose, it says, "I have been offered counsel." Now, to you that may mean an attorney, or to somebody else it may mean somebody in the orderly room that is not busy. And of course the accused would sign saying, "I do not desire counsel," because he didn't know whether he was going to get Lieutenant Dumbjohn or some busy captain that had 10 minutes to prepare the case.

Mr. CREECH. Colonel, the subcommittee was told by the Assistant Secretary of Defense for Manpower that the administrative action during which administrative discharges are processed provides for specific procedures and safeguards which must be observed. He said that he felt it was so important that he was quoting them verbatim for the subcommittee. And among those is the provision, "to be represented by counsel who, if reasonably available, should be a lawyer."

Now, on the basis of what you have said, I have assumed that was at Fort Riley—is that where it was?

Mr. PARISH. Yes, sir.

Mr. CREECH. That in the case of these boards legal counsel was never available.

Mr. PARISH. Never available.

Mr. CREECH. Was never available to any serviceman who was appearing at any of these boards.

Mr. PARISH. Never. Or at Fort Meade or Nuremburg or Stuttgart or Korea where I served, none were ever available. And the other day I called a G–1 out there and asked him if he ever did have a lawyer available, and I was told no. And I have told Mr. Wheeless in the Department of Defense this same thing a few months ago, that what they think may be true in the Pentagon just doesn't operate that way on the line.

Senator ERVIN. Colonel, I hope you are a little pessimistic in your outlook. I have known a lot of people in the Army that came out, officers and enlisted men, and I would hate to think that all of them, when they got ready to put on their uniform, lost all desire to see justice administered to such an extent that they all wanted to get convictions. Does no military officer in a case he is assigned to prosecute ever come in and say that the case ought to be dismissed?

Mr. PARISH. Well, I have heard of one case like that.

Senator ERVIN. Well, that is encouraging.

Mr. PARISH. It was a long time ago, sir.

Senator ERVIN. Now, in addition ordinarily they have a Judge Advocate, do they not?

Mr. PARISH. Yes, sir. The T.O. & E. in an Army division calls for usually three field-grade officers. I haven't seen a T.O. & E. for about 6 months. And it has a group of junior officers who do the work of prosecution and defending. And the worst part of the system is, suppose that you are the colonel and Stover is the trial counsel 1 month and I am the defense counsel, then after a couple of months we highport and change over, and then I start presecuting, and Brother Stover starts defending. In the meantime, you are making out both of our efficiency reports. Of course, I am in there fighting when I am prosecuting, and you have two teams, you see, the attackers and the defenders. And then you have us highport and change over after a couple of months. That part of it to me is very base. I know when we were teaching the Japanese how to reorganize the army they wondered what kind of a system was this where you had them change sides like that all the time.

Senator ERVIN. We used to have a major for the judge advocate of a division.

Mr. PARISH. Yes, sir.

Senator ERVIN. And the commander of the division ordinarily, if some case came up, usually turned to this man and asked him to investigate it to see whether there should be a prosecution or not, and he investigated it. And in my experience, most of these men were trained in the law and had some small amount of compulsion to do justice.

Mr. PARISH. Yes, sir. That is the procedure under 32(b) of the MCM. Now, the trouble with that is that today the 32(b) officer is a field-grade officer—he may be a busy artillery man, a lazy doughboy, or somebody else. And those 32(b) investigations are held by the laymen. And, of course, that 32(b) officer may be a qualified attorney, and he is a judge advocate general officer when it is before a general court. I don't quarrel with that system provided the procedures are followed. The trouble is, when you get into reviewing the records, say, before the discharge review board, or the Board for Correction of Military Records, you find the accused has been under quadruple jeopardy. And that is the thing that is bad. If a man were tried and convicted and punished and paid his debt to society, to the Army, that is one thing. But then when you take two courts and board him, boot him out of the Army and give him his second jeopardy, and then, thirdly, take his veterans' benefits away, you have him under a third jeopardy. And then, fourth, you smear him with an undesirable discharge from one of these boards. Then you have provided a bill of attainder that reaches down to his grandchildren, because he can't get a job, even our forms 57 for the Federal Government would preclude him from ever getting by any of the personnel offices. And now we have a citizenry of over a million people who have been denigrated by this type of thing. Actually, there is a quintuple jeopardy there.

Mr. CREECH. Colonel, in appointing these boards, when you appointed a board of this sort, what procedure was followed?

Mr. PARISH. Well, sir, usually we took a roster of the officers—well, I will give you an example. In the 3d Armored Cavalry Regiment we always used the 6's, that is, the commanders, because, for instance, if you four gentlemen were company commanders and were

sitting on the board, and Comrade Stover was up before the board, and Brother Robinson Everett voted for acquittal, and he came out of my company, then we would transfer Stover over to Everett's company. So that teaches the commanders that when they sit on a board they had better vote for a conviction. And that is the way we operated.

Mr. CREECH. Now, does your experience indicate that there was any command influence over the boards—apart from what you have just indicated, that there might be some predisposition, because you might end up with a man under your command? In other words, would the convening officer, the man who convened the board, and the man who, I presume, might be the same individual who was having the serviceman up before the board, would he—were there ever any indications that influence was exerted by him, by the convening officer on the board?

Mr. PARISH. Well, sir, the present processes exude the evidence of command influence, because before we put Stover up before this board, we have already sent a disposition form to the commanding officer saying, "We need the board to boot Stover out of the Army, because he has got his two courts-martial."

For instance, in the 7th Army we have memorandums, and in the 2d Army, once a man has two courts-martial he will be considered for a board. Then, in compliance with those circulars and memorandums, we submit Stover's name to the commanding officer for board action, and his adjutant tells the courts and boards sergeant, "Run up another tailor shop, we have got to measure Stover up for a board."

So this thing is rather routine. And the commanding officer initials the DF. He knows Stover is going to be boarded.

Mr. CREECH. Were you ever presented with any quotas, did you ever have any quotas for administrative discharge?

Mr. PARISH. Well, we weren't presented quotas, we were told, for example, in the 371st Armored Infantry Battalion, to get them all out if they had two or more courts. In fact, one example was, one accused——

Mr. CREECH. Excuse me. Was there any time element for the courts-martial?

Mr. PARISH. Forty-eight hours.

Mr. CREECH. You said two or more. In other words, if a man had been in the service for 19 years and had been court-martialed once 15 years ago and once 3 years ago, was there any time element?

Mr. PARISH. Three years.

Mr. CREECH. Within a 3-year period?

Mr. PARISH. No, that was the old criteria for previous convictions. But now when you check a record over in the Pentagon and you have worked before these boards, they go back to ab initio, to the very start of the action, which is the day you first came in the Army.

Mr. CREECH. And the seriousness of the offense has nothing to do with it?

Mr. PARISH. It is the cumulative effect. It is the same thing of having your whole past revealed before you. You may have a man that has 19 years, like a case that I had the other day, this Charlie Cooke case. It went all the way back to his article 15, way back in World War II.

In fact, in another case, the Stratton case, that was a World War I case, and they brought up a company punishment against him, and that was in 1918.

And you are never clear. It is something like a venereal disease record, you never get rid of it.

Senator ERVIN. Colonel, may I draw the inference that the military law as administered in the Army is tantamount to Lydford law, which is described in the verse:

> I oft have heard of Lydford law
> How in the morn they hang and draw
> And sit in judgment after.

Mr. PARISH. That is about it, sir, because there is no rehabilitation, the record is always upon you, and you are always under this quintuple jeopardy.

Mr. CREECH. With regard to rehabilitation, the subcommittee was told that prior to the commencement of the formal proceeding every effort was made to rehabilitate the individual, and that, only when reassignment, counseling or other rehabilitative efforts have proven fruitless, is he considered for separation with less than an honorable discharge.

Mr. PARISH. Well, sir, I don't know who made that statement, but I should like to take the gentleman on a tour of a few outfits and find out why you have this conflict of policies, where in one case we are going to boot the people out after two courts-martial, and yet we have another policy that says we are going to rehabilitate them. Now, the Air Force does make an effort to rehabilitate some of these youngsters. But the Army has gone out of its way to close down its stockade and show that the cost per man has gone down. And the rehabilitation effort, if any, is spurious, it just doesn't exist that I have ever seen.

Mr. CREECH. Did you ever reassign personnel as a means of rehabilitation, or letting them know that they were being considered for board action?

Mr. PARISH. I have never boarded a man under my command. It happened one time when I was on leave that a man was boarded in my regiment. We had some strong generals like General Shey and Terry Allen, and those people who never boarded a man. They maintained that the company commander was responsible for his troops, and that was his problem, and they didn't want us bringing our problems to them. And they didn't compromise our function of command at all. That is where a lot of the trouble is.

For instance, on these board actions over here in the Pentagon, you will see Sergeant Jones says so and so, derogatory comments about the petitioner. Then you will see Lieutenant Brown making the same statement. It is repetitious hearsay, and it lacks specificity. And finally, you are before the board with six or eight statements made by people who aren't even available before the board most of the time. So there is no way that you can confront your accusers. It lacks due process.

Mr. CREECH. Also the subcommittee was told that, before the board hearing is concluded, the soldier is afforded full opportunity to present evidence or to call witnesses in his behalf to the extent that they are reasonably available.

Mr. PARISH. Well, sir, I should like to point out one thing. The boards do not apply the rules of evidence. And that is one of the greatest weaknesses in these boards, because you cannot have due process of law without rules of evidence.

Mr. CREECH. The subcommittee was told that, after all the evidence is in, the board will recommend either a discharge and the character thereof or retention in the service, including a trial period to be assessed at a later date so as to permit rehabilitation.

Mr. PARISH. That is true of the 635 series in the Army with which I am most familiar, to provide that outline. However, how could we rehabilitate a man that had a court-martial in 1950 and another one in 1960, and under the 7th Army policy and the 2d Army policy he has to be moved out? Suppose you are a commander and you buck that policy and say, "We are going to rehabilitate Stover, he has only had a couple of courts for missing bed check, and we are going to give him a chance to rehabilitated." I would be bucking the commanding general's policy if I sought to rehabilitate him. If I showed that policy to General Clark in Germany they would laugh at me, they would say, "Well, what about our policy of two courts-martial out?"

Mr. CREECH. Are you thinking of a case in point, sir, when you say that a man might receive an administrative discharge as undesirable for military service on the basis of missing two bed checks over a 10-year period in military service?

Mr. PARISH. I would like to tell you, sir, about the Sepulveda case. That occurred in October of 1956. Sepulveda was the soldier of the month in October 1956 in the 371st Armored Infantry Battalion. He wanted to go home and see a girl in Brooklyn. He couldn't get any leave, and he had plenty of leave. So he missed bed check once and got his first summary court. And then he got another court just before Christmas of 1956. And he asked at the time if he had to miss bed check the third time so that he could qualify for his 208 board. So we obliged him with the 208 board and sent him home. And of course that is an AWOL charge under article 86.

Mr. EVERETT. Colonel Parish, one final question, and then I want to ask Mr. Stover some questions about the material submitted to the subcommittee. In the selection of court members would it be possible to determine the composition of the court in order to achieve a particular objective?

Mr. PARISH. Yes, indeed. Otherwise you wouldn't get your convictions.

Mr. EVERETT. Now, I would like to ask you about three of the cases that were submitted to the subcommittee by the VFW. The fifth case, attachment No. 1, relates to alleged command influence on a board where the first board recommendation was for retention in the service, and then a second board recommended an undesirable discharge. I have a twofold question about that.

First, was the recommendation of the second board executed; and, secondly, was the evidence before the second board, the adverse evidence, identical with that before the first board, if you recall?

Mr. STOVER. Mr. Lloyd, I think, handled that case.

Would you wish to comment on that, do you remember that one?

Mr. LLOYD. I was looking at the case, and might have missed the question.

The first board made its recommendation, and it then went to the convening authority. The convening authority disapproved the action of the board and sent it back. Then he made another board with the same evidence, and the only other evidence that was added to the second board was good evidence in favor of the man.

Mr. EVERETT. No further adverse evidence?

Mr. LLOYD. No further adverse evidence.

Mr. EVERETT. He went out on an undesirable discharge?

Mr. LLOYD. Yes, sir; he went out on an undesirable discharge.

Mr. EVERETT. Let me ask you about the sixth case listed there. This pertained to a man with 17 years of previous honorable service who in his last enlistment—I don't know how many previous ones there had been, it is not stated here—was convicted, by a civil court in Massachusetts, of drunkenness and driving under the influence of liquor in violation of the automobile law and endangering the public. Was there any evidence against him other than the conviction of drunken driving?

Mr. LLOYD. No, sir; that is about all there was.

Mr. EVERETT. There was no injury to a human being that resulted, no accident, no manslaughter charge, or anything of that sort?

Mr. LLOYD. No, sir; not to my knowledge, no injury.

Mr. EVERETT. So that it was simply a conviction for drunken driving?

Mr. LLOYD. That is right.

Mr. EVERETT. Had there been previous convictions by a civilian court, was he a habitual offender, or anything of that sort?

Mr. LLOYD. There were two violations, only one charge filed, nothing previous.

Mr. EVERETT. And it happened that under Massachusetts law, driving drunk under these circumstances did carry a maximum of 2 years?

Mr. LLOYD. Yes, sir.

Mr. EVERETT. Was that a felony under Massachusetts law, or do you recall?

Mr. LLOYD. I think it was a 2-year maximum sentence; that would be considered a felony.

Mr. EVERETT. So he received an undesirable discharge after 17 years of honorable service because of a driving drunk conviction on a first offense, is that right?

Mr. LLOYD. That is right, sir.

Mr. EVERETT. With reference to the seventh case set forth, you indicate that the soldier who had 15 years of prior honorable service had been accused of absconding with various food items, and requested trial. And under the circumstances there was no trial by court-martial, general court-martial, but he was discharged with an undesirable discharge; is that the way it happened?

Mr. LLOYD. That is right; yes, sir.

Mr. EVERETT. And this was despite his request for a general court-martial; there was no trial at all of any sort in that case?

Mr. LLOYD. No, there was no trial. They said they didn't have enough evidence to convict him.

Mr. EVERETT. There have been proposals for increasing the company punishment available under article 15, increasing the authority of the commanding officer, but giving the soldier, sailor, or airman an absolute election to choose trial by a court-martial; that would not be a summary court, which would be abolished entirely. Would you favor this proposal, which would increase the power of the commanding officer but would give the serviceman a chance to elect trial by court-martial?

Mr. STOVER. We have no experience upon which to base an answer. However, maybe these gentlemen here with me, one of them may have some reaction with respect to that proposal.

Mr. JONES. Am I correct, this would include an alternate proposal for the right of trial by court-martial before a law officer, not a summary court by a nonattorney officer, am I correct?

Mr. EVERETT. Yes, sir; that is correct.

Mr. JONES. I wouldn't have any firm opinion.

Would you, Colonel?

Mr. PARISH. Well sir, there are two proposals, as I understand, to modify the MCM. First, have the old deck court type of punishment prerogative with the commanding officer. And the second one is to have a special court-martial of one officer who would be an attorney. I shan't speak for the organization, because, after all, we have a million and a half people. But if you are asking me for my own opinion as a former enlisted man and a commanding officer, I should say that it would be very good for the Army if that commanding officer had the authority to take care of his own troubles in his own outfit without having a lot of outside interference, provided the jeopardy fell on the accused only one time, which is in consonance with our principles of constitutional law. If that company punishment were used against the man one time and he was punished once for one offense, then I would be for it.

But the trouble today is that if the man is missing his name tag on a shirt he gets an article 15; if he doesn't have his shoes polished he gets another article 15. And I would be the first commanding officer to give them that punishment, but I would be the last commanding officer to take those two articles 15 and use them in double jeopardy against that man and board him out, and then have him subject to the triple jeopardy of being precluded from his Veteran's Administration benefits.

Mr. EVERETT. Thank you.

Senator ERVIN. Mr. Stover, I want to thank you and your associates——

Mr. JONES. Could I make just two brief points?

Senator ERVIN. Certainly.

Mr. JONES. First, I should state for the record that Colonel Parish retired in 1960 after 20 years of military service, including a remarkable war record in Korea involving heroic achievement, and while in service obtained a law degree by resident instruction, and has been admitted to practice before the highest court of the State of Georgia.

And in connection with the VA benefits based on character of discharge, and related to the testimony of the witness for the Veterans' Administration, perhaps, it is my understanding that if a veteran receives a dishonorable discharge by a general court-martial order, he

is barred from benefits even though the Records Correction Board might change the character of that discharge to honorable. Under those circumstances the mere fact that he was discharged by general court-martial order bars benefits. I think that is an inequity in title 38. I realize that title 38 may not be within this committee's jurisdiction, but since there was testimony on it I thought I should place that in the record.

It is quite disturbing to us. It seems to us that if a man gets an honorable discharge after a reasonable consideration by a constituted board, it should have the full meaning of an honorable discharge as though it had been issued originally.

Senator ERVIN. I think your observation is well taken.

Mr. JONES. I might comment, too, that these cases we presented were not identified, but we do have identification and can present it if the committee wishes.

Senator ERVIN. I am not familiar with the law on the point, but I was under the impression that, when the board directed a man's discharge, this put him in the same status as if he had never received that discharge.

Mr. JONES. I can cite a case with which I am quite familiar, and others too, in which we obtained a Corrections Discharge, and the VA, and this includes the Central Office too, cannot touch it, because he was given that discharge by court-martial order. I think it is a provision of title 38, and I think it is an unfair provision.

Mr. EVERETT. Isn't it your understanding that the Army and the Navy on the one hand and the Air Force on the other take differing positions about the effect of action by the Board for Correction of Military Records in eliminating the fact of a conviction, and that under one of these interpretations a conviction by general court-martial still remains, and under the other interpretation it is completely eradicated?

Mr. JONES. Of course, if you eliminate the conviction per se, then we have a good case if the discharge is honorable in character. But in numerous cases the conviction is not erased, it stands on the record, the fact is that he was still discharged by order of general court-martial.

Mr. STOVER. I think it is well understood—and this isn't meant to disavow Colonel Parish—but most of those views he expressed are his own views and not necessarily the views of the Veterans of Foreign Wars. Our testimony and our position is founded on established procedures, and he was reciting most of the time his own experience, which is not necessarily our official views.

Senator ERVIN. The colonel was talking mostly about Fort Riley. So I trust that all those conditions were not general.

Mr. PARISH. On the contrary, sir, I found it to be quite general.

Senator ERVIN. Mr. Stover, I want to thank you and your associates for coming in and giving us the benefit of your experience, and also calling our attention to the position which the Veterans of Foreign Wars has taken in the matter of resolutions on some of the matters that we are considering here.

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

Mr. CREECH. The next witness is Rear Adm. William C. Mott.

**STATEMENT OF REAR ADM. WILLIAM C. MOTT, U.S. NAVY, THE JUDGE ADVOCATE GENERAL OF THE NAVY; ACCOMPANIED BY CAPT. MACK K. GREENBERG, U.S. NAVY, ASSISTANT JAG FOR MILITARY JUSTICE; AND CAPT. JOHN M. CONNOLLY**

Senator ERVIN. Admiral Mott.

Admiral MOTT. Mr. Chairman, I have a short statement which, in view of the hour, I will try to render quickly.

I am pleased to be called back before the committee for the purpose of expressing my views in a few areas in which the committee has expressed interest.

The Uniform Code of Military Justice is now over 10 years of age, and as I mentioned in my testimony before the committee the other day, it has survived the Korean war, and it appears to be working reasonably well.

The framers of the code, in their wisdom, provided a means by which recommended changes to the code could be brought to the attention of Congress. Article 67g. requires that the judges of the Court of Military Appeals, the Judge Advocate Generals of the Armed Forces and the General Counsel of the Treasury meet annually for the purpose of surveying the operations of the code and reporting to the Committees on Armed Services of the Senate and House of Representatives, to the Secretary of Defense, and to the Secretaries of the Departments. This committee has come to be known as the Code Committee.

As a matter of fact, we meet quite often, more often than once a year, to decide what recommendation should be made.

The Second Annual Report of the U.S. Court of Military Appeals, covering the period June 1, 1952, to December 31, 1953, reported on some 17 amendments recommended by the Code Committee, of which I spoke a moment ago. Subsequent annual reports of the Court of Military Appeals reflect continuing study and refinements of the changes originally recommended. Despite the submissions made annually to the Congress to date, some 10 years, only two minor amendments to the code have been enacted.

By January 1959, some 17 changes to the code were incorporated into one omnibus bill. This bill was processed through the Court of Military Appeals, the Department of Defense, the Department of Justice, and the Bureau of the Budget, transmitted to Congress, and introduced by Mr. Vinson as H.R. 3387. No hearings were held. In January 1961, the omnibus amendments were again transmitted to Congress as part of the present administration's legislative program. They have not been introduced.

The committee staff; that is, the committee staff of the House Armed Services Committee, has informally suggested that the omnibus amendments be split into piecemeal legislation. With this in mind, the most vital item in the omnibus bill, which you have heard a lot about in these hearings; namely, increasing commanding officer's nonjudicial power (art. 15), was extracted from the omnibus amendments, brought current, and introduced in Congress as H.R. 7656.

In my opinion and in the opinion of the fleet and shore-based commanders generally, one of the most serious defects in the code

results from the inadequate authority of a commanding officer to impose nonjudicial punishment upon members of his command for minor offenses. H.R. 7656, the presently pending bill, will, I am certain, go far toward improving discipline in the Armed Forces, without necessity of resorting to the court-martial process with its accompanying stigma of a criminal conviction. I sincerely hope Congress will enact this legislation into law during the present session.

Senator Ervin. On that point I would like to ask you a question, Admiral. Would this amendment provide that they can inflict such punishment regardless of the wishes of the individual on whom the punishment is to be inflicted? In other words, does he have any say-so at all?

The reason I asked that question, that is somewhat comparable with what we used to call company punishment.

Admiral Mott. It is company punishment; yes, sir.

Senator Ervin. In the Army. I understand their practice is different from the Navy's. But in the Army the person whom the company commander thought should be disciplined was given the option of either taking a summary court or submitting to company punishment.

Admiral Mott. That is correct, sir.

Senator Ervin. And personally I agree with the company punishment method, because I think it accomplishes the same result without having it on the man's service record.

Admiral Mott. Well, I think in probably 99 cases out of 100, if I were an attorney representing a man, even if he had that election I would advise him to take the company punishment in order to prevent the possibility of getting a criminal conviction on his record.

However, you are quite correct, sir. The law allows the Secretary of the service concerned to make regulations in this area. In other words, it gives the service Secretaries the discretion to decide whether or not a man should have the right to demand a court-martial in lieu of taking this company or mast punishment, as we call it in the Navy. It is equally true that in the Navy the discretion of the Secretary of the Navy has always been exercised not to give this election. Now, in the Navy we believe that this is necessary because of our particular organization and our particular method of operation. Perhaps I could make this clear by an example.

As I understand the Army practice, if a man refuses company punishment and says, "No, I want to be tried by court-martial," then the court-martial is convened by the next superior authority, which might be the battalion commander. This is difficult if not impossible in the Navy, where you have no superior command with you. You are out at sea. A man commits some transgression and the commanding officer takes him up to mast. He is the absolute authority present under long custom of the sea. If the man were to say, "No, I won't take commanding officer's punishment," it undermines the captain's position of responsibility. It is also a little difficult to find a superior authority to convene a court-martial. The only recourse that the man would have in that case would be to have some junior officer constituted as the court. I personally think this would be bad for discipline and eventually bad for morale in the Navy as we operate.

However, Senator, it may be that when this bill which is now pending is passed, the Navy will have to reevaluate its policy as to this exercise of discretion by the Secretary. It may be, for instance, that if the summary court is abolished, which is one of the proposals, we might wish to reevaluate this. In any event, we would reevaluate it depending upon the circumstances and the changes that are made in the legislation.

But I think it would be wrong, sir, for the Congress to write this into the law. After all, the Secretaries of these Departments are men of very broad experience. The Secretary of the Navy, Mr. Korth, is a very distinguished lawyer. I am certain that he would listen to arguments on both sides. And if he decided that this election should be given under the terms of this new law that is passed by the Congress, I am as sure as I sit here that he would say, "No, I believe, after I have considered all the facts and the evidence that has been presented to me, that we should give the man the election."

If I may add, sir, I was a little bit confused by some of the testimony that was given here this morning, or yesterday, rather. As I understand it, some of the people recommended in one breath the abolishment of both the summary court and the special court, but still said that a man should be given the election regarding company punishment, which would force him to a general court-martial. I think that would be a terrible mistake.

Senator ERVIN. I am not convinced about the summary court, I think the summary court functions fairly well and serves a useful purpose. It is sort of like a police court for very petty misdemeanors, or a municipal court.

Admiral MOTT. The Congress hasn't faced up to this yet, sir. They may decide to leave the summary court. That is an optional tool for the commander to use. However, again, we have a different operation in the Navy. In the Navy a summary court officer is a subordinate officer on the same ship. Consider this example: Here is a small ship out in the ocean. It has 10 officers on it—all juniors. The commander can only refer the summary court to one of these junior officers in his own command. It is different with the Army, where they can turn to a superior command to refer the summary court. The convening of the court and the actual officer who mans it is in that superior command.

Senator ERVIN. I appreciate very much your explanation and reason for the different practices. And I also would be glad if the Navy did reconsider and review the policy and see if they still think the policy is wise or necessary, or whether they think it can be modified.

Admiral MOTT. I am absolutely certain that the Navy will, when this law is passed, if it is, reconsider this policy on the basis of what the new law says, and the basis of experience over the years.

Judge, this has been by no means a unanimous opinion in the Navy. I know senior officers in the Navy who at the very beginning recommended that this election should be given to men, especially did senior officers in joint commands make such recommendations. But on balance, after considering all the evidence, the Secretary of the Navy decided not to do it. If this law passes I am sure he will consider it again in the light of the then current evidence.

Senator ERVIN. Thank you, sir. In other words, there are so many of these things on which neither the proponents or opponents can say they have the absolute truth and the other side has none, is that correct?

Admiral MOTT. That is correct, sir.

If I may continue, sir. I have already indicated during the hearings to date that another area of difficulty in the administration of military justice is in the special court-martial field. Present law, as you know, does not require the appointment of a lawyer as a member of such a court nor does it require the use of qualified lawyers as counsel. In the great majority of cases involving simple absence offenses, violation of lawful orders, or simple assaults, resort to special court-martial trial with nonlawyers as counsel pose no particular difficulty. Justice is done and the accused's rights are adequately protected.

Senator ERVIN. On that point, is not each naval officer given instruction in the fundamentals of Navy law?

Admiral MOTT. Well, the law itself requires that certain instruction be given to everybody, including enlisted men. In the Navy we have a School of Naval Justice. Incidentally we are the only service that does take our line officers and attempt to instruct them. Also a certain number of hours are devoted to this at the Naval Academy and at the Post Graduate School in Monterey. But at the Navy Justice School we have a specific course of 7 weeks' duration designed for line officers. Commanding officers will usually survey the roster of officers on their ship when they take command to find out how many officers are graduates of this school. And if they do not have any, or if they feel they do not have enough, the commanding officer of that school will soon receive a request for a quota.

As a former commanding officer of the school, I have many times received requests from commanding officers saying, "I don't have enough officers on my ship who are graduates of the school, please give me a quota." And we always complied.

I am aware of the practice in the Air Force to assign lawyers as trial and defense counsel in special courts-martial. As Mr. Fay pointed out during his testimony, the Navy has at present on active duty but 471 uniformed lawyers.

Within our capabilities, we have considered other means of insuring the adequate protection of the rights of an accused as well as the interests of the Government in the trial of the complicated types of special courts-martial. One device which has been used to a limited extent is the so-called "dockside court." This practice involves appointment of lawyers as trial and defense counsel in areas of concentrated naval activity where such lawyers are available. However, in view of the limited number of lawyers in the Navy and the burden that is already placed upon them in carrying out their primary assignments, it has not been possible to expand the "dockside court" concept to any degree.

You have asked me to comment on the so-called "B" bill. Before doing so, I should like to make it clear on the record that this bill has not been coordinated within the executive branch of the Government and I do not know whether or not it conforms to the program of the President. However, you have asked for my personal

views on this matter and I am pleased to state them. This bill, if enacted, would eliminate the summary court-martial, and that is what you spoke about a moment ago, Senator.

This trial forum has been criticized by the Court of Military Appeals, by the American Legion, and others. I would favor giving up this type of court if additional commanding officers' power is granted. The "B" bill provides for a one-officer special court-martial to be used at the option of the convening authority and the accused. A qualified lawyer certified by JAG for such assignment would constitute the one-officer court. Additionally, the "B" bill provides for a law-officered special court-martial. The law officer for this court would function just as he does at present in a general court-martial.

What that means is simply this. You would have the regular special court made up of three officers, and then in addition you would have a law officer just as you do in a general court-martial.

This, too, is an optional type court but the option is with the convening authority only, depending largely on whether or not a law officer is available to him. These two new types of special courts-martial would have a salutary effect upon the fairness and adequacy of the trial, absent the availability of qualified lawyers as counsel.

Still another provision of the "B" bill provides for a one-officer general court-martial with the law officer sitting as the single officer. This would be tantamount to a jury-waived trial.

These two proposals (H.R. 7656 and the "B" bill) if enacted will go far toward strengthening the judicial process and at the same time insure to an accused his constitutional rights.

And I might add that this Code Committee, of which I am a member, made up of the judges and the JAG's, favors the enactment of these bills.

When Mr. Fay, the Under Secretary of the Navy, appeared before this committee, he mentioned briefly in response to a question by counsel that the Navy had under consideration the establishment of a specialized law officer program which would service all general courts-martial convened in the naval service and in the Marine Corps as well.

My recommendation for the servicewide implementation of this program has gone forward and 3 days ago was approved by the Commandant of the Marine Corps. In view of the highly technical nature of a law officer's assignment and the relatively few cases in which the average officer has the opportunity to sit, we found that the incidence of law officer error was relatively high under a hit-or-miss assignment of such officers. During the past year we in the Navy tested the program through a pilot organization in the Navy and a similar organization in the Marine Corps. It is my opinion that the specialized law officer program is well suited to the needs of the Navy, is economical and will materially improve the administration of justice in the general court-martial field. We hope to have the program fully implemented by mid-summer of this year.

That completes my prepared statement, and I will be happy to try to answer any questions you may have.

Mr. CREECH. This morning the subcommittee was told that the Judge Advocate General's School, the Army school at Charlottesville, has made a very fine contribution to the administration of military

justice. And I wonder, sir, about the Navy's school at Newport. You mentioned that it was for line officers, and I presume that would not be comparable to the Army school?

Admiral MOTT. Well, I have to explain that a little bit. The school at Newport is primarily designed for line officers, but as a matter of policy we put our lawyers through it. When we procure a young lawyer from the Officers Candidate School at Newport he is "fresh caught" both as a line officer and as a lawyer. So we require all of our new lawyers to go through this school.

Now, when I was in command and Captain Greenberg here was the executive officer, we used to split our classes into sections so that we would have all lawyers in one section and all line officers in another. By so doing you could talk on different planes and wouldn't have heterogeneous classes.

In addition, I have great belief and faith in the Army Judge Advocate's School at Charlottesville, and have been a supporter of the school for 10 or 12 years. Recently I succeeded in convincing the Navy that we should have a lawyer on the teaching staff at that school. I now have such a lawyer down there.

In addition, I have an annual quota, or the Navy has an annual quota, of lawyers to send to that school as students. So that in effect we take advantage of the Army JAG School and the Navy's as well. I have recently received a request from another service which I said I would cheerfully honor if made to me formally to allow some of the nonlawyers to go to our School of Naval Justice at Newport. So it is a cross-educational and cross-fertilization field as far as I am concerned.

Mr. CREECH. Sir, it has been proposed here during the course of the hearings that, in view of the shortage of lawyers in the various services, when attorneys are needed for appearances to represent servicemen, if they are not readily available in one service, there might be some interchange of counsel. I wonder, sir, if you feel that it would be advantageous to have one service school such as the school at Charlottesville, in which all of the lawyers would be trained for the military service, and perhaps another school such as the one that you have at Newport for all the line officers who were not lawyers?

Admiral MOTT. It would be a little difficult to plan the curriculum of such a school, because the Judge Advocate Generals of the various services have different responsibilities under the law.

Now, let me give you an example. In the Navy, for reasons which are mainly historical, the Office of the General Counsel handles all of our commercial and procurement law, whereas in the Army the Judge Advocate General of the Army, if I am not mistaken, has responsibility for this type of law. Since we do have somewhat different responsibilities, it would be a little difficult to have a curriculum which would satisfy everybody.

I suppose it doesn't hurt anybody to take some law he won't use. I took a lot of it in law school myself. But that would be one of the problems. And as I have already said, Mr. Creech, we do utilize their school and they utilize ours.

Mr. CREECH. Now, sir, I wonder if you feel there would be any difficulty, for instance, in a Navy lawyer defending a serviceman

who might be in the Army, or in the Marines, or the Air Force, if there were such an exchange of legal service personnel.

Admiral MOTT. Well, such performance is permissible now, and if you will recall, in my testimony the other day I told you about an actual case where an Army officer—and it was a famous case, the *Colonel Fleming* collaboration case—requested one of my officers as defense counsel. I determined that this officer was reasonably available, and he, a naval officer and a very competent attorney, did defend Colonel Fleming in that court-martial at Fort Sheridan.

So that can be done now. I notified Washington that this was going to happen. Whether there should be more of such cross-use is a matter which I feel has some overtones and undertones which should be thoroughly considered. But it is permissible under the law now.

Mr. CREECH. It is just not done to any great extent at this time?

Admiral MOTT. That is correct.

Mr. CREECH. Admiral, you stated that the pilot program of the field judiciary which the Navy had in operation has been successful, and that you expect to have it in full operation by midsummer. Is that correct, sir?

Admiral MOTT. A formal decision putting it into effect on a servicewide basis has not yet been made by the Secretary. As Mr. Fay testified the other day, he has it under consideration. It must still be processed by recommendation of the Chief of Naval Operations and his adviser, the Chief of Naval Personnel. I would expect the Secretary of the Navy would be ready to make a decision on this matter within a week or two, or perhaps a month at the outside.

Mr. CREECH. Admiral, you have indicated here—at least you have, if I recall correctly—that you have approved, and that the Marine Corps has approved this program. I would just like to ask you, what is the basis of opposition, if there is any? Now, the subcommittee has been told informally that there is opposition by the Bureau of Naval Personnel to this type of program.

Admiral MOTT. There has been some opposition in the past. But the Chief of Naval Operations, Admiral Anderson, after a briefing by me on the subject which he requested, sent me down to Norfolk to speak to the type commanders and explain the program to them. I found that most of the opposition was based on a misunderstanding of what the program was all about. I haven't had a chance to talk to the Chief of Naval Personnel about his attitude on this subject since my trip to Norfolk. But I really do not think that there is any serious objection to this program now, I may be oversanguine, but I think it so proves itself on its merits that it is very difficult to find opposition to it. That is my own personal opinion.

One of the objections to it was the method of making out the fitness report. Some commanders felt that the law officers should be marked only by the commander and not have a fitness report marked by the Judge Advocate General. Some commanders, while they agreed that the fitness report should be marked by both, wanted the primary report to be made out by the commander and the current report to be made out by the Judge Advocate General.

As long as the Judge Advocate General gets to make out a report which goes directly to the man's record, I would not object to making out the concurrent report. This is my own personal feeling. I do

believe, however, it is important, if you are going to have a judiciary program of this type, that the Judge Advocate General be permitted to make out a fitness report. And I feel that way for this reason: He really is the only one who follows the professional work of the law officers through the appellate system. He is the one who observes how their rulings stand up as the case flows through the chain of our appellate system. Therefore I feel, as far as the professional qualifications of this man are concerned, I should make out a fitness report.

Furthermore, the law puts upon the Judge Advocate Generals of all the services the responsibility which is vested in no one else. The law says that the Judge Advocate General is the only person who can certify a law officer as qualified to sit as a judge. Likewise he is the only man who can decertify him. So in effect the Judge Advocate General is the only person in the service who can make or break a law officer.

Mr. CREECH. You have heard some of the testimony here this afternoon, and I am aware that you have followed much of the testimony which we have received at these hearings. I wonder if you would comment on some of the questions which have been posed here this afternoon pertaining to the fairness of proceeding before the various boards, for instance, the Board for Correction of Naval Records.

Admiral MOTT. Well, it so happens that I have argued a number of cases myself as an attorney before the Board for the Correction of Naval Records. It is probably a good thing I became the Judge Advocate General, because I made a record over there of never having lost a case before them. My luck was about ready to run out. So you might imagine that I am rather partial to the procedure before this Board. Frankly, I never argued a case before a board which did not bend over backward to hear the side of the accused.

It was mentioned here earlier by a witness that boards didn't follow the rules of evidence. As an attorney representing individuals before the Board for Correction of Naval Records, I always found this to be a great advantage, because I could get in hearsay evidence myself, and frequently did. I found both the recorder and the examiner for the Board for the Correction of Naval Records to be very fair in the way they allowed counsel to present the case. I couldn't ask for a better atmosphere in which to try a case.

Now, this is only my own personal experience. But I found it very refreshing.

Mr. CREECH. Would you care to comment on the boards which give the administrative discharges? Do you have experience there, sir, that would enable you to comment on those boards?

Admiral MOTT. Well, of course, occasionally such cases come before the Board for the Correction of Naval Records, after the fact. I have had no experience—personal experience—before the boards you speak of. But some of the lawyers in my office have represented people before them, and have found that they—I am talking about the Washington level boards now, not the field boards—and they have found that they had a fair hearing before them.

Let me just ask Captain Greenberg, if I may.

Yes, he confirms what I thought to be a fact, that lawyers in my office appear quite frequently before the Board in Washington, and they have never come and reported to me that they were getting other

than a fair opportunity to defend their client before the Board. They may not always win, but as Judge Ervin remarked earlier in this hearing when I was here, lawyers have a habit of complaining if they lose a case.

Mr. CREECH. Earlier this afternoon you heard a description of the manner in which the court-martial is designated, and also a discussion of the competence of the trial and defense counsel in court-martial proceedings. I wonder if you would care to comment on this?

Admiral MOTT. Well, this was a very strange procedure that I heard described today, and of course I know nothing about how they work things in the Army. You would have to recall an Army witness to get evidence on that point. But in the Navy I just never heard of such a system. In the Navy when I was a district legal officer, which would correspond to being a judge advocate of a division, I used to rotate my people, certainly. For instance, you have already had before you one of the best trial lawyers I ever had work for me in Commander Neff.

Now, Commander Neff was an incomparable defense attorney. But so was he a good trial counsel. If a lawyer is to qualify some day to be a judge; that is, a law officer, he must of necessity, if he is properly trained, walk down both sides of the street. That is to say, he must have represented the Government and he must have represented the defense.

Now, very early in the game the Court of Military Appeals was critical of using the more experienced man as trial counsel and the less experienced man as defense counsel. From the very first days of the criticism on this score by the Court of Military Appeals, we have always bent over backwards in the Navy, or at least I have—and such other commands that I have personal knowledge of—in putting the more experienced men in as defense counsel. But naturally you can't leave a man in as a defense counsel forever, you must move him into other duties if he is to be adequately trained to become a law officer—as Commander Neff was.

And to use him again as an example, I shifted him from defense counsel to trial counsel so that he would qualify to be a law officer or a judge at a later date, which he did.

Mr. EVERETT. Admiral, going back to the explanation that you gave to the chairman for the absence of any option in the Navy to decline article 15 punishment, why is it that it applies to all sailors in the Navy—and I gather all Marines—whether they are on board ship or whether they are based at Norfolk in a large oceanside installation where plenty of summary court officers would be available?

Admiral MOTT. First of all, let me say, we are talking about a very, very small percentage of cases. In fact, they may be nonexistent in the Navy. I called over this morning anticipating that you might ask this question to ask if we had any complaints in the Navy from men who were refused the right to court-martial in lieu of mast punishment. I was informed that we have had no such complaints in the Navy that we knew of. I have never heard of one. So we seem to be pretty happy with this system.

But to go specifically to your question, assuming that there was a complaint—which we don't know about—it would be difficult to have one rule for the shore-based commands and a different rule for

the ones at sea. I mean, in the interest of uniformity it would be hard to say to a man who was in a destroyer in a port, for instance, "Well, you don't have the right of election, but if you were at the receiving station here you would."

Mr. EVERETT. Admiral, isn't that exactly what has been done in one form or another in article 15 in stating who may be confined? Isn't that determined by whether someone is attached or embarked on an ocean vessel?

Admiral MOTT. I believe that that is true under the present law. But I am also informed by Captain Greenberg that the "A" bill would correct this.

Mr. EVERETT. Under the "A" bill wouldn't they take out the word "attached" and limit it just to the people who were embarked on a vessel?

Admiral MOTT. Captain Greenberg informs me that the correctional custody would be applicable whether he was ashore or afloat.

Mr. EVERETT. But certainly under the existing law there is a differentiation made which could have been made by the Secretary of the Navy in granting an option to naval personnel without significant inconvenience?

Admiral MOTT. That is right. But what I am saying, Mr. Everett, is that I simply don't know what all the shouting is about. If the subcommittee has any complaints from naval personnel who have been denied the right to elect court-martial in lieu of mast, I would like to know about them, because we don't have any in the Navy that I know of.

Mr. EVERETT. Isn't it always a possibility that this long-established custom may just have been accepted as natural, and it may never have occurred to anyone to complain?

Admiral MOTT. I guess you don't know the enlisted man in the Navy.

I think the reason for it is that most of them realize that they are a lot better off with the company punishment, which is the idea I started out with.

Mr. EVERETT. In that event, if they are much better off with the company punishment, wouldn't this mean that there would be no loss from the Navy's standpoint in granting this option, since it would seldom be exercised?

Admiral MOTT. Mr. Everett, this is one of the arguments that I promise you will be presented to the Secretary if this bill is passed.

Mr. EVERETT. Now, Admiral Mott, let's look for a moment, if we may, at another type of organization. This pertains to a letter that was sent to the chairman on February 28 by Under Secretary Fay. And it relates to his testimony given on February 20, 1962, when you were present. I would appreciate your clarifying this passage.

Admiral MOTT. I did not write this, and I have not seen it, but I will try.

Mr. EVERETT. Let me read the passage, and perhaps you can give us your interpretation thereof. Mr. Fay writes:

> In connection with the question concerning the disposition which is made of pending undesirable discharges, when the man involved requests trial by court-martial, I answered that invariably the man was given the benefit of the doubt and discharged under honorable conditions.

He then adds:

I hope I did not create the impression that any man can avoid an undesirable discharge merely by requesting trial. Actually, the only category of cases in which this question arises is that of the sex pervert. In the other two categories, the civil conviction cases and the habitual offender, there is normally no occasion for the question to arise.

Now, my question is this: Does Mr. Fay mean that in this category of cases concerning sex perverts you do give the man the benefit of the doubt and invariably discharge him with an honorable discharge, or does he mean something else?

Admiral MOTT. That is right. If he demands a court in one of these sexual pervert cases, you do give him the benefit of the doubt. Now, I judge that he may have also been saying, however, "We don't want this word to get around in other cases, that all a man has to do is to demand a court, and he gets an honorable discharge."

Mr. EVERETT. He meant then that this does not apply to the civil conviction cases and the habitual offenders, is that right, but it does apply to the single category of cases which we are asked about.

Now, Admiral, during the portion of Mr. Creech's questions to an earlier witness about the Navy brochure, I thought I observed you shaking your head vigorously when it was stated that the Navy was going to give out a brochure which would replace the pretrial instructions. Perhaps I misinterpreted your gestures at that time; I would like for you to clarify: What is the Navy going to do with the pretrial instructions?

Admiral MOTT. I think I was shaking my head at something my secretary said to me, sir, that had nothing to do with the brochure.

Mr. EVERETT. So the brochure is on the runway?

Admiral MOTT. That is right. We have every intention, if we can get the brochures cleared, of putting it out.

Mr. EVERETT. And that will supplant the pretrial instructions?

Admiral MOTT. Yes. The handbook now, Captain Greenberg informs me, is with Army and Air Force for clearance.

Mr. EVERETT. If they do not clear it, would you still go ahead and put it out?

Admiral MOTT. We might

Mr. EVERETT. There has been some confusion about the following situation. A case is taken to the Correction Board involving a conviction by court-martial. The Board says, "You shouldn't have been convicted." Now, the subcommittee's understanding has been that there was a difference between the Army and the Navy, on the one hand, and the Air Force, on the other, as to what happened in that particular situation.

Admiral MOTT. That is correct.

Mr. EVERETT. In the Navy is the conviction eradicated when the Correction Board finds there is a mistake, or does it remain?

Admiral MOTT. I believe it is our interpretation in the Navy under an existing opinion of the Attorney General that it cannot be eradicated.

Mr. EVERETT. Now, irrespective of the correctness of the interpretation of existing law, would you favor a change in that law so that the fact of the conviction could be eradicated if the Board determined a mistake had been made?

Admiral MOTT. Well, the Congress has set up a rather thorough review now with the civilian court, the Court of Military Appeals, and the Court of Military Appeals can reconsider a case for some time after their decision, I don't know just how long it is.

Mr. EVERETT. That is only on points of law, isn't it, Admiral?

Admiral MOTT. You are talking about a court-martial conviction.

Mr. EVERETT. I mean, the Court of Military Appeals is only reviewing a point of law, and I assume the Correction Board would be confronted with new evidence?

Admiral MOTT. This is a very difficult question, Mr. Everett. And I wonder if I might submit an opinion for the record on this after I have had an opportunity to study the case and talk to the recorder for the Board for the Correction of Naval Records.

(The memorandum referred to follows:)

THE JUDGE ADVOCATE GENERAL OF THE NAVY,
*Washington.*

Memorandum for Senator Ervin, chairman, Subcommittee on Constitutional Rights, U.S. Senate.

Subject: Extension of authority of Board for Correction of Naval (Military) Records to review convictions by courts-martial.

1. In my testimony before your subcommittee on March 1, 1962, I requested permission to submit a memorandum concerning my views as to whether the authority of the Board for Correction of Naval Records should be extended to permit review of convictions by courts-martial.

2. The Navy's position as set forth in its answer to Aide Memoire questions 9 and 10 reflects the view that the Board for Correction of Naval Records not being an established appellate tribunal in the court-martial system, may not wipe out a conviction. The Navy's position is strengthened by opinions of the Attorney General. 40 Op. Atty. Gen. 504, 508 (1947); 41 Op. Atty. Gen. 8 (1949).

3. I personally would oppose enlarging the jurisdiction of this Board for the following reasons:

(*a*) There is no substantial need for such expanded authority. The Uniform Code of Military Justice provides for multiple reviews of courts-martial convictions on questions of both fact and law. This framework of statutory law has been interlaced with a considerable body of decisional law that demands each review to be full, fair and impartial. Thus, in my opinion, the safeguards in the present system are more than sufficient to insure justice, and any additional review by a Correction Board would be almost totally fruitless.

(*b*) The Uniform Code of Military Justice recognizes that there may be isolated cases of injustice due to fraud on the court or newly discovered evidence. It therefore authorizes a petition for a new trial on such grounds within 1 year from the date of the convening authority's action in a case. For some time now it has been recognized that the 1-year limitation might not be realistic, and the so-called omnibus bill (H.R. 3387, 86th Cong.; DOD legislative item 87-29, 87th Cong.) proposed increasing this period to 2 years. This legislation, if enacted, should prevent any injustices that may presently occur.

(*c*) The provisions for a petition for a new trial in the Uniform Code of Military Justice apply only to cases in which a relatively severe sentence is approved (Dismissal, dishonorable or bad conduct discharge, and confinement for 1 year or more). For cases of lesser gravity I, as well as my predecessor, have considered that corrective action similar to the civilian writ of coram nobis may be taken by a convening or supervisory authority.

4. For the foregoing reasons and bearing in mind Article 76 of the Uniform Code of Military Justice which deals with finality of courts-martial judgments, I would oppose enlarging the jurisdiction of the Board.

Mr. EVERETT. This would be your opinion of what the law should be, not necessarily an interpretation of what it is?

Admiral MOTT. Yes, sir. And I don't like to give curbstone opinions without considering all of the facts and the legal issues involved.

Mr. EVERETT. Recently I noticed in the JAG Journal, an excellent publication under the auspices of your Department, an opinion which apparently was to this effect—that a sailor who had been convicted by a civil court and discharged as an undesirable, and who later was pardoned, cannot obtain a change in the character of the discharge. I wondered whether this is the general position of your Department, or how this type of situation involving a conviction which in some way is overthrown, whether by appeal or by pardon, is treated when it comes to changing the character of the discharge.

Admiral MOTT. Well, there are two kinds of pardons, as I understand it, one which is a pardon with innocence, and is very unusual, and another, the usual type, is one which admits the guilt but nevertheless pardons the man. So, query, should you, if you have the ordinary type pardon, the very usual one, be able to go back and in effect change the fact of your guilt?

Now, one of the cases which I argued before one of these boards over in the Bureau was the case of a man that had been convicted of several offenses involving moral terpitude. And even after we got a pardon for him we found that he couldn't get any pay because of the application of the Hiss Act. Then we had to go before another board in the Navy and argued with that board that because of the pardon the man should be reenlisted. And I might add in this case the Navy did reenlist the man—and then put him in the Fleet Reserve so that he would be entitled to retirement.

But those cases are very unusual.

Mr. EVERETT. You mentioned the Hiss Act. Am I correct in my understanding that a summary court conviction has on many occasions disqualified men from receiving benefits by reason of the Hiss Act?

Admiral MOTT. I wouldn't say on many occasions, no. But there have been some cases, a very few, where this has happened. We would like to see this removed. And I believe this has been.

Mr. EVERETT. Now, some question arose in connection with the testimony of an earlier witness as to the function of a recorder. I am not sure of the Navy nomenclature, but isn't there an official in the Navy Field Board who is required to present the evidence to the board, and isn't he sometimes labeled a recorder, and isn't he really a sort of prosecutor for that proceeding?

Admiral MOTT. Well, the only recorder that comes to my mind is the recorder for the Board for the Correction of Naval Records. He has the function of presenting the evidence to the Board, that is true. But I never found him or looked upon him as a prosecutor. I always found him very fair. As counsel for the party, I was always allowed to go talk with the particular examiner that was preparing the case. I sometimes felt that they really did better for my client than I could do myself.

I honestly was very impressed with the fairness of the recorders and the examiners that work for the Board for the Correction of Naval Records.

Mr. EVERETT. Admiral, is it possible that some confusion may exist in connection with the questions Mr. Creech asked you, in that he may have been referring to the Army and Air Force practice, which I believe involves a designation of a recorder at the field board level,

whereas the Navy apparently restricts this term to the Correction Board?

Admiral MOTT. I don't know of any recorder.

Captain Connolly informs me that there is a recorder in each field board in the Navy, and that this recorder does present the Government's case. I have never witnessed a field board in the Navy, and I don't know anything about them. And I don't think my lawyers do either.

Mr. EVERETT. Is the recorder a lawyer? Perhaps this question would be better directed at Captain Connolly than you, since he is more familiar with that particular type of procedure.

Captain CONNOLLY. Almost never.

Mr. EVERETT. But he would be analogous to the trial counsel in the special court-martial?

Captain CONNOLLY. That is correct. He presents the Government's case.

Mr. EVERETT. Is he charged with the duty of representing the accused any more than a district attorney has certain responsibilities in the interest of justice?

Captain CONNOLLY. No more than that.

Mr. EVERETT. Admiral, two final questions relating to command control. While you have testified that you know of no instances of defense counsel being switched because they were too good, isn't it a fact that there have been recurrent complaints which have come to your attention, perhaps, relating to instances in other services of the defense counsel being assigned to claims activities, legal assistance, and so forth, because of alleged proficiency in getting light sentences and acquittals?

Admiral MOTT. Well, I think, very early in the operation of the code, when we had admirals who sat as permanent presidents of the general court, there was a tendency on the part of those admirals to take charge and to put on report a defense counsel who got too good. I believe there were several isolated instances early in the operation of the code where these successful defense counsel were changed.

I can assure you that I know of no such cases within the last 5 years, and if one happened while I was the Judge Advocate General, I would take the promptest kind of action to see that it didn't happen again.

Mr. EVERETT. Then, Admiral, you do recognize that the possibility of use of effectiveness or fitness reports to control the court member or counsel is a danger against which the Navy and the other services must be always vigilant?

Admiral MOTT. There is no question about that. But I just feel that in the Navy we have stamped out whatever practices existed early in the days of the code. I would appreciate any such cases being brought to my attention.

Briefly, I would take steps to see that it didn't happen again.

Mr. EVERETT. Thank you, Admiral.

Senator ERVIN. Admiral, there is a question I would like to put to you. You may not wish to answer it at this time, but there seems to be a widely held feeling, both with respect to undesirable discharges by the Navy and other branches of the service, that the present method of granting those discharges should require some additional

law or some additional regulations to make certain that the person to whom it is contemplated such a discharge should be granted would be given more notice and an opportunity to present in an effective way anything he has to say on the subject, and perhaps be represented by counsel.

Do you have any other observations you would care to make to the committee on that point with respect to the Navy procedures?

Admiral MOTT. Well, first of all, Judge, I think that the effect of these hearings has been most salutary. I am sure that the services, as a result of these hearings, even if the committee doesn't make any recommendations, will review their practices, and if possible, do some of the things which you have suggested.

In the Navy we do, at the appellate level, have an opportunity for a man to appear in person and to have counsel. I get requests in my office to provide counsel for people, and I have never refused anybody that came in and asked for counsel.

At the field board levels we have been considering, since these hearings started, trying to see whether or not in contested cases; that is, in the unusual case where a man protests his innocence and requests counsel, whether or not we couldn't stretch that "if available" clause a little more than it is now stretched to see that he was provided with counsel.

All I can think of, Judge, is that we will make every effort that we possibly can within our personnel limitations along those lines.

Senator ERVIN. As a matter of fact, is it not true that in a very substantial percent of cases where a serviceman is granted a discharge of that character, that the receipt of that discharge is an advantage to him, as well as an advantage to the Navy, in getting rid of a person who is unfit?

Admiral MOTT. I believe that to be true, because in many cases, had he stayed around, he would probably have received a much more severe discharge; yes, sir.

Mr. CREECH. I have one last question I would like to have the admiral's views on.

Admiral, we have received a number of recommendations from a number of individuals that there be a separate JAG Corps for the Navy. I wonder what are your views with regard to that recommendation, and what effect you think it would have in alleviating your lawyer shortage?

Admiral MOTT. Well, my views on this score are a matter of public record. I am in favor of the JAG Corps, because I think it would be better not only for the purposes and aims of this committee, but it would be better for the Navy. I think a JAG Corps will make it easier to recruit lawyers, it will be easier to retain them, and we will be able to give our client, the Navy, better service.

As a matter of fact, there is now pending before the Congress a bill to create a JAG Corps which has the approval of the President of the United States, the Secretary of Defense, and everybody else that you must get approval from when you go through the legislative process. That bill was introduced early last year by the outgoing administration. But it was also reworked through the chain by the new administration and specifically approved by the Bureau of the Budget and the new administration.

I can only hope that there will be hearings on that bill and some action will be taken. I personally endorse it completely and thoroughly. I have talked to my Secretary about this. He is unfamiliar with it. He hasn't been in office very long, and he has promised to hear a briefing on the subject within the matter of a very few days. He may at the end of that briefing take some action of his own to try and bring about a hearing.

It would be unfair of me to suggest what he will do until he has had a chance to be briefed on this particular bill and about which he knows very little.

Mr. CREECH. Thank you, sir.

Senator ERVIN. Admiral Mott, the subcommittee is grateful to you, Captain Greenberg, and Captain Connolly for making your appearances here and for giving us the benefit of your views on these matters.

Admiral MOTT. Thank you, sir.

Senator ERVIN. The committee will adjourn.

(Whereupon, at 5:35 p.m., the subcommittee adjourned, subject to the call of the Chair.)

# CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL

---

**TUESDAY, MARCH 6, 1962**

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to call, at 2:07 p.m., in room 457, Old Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee), presiding.

Present: Senators Ervin, Hruska, and Keating.

Also present: William A. Creech, chief counsel and staff director; Robinson O. Everett, counsel; and Bernard Waters, minority counsel.

Senator HRUSKA. In the absence of our chairman, Senator Ervin, I have been asked to preside over the early portion of this hearing.

We have scheduled for today's business witnesses who will testify on the general subject of constitutional rights of military personnel.

The first witness to be called will be Mr. John J. Finn, legal counsel for the American Legion.

I understand, Mr. Finn, that you are to be accompanied by Mr. John Mears, a member of the legal staff.

Mr. FINN. That is correct.

Senator HRUSKA. Just be seated there someplace so you will have easy access to the committee reporter and also members of the committee.

## STATEMENT OF JOHN J. FINN, CHAIRMAN, SPECIAL SUBCOMMITTEE ON UNIFORM CODE OF MILITARY JUSTICE AND COURT OF MILITARY APPEALS, OF THE AMERICAN LEGION; ACCOMPANIED BY JOHN S. MEARS, LEGISLATIVE REPRESENTATIVE, THE AMERICAN LEGION

Senator HRUSKA. You may proceed in your own fashion, Mr. Finn, to give your testimony in whichever way you desire.

Mr. MEARS. I am a representative of the legislative commission of the American Legion.

Our witness today is Mr. John J. Finn. Mr. Finn was formerly a member of the national executive committee of the American Legion. He has also served the department of the District of Columbia as judge advocate for 6 or 7 years and when the code was originally being formulated and considered by Congress, Mr. Finn was then the spokesman for the American Legion and has been so ever since in connection with this subject. I am happy to present Mr. Finn.

Senator HRUSKA. Thank you very much for that fine introduction. Mr. Finn, you may proceed.

Mr. FINN. I thank you, gentlemen, for the opportunity to address you concerning this legislation. I have been a member of the bar of the Commonwealth of Massachusetts for about 30 years and—33 years, actually. I am also a member of the bar of the Commonwealth of Virginia and of the District of Columbia.

I am a member of the Supreme Court bar, the bar of the U.S. Court of Military Appeals, among others.

I have submitted to you a statement in which I indicate what my background is with relation to the subjects which are under consideration, including the fact that I spent 33 months in the U.S. Navy as a naval officer reviewing general courts-martial, and I spent some of that time on various boards set up by Mr. Forrestal, who was then the Secretary of the Navy.

I have been a member of a committee of the American Legion since 1956, and I am presently the chairman of that committee, which is set up to investigate into matters concerning military justice and the Court of Military Appeals.

We have filed a report with the American Legion, and by mandates of the Legion from time to time, the recommendations of that committee have been adopted by the American Legion.

These are mandates to the committee to seek certain legislation and to oppose certain other legislation.

By not referring to the statment and reading it in full, I do not mean to ignore any part of it. But in view of the press of time under which you gentlemen are operating I believe it probably would be more beneficial to all of us if I read only the salient portions of that statement.

In the statement, I refer to this report on the Uniform Code of Military Justice and I think we have marked it "A" and attached it to the statement.

Senator HRUSKA. Yes. We have that, Mr. Finn.

Mr. FINN. The reason for this is that we conceive that nobody can fully understand all of the aspects of military justice without some investigation into the background, what constitutes military service, the difficulties that the military operate under during time of war, and so forth.

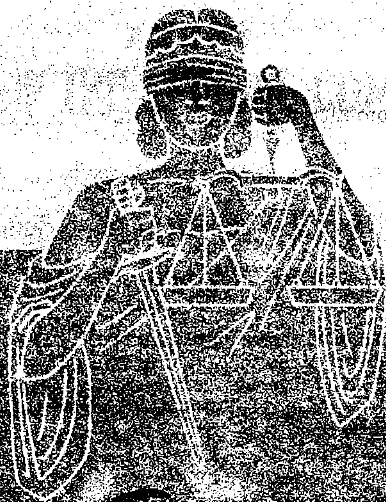
The greater part of that report deals with the underlying reasons for the position which we have taken up to now and which I hope to state here today.

Senator HRUSKA. Mr. Finn, in order that we will get this in the record, we want to say first of all that your statement will be placed in the record in its entirety; also, this exhibit A consisting of the report on the Uniform Code of Military Justice will be accepted for the record and for the use of the committee.

Mr. FINN. Thank you.

(The document marked "Exhibit A" is as follows:)

A



# *Report* ON THE UNIFORM CODE OF MILITARY JUSTICE

DISTRIBUTED BY

**THE AMERICAN LEGION**
**NATIONAL SECURITY DIVISION**
700 NORTH PENNSYLVANIA ST.
INDIANAPOLIS, INDIANA

# INDEX

Page

Creation of the Committee and Membership ........ 5

Meetings of the Committee and Its Processes ........ 5

Fundamental Concepts and Principles of the Investigation ........ 7

Origin of the Code and Criticism of It ........ 10

1. Personnel ........ 12

2. Jurisdiction ........ 20

3. Trial Courts and Appellate Review ........ 23

 a. Introduction ........ 23

 b. General Courts ........ 24

 c. Special Courts ........ 27

 d. Summary Courts and Company and Mast Punishment ........ 28

 e. Appellate Review ........ 29

4. Manual for Courts Martial ........ 32

5. United States Court of Military Appeals ........ 34

6. Discharge Procedures ........ 37

7. Miscellaneous ........ 39

 a. Rehabilitation Procedures of the Air Force ........ 39

 b. New Judge Advocate General of the Navy ........ 40

 c. Publication of the Committee's Report ........ 40

 d. Continuance of the Committee ........ 40

Text References ........ 40

Appendix "A" ........ 42

Appendix "B" ........ 43

Appendix "C" ........ 45

Appendix "D" ........ 47

Resolution ........ 53

# REPORT OF THE SPECIAL COMMITTEE
## *on the*
# UNIFORM CODE OF MILITARY JUSTICE AND THE UNITED STATES COURT OF MILITARY APPEALS

To J. Addington Wagner, National Commander, The American Legion, and to the Delegates Assembled in the 38th Annual National Convention of The American Legion held at Los Angeles, California, September 3-6, 1956.

The Special Committee created pursuant to Resolution No. 172 adopted at the 37th Annual Convention of The American Legion, held at Miami, Florida, October 10 through 13, 1955, submits herewith its report:

## CREATION OF THE COMMITTEE AND MEMBERSHIP

Resolution No. 172 adopted at the 37th Annual Convention of The American Legion held at Miami, Florida, October 10 through October 13, 1955, directed the National Commander to appoint a committee of lawyers to:

1. Conduct a survey of the operation of the code since enactment to determine whether amendment thereof is desirable or necessary and, if so, to recommend to the next National Convention of The American Legion such necessary and proper amendments; and
2. To investigate and report to said National Convention its findings as to the complaints and charges made, and amendments to the code suggested, by military and naval personnel and establishments with the view to determining the truth or accuracy of the charges, the validity of all complaints and the necessity for amendments suggested or recommended by these sources; and
3. To investigate, and report to said National Convention its findings as to, the work of the United States Court of Military Appeals for the purpose of ascertaining its effectiveness in carrying out the spirit and the letter of the Uniform Code of Military Justice.[1]

The committee was to investigate the operation of the Uniform Code of Military Justice, and of the Court of Military Appeals.[2]

Pursuant to the authority thus vested in the National Commander by said resolution he, on December 16, 1955, appointed the following named members of The American Legion to membership on said committee:

Franklin Riter, Salt Lake City, Utah, Chairman
John J. Finn, Alexandria, Virginia
Carl C. Matheny, Detroit, Michigan

Each member of the committee has been in the active practice of law for a great number of years and is now engaged in the active practice of law. Messrs. Riter and Finn participated in and represented The American Legion in the legislative processes preceding the enactment of both the Elston Act and Uniform Code of Military Justice.

## MEETINGS OF THE COMMITTEE AND ITS PROCESSES

The National Commander convened the committee at Indianapolis, Indiana, on February 23 and 24, 1956. At said meeting the committee agreed upon methods and means of conducting its investigation and perfected arrangements for internal organization of the committee making division of labor among the committee membership. It was agreed that it would be necessary to conduct interviews with offi-

cers and personnel of the Armed Services charged with the administration of military justice, civilian officials of the Department of Defense, judges of the Court of Military Appeals, civilian attorneys engaged in practice before the Boards of Review, the numerous administrative boards of the Armed Services and the staff of the Court of Military Appeals, and civilians who had knowledge of matters pertaining to Governmental administrative practice and procedure. Since the committee was and is in truth a voluntary civilian organization without power to compel the appearance of witnesses, the committee recommended to the National Commander that he solicit the cooperation of persons whose information, advice and counsel would be of value in the investigation of the administration of military justice. Accordingly, on March 22, 1956, the National Commander addressed personal communications to 29 selected individuals inviting them to an interview with the committee at a time and place stated in Washington, D. C. This list of invitees had been screened with care to the end that the committee would secure the assistance of persons who presumably were best informed on the functioning of the Uniform Code of Military Justice and the Court of Military Appeals. The list included the Chairman of the Joint Chiefs of Staff, the Judge Advocates General of the three Armed Services, the judges of the Court of Military Appeals, representatives of the Judge Advocates Association and Reserve Officers Association, civilian officials of the Department of Defense, and civilian attorneys engaged in practice before the Boards of Review, the Court of Military Appeals and the numerous administrative boards of the Armed Forces. In addition, the American Legion Magazine, the National Adjutant's Letter, the National Legislative Bulletin and the National Security Commission Newsletter, during the ensuing weeks carried notices soliciting from the general public information as to cases which might indicate a miscarriage of justice in the Armed Forces.

On Monday, April 30, 1956, the committee convened at the Washington Headquarters Office of The American Legion at 1608 K Street, N. W. and during the ensuing week interviewed important and informative witnesses. The testimony and statements of the persons thus interviewed were stenographically reported in 767 pages of testimony. In addition, an exceedingly large number of exhibits representing statistical data and detailed administrative information as to the processes of justice under the Uniform Code were received in evidence. The Chairman of the Joint Chiefs of Staff and the Judge Advocates General of the Army and Navy for reasons which they asserted required their passivity in this investigation did not favor the committee with their information or advice. However, the Judge Advocate General and Assistant Judge Advocate General of the Air Force were extremely cooperative and helpful and presented themselves in person for interview. The committee feels that it is but just and fair to express its appreciation and thanks to Major Generals Reginald C. Harmon and Albert M. Kufeldt for their cooperative and valuable assistance. Likewise the judges of the Court of Military Appeals and their administrative assistants appeared before the committee and have rendered invaluable service. Due acknowledgment is also made to the representatives of the Judge Advocates Association and Reserve Officers Association for their asistance, and to the members of the legal profession who gave freely of their time and knowledge the committee expresses its appreciation.

The committee has secured and has been favored by a large number of monographs and articles written by experts and scholars on the subject of the administration of military justice under the Uniform Code and has given close study to the same. Many of them bespeak most careful research and were written by lawyers of high standing in the profession who are particularly informed in this specialized field of the law. In addition, the committee has had the benefit of two most valuable reports prepared by research committees of unquestioned ability and standing. The first is the report to the Congress by the Commission on Organization of the Executive Branch of the Government, commonly known as the Hoover Commission, on the subject of Legal Services and Procedure with accompanying report of its Task Force on that subject. The second document of material aid to the committee is the report of the Special Committee on Legal Services and Procedures of the House of Delegates of the American Bar Association made at the mid-year 1956

meeting of the House of Delegates in Chicago in February 1956. Mention should also be made of the report of the Board of Directors of the Judge Advocates Association made on October 15, 1955, on certain aspects of the administration of military justice as set forth in the Judge Advocates Journal of December 1955, and also of the Annual Reports of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury made pursuant to the Uniform Code of Military Justice for the years 1953 and 1954.

The requests of the committee addressed to the public (and made known through the publication of notices in the various publications of The American Legion as above recited) for information concerning cases of miscarriage of justice in the Armed Forces proved of little or no value. Approximately 25 communications were received from ex-servicemen and all of them mistakenly assumed that the committee's function was to attempt to vindicate the complainant or to secure mitigation of the severity of his sentence. The committee possessed no authority to assume such a task. Cases which appeared to possess merit were referred to Mr. J. Leo McCormick, Jr., Attorney at Law of Baltimore, Maryland, who voluntarily offered his services without compensation to assist ex-servicemen who had run afoul of the law. The information contained in these letters did not indicate any pattern of injustice which would prompt the committee to direct an investigation into concealed recesses. The cases in three or four instances may have had merit, but over all they did not indicate any repeated subversions of the processes of justice so as to give them evidentiary value.

Between meetings of the committee the members thereof continuously communicated with each other by mail, telegraph and telephone, and thereby synchronized their work. Final meetings of the committee were held in Los Angeles, California, on September 2, 3, 4 and 5, 1956, whereat a careful analysis of all evidence and information obtained by it was made and this report was placed in final form.

## FUNDAMENTAL CONCEPTS AND PRINCIPLES OF THE INVESTIGATION

The committee before commencing its investigation unanimously agreed upon certain fundamental concepts and principles which should guide its procedure:

1. Discipline in the Armed Forces is fundamental, and no military organization can justify its existence if it is an undisciplined collection of men. An Army without discipline is only a mob. The purpose of an Army (and this term is used generally to describe all branches of the Service) is to fight battles and win wars. It is not a social service or educational organization. Physical training, educational improvement and moral betterment of members of the Armed Forces are only means to an end—that of producing ultimately a trained, disciplined individual who has learned to cooperate with his fellow soldiers to the end that their efforts may be coordinated and solidified into a dynamic fighting force. It is axiomatic that only through this cooperation and coordination of effort an effective offensive and defensive machine can be perfected. Discipline, fairly and equitably enforced, is not only necessary to produce a fighting force, but is also imperative in order to minimize the losses of manpower which must of necessity arise out of armed conflict with an enemy.
2. Discipline and justice do not necessarily conflict. There can be no genuine discipline unless it is founded on fair dealing which is free from prejudice and arbitrary exercise of power. Justice can be and should be the means of creating and enforcing an effective discipline. Injustice which becomes a pattern of action in a military organization will surely undermine and eventually destroy discipline.
3. In the exercise of disciplinary authority (human nature being what it is) there must be erected certain safeguards against despotic power. Power-drunk individuals can destroy discipline and inflict gross injustice.

4. The recruitment of military personnel through the processes of Selective Service has radically altered the basis of an individual's membership in a military organization. The old-time concept that an enlistee entered into a contract with his Government to perform military services in return for certain compensation and allowances has been rendered obsolete. It was based on voluntary action by the enlistee. While voluntary enlistment still prevails, it is overshadowed by the compulsory processes of Selective Service. The statement may be hazarded that in times of non-conflict the vast majority of men are in the Armed Services not by choice but as a result of force of law. They enter the Services by virtue of a process of selection mandated by law and directed by civilian authorities—not by virtue of free agency. Their period of service is comparatively brief. They are not career soldiers, but civilians temporarily meeting one of the serious and necessary responsibilities of citizenship in a free nation. A great proportion of them have not attained maturity, and for thousands of them their induction into the Armed Services is their first adventure away from home and parents. Further, a radical change has occurred with respect to the domestic relations of thousands of service personnel. For years the American Army and Navy were "bachelor" organizations. Now they are composed of thousands of young men who have married and assumed family responsibilities.

It is believed that no reasonable person will disagree with the statement that a legal system cannot be administered by persons not trained in the law. Much less can it be administered by men who have not had experience in the handling and commanding of men but who, because of our present military situation, have succeeded to positions of command authority at an early age. It has been testified that many of our Commanding Field Officers lack the experience which formerly was gained by their predecessors by many years of service in low grades.

Whereas formerly the Commanding Officers and the serviceman's experience and maturity of judgment taught each how to get along with the other, each now has not that degree of wisdom, acquired through experience and living together, which fathers the judgment so necessary to efficient operation of an Army, a squadron of airplanes or a fleet.

These vital facts must necessarily force upon the Armed Services a reappraisement of their old established practices, customs and procedures. On all facets adjustments are necessary to meet the problems arising out of enforced service, short periods of active duty, the changed domestic status of a substantial number of the personnel and the immaturity of officers called upon to enforce discipline and at the same time to administer justice. On no front is the impact of change more keenly felt than in the maintenance of discipline and in the administration of justice. As the Armed Forces, themselves, have been compelled to adjust their operations to the changed conditions, so did the committee believe that its survey of the administration of the Uniform Code and the Court of Military Appeals should recognize the situation as it exists.

5. Some authorities contend that under the broad Constitutional power of Congress "to make Rules for the Government and Regulations of the land and naval forces" Art. I, Sec. 8), it is probable that Congress possesses the authority to abolish all existing processes of justice in the Armed Forces as provided in the Uniform Code and in prior Articles of War and Articles for the Government of the Navy and in lieu thereof to substitute a system whereby Commanding Officers of all echelons would be vested with plenary power and authority to administer discipline and justice according to each individual officer's idea as to what punitive action should be taken, thereby substituting a government of men and not of law. Such process would adopt the legal philosophy of the Red Queen of "Alice in Wonderland" who had but one sentence—"Off with his head." Such idea is, of course, fantastic and preposterous. It is of course violative of the philosophy of the American Con-

stitution and of the American people. Congress cannot pass any law which is in contravention of the Constitution, and whatever law Congress does pass must have constitutional sanction to be of any validity whatsoever.

The American people from the days of Washington at Cambridge have ordained that within the Armed Forces the administration of discipline and justice should be consonant with the dearly won principles of the great Common Law insofar as the nature of a military establishment permits. One of the great principles of justice, according to Anglo-American concepts, is that the judicial body—the court—should be free to act without fear of retributive action by Government and free from influences or pressures exerted by any person. The Uniform Code was enacted by Congress with that concept as the great underlying basis with due recognition of the peculiar nature and purpose of military organization. Article of War 37—prohibiting coercion of and unlawful influence upon a court—was written into the Uniform Code as an affirmative declaration by Congress that courts martial should be free instrumentalities of justice—as free as Federal civil courts. Therefore, the committee entertains the positive conviction that when Congress declares that discipline and justice in the Armed Forces shall be administered according to "due process of law" as represented by the Anglo-American philosophy that the functioning of the military courts should be, in fact as well as in theory, courts of justice and not mere instrumentalities of discipline it merely restates Constitutional principles. The court's primary purpose is to administer justice and not carry out the mandates and desires of a commanding officer. Any other concept will render the elaborate provisions of the Code directed to the protection of the accused mere pretensions and idle gestures.[5]

6. The jurisdiction of military tribunals should not be any broader than is necessary to meet the special requirements of military and naval forces stationed in the continental United States and abroad in foreign lands. They should not possess jurisdiction in times of peace, especially in the continental United States in cases where the civil courts—both State and Federal—are empowered to act and can act with reasonable degree of promptness. There are many reasons for this conclusion, but two principal and cogent ones are: (1) the civilian legal profession and the civilian courts, through the process of trial and error, have developed traditions, customs and practices which find no counterpart in the newly established military "bar" and in the military courts and these traditions, customs and practices, many of them unwritten, serve to temper the judicial process with mercy and equity; and (2) the civilian courts are permanent organs of society and are recognized as such, while military courts, as now constituted, are temporary institutions. Permanency produces experience both as to the judges and practitioners before the court, and experience in equating human problems has no substitute.

7. A free and independent bar is indispensable to the successful functioning of any judicial system. The committee conceived that it was its duty to examine into the status of lawyers, both uniformed and civilian, in the Armed Forces to discover if they were free to exercise their traditional functions as legal counselors and advocates independent of the power of command or whether they were "captives" to a military heirarchy and were thereby deprived of their inherent professional freedom of action. Ancillary to the principal question is the question involving their professional relationship to their clients—be it Government or accused—and their opportunities afforded them for professional advancement as lawyers and also as officers.

8. A perfect code of laws by faulty, careless or deficient administration may be rendered useless, extravagant both as to financial costs and commitment of personnel, and wholly ineffective to accomplish the designed purposes. Therefore, the committee believed it must concern itself with details of administration of the Uniform Code by the Armed Forces.

The committee unqualifiedly asserts that the foregoing concepts and principles are firmly established by Congressional action; by the opinions and conclusions of experienced and unbiased students of the judicial process, including the American Bar Association; by the often repeated statements of the civilian officials of the Department of Defense and by the actions and pronouncements of the vast majority of the intelligent and understanding officers in all branches of the Armed Services. In addition, there can be no doubt but what informed groups of American citizens support these concepts and principles. The American Legion in its advocacy of a National Defense system competent and suitable to meet all emergencies has never departed from these fundamentals in the administration of military justice and discipline. The committee, therefore, believed that any investigation to be of any fact finding value must be premised upon the philosophy displayed by said concepts and principles.[5]

## ORIGIN OF THE CODE AND CRITICISMS OF IT

During and following World War II many cases of injustice, instances of the defects and shortcomings in the administration of Military Justice and in the disposition of cases under the then existing laws were brought out and dramatized. The American Legion with other organizations (veteran, legal and otherwise) protested against an outmoded system of Military Justice. The concerted action of all groups resulted in the passage of the so-called Elston Act[3] in 1948. This Act applied to the Army and the Air Force only. With unification of the Armed Forces plus the fact that many thoughtful critics were of the opinion that the Elston Act did not offer solutions to many of the problems, a demand arose for a thorough revision of military law by Congress. The American Legion was in the forefront of those insisting upon sound laws which would afford adequate protection to all personnel in military service. After many months of hearings and effort Congress passed the present Uniform Code of Military Justice, (hereinafter called the Code).

The United States Court of Military Appeals came into existence as a result of the enactment of this Code.

The membership of The American Legion can take great pride in the fact that it was greatly instrumental in the drafting and in securing the enactment of the Code which has contributed substantially to the elimination of many former vicious practices. Our organization acknowledges its indebtedness to those conscientious legislators, who, seeing the necessity therefor worked valiantly for its passage by the Congress.[4]

The Code is a splendid instrument in the sense that it represents the first real and comprehensive effort to create a true legal system in the Armed Forces protecting the investment of the Nation in strong military and naval establishments by insuring that commanders would be able to enforce discipline but at the same time providing the means whereby the American system of law would be applied to the Armed Services to the extent many have thought impossible in a military or naval organization. It further provides protection against faulty administration. (See the Reports of the Hearings before the Armed Services Subcommittee of the Senate and House in the 81st Congress on H. R. 2498 and S 5857, March, April and May 1949)[5]

The military and naval services during the past two years have made many complaints concerning the Code. Other persons and organizations have complained in terms strangely echoing those advanced by the Services.[6]

As a result of these complaints and because of the fact that The American Legion sponsored National Security Training and played the vital part indicated above in the enactment of the Code, many members of The American Legion were extremely concerned that perhaps The American Legion had been overzealous in its efforts to protect the individual serviceman at the expense of a strong military organization. At the same time it was realized that the complaints could be fallacious.

Accordingly Resolution No. 172, referred to above, was forwarded through channels to the Thirty-Seventh Convention of The American Legion held in Miami, Florida in October 1955 where it was adopted.

The complaints from the Services above mentioned have, insofar as they have come to the attention of the committee emanated generally from the Judge Advocates General and from high ranking military or naval officers. The rank and file of the lawyers in the military service do not oppose the Code. (R 53)* On the contrary they favor it. (R 350-351) For the first time each is able to discharge his duties towards his clients without too great fear of retribution. Instances of such retribution, however, have been found to occur still. It appears that the real object of the criticism is not the Code but the United States Court of Military Appeals. The objections stem from the fact that for the first time a civilian court has been set as a watchdog over the military and has the power of final decisions. It is thereby exercising a control that formerly was the personal possession of the Judge Advocates General and sometimes surrendered by them to their superiors—the General Staff of the Army and Air Force and the line officers of the Navy. These officers resent the loss of this power. These complaints fall into three general categories as follows:

1) The Code causes considerable delays. 2) The Code costs too much to administer. 3) There is a diminution in combat effectiveness caused by the Code.

The Judge Advocates General of the three Services met with the Judges of the Court of Military Appeals and with a Committee appointed by said Court for the purpose of attempting to eradicate the alleged defects in the Code. Agreement was had on some seventeen changes in the Code. However, it is found that a bill, H. R. 6583, 84th Congress was prepared and presented by the Pentagon to the Congress which went much further than the proposals which had been agreed upon and in fact these proposals if enacted would have deprived the United States Court of Military Appeals of any further effective part in the handling of military trials. In part, they would have destroyed all the advancements made by the enactment of the Code. In actuality, therefore, because the military apparently could not get the Court to approve changes desired by it, which would destroy the Court's effectiveness, it, thereupon in effect, abrogated its agreement with the Court and the committee and proceeded to sponsor the bill known as H. R. 6583. This is a complete violation of the spirit of Article 67 of the Uniform Code of Military Justice, wherein Congress provided that the Court *and* the Services would make joint recommendations.

In this connection, it is interesting to note that although the Services publicly make the complaints indicated above, when their representatives appeared before a Subcommittee of the Armed Services Committee of the House of Representatives to testify on H. R. 6583, little reference was made to the defects in the Code as indicated above.

The value of the Code is shown in some of the decisions of the Court of Military Appeals reversing convictions approved by the military.[7] An examination of these cases will show a few of the many outrageous practices repeatedly approved by the military and which would have gone unchallenged in the absence of the Code and the Court of Military Appeals.

With reference to the charges leveled at the Code as to increased cost of administration, no real cost analysis has been presented to substantiate the claims made in this regard. No figures seem to be available (at least they are not published) as to costs prior to the time that the Code was enacted. The Judge Advocate General of the Navy has indicated that the Code cost $158,000,000 to the Services. Obviously, this statement means nothing unless one has statistics with which to compare it. Further, no breakdown of the $158,000,000 has ever been supplied. The operation of the military justice system under previous laws was undoubtedly costly too. No convincing proof that the Code has increased costs has been adduced.

* All parenthetical references marked (R) refer to pages in the record of testimony taken by the committee.



84154 O—62——27

The claim that unreasonable delays have arisen because of the processes provided by the Code is not proved by substantial evidence. That there are delays is not to be denied but the fact is that there were time lags in World War II (when the Code was not in effect) as great if not greater. (R 581-582.)

In the last analysis it is our conclusion that most delays which occurred could be reduced substantially if the Manual for Courts Martial were to be rewritten with the idea in mind that the Court of Military Appeals is a permanent institution. Hereinafter we discuss the Manual for Courts Martial with more particularity and specificity.

As to the claims concerning a reduction in combat effectiveness, nothing more need be said than to refer to the words of Admiral A. W. Radford who, while Commander in Chief of the United States Pacific Fleet, reported to the Chief of Naval Operations and to the then Judge Advocate General that the Uniform Code had not affected combat operations in Korea. In fact, he went on to criticize severely the technicalities and confusion in the Manual.

In order to facilitate the direction of Resolution No. 172 and to more clearly point out the salient questions involved we have arbitrarily divided our discussion into the following main topical heads:

1. Personnel
2. Jurisdiction
3. Trial Courts and Appellate Review
4. Manual for Courts Martial
5. U. S. Court of Military Appeals
6. Discharge Procedures
7. Miscellaneous

## 1. PERSONNEL

As was stated by your representatives to the Subcommittees of the Senate and House Armed Forces Committees in 1949, when the Code was under consideration, "no Code can be drawn which will eliminate all abuses. You cannot legislate changes in human nature."

It is the view of this committee that if the personnel who are charged with the administration of the Code were to do so fearlessly and in lawyer-like fashion, there would be little need for any changes in the Code. However, the hearings held by your committee indicate that the level of legal service rendered in Courts Martial in the Navy has been at a very low level; that in the Army these services are somewhat better and that legal services in the Air Force are superior to each of the other two Services. (R. 217-218, 573-579). The Army's uniformed lawyers are organized by statute into a Judge Advocate General's Corps. The Air Force has no Corps as such but under the present Judge Advocate General (who has been The Judge Advocate General since the inception of the Air Force, and who had been a lawyer of many years civilian practice and experience) lawyers in that service have been found to produce superior results because of the fact that they have been allowed to work like lawyers and under the supervision of lawyers. In the Navy uniformed lawyers serve as "Legal Specialists."

Almost every witness who appeared before the committee complained that while there were extremely competent attorneys in the Navy's Legal Specialists group, by and large the Navy was making no real attempt to secure competent lawyers capable of competing with lawyers generally. Until World War II the Navy had a small corps of officers of the regular line who served in the office of The Judge Advocate General at various times during their Navy careers. Most of them were sent to Law schools several years after having been graduated from the Naval Academy. Some of these officers were admitted to the bar of various states. Most, however, never were admitted to any bar. In fact, only the last five Judge Advocates General of the Navy have had a legal degree from a law school or have been a member of any bar. (The immediate predecessor of the present Judge Advocate General became a member of the bar within a short time prior to the time he was sworn in as The Judge Advocate General.) When War came, almost all of these lawyers, trained at public expense to do the legal work of the

Navy, went to, or remained at sea for the duration. Almost all the billets for lawyers in the Navy had to be filled by reserve officers called up for the purpose. Some retired officers with legal experience also were utilized.

The net result of this situation was that shortly after the commencement of hostilities, the legal setup in the Navy broke down to the extent that it was necessary for Mr. James Forrestal, the then Undersecretary of Navy, to set up in the Navy Department the "Office of the General Counsel." Except for military matters, cases involving admiralty, tax, legislation and some other miscellaneous matters, the Office of General Counsel from that point forward carried on almost all of the important legal business of the Navy.

Upon the conclusion of hostilities and because of the experience gained during the War, the Navy accepted many reserve lawyers into the regular Navy. These are Legal Specialists. They are line officers but they cannot go to sea in command functions. Theoretically they are supposed to compete for promotion only with each other. They wear the insignia of line officers but a line officer who cannot take command of a ship will not progress rapidly or very far competing with officers who have such qualifications. In fact, until the appointment of the present Assistant Judge Advocate General of the Navy, no legal Specialist had ever attained the rank of Rear Admiral. The present Judge Advocate General, a legal specialist, has since attained to that grade. Legal Specialists have been known to hold only one command and that is of the Navy School of Justice which is subordinate to the command of the Naval Base at Newport, R. I. Navy lawyers are not accorded any real professional status (R. 20). They have never had their day in Court (R. 63). The Navy has not treated its lawyers with the same consideration as has been the case in the Army and the Air Force (R. 217). As to lawyers the Navy has not produced as sharp and capable young men as the Army and the Air Force (R. 217). Its lawyers with a few exceptions do not measure up to those in the other Services (R. 220).

The morale of officers on legal duty in the Navy is low (R. 12, 25). With the exceptions noted they have yet to obtain flag rank and they belong to no group (or corps), giving them professional identity.[5] It should be noted that the first exception was made after the Hoover Commission made its April 1955 report on legal services and procedure to the Congress in which it recommended a Judge Advocate General Corps for the Navy.

We are advised of a case where, in the Navy, a Commander who, because of his objective approach and firm insistence on following legal principles as law officer of the Court-Martial of a naval officer annoyed the commandant, though a diligent and fine job as a lawyer had been done. As a result, the Commander was immediately transferred and his record is permanently blotched. (R. 48, 49).

The Navy has never accepted the proposition that the Navy Legal Specialist has a dual responsibility of being a fine Naval Officer under the chain of command and also professional responsibility as a lawyer to be sure that the fairest and best justice is accorded an accused in the Naval service (R. 41).

Naval officers who disagree with the line or who furnish honest opinions which do not coincide with the chain of command concept, or who believe that a Naval lawyer has a professional responsibility as a lawyer have in the past, been placed in undesirable posts or have received fitness reports which mar their future hope of promotion (R. 12 et seqs.).

The main difficulty seems to stem from the fact that the Bureau of Naval Personnel or the line of the Navy desires to retain the strong control over the office of The Judge Advocate General they have always possessed. The lawyers in the Navy, therefore, are controlled and managed through an administrative system of command rather than as lawyers are treated in a law firm. Lawyers, whether in uniform or out, to be successful and effective, for the clients whom they serve, must be managed in the latter rather than the former fashion.

A uniformed lawyer, to be of any value to anyone including his clients, must have professional independence. He can only have that independence when he works for himself or, if he is to be supervised by someone, that supervisor must be

another lawyer who is himself free of any command, or chain of command, influence.

When a lawyer knows that a person not a lawyer is to control his future, and his ability to rise to the top of his legal field is controlled by someone not a lawyer his efficiency, morale and his independence are destroyed or at least greatly minimized.

This does not mean that such a lawyer should be so independent that he loses sight of the basic principles of the lawyer-client relationship which are largely built on the theory of service. The lawyer should always serve his client, and help him in every way consistent with the ethics of the legal profession.

In order to attract and maintain able lawyers and to keep morale at a high level, there must be provided incentive (R. 20, 21, 25). Incentive will be provided if opportunity for advancement (promotion) is always present but as pointed out above, such a promotion system must be free from the military command concept and there must be enough high positions available to provide an objective which will attract capable and ambitious young lawyers.

As the present system operates in all of the Services the brighter the young lawyer is, the more ambitious he is, the less apt he is to remain in an organization which does not maintain an ultimate goal high enough to meet his ambitions.

All lawyers who enter any of the Services should have the knowledge that on their merits as lawyers they can ultimately succeed to the position of The Judge Advocate General. They should not be compelled to operate under the conditions now existing in the Navy, where they know that their chance of rising to that eminence will always be forestalled by someone who is satisfactory to the line of the Navy or the Bureau of Naval Personnel (R. 520-522).

While the situation may not at first blush be quite as apparent in the Services other than the Navy as stated in the last sentence, the operation of the system in those Services to all intents and purposes reaches the same result. In short, the young lawyer who enters any of the Services today has relatively little chance of advancement in his chosen profession and ultimately becoming The Judge Advocate General.

These objectives can be obtained either by administrative action or by legislation. Past experience teaches that the administrative approach will not accomplish the objective.

The Hoover Commission concluded that

> "the only way in which a strong professional spirit can be regained by lawyers in the Navy, with consequent benefit to the service, is by establishing a staff corps for Navy Officers who primary duties shall be legal. It is particularly important that the Judge Advocate General and his assistants be selected from that corps (discussion concerning recommendation No. 18.)[9]

H. R. 6172, Title II, introduced into the House of Representatives in May, 1955, (84th Congress) proposes a Judge Advocate General's Corps for the Navy. So too does H. R. 6115, Title IV, introduced at the same time. The former bill was referred to the Armed Services Committee, the latter to the Judiciary Committee, of the House. Due to adjournment of Congress these bills have lapsed.

Many of the witnesses who appeared before the Congress in 1949, at the time hearings were held in the House on the Code, were in favor of establishing a Corps in the Navy, including representatives of The American Legion.[10] Similarly, before the Senate Sub-Committee the same recommendations were made.[11]

Senator McCarren, then Chairman of the Judiciary Committee, wrote:

> "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 Con-

gress will amend the bill so as to set up in the Navy a system similar to the Judge Advocate General's 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 them they must deal in carrying out their naval duties."[12]

Every witness who appeared before the hearings of your committee, who had knowledge of the subject, and who would comment thereon, recommended that a Judge Advocate General's Corps be set up in the Navy. References appear throughout the Record. (For example—R. 25.)

One witness, who represented a Task Force of the Hoover Commission and, in that capacity, interviewed many Naval lawyers stated that he heard no "voice raised in opposition to the creation of a Judge Advocate General Corps for the Navy." (R. 61). He heard otherwise, of only two law specialists in the Navy who failed to favor such a Corps. Some 25 per cent of those interviewed took no position. Those who supported a Judge Advocate General Corps included the then incumbent Assistant Judge Advocate General, the General Inspector of the Office of the Judge Advocate General, Legal Officers of five Naval Districts, and the Legal Officers of the Pacific, Foreign and Atlantic Fleets. (R. 61, 62.)

Past Judge Advocate General Ira H. Nunn, and his predecessor both opposed the formation of a Corps. Neither of them is a Legal Specialist but is a line officer and each is on active duty today in the line in a billet other than legal.

The Navy Judge Advocate General in 1949 was Rear Admiral George L. Russell, an able Naval Officer. His position opposing a Corps was stated to the Sub-Committee of the House and Senate considering the present Code.[13]

For a succinct and able refutation of the arguments of Admiral Russell we are indebted to Henry M. Shine, Esq., of Dallas, Texas. It appears in the Federal Bar Journal Vol. XV, No. 4, October-December 1955, pp 329-333. The views coincide with our own:

"Admiral Russell said the law specialists provided by Section 401 of the Officer Personnel Act of 1947 performed sea duty and that their status as line officers permitted them to be of 'extreme value' where they were 'assigned to small fleet units.' The Navy was thereby enabled to use the 'law specialists' to perform other line duties and a 'law specialist' was not compelled to sit idle in the midst of continuous activity of the ship when his law work is at a low ebb.'

"An analysis of Chart II-1-2 of Part VI of the Legal Services and Procedure Task Force Report (of the Hoover Commission) indicates that there are only three possible type commands to which either law specialists or unrestricted line officers with legal training could be assigned which would entail 'seagoing duty.' In a report filed by the Judge Advocate General with the Task Group 5, one may ascertain the role of these commands, i.e., the Atlantic Fleet command, the Pacific Fleet command and the Foreign Area command. In these three major commands, there are 45 separate commands with 78 officer-attorneys. It is a known fact that the flagships of most commands operate almost continuously from home ports. A conservative estimate of the 45 commands indicates that, with the exception of the U.S. Service Force and U.S. Destroyer Forces' Atlantic Fleet, which have seven and six officer-attorneys respectively, the average is one officer-attorney for each command. Because of the size of the command and the nature of Naval operations, it is ridiculous to talk about 'small fleet units' or law work being at a low ebb, for one officer-attorney assigned to a particular command is probably heavily overworked and overburdened with legal responsibilities under the requirements of the Uniform Code of Military Justice, coupled with legal assistance activities, military affairs, and related law matters. It would prove extremely interesting to all concerned if the Navy were to publish a list showing the number of Naval officers

who are law specialists as distinguished from unrestricted line officers who are assigned to 'small fleet units' or to individual ships. It is more than likely that of the 78 'officer-attorneys' mentioned above, less than half are law specialists actually assigned to 'small fleet units' or to individual ships. In view of the work of a supply officer, a doctor, a dentist or a chaplain aboard a single ship or assigned to a fleet unit, is it not probable in those extremely rare instances where a law specialist's work was at a low ebb he could be assigned duties similar to such staff officers? Is it not customary for a staff officer to serve on decoding boards, as mess treasurer and the like? To assure the Navy of full utilization of any officers in the proposed Judge Advocate General's Corps, the Commission, in discussing Recommendation No. 18 clearly stated that Naval Officers assigned to a Corps would have 'primary duties' that were legal. That certainly does not preclude secondary or collateral duties comparable to those assigned to staff officers of the existing Corps.

"Admiral Russell said that the present system of law specialists was 'working very well indeed' and that 'it revealed no major weakness or practical difficulty.' In view of the inability, to date, for a law specialist to reach flag rank, of the Navy's recent plea for additional lawyers via Governmental training, and of the small percentage of junior ranking law specialists accepting permanent commissions, plus the over-all low morale of the law specialists almost to a man, can one gainsay that there are not weaknesses or practical difficulties inherent now? Would not a Judge Advocate General's Corps provide the only fair, reasonable and positive solution?

"A survey of the figure given by Admiral Russell in which he claimed that the Naval lawyers are concerned 50 per cent with military law, the remaining 50 per cent being a variety of legal matters, would indicate that the present Uniform Code of Military Justice is working quite well. If only 50 per cent of the Naval lawyers' time is spent in military justice, what are the reasons for attacking the Code as being time-consuming, etc.? At least two admirals on active duty, in addition to the Judge Advocate General of the Navy, have seen fit to attack the Code in recent months. Further the Admiral (Russell) states 'the formation of a legal staff corps, is subject to a broad objection from the standpoint of integration and homogeneity with the rest of the officer personnel of the Navy. This has been accomplished without the accompanying rigidity of a staff corps by means of the designation of officers for special duty in such fields as engineering, communications, Law, Naval intelligence, photography, public information, psychology and hydrography.' Even those not conversant with the role of a lawyer well know that he will be called upon for numerous consultations about some specialty be it military justice or admiralty law. It is traditional for an attorney to be counsel and advisor to administrators. That condition would continue in a Navy JAG Corps.

"Item 4 of Admiral Russell's 'Bill of Particulars' against a corps states:

'(4) Should the Navy law group be reorganized as a staff corps, the performance of law duties, including those concerned with military justice, would necessarily be restricted to members of the legal corps to the exclusion of the legally trained general-service line officers. This exclusion would have two serious disadvantages:

'(a) Replacements would be necessary for those general-service line officers now assigned to law billets, and the Government's investment in their law training would in the future be wasted, along with the valuable combination of naval and legal experience which may be found in those officers.

'(b) Officers of the legal staff corps would have to be made available on ships throughout the world, whereas previously the distribution throughout the fleet of general-service line officers with law training made it possible to keep the law specialist officer assigned primarily in central locations.

The assignment of legal staff corps officers would frequently be necessary on ships having no space available for the quartering of officers whose duties are so highly specialized and rigidly confined.'

"As to point "A", is it not true that only a small percentage of the 54 Government-trained lawyers of the line were assigned to law billets in 1954? By law billets, I mean those duties which are primary in nature, requiring 80 per cent of one's time in professional legal work. The Government's investment has never been fully developed in any event and the Task Force legislation provides: 'Any officer of the line or staff of the Regular Navy or of the Naval Reserve may, upon acceptance of his application therefor by the Secretary of the Navy be appointed a Judge Advocate of the Navy, with a rank not to exceed the rank of Commander.' This small percentage would unquestionably prefer not to transfer to a corps. Such a transfer would seriously curtail promotional opportunity even with the three flag ranks provided by the proposed JAG Corps Bill. However, the other 41 unrestricted line officers of the rank of Commander or below are afforded an opportunity to elect whether they shall perform primarily legal or command functions for the balance of their careers.

"Item 4 (b) of Admiral Russell's statement has been previously answered. Very few legal specialists are now aboard 'ships throughout the world.' It is doubtful the number would increase. There were only 73 unrestricted regular line officers with law degrees in 1954. It would prove a great help to any study to know how many, in addition to the 26 assigned to legal billets under the cognizance of the Judge Advocate General, were actually serving aboard individual ships or with type commands. Also, isn't the Admiral somewhat inconsistent? He praises their assignment, few though they were, to 'small fleet units' and then says as Corps members they 'would have to be made available on ships throughout the world.' How could the needs for law specialists be increased by a Corps, with only 26 unrestricted line officers now assigned to legal billets out of an available 73?

"Finally, the JAG Corps would not repeal the present authority of the Judge Advocate General to certify non-JAG officers as trial and defense counsel or as law officers. Further Articles 26 and Article I (14) which relate to legal officers and law officers have not been altered.

"In Item 5 of Admiral Russell's precis he contends, 'command exerts no influence over the Judge Advocate General under the present system, as he is responsible only to the civilian head of the Naval Establishment.' This is paying lip service to a Table of Organization. Who recommends a JAG nominee to the Secretary of the Navy for appointment? Is it not the customary practice that the recommendation for Judge Advocate General is made to the Secretary of the Navy by Chief of Naval Personnel, the Chief of Naval Operations, and the outgoing Judge Advocate General? All are and have been 'General Service Line Officers.' In sum, the present system simply provides a short duty assignment and flag rank for a Naval Academy captain (unrestricted line) with law training."

The last Past Judge Advocate General of the Navy is Rear Admiral Ira H. Nunn. He has vigorously opposed the implementation of a Judge Advocates Corps in the Navy. His basis of objection must come from his writings and speeches since he wrote the committee he did not feel he could appear before it with propriety because of pending legislation.

However, Admiral Nunn appeared before the House of Delegates of The American Bar Association on the afternoon of February 20, 1956 at Chicago, Illinois, and he is reported to have stated that the proposal of The American Bar Association for the establishment of a Judge Advocate General Corps for each branch of the service would apply only to the Navy Department, since the Army and Air Force already had such Corps or similar organizations; that the Navy Department is opposed to creating a Judge Advocate General Corps in the Navy and that the Navy's

lawyers are now set apart as specialists and any improvement or change in the procurement, training, promotion or employment of Naval legal specialists can be accomplished under the existing organization and that he had canvassed the legal specialists of the entire Navy Department and had found that ninety per cent (90%) of them preferred to remain in the line.

The first of these statements is rather cleverly worded in that, if a Judge Advocate General Corps were to be established in each branch of the Services, it would be established for the first time in both the Navy and the Air Force, since neither of these organizations has such a Corps. The Army does. If it's good enough for the Army, why isn't it good enough for the other two? If it's no good for the Navy and the Air Force, why should it be retained for the Army?

It is now and has been obvious for many years that the Navy is opposed to creating a Judge Advocate General Corps in the Navy. Thus, no new information is furnished in this respect, but the query made is whether or not, by this bald statement of a Navy desire, all lawyers, and others, are supposed to accede immediately to the desire of the Navy and not exercise any judgment of their own in respect to the matter.

It is true that Navy lawyers are set apart as specialists and that improvements in their condition can be effected administratively but, despite promises which have been made to the legal specialists since the inception of their group in 1946, nothing has been done for them except the promise. Nothing will be done for them if a specialist group remains.

We prefer to believe that Admiral Nunn was misquoted in the statement reported with reference to his canvassing of the entire Navy Department body of legal specialists. Perhaps he meant ten per cent (10%) since, as is apparent from what is written hereinabove, the overwhelming sentiment amongst legal specialists favors the establishment of a Corps.[14]

Admiral Nunn has also stated that the establishment of a Corps would serve to set up the legal specialists group apart from the line of the Navy. The Corps would function, more or less, as a law firm, retained, as counsel, by the Navy, as client. Administration within the Corps (the law firm) would be independent of administration within the Navy (the client), and the Navy's business, like that of any client, would be prosecuted exclusively by its Executive Branch, the line, and not in any way by its counsel, the Corps.

We are at a loss to understand the reasoning of Admiral Nunn in this connection. In the statement made, it appears to us as lawyers that he has indicated a situation to be evil or undesirable which we conceive to be the fundamental function of a lawyer and a highly desirable relation.

Further, in view of Admiral Nunn's quite comprehensive knowledge of all Navy matters, we are certain that he is cognizant of the operation of the Medical, Dental, Chaplain, Civil Engineer and Supply Corps of the Navy.

He has also, in referring to legal specialists, written as follows:

> "* * * If their field of endeavor is to be limited by the confines of the Corps envisioned to the trial and review of courts martial, their value to the Navy is cut in half, and so are the opportunities offered to them. * * *"

The practice in the Army Judge Advocate General Corps is certainly well known to the Admiral and, in view of the very wide legal fields covered and handled by the Office of the Judge Advocate General of the Army, one cannot understand where Admiral Nunn obtains the idea that a Corps would restrict Naval officers to purely military justice functions. No person, of all those whom we have heard discuss the formation of a Corps, has ever had any such idea in mind for a Corps. In fact, your representatives in 1949, in appearances before the Congress when the present Uniform Code of Military Justice was under consideration, after calling attention to the fact that, because of the Navy's prior refusal to make use of the services of lawyers, it was necessary to set up the Office of the General Counsel in the Navy Department, said:

> "* * * It is earnestly hoped that the Congress will set up in the Navy a system similar to the Judge Advocate General Corps in the Army. Such a sys-

tem at least insures that lawyers will do lawyer's work. It will have the further advantage of enabling lawyers to some extent, to be promoted on their ability as lawyers. They will work as lawyers at all times during their Naval career and thus furnish the Navy with a type of lawyer qualified to cope with those outside the Service and with whom they must deal in carrying out their Naval duties.

"Such a system will have the further advantage, in time, *of placing all the legal activities of the Navy under one head, instead of two, as is now the case.* There will be no divided responsibility, and in all probability great economies can be effected as well as greater efficiency promoted.

"The big business in which the Navy is engaged requires the acquisition and use of the best legal brains available. Unless possessors of such qualities can hope to rise to the top, there is no incentive offered them to enter or remain in the Navy." (Emphasis supplied)[15]

Everyone in the legal profession, who has ever suggested or advocated a legal Corps for the Navy, has done so solely from the standpoint, in our opinion, of the advantages that would accrue to the lawyer in the Navy in widening the fields of law which would fall to his attention and from the standpoint that the Navy, by having well rounded lawyers who could serve as lawyers and nothing but lawyers, would ultimately obtain the services of loyal, conscientious legal personnel of the highest quality.

Your committee therefore recommends that a Judge Advocate General Corps be established in the Navy and that this should be done by legislative action at the earliest possible date.

Naval lawyers should have their own Selection Board, and their own insignia. (R. 50).

The Judge Advocate General of the Navy should be removed from the chain of command and no longer be subject to influence by the Chief of Naval Operation or any other Naval officer. This removal should be made clear beyond any doubt so that the future Judge Advocates General will conduct their offices as would be done by one devoted to the practice of law. Never should they subordinate the office to the line of command.

Furthermore, the Judge Advocate General should have the sole power to mark the fitness reports of all persons in his command.

Your committee and The American Legion have been and are greatly indebted to Maj. Gen. Reginald C. Harmon and his Assistant, Maj. Gen. Albert M. Kuhfeld, for the assistance rendered this committee in the course of its investigation. We feel we would be remiss in our obligations to them and to The American Legion if we were to allow the opportunity to pass without commending them for the most excellent job of administration performed by them in the conduct of the legal affairs of the Department of the Air Force since its inception as an organization following World War II. As pointed out above General Harmon was the first and has been the only The Judge Advocate General of the Air Force. It is because of his enlightened approach to legal problems and the administration of the system under his guidance and leadership, and that of his Assistants, particularly Maj. Gen. Kuhfeld, that the Air Force legal personnel has acquired a very enviable reputation among the members of the Bar outside the Armed Services.

However, we recognize the mortality of men and we appreciate that the system initiated and operated by these gentlemen is administrative in nature and is subject to immediate abolition on their retirement from office. Without the restrictive effect of some substitute their successors may in the conduct of the Office of The Judge Advocate General of the Air Force, revert to or adopt a system similar to that which has been and is now prevalent in the Navy which we have discussed and criticized at great length hereinabove. It is with great reluctance that we reach the conclusion that in view of the ephemeral nature of the present organization of the Judge Advocate General's Department of the Air Force that Congress should be petitioned to create in that Department a Corps similar to that which has existed for nearly one hundred and fifty years or more in the Army.

It is unfortunate that it is necessary to advance such a suggestion particularly in view of the fact that in effect it would appear to be an unwarranted reflection or imposition of a restriction on the sincere and honest officers mentioned who are appreciative of the difficulties inherent in the operation and maintenance of a system of justice in the Armed Services, and have done everything possible in their power to alleviate and eradicate all wrongs which come to their attention. Far better is it, however, for such officers to suffer a possible sense of frustration or some mental distress than to run the risk that the life of one boy be ruined by irremediable, arbitrary or capricious action by an officer who holds the responsible position of The Judge Advocate General at any time in the future who may not be so enlightened, so capable or as respectful of American tradition.

We have been informed of the fact that in the Department of the Army difficulty is being experienced in attracting and retaining capable young men in the Judge Advocate General Corps. It has come to our attention that a number of very brilliant Judge Advocates in the Army have recently left the Service to practice law in civilian life. The fact that a Corps exists in the Army might seem at first to be a denial of our suggestion that a Corps is the final solution of the legal problem which we have been considering. We do not conceive that the creation of a Corps in any Service will effect a final and complete solution of the problems which have been shown to be inherent in a military legal system, some of which are pointed out herein. We do, however, feel that fearlessly and capably administered by a Judge Advocate General who is in no fear of, and owes no responsibility to, the General Staff or his superiors in the line can by the exercise of his powers in a lawyer-like fashion (similar to the manner in which General Harmon has exercised his powers in the Air Force up to now) that a Corps is the best and only conceivable system which we can recommend in light of the information made available to us.

As long ago as 1948 by Resolution No. 99, adopted in May of that year by the National Executive Committee, The American Legion recommended "* * * consolidation of all legal offices of the Armed Forces * * *" (and that they) "* * * in the future be carried out under one head."

We have been pleased to note that the Hoover Commission and The American Bar Association have now made recommendations which follow the position assumed by The American Legion as indicated. These organizations now suggest that a civilian known as a General Counsel be placed in a position in the Defense Department with the duty of supervising the various Judge Advocates General. We agree with the reasoning of these organizations that such a plan would have the effect of removing the Judge Advocates General from the chain of military command.

We therefore recommend that the position we assumed long ago, now advanced by The American Bar Association and the Hoover Commission, be supported vigorously by The American Legion and that legislation be sought to effect this position.

## 2. JURISDICTION

We have come to the conclusion that the jurisdiction of Courts Martial should be reduced at least within the continental United States in time of peace. At all previous appearances of your representatives before Congressional committees they have questioned the wisdom of increasing the jurisdiction of such courts. It was felt, however, that if adequate powers of review by civilians were afforded there would be supplied an effective brake on any vicious practices which might arise.

For example, in stating the position of The American Legion to Subcommittee No. 1 of the House Armed Services Committee this spring, your representative stated, in part, as follows:

> "In the consideration of the Code, and particularly these amendments which have been suggested in the proposed legislation, we desire to refer to a statement made before a subcommittee of the House Armed Services Committee at the time the Uniform Code of Military Justice was under consideration. This statement, in pertinent part, is as follows:

"'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 the commencement of hostilities all activities in America would be subject to martial or military law. All people would then become subject to the proposed or a similar Code. At least military commissions would take the place of civil courts.

"'There has been of late a seemingly increasing inclination to widen the jurisdiction of military authority. In the past, Congress has zealously guarded the distinction between the civilian and the military, indicated as essential by the writers of the Constitution.

"'The military has not always been content to remain within constitutional or statutory limits in this regard. Witness the case of Duncan v. Kahanamoku (327 U. S. 304), the United States ex rel Hirshberg v. Cooke, (17 U. S. Law Wk. 4223), Rosborough v. Rossell, (105 F. 2d 809).' (Page 193/Report No. 491, 81st Congress, 1st Session, House of Representatives.)

"The foregoing is recalled because of the fact, and you will probably remember, that during Operation 'Alert' conducted in Washington, D. C., last spring, a great deal of publicity was given to the fact that martial law was declared. Considerable concern, if not consternation, was expressed by many individuals and by the press that such action was taken. Anyone familiar with military or naval law should know that if an atomic war does come, the first thing that will occur will be that martial law will be declared, and all of us, civilians as well as military, will be subject to military law or to the law of a military commission, with all that is implied thereby."[1c]

Further, with respect to specific proposals to enlarge the jurisdiction of military courts, by means of H. R. 6583, it was stated as follows:

"The American Legion has consistently taken the position that it is dangerous to increase the jurisdiction of any military court or the corrective authority of officers. It has in some instances acceded to an enlargement of jurisdiction and powers, with the proviso always, however, that with each increase in jurisdiction there by a corresponding increase of, or wider, review of all action of military tribunals. In respect to each of the proposed amendments under discussion here, the same comment is made. Obviously, an attempt is made to increase authorized 'company' punishments; to give company officers greater authority and to increase or facilitate the summary disposition of minor offenses. The American Legion does not object to this enlargement of, or increased authority to be placed in commands, provided the proper type of review be granted. We see no provision for review to accompany this increased jurisdiction. We protest this failure.

"The creation of 'one man' special courts, even under the limitation stated is objectionable. Serious question exists as to the advisability of continuing the summary courts, and this proposal may early result in extending the power to administer 'company punishment' under the disguise of judicial process. 'Consent' of the accused to be had by such a court is illusory. The freedom of choice of the soldier or sailor is seriously limited by his environs and circumstances."[1d]

The Army Judge Advocate General has complained of "the loss of power of commanding officers and field commanders" because of the Code. Instead of being able to give parental guidance to first offenders, officers must either order a Court Martial, impose an inadequate punishment under Article 15 of the Code or ignore the matter entirely. He recommends that offenders be given "a few days of confinement." (See Annual Report of United States Court of Military Appeals for period January 1 to December 31, 1954. (P. 22.))

However, in AW 104, in effect before the Code, non-judicial punishments were set forth. The only power thereunder appears to be that which allowed one week's

hard labor without confinement. Now Army Commanders may assess two weeks (instead of one) extra duty, and may withhold privileges or assess restriction to limits for two weeks (instead of one week)!

The complaint is about a loss of a power which never existed! (See R. 16, 17, 18.)

It has been discovered that after the Code was enacted, the various services initiated a practice of having an accused sign a waiver of his right to appeal, despite the fact that it was obvious that such waivers were null and void and were a deliberate attempt to defeat the intent of Congress. If continued or sanctioned by law, the Court of Military Appeals would have been left with little jurisdiction.

Your committee has heard repeated claims of defense counsel being told what issues they can raise and how to raise them; of Boards of Review being told how and in what way to decide cases; of types of "indoctrination" on policies in the Offices of The Judge Advocates General.

The reluctance to adhere to the position previously stated by The American Legion representatives is based on the conception that the military will continue to seek additional jurisdiction, even after being granted greater jurisdiction. It has shown that some segments of the military will not or cannot administer the law within the spirit of American justice, to justify even the allowance of the jurisdiction now granted to it. Unfortunately the more enlightened administrators of the law perhaps must be restricted in order that their more arrogant fellows may be restrained from violating what have come to be accepted principles in this country by the great mass of our people. (See Appendix "C".)

The hearings we have held, added to our own experience, have caused a change of attitude.

If jurisdiction of military tribunals is enlarged the committee is no longer satisfied with an increase of the power of appellate review. We feel that the jurisdiction of military courts and disciplinary agencies within the Armed Services should not be enlarged, but on the contrary, should be decreased.

Our previous discussion of personnel applies here. Integrity and intelligence cannot be legislated into a person. A legal system cannot be administered by men who have not had experience in the handling and command of men. We have alluded hereinabove to the "new look" in our military services at this time and to the fact that both officers and men of our present Services do not possess the maturity and judgment of their counterparts of years past.

We find that this lack of experience produces a lack of judgment in the handling of disciplinary problems. Even in the days before World War II, and during that time, there was a tendency to use courts as an instrument of discipline only, to use courts to supply deficiencies of lack of knowledge in how to control men and keep those for whom one is responsible out of trouble. Today, however, we feel that the situation outlined above has dangers which require a curb on the power of the military to try those in their charge for offenses which are not military in nature.

This feeling is fortified by the experience gained in the years since the inception of the Code. An examination of the opinions of the Court of Military Appeals shows that there is still lacking, in the Services, a basic, elementary knowledge of legal practice as accomplished in civil courts. As examples of immaturity (to be temperate in expression) and lack of independence of Naval legal advisers we cite the decision of the United States District Court of Western District of Washington, Northern Division (May 1, 1956) in the Boscola and Smith cases, wherein is demonstrated the exercise of illegal, capricious and arbitrary power at its worst. When a person puts on a uniform, he should not be deprived of the rights of every other American citizen except those rights specifically denied by our Constitution.

We conclude that no amount of legislating can create a system of satisfactory general criminal jurisdiction in military courts. .

The field of courts martial jurisdiction is one that preeminently calls for application of the principle of limitation to "the least possible power adequate to the end proposed." *Anderson* v. *Dunn,* 6 Wheat. 204, 231; *Toth* v. *Quarles,* 350 U. S. 11, 23, *Cammer* v. United States, 350 U. S. 399, 404.

The least possible power adequate to the end proposed would be provided by affording jurisdiction in peace times over purely military matters to military courts. The civilian courts, in time of peace, with their rights to jury trials, and other safeguards, can and should handle offenses of every other nature.

We are aware, as The American Legion has previously informed Congress, "that the purpose of our Military Establishment is to be prepared for war, and, if it comes, to fight it efficiently and successfully. To accomplish such a purpose the commanding officers must have discipline and a means of enforcing order. You can't have a debating society holding forth in battle or when a ship is underway."[5]

It cannot be said, however, in our opinion, that the rapist, the housebreaker or the drunken driver by committing those offenses and being tried in a civilian court destroys the commanding officer's discipline over his men. As was stated by a witness before the committee, after indicating that there is no distinction between justice and discipline—a point made long ago by The American Legion—"You can't discipline by injustice, and justice to the community demands discipline of the offending individual." (R. 724)

The committee therefore recommends:

1. Article of War 74 of the 1920 Code should be reenacted so that the civilian courts will have priority of jurisdiction in peace time over offenses of a civil nature committed off a military reservation; and

2. Article of War 92 of the 1920 Code should also be reenacted so that no court martial may try an offender for a capital offense which is a civil offense, i. e., rape, murder, etc., wherever a State or Federal court is functioning.

## 3. TRIAL COURTS AND APPELLATE REVIEW

### A. Introduction

The committee, during the course of its investigation, has given consideration to the history and origin of the present Courts Martial system. It was derived from the British Code, operative at the time of the commencement of the American Revolution, and even today carries definite indications of its origin. The British Code, operative in the American colonies, was originally designed for an Army of professional soldiers dispersed in remote outposts against the Indians. In patterning the Code of the Continental Army on the British Code, this characteristic was continued and even emphasized. The modern British and American Codes are strikingly alike in one particular, in that a Court Martial is a court to be convened ad hoc for every individual case. Unlike the military courts of Switzerland, France and even Germany (before the coming of Hitler) which are permanent institutions, the British and American courts have no permanency. Also, unlike the military courts of the three named continental countries, the British and American courts have no civilian complexion.

The committee respectfully suggests that many of the evils and irregularities which have arisen in the American system—both past and present—probably have their origin in the system itself, and that no amount of patching and mending of the present system can entirely eliminate command control and influence. The fact that a court owes its existence to an appointing authority who usually becomes the approving authority, naturally creates a situation which fosters and encourages the idea that a court is only an instrumentality of disciplinary control rather than a court of justice. Further, the weakness with respect to personnel heretofore discussed appears to arise out of the practice, custom and tradition of considering the administration of military justice as a "side line" to the principal responsibilities of an officer.

The committee has heretofore discussed the change in the nature of the personnel of the Armed Forces. While there certainly have been radical reforms in the American Court Martial system so as to bring it more nearly in harmony with the needs of the present citizens Army and Navy of a democratic country, it is startling to discover that the three continental countries above-named have advanced further in this direction than have the United States or Britain.

The committee has discovered that among civilian and military lawyers alike there is a strong undercurrent of thought and opinion directed towards a complete revision of the present system, a revision which will alter and change it in a radical degree. There are two schools of thought, each of which has many supporters. The first may be called the "civilian school" which, as to all offenses, would remove the courts from military control, and would constitute them strictly civilian courts. The personnel of the courts, together with trial and defense counsel, would be civilian lawyers employed by the Government with permanent tenures. They would belong to the Defense Department and would be under the Secretary of Defense. The protagonists of this plan will undoubtedly put it forward when the time appears to be propitious in Congress.

The second plan aims at the abolition of the old established and present method of creation and appointment of military courts. These would be created within the Armed Services as independent judicial department or division which would contain permanent courts staffed by lawyer-officers who would be appointed for life and good behavior. Appointment to the General Courts Martial would be made by the President or Secretary of Defense from among qualified officers of the Judge Advocates General Corps of each of the Services. The plan would probably call for abolishing Summary Courts and the enlargement of the jurisdiction of Special Courts. Special Courts would be the subject of special treatment, the details of which are not complete. The General Courts, however, would try cases arising in all three of the Services and would be in such number as required and would sit at such times and places as designated by the Secretary of Defense to meet the demands and requirements of the Services. Many of these courts would be ambulatory or "traveling" courts while others would permanently sit at specific stations. Accompanying the General Courts would be a cadre of trial counsel or defense counsel selected from the Judge Advocates General Corps. The efficiency reports of all officers engaged in servicing this newly created judicial department or division would be prepared by the Secretary of Defense and promotions and advancements would be made by him.

The committee believes that due to the embryonic status of these revolutionary plans or schemes it should go no further at this time than to report that they are in course of study and formulation. Further, the committee believes that it should not concern itself with their merits or demerits and that it should content itself with investigating and reporting on the Court Martial system as it now exists under the Code.

**B. General Courts**

The evidence presented to the committee convinces it that under the Code there has been a great improvement not only in the functioning of the General Courts Martial, but of more importance, in the spirit in which they conduct their trials. This ultimate statement of facts is based upon the records coming before the Court of Military Appeals and from testimony of civilian trial lawyers. The influence of the Court of Military Appeals upon the general trial courts has been tremendous—an influence which has produced better trials, fairer treatment of the accused, and greater efficiency on the part of the Government in presenting its case. The Court of Military Appeals has also compelled a greater recognition of the right of defense counsel to act independent of command control and without fear of retributive action by higher command and has gone far in establishing the idea that Courts Martial are judicial tribunals in the true sense and not mere instrumentalities of commanders to enforce order and discipline. There is testimony in the committee's record from informed witnesses that the records of many of the trials reveal proceedings which were conducted in the finest tradition of the American civilian court system. On the other hand, records reveal far too many trials which reveal complete lack of understanding of the spirit and objective of the Code and betray evidence that either trial counsel or defense counsel or both were ill-prepared to present their cases or did not possess reasonable legal knowledge or proficiency in their trial work. In all fairness, however, it should be stated that the evidence definitely points to the fact that both in the Air Force and the Army

there has been increased emphasis upon the importance of proper trial preparation and the proper roles of counsel. It is encouraging to report this improvement in trial technique—and in the understanding that the Code was intended to create for the Armed Forces a judicial system which would parallel the civilian system.

Notwithstanding the general improvement in General Court trials, the evidence before the committee reveals several criticizable or irregular patterns or conditions which require correction.

1. **The President of the General Court.** This title and position should be forthwith abolished. It is the last vestige of command control. The President is a vermiform appendix which Congress should excise. Cases before the Court of Military Appeals reveal instances when the President usurped the function of the law officer and arrogantly assumed control and direction of the court because of his superior grade or rank. The law officer should be given all power of control of the court as it sits as a judicial tribunal. It is notorious that in a military hierarchy that if the law officer (as is generally the case) is of junior grade or rank to the president that there is an unconscious subserviency by the former to the latter which should not exist in a supposedly impartial fact-finding body. While in a vast majority of cases the President of the Court has confined his activities to his proper sphere, the temptation of exceeding his powers is ever present. It should be removed and thereby the General Court will not carry any visible evidence of command control. It must be remembered that "command control" of a court does not necessarily come from the outside; it can be exercised within the court itself and the President can, and in many instances has, become an effective means of its exercise.

The committee, therefore, recommends that the pertinent articles of the Code and the relevant sections of the Manual be amended to the end that the office of President of a General Court Martial be eliminated.

2. **Law Officer.** As previously stated, the law officer should be given (regardless of his rank or grade) control and direction of the General Court as and when it sits as a judicial tribunal. His position should be assimilated as nearly as possible to the role of the judge in the civil courts. His powers and authority should include all of his present powers, and also those of the President of the court except the latter's fact finding duties. There is evidence in the committee records that the law officers of the General Courts have in general performed their duties in a creditable manner, but there is also evidence that many of them, through lack of judicial skill and experience, have not attained the maturity of judgment which the office requires. The committee clearly recognizes the fact that the lack of permanency of the courts and the opportunity for law officers to serve continuously as judges have been and are the primary causes of some of the cited deficiencies in performances.

Article 26 of the Code allows the law officer to consult with the Court on form of findings. H. R. 6583 proposes to enlarge this authority so as to authorize him to consult with the Court both on form of findings and the sentence. The committee opposed this amendment at the hearings before the subcommittee of the House Armed Services Committee of the House of Representatives. It is the confirmed opinion of the committee that not only should the law officer *not* consult with the Court as to the sentence, but it now goes further and would prohibit him from consulting with the Court on the form of the findings. The law officer should have no contact with the Court except in open sessions with accused and his counsel present and the trial record should include the verbatim report of the law officer's colloquy with the Court in the same manner as is shown in civilian court records with respect to a jury's request of a judge for further instructions and directions. No logical or sound reason can be advanced in support of the idea that the court requires special directions or instructions either as to form of findings or as to the sentence or on any other matter which cannot be given in open session with accused and his counsel and the court reporter present. A civil judge cannot enter a jury room while the jury is deliberating, and can have no contact with the jury after it is sworn except in open court. Neither can the prosecuting attorney nor defense coun-

sel. A law officer should be subject to the same prohibitions. The proposal contained in H. R. 6583 which makes the ruling of the law officer *final* on all interlocutory questions except the question of accused's insanity has the approval of the committee.

With the proposed increase in the authority and stature of the law officer of a General Court, such title should be changed so as to reveal his increased responsibility and dignity.

The committee, therefore, recommends that Articles 26 and 39 of the Code be rewritten so as to eliminate the law officer's authority to consult with Court on form of findings and that pertinent Articles of the Code and correlative provisions of the Manual be amended and amplified so as to include the increased powers and authority of the law officer resultant upon the abolition of the office of president of the Court.

**3. Instructions.** The giving of instructions to the Court by the law officer in open session and particularly the mandatory instructions of Article 51(c) has undoubtedly eliminated many of the evils of the old practice of permitting the law officer to participate in the secret deliberations of the Court whereat he gave instructions as to the law of the case, which were never revealed to the accused. This archaic practice was responsible for many of the miscarriages of justice and at all times, left defense counsel helpless in his defense of the accused. As was to be expected, the new practice, as provided in the Code, at first produced many errors in the records which called for reversal of the judgment. However, the witnesses before the committee were almost unanimous in agreeing that due to the helpful suggestions and techniques of the Court of Military Appeals and also due to the preparation and distribution by the Services of Manuals of Instructions that reversible errors due to bad instructions were most noticeably decreasing. Certainly this new practice was a most needed reform and it has not proved as difficult of performance or as burdensome as opponents of the plan predicted. The committee believes that this matter of instructions should be left to the guidance of the Court of Military Appeals as it is peculiarly within its province and power.

**4. Sentences.** (a) The committee finds that the practice which prevailed during World War II in many organizations of imposing sentences containing ridiculous and absurd periods of confinement—50 years, 75 years, and the like, has all but ceased. Of course, such sentences were reduced in practically all cases where they were imposed. The average soldier laughed at them. They had no deterrent effect, and only served to discredit the military justice system in the eyes of the public. The soldier did and does fear the two, three or five year sentences. Even in the Korean War few of such long periods of confinement appear in the sentences. This change is an indication that in judicial matters the Armed Services have become more mature and undoubtedly the Code has served to instill a better idea of the processes of justice in the mind of the average officer.

(b) Sentences are now fixed and determined by the Court. In contested cases, there has been no suggestion that the rule be changed, and the committee finds no reason for any alteration of the rule. However, the Court of Military Appeals, the Judge Advocates General, and the General Counsel of the Treasury Department in their 1954 report recommended that in General Court Martial cases, where the accused with the consent of his counsel requests and the convening authority approves a one-officer court, whose identity must be known to the accused in advance, be permitted to accept a plea of guilty and adjudge sentence in all but capital cases. The officer thus designated would have the qualifications of a law officer; must be certified as competent for that particular duty by the Judge Advocate General of the Service concerned and have the rank of at least a Lieutenant Colonel or Commander. No such proposal is contained in H. R. 6583, which originated in the Armed Forces. Evidently such idea has been abandoned by the Armed Forces, although in their appearance before this committee the judges of the Court of Military Appeals affirmed their endorsement of the proposal. The committee admits that there is a strong argument in support of this proposal in view of the universal practice of the civil criminal courts which it would parallel. However, our investigation has

convinced us that the military legal system and those charged with its administration have not reached that state of maturity of judgment which would allow us to support such a proposal.

**C. Special Courts**

1. H. R. 6583 proposed to amend Article 16 (2) by providing that a Special Court Martial may consist only of a law officer if, prior to the convening of the Court, the accused has so requested in writing upon advice of counsel, and the convening authority has consented thereto and the identity of the law officer is known to the accused in advance of the date of trial. It also proposes to amend Article 51 which pertains to voting and rulings of both General and Special Courts Martial by providing that said Article shall not apply to a Special Court Martial consisting only of one officer, and that notwithstanding any other provision of the Code, the officer who is appointed to such Special Court Martial shall determine all questions of law and fact arising during the trial by such Court and shall, in the event of conviction of the accused, adjudge an appropriate sentence. Other amendments of Articles consistent with the one-man court idea are also proposed by the bill. In the appearance of the committee before the Subcommittee of the Armed Services Committee of the House of Representatives, these proposals were opposed on the ground that the so-called "consent" of the accused is illusory. The freedom of choice of the soldier or sailor is seriously limited by his environment and circumstances. While it is true that Article 25(a) is also to be amended so as to provide that the officer shall have the qualifications specified for a law officer of a General Court Martial, the committee believes that at present, at least, such amendment, rather than lessening, would increase the opportunity for arbitrary exercise of power. It is true that the Court of Military Appeals in the 1954 Joint Report recommended this proposed amendment, but notwithstanding this recommendation, your committee does not agree. It believes that for the time being at least the status of the present Special Courts should remain as they are except that we have reached the conclusion that the president of a Special Court should be a lawyer and possess the qualifications for a law officer as set forth in Article 26(a), and it so recommends.

2. The power of Special Courts to adjudge bad conduct discharges has been the subject of investigation and consideration by the committee. It has been discovered that bad conduct discharges carry with them a penalty almost equivalent to a dishonorable discharge. The evidence before the committee shows clearly that employers in civil life regard bad conduct discharges as equivalent to dishonorable discharges. Further, the evidence before the committee proves that punitive discharges inflict ferocious punishment although they are undoubtedly dictated in certain cases.

The indiscriminate use of punitive discharges is an evil which the committee cannot lightly regard. A punitive discharge will, in practically all instances, bar a veteran from Government benefits, but of more importance, destroy or seriously impair his entire career in civilian life. Employers of labor regard them an indicia of the character of the individual. There are certain offenses that deserve such discharges, and the committee would not, for one moment, argue in favor of their elimination. The problem, however, is not of easy solution because the evidence shows that in the issuing of bad conduct discharges there is not the same restraint displayed as in the cases of dishonorable discharges. Therefore, the authority of a Special Court to adjudge a bad conduct discharge has caused the committee deep concern.

Article 19 provides there must be a complete record of the proceedings and testimony in such cases. Article 66 directs that such cases be reviewed by the Board of Review. Article 67 authorizes the Court of Military Appeals to review such judgments. These limitations are salutary and protective, but the committee, after review of all of the evidence before it has concluded that the Special Courts should be deprived of authority to adjudge bad conduct discharges and that the General Courts alone be vested with the power to adjudge dishonorable and bad conduct discharges, and it so recommends.



84154 O—62——28

**D. Summary Courts and Company and Mast Punishment**

1. Summary Courts cannot be treated without consideration of company or mast punishment. The Joint Report for 1954 of the United States Court of Military Appeals, the Judge Advocates General of the Armed Forces, and General Counsel of the Treasury Department, recommended that Article 15 of the Code be amended so as to increase the permissible punishments. The maximum would not exceed the forfeiture of one-half of one month's basic pay per month for a period of two months in the case of an officer and the loss of one-half month's pay for a period of one month or confinement up to seven days in the case of enlisted personnel. The present Article 15 allows, in the case of an officer, forfeiture of not to exceed one-half of his pay per month for a period not exceeding one month, and in the case of any other personnel, no loss of pay but in lieu thereof, withholding of privileges, restriction to specified limits, extra duty and reduction in grade. However, there is a special provision pertaining to the Navy which allows a person attached to or embarked in a vessel to be confined for a period not exceeding seven consecutive days, or confinement on bread and water or diminished rations not to exceed three consecutive days. H. R. 6583 proposed to increase the forfeiture for officers from one month to two months, eliminates the qualification as to a person being attached to or embarked in a vessel with respect to confinement and adds the right to impose forfeiture of not to exceed one-half of one month's pay on all military personnel other than officers or warrant officers. This increase of company or mast punishment was opposed by the committee in view of the fact that there is no provision for a satisfactory review of the punishment. It is true that under Article 15(d) a person deeming his punishment unjust or disproportionate may appeal to the next superior authority. In general, this appeal has proved fruitless. It is very rare, indeed, that there is any change in the punishment. Under the old Article 104 of the 1920 Code, company punishment was inflicted principally upon enlisted personnel, although in time of war a general officer might impose upon an officer below the grade of Major a forfeiture of not more than one-half of such officer's monthly pay for one month. The increase in company or mast punishment as set forth in Article 15 of the Code might perhaps be justified due to the change in the personnel of the Armed Forces.

The committee views with suspicion any increase in the intensity of the punishment that may be inflicted. It cannot at this time join in such recommendation.

2. The Summary Court situation in the Armed Forces is far from satisfactory. It is difficult to distinguish between the actions of Summary Courts and of officers exercising company or mast punishment. A Summary Court cannot impose punishment exceeding confinement in excess of one month, hard labor without confinement in excess of 45 days, restriction to limits in excess of two months or forfeiture of pay in excess of two-thirds of one month's pay. Of course, it has no power to adjudge death, dismissal or punitive discharges. The Summary Courts of the Armed Forces resemble the police courts of civil life. They may be highly necessary, but their function has not been such as to inspire any great degree of confidence. The legal profession and the American Bar Association have been giving great attention to the minor civil courts as they have recognized that the general public's contact with courts for the most part is with these minor courts. The functioning of the Summary Courts of the Armed Forces has an indirect influence upon the standard of military justice. It may be that eventually the Summary Courts should be abolished and their authority vested in Special Courts, but for the time being at least the committee does not recommend such action. Rather, it believes that the Summary Courts should be strengthened by requiring that a Summary Court officer should possess the same qualifications as a law officer under Article 26(a).

It is recognized that this recommendation is but a stop-gap suggestion but it is believed that such change in the stature of a Summary Court officer might have the effect of raising the dignity of the Summary Court. Fundamentally, the problem arises out of the fact that a Summary Court officer in an organization performs his function only as a "side line" to his general duty. If the Commanding Officer of the organizations would adopt the policy of selecting an officer with the required

qualifications and make his sole duty that of a "police judge" it is believed that many faults of the Summary Courts would be removed. As supplemental to this action the Commanding Officer should provide the Summary Court officer with a court-room and a clerk, so that the atmosphere would be judicial. This is an example again of a problem of administration. No amount of legislation can correct this condition unless there is a keen realization on the part of the Commanding Officers that the Summary Court is a part of the Armed Forces judicial system and should be accorded the rank and dignity which a Court deserves.

**E. Appellate Review**

**1. Boards of Review.** In respect to the Boards of Review, each of the Services has set up under the Code Boards of Review consisting of three members in each of the offices of the Judge Advocates General. In the Navy one civilian has been assigned to each Board; in the Air Force and the Army the personnel is purely military.

The experience of witnesses who appeared before the committee seemed to indicate that there was little difference in the end result reached in any of the Services. The Air Force Boards write rather lengthy opinions. The Army Boards write "short form" opinions but the conclusions are more or less the same. Some attorneys have expressed the view that it is a waste of time to appear before the Boards of Review. What we have stated with relation to the cases which go to the United States Court of Military Appeals, indicating the type of practice which that Court has been called upon to discourage, and the type of cases which come before the Court as outlined in Appendix C, to some extent indicates that the Boards of Review are not discharging their assignments properly. If they were, that type of case would never go as far as the Court of Military Appeals. The opinions of the Court of Military Appeals indicate that there is something lacking in the handling and disposition of cases by the Boards of Review as they are presently constituted.

No evidence of any interference by The Judge Advocates General with the Boards of Review has been brought to our attention, but we have been reminded of the fact that the respective The Judge Advocates General, except in the case of the Navy civilians who are so employed, mark the fitness reports of the officers who sit. It takes little imagination to conclude that the wishes and general legal theory of The Judge Advocates General in respect to the manner in which cases should be handled and disposed of can be and probably are conveyed to the members of the various Boards to the extent that while the members of the Boards may not consciously strive to adhere to the desires and viewpoint of their Commanding Officer, there are instances where the result reached by a Board is not the same as that which would be reached if the Board members were free of fear of command retribution. The system must incite in the mind of each officer the knowledge that the possibility exists that if his conclusion does not meet with the approval of, or conflicts with the desires of his commanding officer, he may receive a fitness report which will not contribute substantially, or to any degree, to his further advancement or promotion in the Service.

One of the main difficulties with the Boards of Review as presently constituted seems to be that there is considerable rotation of the personnel of these Boards. This rotation is caused by the laws of Congress, specifically the "Manchu Act" which requires a change in station after the expiration of four years, approximately, in any billet in Washington, D. C., for all officers in the Services. The result is that in the case of men who show themselves eminently qualified to be Board of Review members at the expiration of a period of four years, they must be transferred to other duties—to duties in many instances which they cannot perform as efficiently as those carried out by them while on the Board. Such a system unquestionably is a waste of manpower and under such a system obviously the most qualified persons are not serving at all times.

It is our conclusion that Boards of Review should be so constituted that a much more permanent status shall be enjoyed by each of the members of a Board. The Board members should have rank sufficient to enable them to be relatively oblivious to financial considerations and while we see no objection to rotation of

officers among the various Boards, it is our view that more permanent staffing of these Boards would be of great advantage to the Services and to the Nation.

Because of what is stated hereinabove with reference to the possibility of influence of Commanding Officers on Boards of Review and after considerable thought, we have come to the conclusion that the Boards of Review should be removed from the immediate control of The Judge Advocates General in the individual Services. It is our belief that the Boards of Review should be placed in the Department of Defense, responsible solely to the Secretary of Defense; that officers who serve on such Boards be given permanent assignments to this duty in the Defense Department subject always, of course, to efficient performance of duty and good behavior and that the only control over their military performance of the duties assigned to them shall be that exercised when necessary by the Secretary of the Department of Defense.

It is our position that the possibility of improper influence or influences of any kind on a person who in effect occupies a position of an appellate judge should be removed so that absolutely no opportunity for such influence can exist or even be hinted at.

It is believed that such changes would contribute to these very desirable reforms:

a. Independence of the Boards of Review of the General Staff and of the line would be promoted;
b. Substantial uniformity of decision would result; and
c. Continuity of tenure of office of members of the Boards of Review would be promoted.

Such changes would require the amendment and modification of many provisions of the Code.

With respect to Boards of Review, the committee recommends:

a. That they be removed from the offices of The Judge Advocates General and be placed under the direct supervision of the Secretary of Defense.
b. That the "Manchu Act" be amended so that at least members of the Boards of Review as reconstituted in the office of the Secretary of Defense be not subject to its provisions.

**2. Certificates of Probable Cause.** H. R. 6583 proposed an amendment to the Code, whereby the Court of Military Appeals is prohibited from considering a petition for grant of review unless counsel representing the accused at his trial or before the Board of Review, or Appellant Defense Counsel appointed by The Judge Advocate General if the accused was not represented by counsel before the Board of Review, or civilian counsel retained by the accused, certifies that, in his opinion, a substantial question of law is presented and that the appeal is made in good faith.

The committee opposed this amendment before Congress. This provision was also opposed by all witnesses appearing before the committee, except Armed Forces representatives. This amendment was not included in the seventeen recommendations of the 1954 report made by the United States Court of Military Appeals, the Judge Advocates General of the Armed Forces, and the General Counsel of the Treasury Department. It is a direct effort to limit the Court of Military Appeals in the exercise of its jurisdiction. In its original conception, as proposed by The Judge Advocate General of the Air Force, this certificate of probable cause could only have been issued by a newly created judicial appeals board in the office of The Judge Advocate General of the particular Service involved. (See the 1954 report of the Judge Advocate General of the Air Force.)

The committee is of the opinion that any limitation upon the authority of the Court of Military Appeals to review records of trial would prove highly injurious to the process of military justice as implemented by the Code. The opposition of The American Legion to any such proposal should continue.

**3. Appeal Time.** H. R. 6583 also proposed to reduce the time within which the accused must ask for a review by the Court of Military Appeals from thirty (30) days to fifteen (15) days. In support of such amendment, it is claimed by the proponents thereof that time could be saved in the disposition of cases by the Court

of Military Appeals. It is not necessary for the accused to deposit his notice of appeal with the Clerk of the Court but it is effective when transmitted through military channels. This was a highly necessary interpretation of the law. In all of the discussions before the committee, there was no evidence that this time reduction would effectively speed up the disposition of cases. The committee opposed the amendment before the committee of Congress and still does oppose it.

**4. Delays and Time Lag.** All of the military witnesses vigorously protested against the time consumed in the military justice process which ends with the action of the Court of Military Appeals. The fundamental reason given for several of the amendments displayed in H. R. 6583 is to reduce this time lag. The committee finds that there is considerable time consumed in following through the processes, commencing with the preliminary investigation and ending with the action of the Court of Military Appeals. It must, however, exculpate the Court from any charge of being dilatory in its disposition of cases. It is true that there are several cases which the Court held under consideration for several months, but in each case there was an extraordinary situation which justified the Court in carefully considering its final action. The evidence shows that the great majority of cases are handled by the Court in a reasonably expeditious manner. We refer again to Admiral Radford's statement concerning the functioning of the Manual for Courts Martial. We repeat—delays for the most part are the result of the requirements of the Manual and not of the Code.

The evidence displayed to the committee shows that it is while cases are in process in the Services that the greatest amount of time is consumed. For example, the committee was informed of one case where a period of approximately three months elapsed following the final decision of the Board of Review before the accused was notified of the decision (R. 730). In making this statement, the committee comprehends fully the problems and complexities involved in the trial and disposition of cases before they reach the Court of Military Appeals. It is not at all certain that these delays are unreasonable when consideration is given to the fact that the Courts Martial are intended to administer justice and not act as mere instrumentalities of discipline. The committee also takes notice of the fact that the same criticism is made of civilian criminal courts—a criticism which undoubtedly is justified in many instances. Notwithstanding this criticism, the committee asserts that speed is not the objective of any judicial process, be it civil or military. The end to be achieved is justice—justice both to the prosecution and the accused. If justice can be obtained with speed, it is to be commended, but if justice is to be sacrificed in order to attain speed, then speed is not justified. While some of the cases appealed to the Court of Military Appeals are without merit, within the whole volume of cases for which review is asked, there is certain to be a large number in which justice would be defeated if most careful and time-consuming review of trial proceedings were not had. The committee has concluded, after most careful study and consideration of this problem (and it fully understands the viewpoint of the Armed Services), that further examination and research must be given by the Court of Military Appeals and by the Armed Services in order to find a satisfactory solution without impairing the jurisdiction and powers of the Court. It is again strongly suggested that there are provisions in the Manual which must be amended with the objective of eliminating time-consuming processes. In one respect, this problem has been the most troublesome which has been presented to the committee, but it has concluded that no amendment of the Code should be made at present which will change the methods of review.

It strongly recommends that the Court of Military Appeals and the Armed Services and all other persons interested in military justice give time and effort to developing greater speed in the disposition of cases without sacrificing the rights of the individual accused, not only to a fair trial but also to an exhaustive review of the trial court's action.

**5. Review by Appointing Authority.** One of the unique features of the functioning of Courts Martial has been the review of the trial proceedings and action on the same by the appointing or reviewing authority. Out of this unique primary review has grown several obvious weaknesses. It is due to this review by the ap-

pointing authority that the idea originated that a Court was the personal representative of the appointing authority and that it was but an instrumentality of discipline. Further, this power of the appointing or reviewing authority over the proceedings and the sentence necessarily encouraged a certain amount of command influence. These weaknesses are inherent. There have been many instances where Courts Martial have retreated from that statutory duty and have imposed maximum sentences in the belief that they will be reduced by the reviewing authorities. The committee has evidence in its record where ill-informed appointing authorities have indicated to trial courts that they should impose the maximum sentence, and that the appointing authority would, in the exercise of his judgment, grant clemency. Happily, however, under the Code, apparently there have been but few such cases. There can be no question but what this primary review by the appointing authority has been exercised in the majority of cases in a most judicial manner and has resulted in the reduction and amelioration of sentences. So long as the present method of appointment of courts is continued, this primary review by the appointing authority is almost a necessity. Its elimination would require a complete reconstruction of the Courts. It is not at all certain that Congress, at the present time, would be willing to indulge in any such radical departure from established precedent. Again, there is presented an example of the necessity of a wise and judicial action by the appointing authority who fully understands the present military justice system and who is sympathetic to its objectives. It is believed that the present method works, in general, to the advantage of the accused. However, in the hands of an arbitrary appointing authority who does not comprehend or understand that Congress has erected a judicial system, this power is subject to grievous abuse.

The committee makes no recommendation as to any change at this time, believing there is involved the broader problem of the nature of the military judicial system.

## 4. MANUAL FOR COURTS MARTIAL

Except for the Table of Maximum Punishments (Article 56) and the Rules of Procedure and Evidence (Article 36) contained within the Manuel for Courts Martial, many reputable legal authorities regard it only as a text book or an exposition of law. There is a sharp division of opinion on this question and it must be frankly admitted that the Court of Military Appeals in a number of decisions has considered certain provisions of the Manual as possessing the dignity of a Congressional enactment. Appendix "D" summarizes numerous instances where there appears to be a conflict between dissertations in the Manual and the provisions of the Code. It also contains references to cases where the Court of Military Appeals has in instances struck down Manual provisions as being in conflict with mandates of the Code and in other instances it has sustained Manual provisions as not being in conflict with the Code, and as correct expositions of military law on the particular subject. The latter cases show a tendency to read the Manual provisions as part of the statutory law. The committee at this time does not offer the foregoing as criticism of the Court, but only by way of illustration of the confusion and uncertainties which have arisen in attempting to administer the Code as elucidated in the present Manual.

The Manual is in truth an Executive Order of the President promulgated pursuant to delegated authority (Articles 36 and 56) and a most serious Constitutional question has always existed as to the power of Congress to delegate authority to the President (with due regard for his dual capacity as Commander in Chief) to promulgate rules and regulations which pertain to substantive law as distinguished from the procedural detail (Ex parte Quirin, 317 U. S. 1, 25-26; Ex parte Milligan 4 Wallace 2, appear to limit the "commander in chief's" function to "the command of the armed forces and the conduct of campaigns" except as Congress under the "necessary and proper clause" may otherwise provide.) However, by long standing tradition and practice it has been accepted that the promulgation of the Manuals for Courts Martial by the President is a valid exercise of delegated authority,

particularly since Congress has required that the rules and regulations as set forth in the Manual be reported to it (Art. 36).

It is notorious that the present Manual was the product of the Armed Forces and was prepared by them. Undoubtedly it was approved by them before being submitted to the President. Whether the President made alterations in the submitted draft the committee is, of course, unable to state, but it is believed that the Manual in its present form is substantially the same as prepared by the Armed Forces. Changes and amendments of the Manual necessarily come from the Armed Forces. As an example of amendment, the committee refers to Executive Order 10565 dated Sept. 28, 1955 (whereby paragraphs 76a and 122c of the Manual are amended) which provides that if an accused is found guilty of an offense or offenses for none of which dishonorable discharge is authorized, proof of three or more previous convictions during the year next preceding the commission of the offense of which accused stands convicted will authorize a sentence of dishonorable discharge, forfeiture of all pay and allowances, and if confinement otherwise authorized is less than one year, confinement at hard labor for one year. Here is a revolutionary method of determining severity of sentences. Three convictions by a summary court (within the year) of simple AWOL each for a few days authorizes the Court to impose a terrific punishment in form of dishonorable discharge for an offense for which the law authorized no such punishment.

Without entering into a discussion of the legal problems created by this amendment to the Manual, the committee suggests the Court of Military Appeals and the Federal civil courts will be offered opportunities to pass on the validity of this amendment. Assuming eventually it will be declared valid by the courts, the fact remains that it is an example of the process of the military mind in dealing with a problem, which certainly belongs to Congress for solution and not to an administrative or executive agency of Government.

The committee hereinbefore has expressed its opinion that many of the alleged shortcomings in the Code may be attributed to the Manual for Courts Martial. We have set forth the opinion of Admiral Radford, the Chairman of the Joint Chiefs of Staff, in this connection.

In the past we have suggested that, since the Manual was the product of compromise between views of the Army, the Navy and the Air Force, it is natural to expect some confusion therein. We have suggested that the real difficulty in military justice "does not lie within the Code but lies within the Manual for Courts Martial under which the Code is administered. Whether the Manual was the product of deliberation or of ignorance, is difficult to state; but if one were trying to sabotage the Uniform Code of Military Justice one could not have devised a more artful or a better means for so doing than is provided by the Manual."

We have further suggested before Congress that the present Manual should be replaced by a new one. We have not been convinced otherwise by anything brought to our attention. Indeed, we have been, we believe, entirely justified in our previous statements by the information gained upon additional research. We have gathered a number of the instances where the Manual is inconsistent with the Code—in some cases to the point of vitiating or nullifying the provisions of the latter—instances of obviously erroneous definitions of the intent of a particular Article of the Code. In fact, the Manual is a document which sets forth concepts at variance with the spirit and letter of the Code, and at variance with the intent of Congress and the American people. (See Appendix "D".)

We therefore conclude that the present Manual for Courts Martial should be rewritten with a different concept in mind from that of its authors. It should be written from the standpoint of a person sympathetic to the Code, and the principles of American justice but who, at the same time, desires to maintain a strong, vigorous and capable military establishment.

We recommend that legislation be enacted directing rewriting of the Manual and in that regard Articles 36 and 56 should be amended so as to direct that no rules of or concerning substantive law or evidence, no definitions of crimes or elements of a crime, except military offenses, should be included therein. The statute should affirmatively direct that in cases other than those involving military of-

fenses, the rules of the Federal civil courts pertaining to evidence and interpretation of statutory law should control; that procedural rules should be prepared by and under the direction of the Court of Military Appeals; that The Judge Advocates General of the Armed Forces should prepare expositions of strictly military offenses for inclusion in the Manual, and that the entire Manual before submission to the President for action shall bear the approval of the Court of Military Appeals; said approval being indicated by a formal order of court.

## 5. UNITED STATES COURT OF MILITARY APPEALS

Public Law 506 of the 81st Congress adopted on May 5, 1950, effective on May 31, 1950, established the Court of Military Appeals. It will be hereafter referred to as "the Court."

The foregoing Act established for the first time in the history of the United States a Civilian Court to review the proceedings of Courts Martial.

The Court consists of three Judges appointed by the President for terms of 5, 10 and 15 years, subject to confirmation by the Senate. The Code further provided that no more than two of the Judges should be from the same political party. The Code further gave the President the power to designate one of the three as the Chief Judge and the power of removal after a hearing for neglect of duty or upon mental or physical disability, but for no other cause. The President may designate Judges of the United States Court of Appeals to sit on the bench during the disability of any of the Judges.

Article 67 reads as follows: "The Court of Military Appeals shall review the record of 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."

We find that as of April 14, 1956, from the inception of the Court, 8,340 cases have been before the Court, under this Code. Thirty of these cases came to the Court under the Mandatory Section, above referred to, twenty-nine of which were from the Army and one was from the Air Force; none was from the Navy or Coast Guard.

Two hundred eight (208) of these cases were certified to the Court by The Judge Advocate General, sixty-eight from the Army, one hundred sixteen from the Navy; nineteen from The Judge Advocate General of the Air Force and five from the General Counsel of the Coast Guard. The remainder of the cases (8,194) reached the Court under Section 3, which gives the accused on good cause shown, the right to appeal to the Court for a review of his case. Of these 8,194 cases, 778 of them were granted Certiorari, approximately 10 per cent of all the cases submitted to the Court since its inception.

From the information submitted to us, we find that the average time from the trial of a case, until the case is docketed in the Court of Military Appeals from the Army was 143 days. The Court of Military Appeals disposed of the cases from the Army in an average of 57 days, computed from date of docketing and final decision. The cases from the Navy averaged 185 days from the trial until the time it was docketed in the Court of Appeals. The Court of Military Appeals disposed of these cases on an average of 58 days. The cases submitted to the Court from the Air Force averaged 163 days from the trial, to the time they were docketed. These cases were disposed of in an average of 46 days. Cases received by the Court from the Coast Guard, required an average of 141 days to be docketed and were disposed of by the Court in an average of 78 days.

It appears to your committee that many of the delays complained of in the administration of the Code were occasioned by the Armed Services rather than by the Court.

The movement to take the Court out of existence or to so emasculate the Code to the extent that it would be no longer workable is probably much more deeply rooted in certain branches of the Armed Forces, than was realized by this committee at the beginning of our investigation and the interviewing of witnesses.

Of course, we are familiar with the speeches made at Chicago by two of The Judge Advocates General before the House of Delegates of the American Bar Association, and to the Judge Advocates' Association, which advocated abolishing the Code. This is further evidenced by the fact that the three Judge Advocates General and the three Judges of the Court of Military Appeals conferred for study of and to suggest necessary amendments to Congress to the Code. The Hon. George W. Latimer, Judge of the Court of Military Appeals, pointed out to this committee in testimony before it that the entire attitude of The Judge Advocates General at the study conference seemed to be, to use his words, "well, let's see what we can do about getting this back into the Services again"—which denotes a determination to regain the power to control Military Justice. (R350)

The proposed amendment to Congress in H. R. 6583, which would put the burden on an accused to show cause why he should be permitted to appeal, points up this apparent desire. If enacted very few cases, if any, would reach the Court of Military Appeals.

We conclude, therefore, that the Armed Forces have definitely determined to abolish the Court of Military Appeals or to so minimize its effectiveness that it would be merely a rubber stamp for the Military.

Witnesses before this committee were almost unanimous in the opinion that the Court should be maintained at all costs and urged that The American Legion employ its maximum influence to perpetuate the Court of Military Appeals in its present form.

There were those who, in 1949 and 1950, had opposed the enactment of the Uniform Code of Military Justice, and who appeared before us and stated in retrospect that their judgment had been erroneous in opposing the Code including the Court of Military Appeals.

It is the unanimous opinion of this committee that the Code is workable in time of war. There appears to be nothing to prevent separation of the Court of Military Appeals into several divisions to serve in several theaters of war; provided, of course, adequate personnel were made available. In the event of war, it would require the lapse of from 100 to 150 days before the case load would become unduly burdensome, which would provide sufficient time for the Congress to remedy the situation by legislation affording adequate judicial machinery.

However, we believe, in view of the latter part of the resolution which authorized the establishment of this committee, that we should present in this report some of the complaints which our investigation elicited.

Furthermore, we conceive that it is impossible to discuss the question of Military Justice without some exploration of the action and administration of the Court of Military Appeals.

It is not believed that even the Judges of the Court themselves would claim that it is a perfect Court. Certainly it has defects. We have been informed by various persons of what we conceive to be justifiable complaints against some of the Court's decisions. There have come to our attention criticisms of the Judges individually but it is felt that some of these may well stem from personal reactions and may well be the exercise of the prerogative of every lawyer who has lost a case to criticize the offending Judge in the local tavern.

One of the main complaints from lawyers, both from within and without the military, has been that the Court generally has gone too far in upholding doubtful convictions and in approving questionable practices. It is noted that two of the Judges have expressed the view that men in the military are not entitled to constitutional rights except as re-enacted by Congress in the Code! (Sutton 3:220, Deain 5:44, Clay 1:74). One Judge has spoken of the loss of constitutional rights as

"the compulsion by necessity" (Sutton 3:220). It has been held that confrontation in a capital case can be waived (Houghtaling 2:230)—a conception contrary to the accepted Federal rule: and the Court adopted a conception of double jeopardy (Zimmerman 2:12) that conflicts with the doctrine of the U. S. Supreme Court in *Wade* vs. *Hunter*, 336 U. S. 684.

The Court overruled the U. S. Supreme Court's holding in the *Hirshberg* case (336 U. S. 210) by authorizing trials for offenses in a prior enlistment. (Solinsky 2:153). The Court upheld compulsory self-incrimination in one case but held that another trial would be a waste of time (Moore 4:207). It has approved lack of confrontation by approving use of depositions (Sutton 3:220) and on evidence given to a Court in the absence of the accused (Velez 4:183). It has approved depositions in capital cases (Horner 2:478, Young 32:470), which is contrary to the provisions of Art. 49 of the Code, with one Judge noting that a deposition was a statutory exception to the constitutional right of confrontation. (Young supra.)

The Court has upheld many times provisions of the Manual as the "Serviceman's Bible" even though the Manual conflicts in many places with the Code and the intent of Congress, as the Court itself has pointed out.

It is claimed that the Court has shifted the burden of proof to an accused requiring him to prove innocence to the extent of showing that a certain act was performed with authority in a case where he was charged with doing the act "without authority," on the theory that it was easier and more convenient for him to carry this burden than for the Government to prove lack of authority (Blau 5:232, Gohagan 2:175, Bennett 4:209 and see the concurring opinion in Anderton 4:354, on the failure of the accused to furnish an explanation). It is claimed that the Court abridged the constitutional right to bear arms by holding such to be an offense even though no law or regulation forbidding the carrying of arms was extant (Thompson 3:620). It is stated that the Court has been distinctly pro-military in upholding jurisdiction of civilians (Weiman 3:216, Marker 1:393, Garcia 5:88). (However, the Supreme Court of the United States has taken the same attitude in the *Covert* and *Krueger* cases decided in June of this year.)

It is also alleged that the Court has refused to extend the full faith and credit clause to a bona fide decree of a State court (Johnson 3:725). Substantial criticism has been leveled at the Court for its decisions in Deller 3:409 and O'Neil 3:416. These men were tried and convicted of aggravated absence without leave but the Court held that they were guilty of desertion although they were never convicted by a Court Martial of that offense. The Court noted that the claim that Counsel did not have an opportunity to argue the question of the legality of such conviction was "without significance" since there was merely a question of law involved.

Complaints have been made that the Court has several times upheld convictions on theories never advanced at the trial or other levels (Hainson 5:208, DeLeo 5:148, Manuel 3:739), a practice not permitted in Federal Courts. See Bollenbach U. S. 326 U. S. 607.

It is also claimed that the Court has become involved in prolonged theoretical discussions which at best, are confused and in the view of some people, make no sense (Biesek 3:714, Josey 3:767, Johnson 3:725, Veleg 4:183, Gibson 3:512). Many complaints have been made about the length and number of opinions per case in view of the numerous concurrences and dissents by the Judges.

We have collected a group of cases in Appendix "C" attached to this report which contains some of the cases referred to above but many in addition thereto which demonstrate the type of case handled by the Court.

As stated above, we are of the opinion that the complaints in many of the instances set out are justified. We feel that if we as lawyers were seated on the Court we would arrive at different conclusions. However, we are thoroughly cognizant of the fact that the Court of Military Appeals is plowing new ground. It is faced with the problem of, in a few years, expounding and setting out concepts which are radically at variance with those which have existed for 175 years or more, and it must guard against the possibility that any opinion enunciated by it will be destructive of the discipline which must be maintained in order to afford

certainty that our Armed Services will be effective fighting units, should a war arise.

There has been a recent addition to the Court because of the death of one of the original members thereof. It is believed that time will congeal the legal rationale of the Judges of the Court of Appeals and that further years of experience with the Code will furnish decisions which are less likely to raise objections of the nature of those outlined above.

In order that we may avoid any possible misunderstanding, however, we repeat again the Court of Military Appeals is a splendid creation of the Congress. We feel it is the most salutary advancement ever made in the field of military law. Nothing which we have said herein should be construed by any person as being anything but the highest endorsement of its continuance. The shortcomings of the Court are of such nature as to be expected of any judicial body which is engaged in a great reform.

The members of the Court stated to your committee that they desired no statutory action which would enable the Court to weigh the evidence, resolve conflicts therein and to judge of the credibility of witnesses. The Boards of Review now possess this authority.

This attitude is directly contrary to a rising sentiment (at least in capital cases) now abroad in the Civil jurisdictions. Several States either by Constitutional Amendment or statutory enactment have increased the function of their highest appellate tribunal to compel such courts to review the facts as well as the law. In fact many courts, where such practice is not recognized as binding upon the Appellate Court, in effect reach the same result by deciding cases on the basis that "substantial evidence" is not present in the record to justify a conviction.

Notwithstanding the attitude of the Judges of the Court of Military Appeals we conclude that the Court should, by statute, be authorized to weigh the evidence, resolve conflicts therein and judge of the credibility of witnesses.

## 6. DISCHARGE PROCEDURES

It has come to our attention that the Services have effected many discharges in the past few years since the inception of the Code without resort to any legal proceedings. These discharges are given out for medical and for many other reasons.

It is realized that a military organization, particularly under a system where men are drafted, many times acquire the services of misfits and persons who are for physical or mental reasons unable to serve properly in such an organization. It is further realized that medical examinations prior to induction may not expose the particular difficulty which subsequently causes the failure of the individual to fit into the military organization. However, we conceive that it is grossly unfair to American youth to induct them into the military or Naval Services and shortly thereafter discharge them under conditions which attach to them a stigma which lasts throughout their lives.

Our complaint is that many of these discharges which we shall lump together under a term "administrative" are handed to servicemen without any hearing before the board, court or tribunal of any kind. Many people in civilian life are wary of employing a young man who, for example, has received any type of administrative discharge from the Services. They are loathe to hire a young man who has been in the Service and cannot show a certificate indicating an Honorable Discharge or a Discharge under Honorable Conditions. Many administrative discharges have been given servicemen because some superior officer believed it is for the good of the Service that they be severed from Service in this fashion.

There have been witnesses who have appeared before us who have stated that the Services have resorted to administrative discharges to circumvent the Code of Military Justice perhaps on the theory that such discharges are not reviewable by the Court of Military Appeals or any other board or tribunal outside the Service.

As we have stated in the past, many military people do not seem to realize the effect of a bad conduct, dishonorable or other discharges from the military

or Naval service which is not an Honorable Discharge, or one under Honorable Conditions. Some method must be set up to eliminate the apparently indiscriminate awarding of discharges other than Honorable, or under Honorable Conditions. If a person is properly convicted of a crime in accordance with the laws of the land and the proper authorities determine that a bad conduct or dishonorable discharge should be meted out to the offender, such punishment is just and deserved. However, in the many cases which have occurred where no hearing of any kind has taken place and a person is severed from the Services with an administrative discharge, he has been unable to attend schools because the schools will not admit him; he has been unable to obtain jobs and thus his career is blighted, sometimes for reasons over which he has no control. The American people believe a hearing is a necessity before a punishment is handed out to an individual. Any discharge other than Honorable or one under Honorable Conditions is a punishment.

It is, therefore, the recommendation of the committee that no discharge of any type except an Honorable Discharge, or one under Honorable Conditions, may be given to any person once properly inducted into the military service, unless and until the circumstances of the dismissal have been reviewed by a Board of civilians which Congress should set up for the sole purpose of reviewing such discharges.

In view of the fact that The American Legion has strongly favored Universal Military Training and that because of its diligent action National Security Training Act was enacted (by which all American youth is subject to military training of one kind or another) it is most important that The American Legion insure to the mothers of America that their boys will return to civilian life after any military service under the same aegis as that which put them into the Service. In short when civilians put them in, for example by means of Draft Boards, then civilians should review the type of discharge received, if said discharge is one other than Honorable or under Honorable Conditions.

In this connection, it is pointed out that the experience of many practitioners before the Board for the Correction of Military Records and the Board for the Review of Discharges and Dismissals, set up in the various services following World War II, has been unsatisfactory and sorely disappointing. While the experience of different Services varies, the general experience has been that little, if anything, is accomplished by these Boards towards righting or remedying wrongs which have occurred. In fact, some attorneys feel that it is a complete waste of time to take a case before any of these Boards. We suggest that the personnel who staff these Boards constitute a considerable number of individuals who, since they are not accomplishing much in the way of rectifying errors which have occurred, could well be employed in other pursuits.

It is believed that the criticism with regard to the operation of these Boards stems from the interpretation, administratively arrived at by The Judge Advocates General of the various Services, as to the nature and scope of the work of the Boards. In short, since the Board for the Review of Discharges and Dismissals and the Board for the Correction of Military Records, must pass upon a case or record which previously has been processed in the Office of The Judge Advocate General, and since the Offices of the Judge Advocates General have control over these Boards by way of assignment of officers and personnel, the Boards are often reluctant, if indeed they do not find it impossible, to overrule a conclusion reached by their superior officer.

These Boards could perform a most useful function if intelligently and fearlessly administered and operated. However, under the rules set up by the Judge Advocates General, and the other circumstances indicted above, which restrict the Boards in many respects, it is difficult to understand how the Boards can do much else than confirm actions already taken by the Services involved. To overrule the action is to admit that error existed. Experience has shown that the Military and Naval Services are somewhat reluctant at any time to admit errors.

It is further realized that the Secretaries of the various Services have the power and right of review of the actions of the Boards. In fact, the Boards are answerable to them. On the other hand, with the tremendous volume of administrative detail which falls to the lot of any Secretary of the Services, in these de-

tails much work of this nature is delegated to subordinates, many of whom are assigned to the work by The Judge Advocates General. Overruling of the action of a Board or of The Judge Advocates General, even by a person acting in the capacity of a delagee of the Secretary of a particular Service would not be conducive to subsequent promotion.

Your committee recommends that the Congress conduct an investigation into the activities of the Boards of Review of Discharges and Dismissals, and the Boards for the Correction of Military Records at the earliest possible time. We recommend that close attention be directed to the question as to whether or not said Boards have been carrying out the intent of Congress.

## 7. MISCELLANEOUS

### (A) Rehabilitation Procedures of the Air Force

The committee desires to commend the Air Force on its experiment in rehabilitating convicted military personnel in the endeavor not only to return them to effective military duty but also to return them to civil life with a fair prospect of becoming productive, law-abiding citizens. Its program of rehabilitation, known as the "Amarillo Program" deserves the highest commendation.

Some five years ago, Generals Harmon and Kuhfeld selected and procured the use of the Amarillo Air Force Base as a place of retraining convicted enlisted airmen. It is in truth a training command where men are given mechanical as well as other service training. It has no fence around it and it has no guards with guns. There is but a minimum of custodial guard. The staff contains social workers, psychiatrists, penologists, and experts in behavior difficulty. There is a preliminary screening process, but a convicted man can be sent directly from his base to Amarillo. Forty-two bases are participating in the program which has four phases.

The first phase is that of indoctrination. The second phase involves military teaching and instructions concerning our Government and its institutions. At the end of this phase, and in phase three, the men are reclassified so as to fit them into a proper category of activity. In phase four, they are sent out to the base to perform the particular task for which they have been trained. Seventy-six per cent of the men sent to Amarillo are restored and restored successfully. At the end of the fourth phase, the unexpired portion of their punishment can be remitted and the man sent to duty. He is never returned to his old outfit.

Even though the "Amarillo Program" is still in the course of experimentation it has received the commendation of many leading penologists and there is every prospect that it will become a permanent institution, at least in the Air Force.

The philosophy supporting this experiment was expressed by General Kuhfeld thus, "When we are talking about this restoration and rehabilitation problem, we are not talking about kids that spit on the sidewalk or go AWOL, we are talking about the gamut of this thing. Our view is this—that unless you get the sex offenders, and there you have an entirely different proposition, or drug offenders, and there you are in a different ball park—that unless you get into that class of crime, we are saying that the crime the fellow commits doesn't determine whether or not he is a restoration or a rehabilitation potential. It is the individual, his background, his make-up and character, and not what he did, and that is the way we are trying to administer the program."

There are at present about 250 men at Amarillo. The average age of a trainee is about 23, although there are many youngsters of the ages of 17 and 18. It is an Air Force operation. The Army is, at present, endeavoring to establish a similar camp at Camp Gordon. The committee was furnished no evidence as to its progress or success.

In conclusion, the committee congratulates Generals Harmon and Kuhfeld for their enlightened endeavors. They point in the right direction, and with reasonable understanding and encouragement the experiment should succeed. Its value lies not only in the military rehabilitation of the individual but also in his rehabilitation as a law-abiding, productive citizen.

General Harmon has stated that this program has not been applied insofar as officers are concerned. There are, as must be obvious, many reasons why the program cannot be made applicable to officers, but it is believed some research and consideration should be given to extending the program to include officers.

It is the recommendation of this committee that the Congress enact legislation which will give statutory authority to insure the continuance of the Air Force "Amarillo Program." Such Congressional action should also extend the program to the Army, the Navy and the Coast Guard.

**(B) New Judge Advocate General of the Navy**

Since the committee has held its last meeting, the President has appointed a new Judge Advocate General of the Navy in the person of Rear Admiral Chester Ward. We have heard nothing but words of highest praise concerning his ability and accomplishments as a Legal Specialist in the U. S. Navy and in private practice as a lawyer.

The President is to be congratulated on the appointment made.

We are confident that morale will rise in the Navy's legal organization as a result of this appointment. We feel, however, that we have pointed out hereinabove to Admiral Ward many of the defects in the system over which he now has control. We sincerely hope that he will take immediate steps to eradicate the many deficiencies existent therein and that he will institute reforms which will bring the entire Navy Legal Service to the point where the public will have for each and every officer in the Navy legal group that degree of respect in which Admiral Ward is now held.

(C) In submitting this report, the committee respectfully suggests that funds be provided which will permit its publication in pamphlet form in sufficient numbers to permit a reasonably adequate circulation thereof.

**(D) Continuance of Committee**

In view of the recommendations made by the committee toward enactment of curative legislation by Congress, its opposition to proposed legislation, and the possibility that additional legislation may be suggested from time to time which will derogate against the Code and the Court of Military Appeals to the disadvantage of the Nation, this committee, or an equivalent thereof, should be continued and authorized to advise and consult with the National Security Commission and the National Legislative Commission, concerning matters pertaining to Military Justice.

Respectfully submitted,

FRANKLIN RITER, Chairman, Utah
JOHN J. FINN, D. of C.
CARL E. MATHENY, Michigan

**TEXT REFERENCES**

1. The Resolution No. 172 in its entirety will be found attached hereto as Appendix "A."
2. 50 U. S. C. Chap. 22, Secs. 551-741.
3. 10 U. S. C. 1483 (10 U. S. C. 1471-1521 Repealed May 5, 1950, CH 169, Sec. 14A) 64 Stat. 147 eff. May 31, 1951).
4. The many mandates of The American Legion on the subject of Military Justice can be found attached hereto as Appendix "B."
5. See Index and Legislative History Uniform Code of Military Justice, U. S. Government Printing Office 1950 pps. 662-698; 164-205.
6. "Military Justice Code" by Hanson W. Baldwin, New York Times, March 24, 1955.

   "New Military Justice" by Hanson W. Baldwin, New York Times, March 25, 1955.

   "Military Justice Code Revision urged by Nunn," Norfolk Ledger Dispatch, March 26, 1955.

"The Uniform Code of Military Justice should be reviewed immediately by Congress." Speech of Hon. James E. Van Zandt of Penna. in the House of Representatives May 16, 1955. Appendix Cong. Rec. pps. A3326-3327.

"Conflict seen over Military Justice Code," John G. Norris, Washington Post and Times-Herald, June 3, 1955.

"Reforming Military Justice," Editorial—Washington Post and Times-Herald, June 5, 1955.

"Military Justice; Code Changes Sought" by John G. Norris, Washington Post and Times-Herald, June 6, 1955 (included in Congressional Record, Extension of Remarks by Hon. James E. Van Zandt, Penna., June 8, 1955).

"First Things First, and Fast!" Editorial—Navy Times, June 11, 1955.

"Scrap Justice Code Services Urge," Navy Times, June 11, 1955.

"Progress under the Uniform Code," an address by Maj. Gen. Reginald Harmon, Judge Advocate General, Air Force, before Annual Meeting of Judge Advocates' Association, August 18, 1954.

7. See Appendix "C" attached.
8. See "Report of Survey of the impact of the law (UCMJ) and its implementing regulations upon ships operating under war conditions," published as Enclosure (1) to letter dated 1 October, 1952, ser. 6733, from Commander in Chief, U. S. Pacific Fleet, to Chief of Naval Operations, Judge Advocate General and Chief of Naval Personnel.
9. Legal Services and Procedure, A Report to the Congress, Commission on Organization of the Executive Branch of the Government (March, 1955) p. 27.
10. Index and Legislative History, opcit. supra note 5, at 633, 637, 677, 679, 734, 735, 740, 742, 762, 764, 789, 804.
11. Id. at 158, 159, 288, 292.
12. Id. at 120.
13. Id. at 1298, 1299, 1300.
14. 42 American Bar Association Journal 376.
15. Index and Legislative History, opcit supra note 5, at 680.
16. Statement before Subcommittee No. 1, Armed Services Committee, House of Representatives, April 19, 1956.
17. Manual for Courts Martial, United States, 1951, published by the Department of Defense as prescribed by Executive Order of the President, February 8, 1951.

## APPENDIX "A"

Resolution No. 172 in its entirety reads as follows:

Whereas, The American Legion played a vital role in the enactment of the Uniform Code of Military Justice, 50 U. S. C. (Chap. 22), 551-736; Act of May 5, 1950; Public Law 506, 81st Congress, and now retains a profound interest in all matters affecting said Code; and

Whereas, Since the Code has now been in effect five (5) years, there may be experience which would indicate necessary or desirable amendments, inclusive or exclusive of those suggested or recommended by the military or naval services; and

Whereas, The Army, Navy and Air Force, as evidenced by pronouncements through official channels and by public statements of persons in authority in said Services, are conducting a vigorous campaign, complaining that the Code is unwieldy, expensive and impracticable among other things, and to amend various provisions of the Code; and

Whereas, Many of the amendments and changes sought and recommended by the military and naval Services may serve to emasculate the Code in its provisions set up to safeguard the rights of individuals affected by the Code; and

Whereas, The American Legion in national convention assembled, October 10-13, 1955, Miami, Florida, should be fully informed on all aspects of the administration of the Code in order to propose to the Congress of the United States, if such is the will of the convention, any necessary or desirable changes in the Uniform Code of Military Justice, or to take whatever action The American Legion deems advisable in the light of the facts it may be able to obtain from an objective, unbiased survey of the Code itself or the administration thereof since its enactment; now, therefore, be it

Resolved, That the National Commander of The American Legion shall appoint a committee of lawyers to:

1. Conduct a survey of the operation of the Code since enactment to determine whether amendment thereof is desirable or necessary and, if so, to recommend to the next national convention of The American Legion such necessary and proper amendments; and
2. To investigate and report to said national convention its findings as to the aforesaid complaints and charges made, and amendments to the Code suggested, by military and naval personnel and establishments with the view to determining the truth or accuracy of the charges, the validity of all complaints and the necessity for amendments suggested or recommended by these sources; and
3. To investigate and report to said national convention its findings as to the work of the United States Court of Military Appeals for the purpose of ascertaining its effectiveness in carrying out the spirit and the letter of the Uniform Code of Military Justice.

## APPENDIX "B"

At its Twenty-eighth Annual Convention, held at San Francisco, California, in 1946, by Resolution No. 284, The American Legion indicated that it favored a general overhauling of the courts martial system and made the following recommendations:

1. That the administration of justice in the Army and Navy be placed in the hands of *trained* personnel.
2. That enlisted men not under officers concerned, as well as officers, be represented on the courts martial.
3. That the Articles of War be revised so as to provide a better definition of crimes and the punishment therefor with a view toward uniformity.

At the same convention a resolution was adopted requesting that The American Legion petition Congress for the immediate enactment of legislation authorizing or granting a reviewing party (1) directed to review immediately and empowered to revise sentences of court martial of these serving such sentences and (2) empowered to revise sentences already executed whether or not said sentences are a result of general court martial or otherwise.

The following Resolution No. 99 with reference to military law and justice in Armed Services was adopted by the National Executive Committee of The American Legion at its meetings held May 3-5, 1948, at Indianapolis:

Whereas, There has been effected a merger of the Armed Services; and

Whereas, Under the system of military law and justice presently existing and immediately contemplated, there are or will be a Judge Advocate General in each of the Army, Navy and Air Force; and

Whereas, The American Legion, interested not only in the economical but also adequate and capable administration and disposition of legal matters, sees no reason for the maintenance of three separate legal systems in the Armed Forces; now, therefore, be it

Resolved, That the Congress of the United States before enacting legislation presently pending in bills presented by the Army revising the Articles of War and by the Navy revising the Articles for the Government of the Navy be called upon to instigate an investigation of the present system to the end that more equitable and just disposition of courts martial cases be had; that past injustices in the said system may be remedied; that the preferential treatment of officers of the Regular Services over officers in the Reserves in the matter of retirement benefits may be abolished; that preferential treatment of officers over enlisted personnel in regard to courts martial be abolished.

That the Boards for the Review of Discharges and Dismissals set up under the G. I. Bill and the Boards for the Correction of Military Records for the Review of Discharges and Dismissals set up under the G. I. Bill and the Boards for the Correction of Military Records set up under the Reorganization Act (Public Law 601, 79th Congress, Section 207) be made to act in accordance with the will of Congress and the people; and

That consolidation of all legal offices of the Armed Forces may be effected and in the future be carried out under one head.

The following is the text of Resolution No. 750 with reference to military and naval justice in the Armed Services, adopted by the 30th Annual Convention of The American Legion at Miami, Florida, in 1948:

Whereas, The Senate of the United States has passed a Draft Act to which it has appended an amendment providing for a revision in the system of military justice in the United States Army and Air Force; and

Whereas, No provision for any change in the Articles for the Government of the Navy has yet been acted upon by the Congress; and



84154 O—62——29

Whereas, At the May meeting of the Executive Committee of The American Legion, Resolution No. 99, previously approved by this Department, was approved; and

Whereas, Such resolution sets out the position of The American Legion with regard to the question of military justice in all present aspects; now, therefore, be it

Resolved, That The American Legion, in convention assembled, does hereby petition the Congress of the United States, immediately upon its reconvening, to institute and pass legislation to effect the purposes of said Resolution No. 99, to the end there be a clarification and modernization of the laws pertaining to military and naval justice with regard to all the Armed Services.

At the 31st Annual Convention of The American Legion, held at Philadelphia, Pennsylvania, in 1949, Resolutions Nos. 600 and 652 were consolidated and as Resolution No. 652 was approved as follows:

That in summary The American Legion in convention assembled in Philadelphia, Pennsylvania, August 29-September 1, 1949, urges the establishment of a simple, consolidated and uniform code of justice for all branches of the Armed Forces of the United States; and that the uniform consolidated system so urged should, in addition to having full jurisdiction over all courts martial, also have full jurisdiction over all board of review of discharges and dismissal, and over all boards for the correction of military records.

At The American Legion Convention held in Los Angeles, California, on October 9-12, 1950, the following resolution was passed:

Be it, therefore, Resolved, by The American Legion in convention assembled in Los Angeles, October 9 to 12, inclusive, That they propose the following changes be made at once in the courts martial systems of our Armed Forces:

1. That appointment of special courts martial in the Army, Navy and Air Force be made by the commanding officer of the next higher echelon of command above the accusing officer or enlisted man, or above the accused's organization, whichever is the higher.

2. That findings and sentences of such courts be reviewed and approved or disapproved by a judge advocate of a higher command.

3. That general courts martial of five members be appointed by the President of the United States and approved by Congress for terms of 10 years, and one such court assigned to each Army, Air Force and Naval Unit in time of peace and increased in time of war, traveling from command to command as needed, and each such board shall have competent defense counsel traveling with it to represent such defendant at each command as may be required.

## APPENDIX "C"

The following cases are examples of miscarriages of justice in the military which probably would not have been corrected had it not been for the United States Court of Military Appeals:

*ROSATO* Case—(USCMA 143). As it was suspected the accused was involved in unauthorized money deals, the Commanding Officer called him in and ordered him to prepare handwriting specimens which would be used as evidence to convict him on trial. Rosato, on advice of counsel, refused. He was tried and convicted for wilful disobedience and given a sentence of three years confinement, with a dishonorable discharge. The conviction was upheld at all military levels but the Court dismissed the case, pointing out that the order violated both the Code and the Constitution.

In the case of *BURTS* (3 USCMA 418) the accused was given twenty years for murder. All Army reviewing authorities approved the conviction and sentence although the defense had claimed throughout that the evidence was insufficient to convict. When the case was appealed to the Court of Military Appeals, the Government, without argument, appeared and admitted the evidence was insufficient. As a result, the case was reversed and dismissed.

In the case of *LITTRICE* (3 USCMA 387) the Executive Officer called the members of the Court Martial in for briefing immediately before the accused was to be tried for theft. He explained, among other things, that the Court should not usurp the sentencing prerogates of the Convening Authority because inadequate sentences brought the military into disrepute; that thieves should be discharged; that cases were thoroughly reviewed before and after trial; and to the effect, in general, that only the guilty were tried and convicted. He further pointed out that those Court members who properly performed their duties would be recognized "by appropriate notation on their efficiency reports." All this was accomplished despite Article 37 of the Code which prohibits command control. The accused was convicted, given a sentence of two years and a dishonorable discharge.

In the case of *FERGUSON* (5 USCMA 68) there was a stockade mutiny and, before trial, the Convening Authority had a meeting of staff officers and the members of the Court Martial. The members were advised how "touchy" the situation was, that such cases had to be handled expeditiously, promptly and firmly to prevent other disturbances which would reflect adversely on the Army, all to the effect of making an example of the accused forthwith. The next day the Court convicted all the accused and imposed sentences ranging from ten to thirty-five years.

In the case of *DEAIN* (5 USCMA 44) the President of the Court Martial was a retired Rear Admiral (assigned by the Bureau of Naval Personnel for said duty) who indoctrinated the fellow members of his Court Martial, who were all junior to him, in his beliefs to the effect that persons in the military had no constitutional rights and that anyone sent before the Court for trial had to be guilty of something. He further explained that the law of desertion was that one who was away from his station and duty over sixty days was guilty, (no mention of intent). This President also prepared the fitness reports of the members of the Court. The Court of Military Appeals reversed the accused's conviction and dismissed the case.

In the case of *ZAGAR* (4 USCMA 510) a staff officer told the Court members before a trial, in effect, that only guilty cases were presented for trial and it was up to the accused to prove his innocence.

In the case of *HUNTER* (3 USCMA 497) the Commanding Officer told the Court members before trial how bad the accused was and that his last trial had resulted in an inadequate sentence.

In *JONES* (decided by the Court of Military Appeals in March 1955) the accused was taken under guard to the dispensary and an attempt was made to secure a urine specimen. When it appeared he could not supply such, 1000 cc's (over

a quart) of a glucose solution were injected into his veins. When he still produced no specimen, he was then forcefully catheterized over his protest. This procedure was vigorously defended by the military but the Court of Military Appeals reversed the conviction based, in part at least, on the evidence secured in the indicated fashion.

In the *GREEN* case (April, 1955) the conviction was reversed where the record showed that the defense counsel, who represented the accused at pre-trial, then prepared, at the direction of higher authority, a summarization for the prosecution of the case, pointing out what the evidence showed and what witnesses would prove the case against his client, etc.

In the *GORDON* case (1 USCMA 255) the Air Force saw nothing wrong in the accused having his "impartial" review by the Convening Authority where the accused had been originally charged with breaking into the house of that same officer.

In *COULTER* (3 USCMA 657) the "impartial" review of the trial was written by the prosecutor.

In *SCHILLER* (5 USCMA 101) the impartial law officer who presided at the trial was the same officer who forwarded the charges and recommended the trial.

In *EDWARDS* (4 USCMA 299) a member of the Court was the Provost Marshal (Chief of Police) in charge of all criminal investigations.

In *GUEST* (3 USCMA 147) a staff officer, during a trial recess, discussed the principles involved with the Court President and gave him legal holdings that showed the accused was guilty.

In *STRINGER* (5 USCMA 122) the Court President became incensed at the lack of evidence put in by the prosecution and remarked that if it continued "we will hang the man innocently."

In *DUFFY* (3 USCMA 20) the Staff Judge Advocate recommended that the Convening Authority disapprove the conviction because the evidence was insufficient (Court of Military Appeals later agreed) but the Convening Authority refused to do this because, as he stated: He knew the man was guilty because of other things not appearing in the record of trial."

## APPENDIX "D"

The following are some of the items which indicate at least a surface conflict between the Manual for Courts Martial and the Code and/or Federal procedure. Where available, there have been added the citations of the Court of Military Appeals' holdings on the particular situations. The list is not intended to be all inclusive since there are other areas of possible differences. If personal opinion should happen to be reflected in any of the items that follow, it is purely the personal opinion of your committee and nothing more.

Paragraph 21d permits confinement pending appellate review as the probable cause under Article 9(d), even though the man has no confinement to serve and is merely awaiting a Bad Conduct Discharge or other administrative action. This was upheld by the Court of Military Appeals in *Teague,* 3 USCMA 317.

Paragraph 55 outlines a procedure whereby, if a court finds evidence manifestly insufficient, it can report to the Convening Authority who, in turn, can send more evidence to convict. This appears contrary to Article 62(b)(1). However, it was upheld by the Court of Military Appeals in *Turkali,* 6 USCMA 340.

Article 49(d) forbids depositions in a capital case, but Paragraph 145a stated that, where a trial involves several specifications, each one is a separate case. Therefore, in such a trial depositions can be admitted on everything but the capital specifications, and even on that if the law officer says it is not material. This was approved in *Gann,* 3 USCMA 12.

Article 27(b) requires qualified counsel for General Courts Martial, but Paragraph 117a would permit depositions for such trials to be taken by anyone. The Court of Military Appeals denied this in *Drain,* 4 USCMA 646.

The approach of the Court of Military Appeals has been that the Manual for Courts Martial and the Code are on the same level, although the Code prevails if there is any conflict. See *Lucas,* 1 USCMA 19.

Article 118(3) sets up second degree murder where an act is inherently dangerous and evinces a wanton disregard of human life. As explained in Paragraph 197f of the Manual for Courts Martial, such an act can involve mere heedlessness or indifference. This was upheld by the Court of Military Appeals in *Stokes,* 6 USCMA 65.

Paragraph 148e permits a husband or wife to be a compulsory witness if an injured party. This is in direct contradiction to the Federal rule (Article 36). However, the case of *Strand,* 6 USCMA 297, indicates that this will be upheld by the Court of Military Appeals.

Paragraph 127c discusses an offense of concealed weapons, even though not forbidden by regulation. This was upheld by the Court of Military Appeals in *Thompson,* 3 USCMA 620. The Constitution and Federal laws permit the bearing of arms unless forbidden by regulations (Police Power).

Paragraph 122c permits a Court of Military Appeals to examine inadmissible evidence on sanity in closed session (no confrontation or cross-examination). This was approved by the Court of Military Appeals in Concepcion-Velez, 4 USCMA 183.

Paragraph 73C overrules Article 51 (c) on instruction of the Court by the law officer. It states that it is not necessary for the law officer to instruct on lesser offenses, affirmative defenses, etc. The Court of Military Appeals denied this in *Clark,* 1 USCMA 201, and others.

Paragraphs 213a and 213b setting out as sufficient instructions for the hundreds of different offenses that can be there charged, that the accused did or failed to do the acts as alleged and the circumstances as specified. This has been denied by the Court of Military Appeals in several instances.

Under Paragraph 200a 6, it is stealing even though at the time of taking, the taker intends "to pay for the property stolen or otherwise to replace it." This is contrary to the Federal rule. However, it was upheld by the Court of Military Appeals in *Krull,* 3 USCMA 129.

Under Paragraph 200a 5, a false pretense is one made "without an honest belief in its truth." This is contrary to the Federal rule (and most civil rules) and

could cover puffing or sales talk. This was upheld by the Court of Military Appeals in *Beasley,* 3 USCMA 111. In the opinion of your committee, a false pretense is a false material representation knowingly made with intent, etc.

Paragraph 11c permits a trial in absentia in a capital case after an escape. This is contrary to Federal rule, but was upheld by the Court of Military Appeals in *Houghtaling,* 2 USCMA 230.

Paragraph 138a provides that a presumption is an inference and an inference is merely a presumption even though one is mandatory and the other is permissive. However, after the statement that they are interchangeable, it is noted by your committee that the Manual for Courts Martial unfailingly uses the stronger term "presumption" wherever it will militate against an accused. In cases involving possession of recently stolen property, failure to account, etc., it is noted by your committee that the Manual for Courts Martial states that under those circumstances the accused can be "presumed" to be guilty. This was upheld by the Court of Military Appeals in *Biesak,* 3 USCMA 714.

Article 31, dealing with self-incrimination, is overruled by Paragraph 150b authorizing compulsory handwriting samples, voice identification, etc. This was denied by the Court of Military Appeals in *Rosato,* 3 USCMA 143 and *Greer,* 3 USCMA 576.

Paragraph 152 on search and seizure can be compared to the Federal holdings, although it will not benefit thereby. The Court of Military Appeals upheld this in DeLeo, 5 USCMA 148, regardless of any conflict with the Federal rule.

Paragraph 125 permits the Navy to give thirty days on bread and water, although Congress specifically limited this to three days. This was denied by the Court of Military Appeals in *Wappler,* 2 USCMA 393.

Page 227 sets up threats as a three-year offense, even though ordinarily they are a minor misdemeanor and often part of an assault. The Court of Military Appeals upheld this in *Holiday,* 4 USCMA 454.

Paragraph 33-1 permits common trials for two or more accused where offenses are similar but not joint. This was upheld by the Court of Military Appeals in *Bodenheimer,* 2 USCMA 130.

Page 259 permits proof of fingerprints by an *ex parte* certificate setting out the hearsay results of a test by an alleged expert back in the Department. This was upheld by the Court of Military Appeals in *White,* 3 USCMA 666.

Paragraph 11b apparently overrules Hirshberg (no trial for an offense in a prior enlistment) if the enlistment is terminated for the convenience of the Government) with a reenlistment thereafter. This was upheld by the Court of Military Appeals in *Solinsky,* 2 USCMA 153.

Under Paragraphs 37 and 41 a Convening Authority can add or excuse members of the Court during the trial and also can change the "judge" under Paragraph 39e. See *Grow,* 3 USCMA 77, *Whitley,* 5 USCMA 786.

Paragraph 38 has been used as a basis for attempts at command control in briefing courts on the status of disciplinary matters in the Command. See *Littrice,* 3 USCMA 487 and *Isbell,* 3 USCMA 782.

Although Congress took the law member out of the closed sessions of the Court, the military, on occasion, put lawyers in as Court members. See *Glaze,* 3 USCMA 168, but read *Sears,* 6 USCMA 661.

Paragraph 40 deals with actions taken by the president of the Court which rightfully belong to the law officer, according to the interpretation of Articles 26 and 51 by your committee. In some areas there are two presiding officers and a division of continuous authority under Paragraph 58 with the Convening Authority also getting into the continuance picture under other provisions. Also under Paragraphs 55 and 56 the Convening Authority can step in and stop the trial, in whole or in part, and can review rulings on motions during the trial. See Paragraph 67f. This was approved by the Court of Military Appeals in *Turkali,* 6 USCMA 340, and *Stringer,* 5 USCMA 122.

The military has seen nothing wrong with having former defense counsel help the prosecution in its case against his client. See *Green,* 5 USCMA 610; *McCluskey,* 6 USCMA 545; *Stringer,* 4 USCMA 494; and *Marrelli,* 4 USCMA 276.

Paragraph 48 states that the accused has the "statutory right" to counsel of his own choosing. In the opinion of your committee, this is a "constitutional right."

Paragraph 48j 3, permits a Board of Review to act, with the accused having waived right to counsel, if no request for the same was made within ten days from the date of sentence, not even from the date of the receipt of the record of trial. No such restriction appears in Article 70.

Paragraph 53e gives the Convening Authority wide discretion in ordering a trial closed to the public. This is now pending in *Brown*, No. 7998.

It is suggested again that Paragraphs 55 and 56 be read very carefully and precisely. These deal with the Convening Authority's taking over, stepping into the middle of the trial, usurping functions of the law officer, etc., although these should all be for the law officer under Paragraph 51b.

Paragraph 57g discusses the deciding of certain motions on a preponderance of evidence. It is thought that certain fundamental items, such as search and seizure, etc., put the burden on the prosecution.

Paragraph 57g 2, allows the law officer to omit certain arguments and offers of proof from the verbatim record. See Article 54.

Paragraph 67g apparently precludes the raising of the constitutional claim of lack of speedy trial other than for a continuance or to mitigate punishment. The Court of Military Appeals denied this in *Hounshell,* No. 7393.

Under Paragraphs 128b and 68g, if the Commander gives an Article 15 or administrative punishment for an offense that is not minor, the accused can still be given a court martial for the same offense. This was upheld by the Court of Military Appeals in *Vaughan,* 3 USCMA 121.

The reasonable doubt coverage in Paragraph 74a 3 is questionable, particularly the last sentence on page 114. This was upheld by the Court of Military Appeals in *Moore,* 4 USCMA 482.

Paragraph 74d 3 has a completely backwards approach on voting by first telling everything on how to convict, how many votes are needed to convict without saying that without such a vote there is an acquittal, and ends by saying that, if no other valid finding is reached, then the result is not guilty. See *Nash,* 5 USCMA 550 for discussion.

Paragraph 82e provides that trial counsel can permit defense counsel to examine the record of trial before sending it up for appellate review "when undue delay will not result."

Articles 63a, 66c, and 67d authorize a rehearing unless the case is set aside because of "lack of sufficient evidence *in the record* to support the findings." This is construed by Paragraph 92 as permitting a rehearing where "proof of guilt consisted of inadmissible evidence, for which there is available an admissible substitute." This was approved by the Court of Military Appeals in *Mounts,* 1 USCMA 114.

Paragraph 109 limits the right to a new trial under Article 73 to offenses occurring "after 30 May 1951." In this connection, the Board of Review rules in the Air Force (and probably in the other Services) originally indicated that only one petition for a new trial would be considered in any case. Such a rule would be contrary to Federal practice and there is no such restriction in Article 73.

Paragraph 109d limits the right to a new trial under Article 73 to "only if" the accused affirmatively establishes that an injustice has resulted and that "a new trial would probably produce a substantially more favorable result for the accused." This is contrary to the Federal rule where, in a case of fraud in fact producing the Court's verdict, a new trial would be granted. Fraud in the verdict, however, in a Federal Court is sufficient to set the verdict aside. In the Article the accused must show the result for both fraud and new evidence will be to produce "substantially more favorable result." It is assumed that, if a part of the offenses alleged were dismissed, it could be said that the sentence is still proper so no new trial is necessary. It is further indicated that the fraud must have had "a substantial contributory effect" upon the findings and that without it "there probably would have been a finding of not guilty." Further, a Judge Advocate

General can find "meritorious grounds" for relief but not award a new trial. It will suffice if he merely sends it to the Secretary for administrative action under Article 74.

In Paragraph 109f the Court of Military Appeals is informed by the Manual for Courts Martial that it should not grant a new trial under certain circumstances.

Under Paragraph 115d (see also p. 563) the Manual for Courts Martial construes Article 46 as authorizing the preparation and execution of warrants of attachment. This would imply that the military can arrest and detain civilians any place in the United States or possessions and transport them to any other place by force. Article 47 of the Code provides punishment for refusal to appear or testify, but the action must be taken by the District Attorney and the Federal courts.

Paragraph 117 deals with depositions. Elsewhere in this report we have commented on the use of depositions in criminal trials.

Paragraph 118 could be interpreted as a rewriting of the summary power given by Article 48 for menacing words, signs, gestures, or riot or disorder into a general contempt statute.

Article 56 sets out the right of the President to set maximum punishments. In Chapter 25 of the Manual for Courts Martial there is indulged a discussion of policy matters, repeat offenders statute, additional punishments, etc., so that instead of the punishment being as a court martial may direct, it is as the President tells the court martial to direct in many instances. Paragraph 126h on fines actually has no limitations. Paragraph 127c seems to have no limitations in determining the maximum punishment. If you cannot find the punishment in the Table for the offense or one like it or one lesser included, you look in the District of Columbia or United States Codes.

Article 15(b) on commanding officer punishments states that a Secretary can regulate the limitations on the punishments officers are authorized to impose, and the "applicability of this to an accused who demands trial by a court martial." Under Paragraph 132 the Navy and Coast Guard have limited this by indicating that such an accused cannot demand a trial. Paragraph 133 permits an Article 15 punishment used on fact-findings by a court of inquiry or board of investigation.

Paragraph 128c permits "non-punitive measures" by way of admonitions, reprimands, rebukes, censures, etc. (oral or written) as being in no wise limited by Article 15 "where not intended or imposed as punishment."

Under Paragraph 130 any failure to comply with Article 15 will not invalidate the punishment except to the extent required by a "clear and affirmative showing of injury to a substantial right" of the person punished, providing that the same right is not found to have been either expressly or impliedly waived.

Paragraph 140 would seem to be a rewriting of Article 31 on the question of self-incrimination, at least to a certain extent, by setting up different rules of admissibility for confessions and admissions.

Paragraph 154a 3, permits ignorance of act as a defense if it is "honest ignorance" and not the result of carelessness or fault. Generally the prosecution must prove an accused's conduct was knowingly willful, etc. There is generally no requirement that it be shown that it is honest and not negligent. *Lampkins,* 4 USCMA 431 and *Rowan,* 4 USCMA 430.

See also Paragraph 154a 4, covering "honest and reasonable mistake" and approving constructive knowledge in a criminal case where actual knowledge is an element. The *Stabler* case, 4 USCMA 125, condemns this, but see *Stokes,* 6 USCMA 65, which approves constructive knowledge in second degree murder on knowledge that an act is dangerous, etc. Paragraph 171b also talks of constructive knowledge. Compare *Solow,* 138 Fed. Supp. 812.

Paragraph 164a 1, provides that an intent to desert can be found from a purpose to return when a particular but uncertain event occurs in the future. This was thrown out by the Court of Military Appeals in *Rushlow,* 2 USCMA 641. On page 313 of the Manual for Courts Martial there is a provision for constructive absence without leave (AWOL), even though a man is on authorized liberty on

some theory of abandonment of his contract. Apparently a plan or attempt to desert.

Paragraph 173a construes Article 94 as permitting a one-man mutiny. Of course, Article 94 is written very loosely and perhaps the Article should be rewritten, as well as the Manual for Courts Martial in this connection.

Paragraph 174a says you can resist arrest by flight. Paragraph 174b states you can breach arrest by inadvertence or a bona fide mistake of the limits of the arrest.

In discussing Article 99(9) on misbehavior covering the giving of relief to troops, etc., it appears by the Manual for Courts Martial that an additional element is necessary in that first such relief must be required. See page 334.

Paragraph 183d on communicating with the enemy under Article 104 states that the offense is complete the moment the communication issues from the accused whether it ever reaches the destination or not. This would appear to be clearly erroneous. It would seem that such an example would only constitute an attempt.

Paragraph 187b on the negligent loss, damage, etc., of military property under Article 108 holds that once you show the property was issued to the accused "it may be presumed that the damage, destruction, or loss shown, unless satisfactorily explained, was due to the negligence of the accused." This appears to be basing a conviction on a presumption.

Paragraph 193b, in discussing a person "having knowledge of a challenge sent or about to be sent" (dueling, Article 114), rewrites the Code so that "any one who has reason to believe" is substituted for knowledge.

Paragraph 197 on murder merely states that death from the act of the accused, if it occurs "sometime" thereafter, can be the basis of conviction. This omits the well known "within a year and a day" rule extant in almost every jurisdiction, if not in all.

Paragraph 197d, as construed, permits instantaneous premeditation. This appears to be a grammatical contradiction. The Federal rules generally hold that the time must be appreciable. This paragraph was approved in *Sechler,* 3 USCMA 363, but see *McMahan,* 6 USCMA 709.

Paragraph 199a states that it is not rape if there is actual consent although the consent is obtained by fraud. It is difficult to see how one can have actual consent in the presence of fraud.

Paragraph 200a 5, permits a conviction on false pretenses on a representation of an intent to do something in the future. This is contrary to Federal practice.

Page 368 discusses arson and construes Article 126. The discussion relates to the necessity of proof of knowledge of the presence of a human being at the time of burning and adds an element of value which is not contained in the Code. This Article itself is another that could stand clarification.

Page 370 sets out that a simple assault can be committed by a culpably negligent act or *omission.* How can this be?

Page 371, in discussing self-defense in assault, states that it is limited to meeting "force with a like degree of force." The law always has been that you can use all reasonable force to repel the attack. See *Wilson,* 5 USCMA 783.

On Page 373 the discussion of what is or is not breaking in burglary is obscure.

Article 118 provides "death or life imprisonment" for "first degree" murder, but Paragraph 88c lets a Convening Authority reduce this sentence to a term of years. Now pending in *Jefferson,* No. 7734.

Article 83 covers Fraudulent Enlistment. Paragraph 162 indicates that this includes "induction." Now pending in *Jenkins,* No. 8268.

Under Articles 39 and 51 court martial proceedings are secret. However, Paragraph 74f (3) gives the court martial the right to include in the record "a statement of the reasons which led to a finding and a statement of the weight given to certain evidence * * * for the information of the Convening Authority."

Pages 224 to 227 of the Manual for Courts Martial discuss the offenses under

Article 134 (and possibly Article 133) of the Code. Almost 100 offenses are listed under the Article. Many of them enter areas that have actually been legislated upon by the Congress in the punitive Articles. See *Norris*, 2 USCMA 236; *Hallett*, 4 USCMA 378; *Hamiltion*, 4 USCMA 383; *Lorenzen*, 6 USCMA 512; *Downard*, 6 USCMA 538; and *Kirksey*, 6 USCMA 556.

Under Article 62a, if a specification before a Court Martial has been discussed on motion and the ruling does not amount to a finding of not guilty, the Convening Authority has the right to return the record for reconsideration.

Under Paragraph 67f of the Manual for Courts Martial, in the last paragraph on page 98, you will find that this has been blown up to the effect that any motion not amounting to a finding of not guilty is not limited to a specification dismissal, as in the Article itself, but it applies to any motion and the Convening Authority, if he differs on the ruling and if a question of law is involved, he does *not merely return it for reconsideration*, he returns it to the Court and "the Court will accede to the views of the Convening Authority."

# RESOLUTION

Whereas, The American Legion duly assembled in its 37th Annual National Convention, held in Miami, Florida, October 10 through 13, 1955, by means of Resolution No. 172 did authorize the National Commander to appoint a committee of lawyers to investigate the administration of the Uniform Code of Military Justice and the United States Court of Military Appeals; and

Whereas, Purusant to said resolution the National Commander did appoint a committee of three (3) lawyers to wit:

Franklin Riter, Salt Lake City, Utah.
John J. Finn, Boston, Mass., and District of Columbia.
Carl C. Matheny, Detroit, Mich.

to constitute the said committee; and

Whereas, Said committee has during the past year engaged in an extensive and comprehensive investigation of the matters set forth in Resolution No. 172, and has, at the 38th Annual National Convention of The American Legion held in Los Angeles, California, September 2 through 6, 1956, filed with and submitted to the convention its report containing its findings, conclusions and recommendations; and

Whereas, The said 38th Annual National Convention of The American Legion has considered said report;

NOW, THEREFORE, BE IT RESOLVED, That The American Legion at its 38th Annual National Convention, duly assembled in Los Angeles, California, September 2 through 6, 1956, does oppose any legislation which would

1. Increase authorized company and mast punishments now defined in the Uniform Code of Military Justice.
2. Allow any authority to convene a court to try any person for an offense unless the said authority is superior in grade to the accuser of the offender.
3. Allow for any consultation between the law officer and a Court Martial either on the findings, the sentence or on challenges to the members of the Court.
4. Enlarge the jurisdiction of any military court.
5. Allow a law officer, in any trial, to change rulings favorable to an accused, given by him during the course of a trial.
6. Make unnecessary the keeping of proper and definitive records of trials by Courts Martial.
7. Increase Presidential or other authority to prescribe periods when a sentence to confinement may be interrupted.
8. Effect reduction in the powers or authority of Boards of Review as now constituted under the Uniform Code of Military Justice.
9. Narrow or circumscribe an accused's right to appeal, as now defined by the Uniform Code of Military Justice.
10. Necessitate or require a certificate of probable cause or its equivalent, as a condition precedent to an appeal to the Court of Military Appeals from the decision of any Court Martial as now allowed under the Uniform Code of Military Justice.
11. Allow any reduction in the time allowed an accused under the Uniform Code of Military Justice within which to appeal to the Court of Military Appeals.
12. Authorize one man Courts Martial.

BE IT FURTHER RESOLVED, That The American Legion requests Congress to enact legislation which will

1. Create in the Department of the Navy and in the Department of the Air Force a Judge Advocates General Corps similar in import and purpose as has heretofore existed in the Department of the Army.

2. Re-enact Article of War 74 of the 1949 Articles of War so that the civilian courts will have priority of jurisdiction in peacetime offenses of a civil nature committed within the limits of the States of the Union and the District of Columbia.
3. Re-enact that part of Article of War 92 of the 1949 Articles of War which deprives Courts Martial of jurisdiction to try, in time of peace, an offender for a capital offense which is a civilian offense, i. e., rape or murder, committed within the geographical limits of the United States and the District of Columbia.
4. Abolish the office and position of President of a General Courts Martial.
5. Amend Articles 26 and 39 of the Uniform Code of Military Justice so as to prevent the law officer from consulting with or directing the Court on form of findings and sentence and on other matters arising during course of trial, except in open court in the presence of the accused and his counsel, and with a court reporter present, and also increasing the powers and authority of the law officers resultant upon the abolition of the office of President of a General Courts Martial.
6. Endow the law officer with the stature, dignity and functions of a judge of a civil court.
7. Provide that a Summary Court officer shall possess the same qualifications as the law officer shall possess upon the passage of legislation carrying out the resolutions hereinabove set forth.
8. Insure that summary Courts Martial are treated and considered as judicial tribunals and not as mere instrumentalities of discipline.
9. Remove Boards of Review from the offices of the Judge Advocates General and place them in the office, and under the supervision, of the Secretary of Defense who shall mark their fitness reports.
10. Insure that the members of the Boards of Review as reconstituted by the Secretary of Defense shall not be subject to the provisions of any statute which will compel rotation in office.
11. Effect the amendment of Articles 36 and 56 of the Uniform Code of Military Justice so as to direct that no rules of, or concerning substantive law or evidence, no definition of a crime, or of the elements of a crime, except military offenses, shall be included therein, and affirmatively direct that in cases other than those involving military offenses, the rules of the Federal Civil Courts pertaining to evidence and to statutory construction and Interpretation shall control.
12. Direct that the Manual for Courts Martial shall be completely rewritten in order that the Manual shall be consistent with Articles 36 and 56, as amended, pursuant to legislation requested in the resolution hereinabove set forth, and direct that no rules of or concerning substantive law or evidence, no definition of a crime or of the elements of a crime except military offenses, shall be included therein, and further direct that in cases other than those involving military offenses the rules of the Federal Civil Courts pertaining to evidence and statutory construction and interpretation of law shall control; that procedural rules shall be prepared by and under the direction of the Court of Military Appeals; that the Judge Advocates General of the Armed Forces shall prepared expositions of strictly military offenses for inclusion in the Manual, and that the entire Manual, as rewritten, before submission to the President for action shall bear the approval of the Court of Military Appeals by formal order of the Court.
13. Provide that the "Amarillo Program" of the Air Force—a program of rehabilitation of personnel—become a permanent institution with statutory authority for its existence.
14. Provide a rehabilitation program, similar to the "Amarillo Program" created and operated by the Air Force, applicable to the Army, Navy and Coast Guard.

15. Denounce as a civil felony indictable and triable in a United States District Court the action of any person who shall censure, reprimand, admonish, influence, or attempt to influence, directly or indirectly, any Court Martial or other military tribunal or board, or any member thereof, or any law officer or counsel thereof, with respect to the performance or exercise of its or his duties or functions.
16. Create a position to be known as General Counsel who will be attached to the office of the Secretary of Defense and responsibility to said Secretary and to whom the Judge Advocates General shall be responsible in their professional capacities and duties.
17. Provide that the uniformed lawyers in the Corps of the Services, responsible to the Judge Advocates General, shall be eligible for promotion in competition with their brother uniformed lawyers only; shall be promoted by means of their own Selection Board, and shall be entitled to their own insignia of office.
18. Insure that the Judge Advocates General of the Armed Services shall be removed forever from the chain of command and no longer be subject to the influence of any officer superior or otherwise.
19. Authorize the Judge Advocates General of each of the Services to possess the sole power to mark fitness reports of all persons in the Corps subject to his command.
20. Provide that the rulings of a law officer will be final and binding on all matters except on the question of insanity.
21. Deprive any court except a General Court Martial of the authority to sentence any accused to a Bad Conduct Discharge.
22. Create a board consisting solely of civilians to be appointed by the President whose duty it will be to review all discharges except Honorable Discharges or Discharges granted under Honorable Conditions, with full authority to exercise powers of clemency and pardon and to replace any discharge other than Honorable Discharges or Discharges granted under honorable conditions, with any type of discharge it may, in the exercise of its discretion, deem to be just and proper. Such board shall be responsible to the President only, and shall not be connected with any existing governmental department or agency.
23. Provide for Congressional investigation at the earliest possible time into the activities of the Boards of Review of Discharges and Dismissal and the Boards for the Correction of Military Records, for the purpose of ascertaining whether or not said Boards have been carrying out the intent of Congress in their creation.
24. Authorize the Court of Military Appeals, in considering appeals, to weigh evidence, reconcile conflicts in the evidence, judge the credibility of witnesses and determine issues of fact; and be it further

Resolved, That this Convention hereby authorizes the continuance of the Special Committee on the Uniform Code of Military Justice or the creation of a similar committee, to be appointed by the National Commander, which committee shall be authorized to assist, advise and consult with the National Security Commission and the National Legislative Commission concerning matters pertaining to Military Justice; and be it further

Resolved, That the report of said Special Committee on the Uniform Code of Military Justice, created by aforesaid Resolution No. 172 be printed in sufficient number to permit circulation thereof to a reasonable extent.

Mr. Finn. Then I will refer, since this committee, as announced in the newspapers, and from my understanding, was to discuss administrative and discharge procedures, only to that portion of my statement which commences on page 3 entitled "Discharge Procedures."

I should indicate that this statement was written in 1956 and we believe that it is, in great measure, just as apropos today as it was then.

It has come to our attention that the services have effected many discharges in the past few years since the inception of the code without resort to any legal proceedings. These discharges are given out for medical and for many other reasons.

It is realized that a military organization, particularly under a system where men are drafted, many times acquire the services of misfits and persons who are for physical or mental reasons unable to serve properly in such an organization. It is further realized that medical examinations prior to induction may not expose the particular difficulty which subsequently causes the failure of the individual to fit into the military organization. However, we conceive that it is grossly unfair to American youth to induct them into the military or naval services and shortly thereafter discharge them under conditions which attach to them a stigma which lasts throughout their lives.

Our complaint is that many of these discharges which we shall lump together under a term "administrative" are handed to servicemen without any hearing before the board, court, or tribunal of any kind.

Many people in civilian life are wary of employing a young man who, for example, has received any type of administrative discharge from the services. They are loath to hire a young man who has been in the service and cannot show a certificate indicating an honorable discharge or a discharge under honorable conditions—

May I say right there that I have come to learn only recently and since this statement was prepared for delivery here that certain of the automobile manufacturers in Detroit are pretty wary about a discharge under honorable conditions, which is the general discharge. They will not accept that from a young man who seeks employment from them, according to our people in Detroit.

To return to the statement—

many administrative discharges have been given servicemen because some superior officer believed it is for the good of the service that they be severed from service in this fashion.

There have been witnesses who have appeared before us who have stated that the services have resorted to administrative discharges to circumvent the Code of Military Justice perhaps on the theory that such discharges are not reviewable by the Court of Military Appeals or any other board or tribunal outside the service.

As we have stated in the past, many military people do not seem to realize the effect of a bad-conduct, dishonorable, or other discharges from the military or naval service which is not an honorable discharge, or one under honorable conditions.

Some method must be set up to eliminate the apparently indiscriminate awarding of discharges other than honorable, or one under honorable conditions. If a person is properly convicted of a crime in accordance with the laws of the land and the proper authorities determine that a bad-conduct or dishonorable discharge should be meted out to the offender, such punishment is just and deserved. However, in the many cases which have occurred where no hearing of any kind has taken place and a person is severed from the services with an administrative discharge, he has been unable to attend schools because the schools will not admit him; he has been unable to obtain jobs and thus his career is blighted, sometimes for reasons over which he has no control. The American people believe a hearing is a necessity before a punishment is handed out to an individual. Any discharge other than honorable or one under honorable conditions is a punishment.

It is, therefore, the recommendation of the committee and of the American Legion, that no discharge of any type except an honorable discharge, or one

under honorable conditions, may be given to any person once properly inducted into the military service, unless and until the circumstances of the dismissal have been reviewed by a board of civilians which Congress should set up for the sole purpose of reviewing such discharges.

In view of the fact that the American Legion has strongly favored Universal Military Training and that because of its diligent action National Security Training Act was enacted, by which all American youth is subject to military training of one kind or another, it is most important that the American Legion insure to the mothers of America that their boys will return to civilian life after any military service under the same aegis as that which put them into the service. In short, when civilians put them in, for example by means of draft boards, then civilians should review the type of discharge received, if said discharge is one other than honorable or under honorable conditions.

In this connection, it is pointed out that the experience of many practitioners before the Board for the Correction of Military Records and the Board for the Review of Discharges and Dismissals, set up in the various services following World War II, has been unsatisfactory and sorely disappointing. While the experience of different services varies, the general experience has been that little, if anything, is accomplished by these boards toward righting or remedying wrongs which have occurred.

In fact, some attorneys feel that it is a complete waste of time to take a case before any of these boards. We suggest that the personnel who staff these boards constitute a considerable number of individuals who, since they are not accomplishing much in the way of rectifying errors which have occurred, could well be employed in other pursuits.

It is believed that the criticism with regard to the operation of these boards stems from the interpretation, administratively arrived at by the judge advocates general of the various services, as to the nature and scope of the work of the boards.

In short, since the Board for the Review of Discharges and Dismissals and the Board for the Correction of Military Records must pass upon a case or record which previously has been processed in the Office of the Judge Advocate General, and since the offices of the judge advocates general, have control over these boards by way of assignment of officers and personnel, the boards are often reluctant, if indeed they do not find it impossible, to overrule a conclusion reached by their superior officer.

These boards could perform a most useful function if intelligently and fearlessly administered and operated. However, under the rules set up by the judge advocates general, and the other circumstances indicated above, which restrict the boards in many respects, it is difficult to understand how the boards can do much else than confirm actions already taken by the services involved. To overrule the action is to admit that error existed. Experience has shown that the military and naval services are somewhat reluctant at any time to admit errors.

It is further realized that the secretaries of the various services have the power and right of review of the actions of the boards. In fact, the boards are answerable to them. On the other hand, with the tremendous volume of administrative detail which falls to the lot of any secretary of the services, in these details much work of this nature is delegated to subordinates many of whom are assigned to the work by the judge advocates general. Overruling of the action of a board or of the judge advocates general, even by a person acting in the capacity of a delegee of the secretary of a particular service would not be conducive to subsequent promotion.

Your committee recommends that the Congress conduct an investigation into the activities of the Boards of Review of Discharges and Dismissals, and the Board for the Correction of Military Records at the earliest possible time. We recommend that close attention be directed to the question as to whether or not said boards have been carrying out the intent of Congress.

I go on in this statement with certain aspects of this which were true at the time we wrote the statement. I have made certain inquiries of some of the people of the American Legion who have appeared before the Board for the Correction of Military Records and they tell us that the statement which we made in 1956 was a little too broad, that there are occasions when that board does accom-

plish a good deal. But they were unable to give me any figures as to how many cases were developed, so we inquired of the services. As a result of the conference that we had at Denver, Colo., at our last national convention and through the good offices of the judge advocates general of the various services, we obtained certain figures which are contained in my statement on page 7. I see no reason for repeating those figures here.

Senator HRUSKA. If it will serve any purpose to do so, to make your discussion more applicable and pertinent, we will be happy to insert them in the record at this point.

Mr. FINN. Well, I should like to have them inserted in the record without reading them all, but I would like to indicate that in the column "Undesirable discharges," Senator, in the Air Force, for example, in the year 1961 they had 1,699 undesirable discharges. This is a reduction from 1958, from 8,300 which they had at that time. This is the last column on the right, Senator.

In the Navy and Marine Corps combined, where they had 4,902 in 1958, in 1961, 4,576 were given undesirable discharges.

In the Army, which is the last column, in 1958, they had 17,514 undesirable discharges and, in 1961, this was reduced to 8,319.

Now, our reason for putting these figures out, and as I say on the next page, these figures speak for themselves. It is quite obvious from General Harmon's statement which was incorporated in the report of the Court of Military Appeals, that the services were using undesirable discharges or administrative discharges to avoid trials before the courts, under the general court-martial and other court-martial systems. To avoid the code they were using this type of discharge.

It shows that the Air Force has made some effort, apparently, and has accomplished substantial reduction in the number of undesirable discharges that they have passed out.

The Navy is giving out just about as many today as they have at any time. The Army is giving about half as many as they did before.

If you will refer to the paragraph just below those figures, we have been informed by the Army that they are, under the Universal Military Training and Service Act of 1958, which allows the weeding out prior to induction of personnel who, experience has shown, provide a disproportionate amount of disciplinary and administrative discharges, that act has aided them substantially in being able to avoid handing out these administrative and other types of discharges.

What is really at the bottom of all our complaint is that each of the services has a different method; each of them has different rules, each of them operates differently, and if a boy goes into the Army, for example, he gets a little bit different treatment than he would if he were in the Air Force, for the same type of offense and for the same kind of difficulty, and the further difficulty is that in some services, if he is a homosexual, for example, he is lumped with a person who just has not anything on top here; in other words, he has not mentally the ability to operate in the military services and he never should have been in in the first place.

He is lumped together with a person who is a homosexual, and some person who, through no fault of his own, is suffering from a disease; he is thrown into the same category.

All of these things are wrong, we submit, and to allow people in these various categories to be thrown out of the service with a discharge other than honorable is not proper, in our estimation.

I do not think I can emphasize too strongly the contention that there is no uniformity in the way that these matters are handled in the different services, and this does not benefit the services, and it certainly does not benefit the American people and it is a gross injustice to a great many of the young men who are discharged in this fashion.

Senator HRUSKA. Is it not true, Mr. Finn, that even if one of the services did perfect their method of handling this particular aspect, that standing alone, it would not do much good insofar as the other three services are concerned with the members of the public and members of the armed services?

Mr. FINN. You are absolutely right. This is one of the difficulties which we are complaining about; namely, that each one is different. If one does it by regulation or rule, which is what they are doing, the other services necessarily do not have to follow suit and generally do not follow suit.

The result is you do not get equal treatment in the various services. You get a different type of treatment. And these regulations, I am sorry to say, can be changed tomorrow.

The Air Force, I think, has been doing a very decent job in this connection. But tomorrow, they can change their regulations back to what they were before and revert to the same discriminatory type of dismissal, I believe.

Senator HRUSKA. Now, Mr. Finn, referring to your statement at page 7, below the statistics which you cite there, you make reference to the military service separation regulations as having been liberalized in 1959. Could you elaborate on that a little bit?

Mr. FINN. I do not have a copy of those.

Senator HRUSKA. I mean as to their general nature and which military services there. Was it across the board, or some services?

Mr. FINN. This was explained to us by General Kuhfeld when we were in Denver. It is supposed to be across-the-board Department of Defense directives, which I have never seen and I would rather not comment on something I have not seen.

Senator HRUSKA. We will make a note of it, then, Mr. Creech, and when a proper witness does come before us who will have knowledge on that point, we will make inquiry on it.

Now, do you cover in the statement any place here, Mr. Finn, the feasibility or practicability of a uniform treatment of the subject in this regard?

Mr. FINN. Yes, sir.

Senator HRUSKA. Very well, then. I will not make inquiry at this point, then, on that score.

Mr. FINN. I am going to page 8, about the middle, Senator.

While it is appreciated that some of the severances other than honorable may have been due to medical reasons, there is no doubt that a too substantial number were effected to circumvent the U.S. Court of Military Appeals, thus depriving the serviceman involved of the protections contained in the Uniform Code of Military Justice.

84154—62——30

Certainly, there has been a deliberate attempt on the part of the services to thwart the will of Congress. The system devised by the Congress of the United States for the protection of service personnel has been deliberately disregarded. We feel no one should be discharged with an undesirable discharge without a hearing and a review of his discharge.

What is the lesson to be drawn from this? We do not indict all of the people in the military service and we realize that perhaps those who appear before you from the services will not, and do not condone these practices. But there apparently always will be those in the military services who, through ignorance or deliberation, are not willing to abide by American concepts of justice. Insofar as possible, such persons should be restrained.

We therefore suggest a system be set up for the review of all discharges other than honorable discharges. To effect this suggestion, which the American Legion has been proposing for several years, we attach hereto suggestion legislation marked "B" and I hope you have that, Senator.

Senator HRUSKA. It has been supplied, and that will be available to members of the committee.

(The document marked "B" is as follows:)

B

DRAFT BILL

[S. ——, 87th Cong., 2d sess.]

A BILL To provide for the establishment of an independent civilian board to review and correct military discharges and dismissals, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act shall be known as the "Discharge and Dismissal Review Board Act of 1962."

SEC. 2. (a) There is hereby established in the executive office of the President of the United States a board to be known as the "President's Separation Review Board" (hereinafter referred to as the "Board"). Such Board shall consist of seven members appointed from civil life by the President, by and with the consent of the Senate. A retired or reserve member of an armed force or the United States Coast Guard shall not be eligible for appointment to the Board. Not more than four of the members of the Board may be appointed from the same political party. Each member shall receive a salary at the rate of $17,500 a year and shall hold office for a term of fifteen years, except that (1) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of such term, and (2) the terms of office of the members first appointed to the Board shall expire, as designated by the President at the time of nomination, two at the end of five years, two at the end of ten years, and three at the end of fifteen years. The President shall designate from time to time one of the members of the Board to serve as Chairman. The Board shall have the power to appoint and fix the compensation of an executive director and such other personnel as it deems advisable, in accordance with provisions of the civil service laws and the Classification Act of 1949.

(b) The Board shall determine the number of members required to constitute a quorum, and shall prescribe its own rules of procedure and such other regulations for the conduct of its affairs as are considered necessary or proper and not inconsistent with the provisions of this Act. A vacancy in the Board shall not impair the right of the remaining members to exercise the powers of the Board. Members of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, or for mental or physical disability, but for no other cause.

(c) Upon his certificate, each member of the Board is entitled to be paid out in appropriations for such purpose (1) all necessary traveling expenses, and (2) his reasonable maintenance expenses, but not more than $15 a day, incurred while attending Board meetings or transacting official business outside the District of Columbia.

SEC. 3. (a) It shall be the duty of the Board to review the type and nature of the discharge (other than an honorable discharge) or dismissal received by any former member of an armed force of the United States or the United States Coast Guard. The Board shall have full authority to change, correct, or modify any discharge (other than an honorable discharge) regardless of the circumstances under which issued, and to issue a new discharge of any type that the Board, in the exercise of its discretion, may deem to be just and proper. The review of any discharge or dismissal under the provisions of this section may be made by the Board on its own motion, or upon the request of any former member of an armed force or the Coast Guard, or in the case of an incompetent or deceased former member, upon the request of his spouse, next of kin or legal representative, and shall be based upon (1) all available records of the military department concerned, or the Coast Guard, relating to the person discharged or dismissed, (2) the evidence presented by the person discharged or dismissed, his spouse, next of kin or legal representative, and (3) such other evidence as the Board may determine to be competent and relevant. Witnesses shall be permitted to present testimony either in person or by affidavit, and the person requesting review shall be allowed to appear before the Board in person or by counsel, in accordance with the provisions of subsection (b) of this section. The Board shall also have authority to recommend to the President that he exercise his power of clemency or pardon with respect to any case reviewed by the Board and determined by it to be particularly meritorious and deserving of executive relief.

(b) Any former member whose discharge or dismissal is to be reviewed, or if he is dead, incompetent, or otherwise excusably unable to appear, his spouse, next of kin or legal representative, shall be given not less than thirty days notice of the review and of his rights (1) to appear before the Board either in person or by counsel, including any recognized representative of an organization approved by the Administrator of Veterans' Affairs under the provisions of section 3402 of title 38, United States Code, and (2) to present evidence, including the testimony of witnesses.

(c) No review requested by a former member or his spouse, next of kin or legal representative, is authorized under this section unless application therefor is filed with the Board within fifteen years after the effective date of this Act or within fifteen years after the date of the discharge or dismissal sought to be reviewed, whichever is the later; but the Board may excuse a failure to file within such fifteen year period if it finds it to be in the interest of justice to do so.

(d) Except when procured by fraud, the findings of the Board and all action taken under the provisions of this Act are final and conclusive and shall be binding on all departments, agencies, boards, and officers of the United States.

SEC. 4. The Board is authorized to request from the Secretary of the department concerned all official records relating to the discharge or dismissal of a former member of an armed force or the Coast Guard in any case wherein a review by the Board of such a discharge or dismissal is to be made. Within thirty days of the receipt of such a request by the Board, the Secretary of the Department concerned or his designee shall transmit the indicated records to the Board, and upon completion of the review by the Board such records shall be returned to the Department concerned.

SEC. 5. The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of a change made pursuant to this Act in the type or nature of a discharge or dismissal, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the person whose discharge or dismissal has been changed is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid—

(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of title 10, United States Code; or

(3) as otherwise prescribed by the law applicable to that kind of payment. A claimant's acceptance of a settlement under this section shall fully satisfy the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

SEC. 6. The review of a former member's discharge or dismissal by a board established under section 1552 or 1553 of title 10, United States Code, or under any other provision of law, shall not preclude a review of such former member's discharge or dismissal by the Board established under this Act.

SEC. 7. (a) Section 1553 of title 10, United States Code, is hereby repealed.

(b) The analysis of chapter 79 of title 10, United States Code, is amended by striking out everything following the description of section 1552, and inserting in lieu thereof the following:

"1552. Review of decisions of retiring boards and similar boards."

(c) Any case pending before a board established under section 1553 of title 10, United States Code, on the effective date of this Act shall be transferred to the Board established under this Act for review and disposition in accordance with the provisions of this Act, except that no additional application for review shall be required in such case; and all records, papers, documents, and other evidence concerning such case shall be transmitted by the department concerned to the Board as soon as practicable after such effective date.

SEC. 8. The last sentence of section 1552 (a) of title 10, United States Code, is amended to read as follows: "Except when procured by fraud or when modified by the President's Separation Review Board under the provisions of the Discharge and Dismissal Review Board Act of 1962, a correction under this section is final and conclusive on all officers of the United States."

SEC. 9. The amendments made by this Act shall become effective on the first day of the third month following the month in which it is enacted.

Mr. FINN. Pursuant to——

Senator HRUSKA. Will the record show that Senator Keating of New York has now entered the committee room and is assuming a place at the bench.

Mr. FINN. These mandates have ordered that we attempt to get Congress to create a board consisting solely of civilians to be appointed by the President, whose duty it will be to review such discharges, with full authority to recommend clemency and pardon and to replace any discharge other than honorable discharge with any type of discharge said board may, in the exercise of its discretion, deem to be just and proper. Such board shall be responsible to the President only and shall not be connected with any existing governmental department or agency.

With respect to clemency and pardon, we feel that the board should have the authority to exercise those powers where indicated. We recognize that there may be some legal or constitutional obstacles or that, in fact, the Congress may not wish to bestow that authority upon the Board. Thus, our draft bill empowers the Board only to recommend clemency and pardon to the President.

Most military law is based upon the premise that the service volunteer enters into a contract with the Government under the terms of which he waives constitutional rights afforded the nonservice individual. In the early days of this Republic, such a premise may have been warranted but at this time, and probably since World War I inasmuch as the vast majority of those who have served in the Armed Forces since then have been drafted therein, such a concept no longer has validity.

It is ridiculous to hold that a draftee has contracted away his constitutional rights. A draft board of civilians of his own community puts him in the service. When he is discharged with a type of severance other than honorable, we believe civilians should examine the

type of discharge received by him and that those civilians should be free of any military influence.

Senator KEATING. As a matter of fact, Mr. Chairman, it is impossible to contract away one's constitutional rights, I believe.

Mr. FINN. I believe so, too, Senator, but the fact is that Winthrop, who is the authority on military law, premises, predicates his entire legal theory of the basis for punishment of persons in the military on the theory that when you enter into the military service, you contract away the rights that you would have if you were a civilian, generally.

Senator KEATING. Well, perhaps that is true, but certainly you do not contract away your constitutional rights; at least, unless—I have not studied it; I am no great authority. But after all, a soldier is still a person, a citizen, entitled to his constitutional rights.

I do not see how he can contract them away, even if he tried to.

Mr. FINN. Well, Senator, I agree with you entirely, but in connection with this, may I read to you an excerpt from an article by Joseph W. Bishop, a professor of law at Yale, who in the Columbia Law Review of January 1961, at pages 70 to 71, has this to say. He is discussing the difficulty that a person in the service has to obtain a review by the civil courts of this country after a conviction by a military court:

> I am of the opinion that this gradual edging away from the orthodox doctrine and toward a practical, homologizing military and civil sentences for the purposes of collateral review is very much to be desired. It is to be hoped that the "manifest refusal" language will be allowed quietly to fade away and that increasing stress will be put upon the words, "full and fair."
>
> I come to this opinion partly for the reason I have already given, that the best guarantee of fundamental fairness in military trials in all the circumstances is the existence of a power, wholly independent of the military organization, to enforce such fairness, partly because it is very unlikely that the recognition of a power of collateral review equivalent to that which is exercised over the criminal justice of the States would actually lead to a different result in an appreciable number of cases, or otherwise seriously hamper military discipline, except in circumstances in which it may need a little hampering; partly because there is something irrational in what Mr. Justice Frankfurter describes as "the principle that a conviction by a constitutional court which lacked due process is open to attack by habeas corpus, while an indentically defective conviction when rendered by an ad hoc military tribunal is invulnerable."
>
> But the main reason for my conviction that the civil courts should draw as little distinction as possible between military and civil tribunals and between soldiers and other citizens is simply that if there ever was a time when the Army could rationally be described as a "separate community," with a separate system of government, that time is long past. Most male citizens of the United States and a fair number of the female ones have a relation to the armed services as direct and personal as that of a citizen of Pericles, Athens, or of the Roman Republic in the days of Cato, a censor. My objection to the separate community idea is not simply that it does not square with the facts. On the basis of the experience of many nations in many times, I believe that concept to be actually pernicious, as is any way of thinking which tends to make the armed services an enclave of the national polity, whose inhabitants are of other castes than the rest.

This, I believe. While I probably would not use the exact same language, it is what I believe that our position is in connection with this type of military conviction, generally speaking.

Now, if a person is guilty of an offense, certainly he should be punished and certainly he should be punished by a military court. But as I understood this inquiry, it was devoted to these administrative and other types of discharges and these things we find very grave fault with, the way they are being handled.

Senator HRUSKA. I might say that in regard to the suggestion of the Senator from New York that one may not contract away his constitutional rights, certainly this could be said, that perhaps certain rights or certain individual freedoms for the term of the enlistment or conscription, as the case may be, may be subordinated to superior military authority and are subject to it.

It would seem to me that the statement made by you, Senator Keating, becomes very much stronger when that period ceases. It is a period of enlistment or conscription and the impact, the effect of any action by the military authority will carry forward into the civil status of that particular individual, and it is that with which we are particularly concerned in the field of discharges, is it not, Mr. Finn?

Mr. FINN. I would think so.

There is this to be said, though, Senator. The constitution definitely does not allow a person in the military to a right to a trial by jury, it does not entitle him to several of the other things which the 14th, the 5th, and the 1st amendment allow the ordinary citizen. And that is specifically by——

Senator HRUSKA. Yet there are certain appellate procedures which are available by reason of statute, are there not?

Mr. FINN. In the military?

Senator HRUSKA. In the military.

Mr. FINN. Yes. And the present Code of Military Justice, I think, is a wonderful instrument. It is a marvelous thing compared with what we had before.

Now, there has been some comment here, as I understand it, about the delays that are now inherent in this code, and all I can say is from my experience, when I was in the Navy, we used to get courts-martial from overseas to review and sometimes it would be 8 months or a year before the case cleared the Office of the Judge Advocate General.

Now, that certainly is not expeditious handling of a criminal conviction. And I do not think that today anybody can show you figures that the delays are any longer now because of the advent or the existence of the Court of Military Appeals than they were during the war.

Another statement which I read in the newspaper was to the effect that if this Code of Military Justice was abolished, then it should be abolished and things would be much better if we reverted to an oldtime system.

I would like to recall to this committee, and it is not anywhere in any of my statements, but it is in this report which we advanced here, but during the Korean conflict which some people have referred to as a war, the then Admiral Radford was in charge of all operations in the Pacific, including the Korean conflict.

And he said at the end of that war: "While Commander in Chief of the Pacific Fleet" in a report he made to the Chief of Naval Operations and to the Judge Advocate General of the Navy, "the Uniform Code had not affected combat operations in Korea."

He went on to criticize the manual which has been set up by the services to regulate—stating, rather, the regulations under which the code would be administered by the various services. Again we revert to what I started off saying initially, that the laws generally are all

right, but it is the way that administrative regulations are drawn up which completely nullify or vitiate the statute or the intention of Congress when that statute was passed.

In the report which we have furnished, which is marked "A," we point out a hundred or more evidences of places where the manual seems to us to directly conflict with the law that was passed by the Congress.

In other words, a deliberate attempt—maybe it was not deliberate; maybe it was a result of compromise between the various services that it came out that way. But it was our thought that there was an attempt made and a very definite attempt by the making up of this manual to vitiate portions of the statutes.

Senator HRUSKA. The Chair will ask Senator Keating to take over at this time because of another engagement which I have, which was committed before today.

Thank you, Senator.

Senator KEATING (presiding). Proceed, Mr. Finn.

Mr. FINN. I am now on page 10, Senator.

On the question of military justice generally, I submit the following:

The Uniform Code of Military Justice is a splendid example of progressive, enlightened legislation. It represents the first real and comprehensive effort to create a true legal system in the Armed Forces protecting the investment of the Nation in strong military, air and naval establishments by insuring that commanders are able to enforce discipline but at the same time providing the means whereby the American system of law and equity is applied to the armed services to an extent many thought impossible in military organizations. Its provisions are as well known to each of you as to me. The 10 years that this Code has been in operation have provided the broad experience upon which we base our proposals.

The American Legion is an organization of citizens who served in time of war. We do not desire, and are not in any way attempting, to destroy the ability of responsible commanders to enforce discipline in the armed services or to prevent them from carrying out their duties by imposing upon them a system which prevents their functioning efficiently in peace or war.

While the substantial majority of military personnel on the officer level think and act like most enlightened Americans, in their approach to legal matters and problems, experience under the code, as demonstrated by a perusal of the opinions of the Court of Military Appeals among other things, shows that there still remain some commanding officers who cannot be entrusted with power.

The committee studies have produced what we consider to be ample evidence of a need for amendment of the Uniform Code of Military Justice in several areas to make the code more efficient and more reflective of American concepts of justice and fair play.

All our proposed amendments are directed to the end that lawyers in the service act like, and are to be treated as, lawyers; that any trials in the services shall be conducted, as nearly as possible, in the manner of trials in civil courts; that some of the folderol and trappings of military trials be eliminated, i.e., as to nomenclature, procedures, and personnel; that trials be presided over by a judge, call him what you

will; that no circumscribing of appeals available to an accused, or restriction of appeals, be countenanced; rather, that greater rights of appeal be granted; that wider and greater discretion be lodged in Boards of Review and the Court of Military Appeals; and that Boards of Review, trials, and all persons connected therewith be as independent as possible of command or of any outside influence and divorced from any influence of that character.

We have attached a copy of our bill which was introduced in the first session of the 86th Congress and is marked "C" attached.

(The document referred to marked "C" is as follows:)

C

86TH CONGRESS
1ST SESSION

# H.R. 3455

IN THE HOUSE OF REPRESENTATIVES

JANUARY 27, 1959

Mr. BROOKS of Louisiana introduced the following bill; which was referred to the Committee on Armed Services

## A BILL

To amend title 10, United States Code, in order to improve the administration of justice and discipline in the armed forces, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That title 10, United States Code, is amended as follows:

(1) Section 801 is amended by inserting the words "or special" after the word "general" in clause (10).

(1a) Section 806 is amended by inserting after the first sentence of subsection (a) the following sentence:

"Judge advocates of the Army and Air Force and law specialists of the Navy and Coast Guard, except when serving on a board of review, shall be rated for fitness, efficiency, and performance of duty only by the Judge Advocate General of the armed force of which they are members."

(2) Section 814 (a) is amended to read as follows:

"(a) A member of the armed forces accused of an offense against the laws of the United States or of a State or of a Territory or of the District of Columbia shall, except in time of war, be delivered, upon proper request, to the civil authority for trial. No person shall, except in time of war, be tried for any offense committed within the United States punishable by sections 918–932 (Articles 118–132), inclusive, if, prior to arraignment before a court-martial, the civil authority having jurisdiction to try him for a substantially similar offense under the laws of the United States or of a State or of a Territory or of the District of Columbia requests delivery of that person for trial."

(3) Section 816 is amended by inserting the words "a law officer and" after the words "consisting of" in clause (2) thereof.

(4) Section 819 is amended—

(A) by striking out the word "dishonorable" in the second sentence thereof; and

(B) by striking out the third sentence thereof.

(5) The first sentence of section 824 (b) is amended to read as follows:

"(b) When only one commissioned officer is present with a command or detachment, summary courts-martial shall be convened by superior competent authority."

(6) Section 825 is amended—

(A) by striking out in subsection (a) the word "all" and inserting in place thereof the words "general and special".

(B) by striking out in the second sentence of clause (2) of subsection (d) the words "general or special".

(C) by adding the following subsection:

"(e) The authority convening a summary court-martial shall detail as summary court-martial a commissioned officer qualified to be detailed as the law officer of a general court-martial as provided in section 826 of this title (Article 26)."

(7) Section 826 is amended—

(A) by inserting the words "or special" after the word "general" in subsection (a) thereof.

(B) by amending subsection (b) to read as follows:

"(b) The law officer may not consult with the members of the court except in the presence of the accused, trial counsel, defense counsel, and the reporter, if any, nor may he vote with the members of the court."; and

(C) by adding the following subsection at the end thereof:

"(c) The law officer shall preside over all proceedings of general and special courts-martial except when closed for deliberation or voting by the members and shall control direct and regulate the conduct of all proceedings before the court."

(8) Section 827 is amended by inserting after the first sentence of subsection (a) the sentence: "Upon request of the accused, the authority convening a summary court-martial shall detail a defense counsel."

(8a) Section 829 (c) is amended by inserting the words "the law officer," after the words "presence of".

(9) Section 836 is amended to read as follows:

"§ 836. *Art. 36. Procedure and rules of procedure*

"(a) The rules of procedure in cases before courts-martial may be prescribed by the Court of Military Appeals. The rules of procedure in cases before courts-martial shall apply the principles of law and the rules of evidence applicable to the trial of criminal cases in the United States District Court for the District of Columbia, except as such principles and rules are contrary to or inconsistent with this chapter. No rule or regulation applicable to courts-martial shall define, iterpret, or set forth the elements of any offense under this chapter except an offense not defined in this chapter and arising only in military service, in which case the Judge Advocates General may jointly prescribe such rule.

"(b) No rule or regulation applicable to courts-martial is effective until adopted by formal order of the Court of Military Appeals and approved by the President.

"(c) The procedure, including modes of proof, in cases before courts of inquiry, military commissions, and other military tribunals except courts-martial may be prescribed by the President by regulations which shall, insofar as he considers 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 may not be contrary to or inconsistent with this chapter.

"(d) All rules and regulations applicable to courts-martial, courts of inquiry, military commissions, and other military tribunals shall be uniform insofar as practicable and shall be reported to the Congress.

"(e) The provisions of this chapter shall be construed and interpreted in accordance with the rules of statutory construction applied in the Federal courts. Except where contrary to or inconsistent with the provisions of this chapter, all questions of evidence in courts-martial shall be decided in accordance with the rules applied in the trial of criminal cases in the United States district courts."

(10) The analysis of subchapter VII of chapter 47, title 10, United States Code, is amended by striking out—

"836. 36. President may prescribe rules"

and inserting in place thereof the following:

"836. 36. Procedure and rules of procedure".

(11) Section 838 is amended—

(A) by striking out in subsection (a) the words "of the court" and inserting in place thereof the words "of the law officer";

(B) by striking out in the first sentence of subsection (b) the words "general or special"; and

(C) by amending the second sentence of subsection (b) to read as follows: "Should the accused have counsel of his own selection, the defense counsel, and assistant defense counsel, if any, who were detailed, shall, if the accused so desires, act as his associate counsel; otherwise they shall be excused by the law officer or summary court-martial."

(12) Section 839 is amended—

(A) by striking out the second sentence thereof;

(B) by striking out in the third sentence thereof the words "any other" and inserting in place thereof the word "any"; and

(C) by striking out in the third sentence the words "in general court-martial cases,".

(12a) Section 840 is amended—

(A) by striking out the word "court-martial" and inserting in place thereof the words "law officer or summary court-martial".

(12b) Section 841 is amended—

(A) by striking out after the words "officer of a" in the first sentence of subsection (a) the word "general";

(B) by striking out in the second sentence of subsection (a) the word "court" and inserting in place thereof the words "law officer".

(13) Section 851 is amended—

(A) by amending subsection (a) to read as follows:

"(a) Voting by members of a general or special court-martial on the findings and on the sentence shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the senior member, who shall forthwith announce the result of the ballot in open court.";

(B) by amending subsection (b) to read as follows:

"(b) The law officer of a general or special court-martial shall rule upon all interlocutory questions arising during the proceedings. Any such ruling made by the law officer upon any interlocutory question other than the question of the accused's sanity is final and constitutes the ruling of the court. However, the law officer may change his ruling at any time during the trial except a ruling on a motion for a finding of not guilty that was granted. If any member objects to a ruling of the law officer on the question of the accused's sanity, the court shall be cleared and closed and the question decided by a voice vote as provided in Section 852 of this title (article 52), beginning with the junior in rank."; and

(C) by striking out in subsection (c) the words "court-martial and the president of a" and inserting in place thereof the word "or".

(13a) Section 852(c) is amended to read as follows:

"(c) All other questions to be decided by members of a general or special court-martial shall be determined by a majority vote. A tie vote on a motion relating to the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused."

(14) Section 854 is amended—

(A) by inserting after the word "general" in the first sentence of subsection (a) the words "and special";

(B) by striking out in the first and second sentences of subsection (a) the word "president" and inserting in place thereof the words "senior member";

(C) by striking out in the third sentence of subsection (a) the word "president" and inserting in place thereof the words "the senior member present at the trial"; and

(D) by striking out in subsection (b) the words "special and".

(15) Section 865 is amended—

(A) by striking out subsection (b);

(B) by striking out in subsection (c) the word "other"; and

(C) by redesignating subsection (c), as amended hereby, as subsection (b).

(16) Section 866(a) is amended to read as follows:

"(a) The Secretary of Defense shall constitute one or more boards of review for the armed forces, except that when the Coast Guard is not operating as a service in the Navy, the Secretary of the Treasury shall constitute one or more boards of review for the Coast Guard. Each board of review shall be composed of not less than three commissioned officers or civilians, each of whom must be a member of the bar of a Federal court or of the highest court of a State. A commissioned officer detailed to serve on a board of review shall serve thereon until relieved therefrom by the Secretary who constituted the board of review, and is exempt from the provisions of sections 3031(c), 3031(d), 8031(c) and 8031(d) of this title. An officer of the Navy or Marine Corps serving on

a board of review shall be eligible for promotion without regard to the requirements for sea duty or foreign service. The Secretary, however, may establish boards of review within or without the United States. A commissioned officer serving on a board of review shall be rated for fitness, efficiency, and performance of duty only by the Secretary who constituted the board of review."

(17) Section 867 is amended by striking out the fourth sentence of subsection (d) and inserting in place thereof: "The Court of Military Appeals may affirm only such findings of guilty 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 may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."

(17a) Section 876 is amended by inserting after the words "(article 73)" the words ", to action by a separation review board as provided in section 1168 of this title,".

(18) Section 918 is amended by adding the following sentence at the end thereof:

"No person shall be tried by court-martial for murder committed in the United States in time of peace."

(19) Section 920 is amended by adding the following sentence at the end of subsection (a): "No person shall be tried by court-martial for rape committed in the United States in time of peace."

(20) Clause (1) of section 936(b) is amended to read as follows:

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

(20a) Section 898 is amended by inserting the word "or" at the end of clause (2) thereof and adding the following new clause:

"(3) refuses or willfully neglects to enforce or comply with the provisions of Section 814(a) of this title;".

(21) Section 3036(a) is amended by striking out—

"(10) Judge Advocate General."

"(11) Chief of Chaplains."

and by inserting in place thereof:

"(10) Chief of Chaplains."

(22) Section 3036(b) is amended—

(A) by striking out the words, "except the Judge Advocate General,"; and

(B) by striking out the second sentence of clause (2) thereof.

(23) Section 3037 is amended—

(A) by adding the following sentence at the end of subsection (a): "The Judge Advocate General shall have, in addition to the Assistant Judge Advocate General, such deputies and assistants as the Secretary of the Army may prescribe.";

(B) by striking out the word "and" at the end of clause (2) of subsection (c);

(C) by striking out the period at the end of clause (3) of subsection (c) and inserting in place thereof a semicolon and the word "and";

(D) by adding the following clause at the end of subsection (c):

"(4) shall perform other duties prescribed by the Secretary of the Army"; and

(E) by adding the following subsections at the end thereof: "(d) The Judge Advocate General is not a member of the Army Staff and the duties of the Chief of Staff do not include supervision, direction, control, or command of the Judge Advocate General or of the Judge Advocate General's Corps.

"(e) The Judge Advocate General and officers of the Judge Advocate General's Corps are subject to the supervision of and are responsible to the General Counsel of the Department of Defense with respect to the performance of their professional duties.

"(f) Officers of the Judge Advocate General's Corps are under the sole command of the Judge Advocate General of the Army and of superior officers of the Judge Advocate General's Corps as the Secretary of the Army may prescribe."

(24) Section 3040(a) is amended by striking out the words "and by section 3037 of this title".

(25) Section 3296(b) is amended by adding the following clause at the end thereof:

"(4) The Judge Advocate General's Corps."

(26) Section 3297(a) is amended by adding the following sentence at the end thereof: "A selection board considering promotion-list officers of the Judge Advocate General's Corps shall be composed of officers of the Regular Army who hold a regular or temporary grade above lieutenant colonel, are senior in regular grade to, and who outrank, any officer considered by that board, and are members of that Corps, except that where required, officers of the Regular Army who are not members of the Judge Advocate General's Corps may sit on that board."

(27) Chapter 347 is amended—

(A) by adding the following section:

"§ 3613. *Insignia of Judge Advocate General's Corps.*

"The President shall prescribe a distinctive insignia to be worn by officers of the Advocate General's Corps."; and

(B) by adding at the end of the analysis thereof:

"3613. Insignia of Judge Advocate General's Corps."

(28) Section 5148 is amended—

(A) by inserting after the word "Territory" he words, ", who are designated for special duty (law),";

(B) by inserting after the word "him" in clauses (1) and (4) of subsection (c) the words "by the Secretary of the Navy"; and

(C) by adding the following subsections at the end thereof:

"(d) The Judge Advocate General of the Navy and officers designated for special duty (law) are not subject to the supervision, direction, control or command of the Chief of Naval Operations.

"(e) The Judge Advocate General of the Navy and officers designated for special duty (law) are subject to the supervision of and are responsible to the General Counsel of the Department of Defense with respect to performance of their professional duties.

"(f) Officers of the Navy designated for special duty (law) are under the sole command of the Judge Advocate General of the Navy and superior officers designated for special duty (law) as the Secretary of the Navy may prescribe."

(29) Section 5149 (a) is amended—

(A) by inserting after the words "line of the Navy" the words "designated for special duty (law)"; and

(B) by inserting after the words "Marine Corps" the words "who is a member of the Bar of a Federal court or the highest court of a State or Territory."

(30) Section 5587 is amended—

(A) by striking out in the second sentence of subsection (a) the word "Each" and inserting in place thereof the words "Subject to subsection (e), each"; and

(B) by adding the following subsection:

"(e) Any officer on the active list of the Marine Corps in a grade not above Colonel who is a member of the bar of a Federal court or the highest court of a State or Territory may be appointed to the active list in the line of the Navy as an officer designated for special duty (law). An officer so appointed shall be appointed in the grade indicated in the following table and holds the lineal position which the Secretary of the Navy assigns:

| *Marine Corps Grade* | *Grade of Appointment* |
|---|---|
| Colonel | Captain |
| Lieutenant Colonel | Commander |
| Major | Lieutenant Commander |
| Captain | Lieutenant |
| First Lieutenant | Lieutenant (Junior Grade) |
| Second Lieutenant | Lieutenant (Junior Grade). |

"(f) No officer on the active list of the line of the Navy as an officer designated for special duty (law) shall be removed from that designation without his consent. Any officer removed from that designation after January 1, 1960 may not thereafter be again so designated."

(31) Section 5701 (c) is amended—

(A) by inserting after "(c)" the figure "(1)";

(B) by inserting in the first sentence thereof after the words "special duty" the words "other than in law"; and

(C) by adding the following clause at the end thereof:

"(2) When officers designated for special duty (law) are eligible for consideration by a selection board under subsection (a), the Secretary shall appoint an alternate board consisting of five officers designated for special duty (law) on the active list or officers on the retired list who have served in that designation on the active list. The alternate board shall act on all cases of officers designated for special duty (law). If sufficient numbers of officers designated for special duty (law) of the grade specified in subsection (a) are not available, the Secretary shall, to the extent necessary, appoint other retired officers to serve on the alternate board."

(32) Section 5862 is amended—

(A) by striking out in subsection (d) the word "Each" and inserting in place thereof the words "Except as provided in subsection (e), each"; and

(B) by adding the following sentence at the end of subsection (e):

"Each examining board considering officers on the active list in the line of the Navy designated for special duty (law) shall be composed of officers in that designation or retired officers who have served in that designation on the active list."

(33) Chapter 555 is amended—

(A) by adding the following section at the end thereof:

"§ 6035. *Insignia of law specialists.*

"The President shall prescribe a distinctive insignia to be worn by officers of the Navy designated for special duty (law)."; and

(B) by adding at the end of the analysis thereof:

"6035. Insignia of law specialists."

(34) Section 8072(a) is amended by inserting the words "designated as judge advocates" immediately following the words "officers of the Air Force" in the first sentence thereof.

(35) Section 8072 is amended—

(A) by inserting in the first sentence of subsection (a) after the words "officers of the Air Force" the words "designated as judge advocates";

(B) by striking out in clause (2) of subsection (c) the word "legal"; and

(C) by adding the following subsections at the end thereof:

"(d) The Judge Advocate General is not a member of the Air Staff and the duties of the Chief of Staff do not include supervision, direction, control, or command of the Judge Advocate General or of judge advocates of the Air Force.

"(e) The Judge Advocate General and judge advocates of the Air Force are subject to the supervision of and are responsible to the General Counsel of the Department of Defense with respect to the performance of their professional duties.

"(f) Officers of the Air Force designated as judge advocates are under the sole command of the Judge Advocate General of the Air Force and superior officers designated as judge advocates as the Secretary of the Air Force may prescribe."

(36) Section 8296 (b) is amended to read as follows:

"(b) (1) A separate promotion list may be maintained for commissioned officers of the Regular Air Force in each of the following categories:

"i. Chaplains.
"ii. Medical Officers.
"iii. Dental Officers.
"iv. Veterinary Officers.
"v. Medical Service Officers.
"vi. Air Force Nurses.
"vii. Women Medical Specialists.
"viii. Any category established by the Secretary of the Air Force under section 8067 (i) of this title.

"(2) A separate promotion list must be mained for commissioned officers of the Regular Air Force designated as judge advocates."

(37) Section 8297 is amended—

(A) by striking out in subsection (a) the word "and" at the end of the clause (1);

(B) by striking out in subsection (a) the period at the end thereof and inserting in its place a semi-colon and the word "and"; and

(C) by adding the following clause at the end of subsection (a):

"(3) Promotion-list officers designated as judge advocates shall be composed of promotion-list officers who hold a regular or temporary grade above lieutenant colonel, senior in regular grade to, and who outrank, any officer considered by that board and are designated as judge advocates except that where required, promotion-list officers who are not so designated may sit on that board."

(38) Chapter 847 is amended—

(A) by adding the following new section:

"§ 8613. *Insignia of judge advocates.*

"The President shall prescribe a distinctive insignia to be worn by officers of the Air Force designated as judge advocates"; and

(B) by adding at the end of the analysis thereof:

"8613. Insignia of judge advocates."

SEC. 2. (a) Title 18, United States Code is amended by inserting after section 1508 thereof the following section:

"§ 1509. *Influencing military tribunal or board, or member, law officer or counsel thereof.*

"Whoever censures, reprimands, admonishes or endeavors to coerce or improperly influence, directly or indirectly, any court-martial, court of inquiry, military commission, or any other military tribunal or board or reviewing authority, or any member, law officer, or counsel thereof with respect to the due and proper performance of its or his official duties or functions shall be fined not more than $5,000 or imprisoned for not more than five years, or both."

(b) The analysis of chapter 73, title 18, United States Code, is amended by adding at the end thereof:

"1509. Influencing military tribunal or board, or member, or law officer or counsel thereof."

SEC. 3. All offenses committed and all penalties, forfeitures, fines or liabilities incurred prior to the effective date of a provision of this Act under any law embraced in or modified, changed, or repealed by that provision may be prosecuted, punished, and enforced and action thereon may be completed, in the same manner and with the same effect as if that provision had not become law.

SEC. 4. (a) Except as provided in subsection (b), the provisions of this Act are effective on the first day of the twelfth month following the month in which this Act is approved.

(b) The provisions of clauses (2), (4), (17), (18), (19), (21), (28), (31), (34), (35) and (39) of section 1, and sections 2, 4, and 5 of this Act are effective upon enactment.

Mr. FINN. I have nothing further to state, but I would be very glad to answer any questions anybody might have.

Senator KEATING. Thank you, Mr. Finn. Does any of the committee have questions?

Mr. CREECH. Thank you, Senator Keating. I do have several.

Mr. Finn, if I may, I will start with your very last statement and ask you if you have considered or have any recommendations with regard to a separate JAG Corps. Do you think this would be desirable?

Mr. FINN. Well, we have a uniform code and we are supposed to have uniformity in the services. Our recommendation was to the effect initially, and we have consistently adhered to the position that there ought to be one JAG for all services.

We go along with what the American Bar Association has recommended in this area.

Senator KEATING. There is no reason in the world why there should not be one JAG, in my opinion. It is just the opposition of the various services to consolidating their efforts, which is a constant source of worry to those of us who deal with these problems.

It is just like procurement. They all buck against it, give a thousand reasons why it cannot be done. There is no reason why it should not be done, no reason why activities such as this should not be centralized.

Mr. FINN. If we did, we would certainly have more uniformity and people would be less able to claim that there were discriminations practiced.

Mr. CREECH. Sir, the subcommittee has received testimony to the effect that the conditions differ in the various services; for example, the conditions in the Navy differ appreciably it is said, in some instances from those prevailing in the Air Force or the Army, and that for this reason, it might not be desirable to have an exchange of lawyers even in situations where it is requested, because a lawyer from one service might not be able adequately to defend a man in another service. What are your views with regard to that?

Mr. FINN. Well, if I was a good lawyer, I would not have any hesitancy about trying a case in any service and defending anybody in any service.

I do not—I cannot follow that line of reasoning at all. I do not think there is anything to it. I realize that the Navy has, and I was in the Navy, consistently held that their situation, because they are on vessels and at sea, is substantially different from the situation that governs in the other services.

Well, I think the short answer to that is that the Air Force does not try people on B-59's. We do not think, and I am sure that no general court-martial is ever held in a longboat. They are all held on a battleship or, during the war, the great majority of general courts-martial were held on a base, considerably back of where there was conflict, and certainly this argument that you have a different setup in the various services which require a different type of lawyer or a different kind of lawyer—well, it does not strike me too forcibly at all.

I do not agree with it.

Mr. CREECH. Well, sir, you have said that you feel that it is necessary for commanders to be able to enforce discipline, but at the same time, you wish to provide the means whereby an American system of law and equity is applied to the armed services to an extent that many have thought impossible in military organizations.

You also say, sir, that your investigation has revealed that there still remain some commanding officers who cannot be entrusted with power.

I wonder, sir, if you would care to comment on command influence and how, if you have found evidences of it, it has affected courts-martial or, for that matter, administrative discharges?

Mr. FINN. I think perhaps I can answer you that best by referring you to the Court of Military Appeals. They are—I do not know how many. I read them, and unfortunately, I have a good deal of other matter to read, too.

Senator KEATING. You are like a Senator.

Mr. FINN. No, sir, but I have read from time to time, since they started the Court of Military Appeals, cases which have been set aside because of this command influence.

I have often felt that if the military services would exercise as much ingenuity in trying to enforce the code as it is written as they do in trying to evade it, they would not have anywhere near as many difficulties as they do. Now, only recently, some individual in one of the services concocted the bright idea that if he sent a letter around to various people before they served on courts, this would be a very nice thing to do and very proper, and there would be no command influence. He wanted to know, if I recall aright, what their reaction was to certain things.

Now, to me, that is command influence, and I do not care what they label it and I believe the Court of Military Appeals labeled it as command influence. Now, this is what I conceive to be a rather ingenious method of getting around the so-called command influence.

If they would only exercise that energy, that ingenuity in trying to make this code work instead of trying to throw up roadblocks and obstacles, then we would have a much easier row to hoe, all of us, and so would the military.

Is that an answer to your question?

Mr. CREECH. Yes, sir, it is. It sounds like the *Kitchens* case, in which the court, I think, said there was sufficient indication of command influence to justify a new trial.

Mr. FINN. I do not remember the case name.

Mr. CREECH. Sir, did your investigation reveal other instances than those which you found as a result of your study of the opinions of the court?

Mr. FINN. You have the *Fannie May Clackum* case; I think you referred to that. Have you reference to the case of *Robert O. Bland* v. *Connally?*

Mr. CREECH. I believe that is one of those that has been sent to us.

Mr. FINN. And the case of *Neil F. Bland* was decided by the Court of Appeals of the District of Columbia on June 15, 1961. I do not have the citation any more than that.

Mr. CREECH. I think we already have it.

Mr. FINN. And in the case of *Neil F. Davis* v. *Stahr*, (s-t-a-h-r), decided June 15, 1961.

Mr. CREECH. Actually, sir, what I have reference to is any cases, which had not been the subject of published opinions by any court. We do have, I believe, virtually all the relevant court opinions.

Mr. FINN. This may be a little beside the point of the question you are asking, but this is a memorandum I have from one of the boys who appeared before these boards for the correction of military records in a somewhat allied area. Mr. Everett apparently made the statement here in one of these hearings that the Navy, as an expedient measure, has adopted a procedure whereby a man being considered for an administrative discharge for homosexuality, requests a court-martial, will be given a general discharge:

I was amazed to hear this, because in my capacity as Navy counsel, I find the opposite to be true. As an example, I direct attention to a case recently presented to the Board for Correction of Naval Records, and attached, wherein it will be noted that this man made two requests for a general court-martial rather than accept an administrative discharge.

As a result, an extensive investigation was conducted (approximately 3 months) in an attempt to accumulate sufficient evidence to assure a conviction. When the central office was advised that the evidence uncovered would not support a general court-martial conviction the individual's request for court-martial was ignored and he was issued an undesirable discharge.

Later, the Legion was successful in having that—that is not in answer to a specific question you asked.

Senator KEATING. Was that in the Navy?

Mr. FINN. Yes, sir.

Senator KEATING. And what did the Legion do in that case?

Mr. FINN. We presented the matter to the Board for Correction of Naval Records, and we were able to obtain from that Board a change in the type of discharge the man had received.

Senator KEATING. He had received something less than a discharge not under—a discharge under honorable conditions, and you got a change in what?

Mr. FINN. He was issued an undesirable discharge.

Senator KEATING. And you got that changed to what?

Mr. FINN. I do not have that information here, Senator. But the allusion here is that the American Legion was successful in having this serious injustice corrected at the Board for Correction of Naval Records.

But he also comments that that fact does not correct the procedure followed by the Navy in the original action. Sometimes these people do not have lawyers to represent them and they never get the record corrected.

Senator KEATING. That is right. And of course, that is an inexcusable thing when they know that they cannot get a conviction to then administratively give him a discharge and brand him for life, that he cannot ever get away from, and then refuse to consider the type of discharge he was granted. It is a heartless, cruel, inexcusable line of conduct, in my opinion.

Mr. FINN. That is why I referred to those three cases, Senator, because they are in that same general area. They could not get convictions, so they administratively discharge people, not for what they did in the service but for what they did outside the service when they were not members of the services.

Senator KEATING. Now, under the present code, and I am by no means an expert on this, if the man asks for a court-martial, they do not have to give it to him, they can still proceed administratively, is that right?

Mr. FINN. In this case which I have just cited, that exact thing happened.

Senator KEATING. I wondered if they were acting within the four corners of the law or if that was some arbitrary action.

Mr. FINN. They are supposed to, under certain circumstances, give a man a trial when he asks for it. But they can always revert to this administrative discharge and that is the crux of the complaint which I am advancing here today.

Senator KEATING. But I mean when he is up for consideration for an administrative discharge and he says, "I want a trial," you mean under the present law, he has no right to that trial?

Mr. FINN. They do not give it to him, regardless of what the law is.

Senator KEATING. Does counsel know what the law is, or is this just arbitrary action by some few officers?

Mr. CREECH. Sir, we posed these questions to the military. As a matter of fact, we had an answer from the Under Secretary of the Navy, which was not clear on this point, and on Friday, Mr. Everett

asked the Judge Advocate General, Admiral Mott, specifically about this.

Senator KEATING. Did you get a letter from them?

Mr. EVERETT. Perhaps I can explain this, sir.

As you will recall, the chairman sent over in a questionnaire one question—I think it was question 12—which related to this. The Navy response seemed to indicate that they followed a somewhat different practice than the other two services, and that in the event they could not try a man as he requested, they would give him a discharge under honorable conditions.

When Mr. Fay testified, a question or two was asked of him at that time about the practice. He then wrote a letter to the chairman, which was received last Thursday, which seemed unclear, and further questions were addressed to Admiral Mott. This testimony seemed to indicate that the practice that is "almost invariably" followed—I think this is the wording—is to give a man a discharge under honorable conditions if he is discharged for the misconduct by reason of which they propose to eliminate him.

So far as could be determined from the answers of the other two services, their practice, officially, at least, is not so well settled as the Navy's.

Now, last Friday, I had occasion to speak to an American Legion group and one of Mr. Finn's associates commented on the earlier testimony and referred to the incident that is reflected in the memorandum. At that time, it was suggested that he might prepare a memorandum which could be brought to the subcommittee's attention at this time. It is still a confused situation.

Senator KEATING. In this case that you have referred to, Mr. Finn, did they give the man a discharge under honorable conditions, or something less than that?

Mr. FINN. We would be very happy to furnish the committee with a copy of our entire record in that case.

(The following information was subsequently furnished for the record:)

You are advised that the case involved one ex-private, U.S. Marine Corps Board for Correction of Naval Records, Navy Department. He was given an undesirable discharge because of unfitness (homosexuality) from the U.S. Marine Corps on February 17, 1956.

While under charges and at the age of 17, he requested a general court-martial. The commanding officer, however, chose to effect his discharge administratively as indicated. He was not tried and had no hearing.

The Navy Board for the Correction of Records changed the discharge to a general discharge by reason of unsuitability.

SecNav Instruction 1620.1 cited in the above case confines itself entirely to the issuance of administrative-type discharges to naval personnel involved in some way in a homosexual act. This instruction attempts to place homosexuals into either of three categories:

Class I: A true homosexual.

Class II: Those not evidencing true homosexual tendencies but who have participated in one or more acts.

Class III: Those with tendencies but who have not acted overtly in service.

According to the SecNav instruction, those designated class II are presented with a statement for signature waiving their rights to a trial by court-martial and acceptance of an administrative-type discharge in lieu thereof. This instruction further states that an individual refusing to sign the waiver shall be recommended for a general court-martial.

The Departments of the Army and of the Air Force have no such instructions or regulations.

In general, with the exception of limited application in the Navy and Marine Corps, no serviceman may elect to have a trial by court-marital in lieu of recommended discharge by administrative procedures with an undesirable discharge.

The record of this case may undoubtedly be secure from the Navy Department.

In view of all the circumstances of the case itself, I would not want to be responsible for publicizing the matter formally, i.e., have it appear in the committee record by name.

Senator KEATING. Well if—I am told by counsel here that this man was given an undesirable discharge.

Mr. FINN. Originally, yes.

Senator KEATING. I can understand that some people are not fitted for military or Navy duty, who could not be convicted of anything; they have not committed any offense, but they have just shown themselves unfitted for military duty.

You have served in the Navy and I have served in the Army, and you know what I am talking about as well as I do.

Now I think we must preserve the right of a commander to separate such a man from the service under honorable conditions, and it leaves no stigma on him. But to have a man up on charges and have him given an undesirable discharge when he wants a trial for his offense and they find they cannot prove the offense, where they turn around and give him an undesirable discharge, I think certainly we have to do something to put a stop to that kind of a situation. Would you agree that if his separation from service were under honorable conditions, it would be all right to act administratively?

Mr. FINN. Well I want to make sure that we understand one another, Senator.

As I understand it, they issue an honorable discharge. None of us have any question about that. Then they have a discharge under honorable conditions. Now that is what they call a so-called general discharge, as I get it. We have been told that some of the big automotive manufacturers in Michigan will not accept a boy who has that type of discharge for employment.

Senator KEATING. I did not know that.

Mr. FINN. Now, our complaint is why should a boy who mentally is not up to par, who does not have the IQ, be thrown into the same category with homosexuals and a number of other people who have things wrong with them that the general public does not like, and to be generally classified in the public mind as being one of that group upon whom we all look down?

Senator KEATING. Well, I am not familiar enough—I have asked a few questions in these hearings about the significance of this discharge under honorable conditions. I do not know whether it is like the American Bar Association classifying a man as qualified, which means he just passes the mark; if he is any good at all, he is called well qualified, or outstandingly well qualified, or whether it does really leave a stigma.

You have pointed out a question of employment and that disturbs me, because certainly, aside from benefits and other tangible things, any discharge which militates against a fellow being employed later is an undesirable situation. In a case where they are not able to prove anything on him, I do not know; I think we have to do something.

Mr. FINN. The discharge under honorable conditions, Senator, he is entitled to all the benefits with that, as I understand it, that he would get from the Veterans' Administration, for example.

Senator KEATING. That is my understanding.

Mr. FINN. He does not get an honorable discharge. He is asked, "Were you in the service?" Yes. "Let me see your discharge?" "Why is not this an honorable discharge?"

Senator KEATING. You know that employers are inclined to be reluctant to take on a man with what you call a general discharge as opposed to an honorable discharge?

Mr. FINN. We have been so informed. This is not an idea, this is actual fact from the information which has been conveyed to us.

Senator KEATING. Mr. Chairman, it is necessary for me to go to another hearing, and I want to make a short statement here in the light of a column that I read, which I think you, as chairman, and this committee are entitled to, and you will excuse me, Mr. Finn, for butting in.

I read an article or a column indicating that this committee was engaged in making things soft and easy for servicemen, that they were not aware of the fact that command is important and so on. Now, where that story was leaked from—I do not say it was leaked from the Pentagon, but it might have been. I do not know where it was leaked from.

I, as you know, Mr. Chairman, have felt that there are some other subjects which might well form the basis of hearings before this committee ahead of this subject, but this is an important subject. There is no disposition on the part of the chairman nor the Senator from New York nor anyone else to fail to recognize the problems which commanders have in the services. There is no effort here to mollycoddle any miscreants in the armed services. But the chairman has selected a very important line of inquiry, which is essential to the administration of evenhanded justice to our citizens.

I found out earlier, Mr. Chairman, that a soldier is still a person, a sailor is still a person, an airman is still a person, and they have the constitutional rights of citizens. Of course, some of their freedoms are curtailed, and properly so, when they are called into service. Nobody complains about that. But any intimation—and these stories do not start, you know, without being inspired—any intimation that this committee is engaged in softening up the military services is completely unjustified, and it is regrettable that any of our columnists fell for that kind of propaganda, no matter what its source was.

Senator ERVIN (presiding). I am sure the Senator from New York and myself and other members of the committee all appreciate the role of the military in our lives. All of us have faith in a strong military and we recognize that there has to be discipline. We also believe that a person in military service should not lose our basic constitutional rights, which include notice and an opportunity to be heard before any adjudication which affects his life is made. Any idea that we are trying to interfere in any way with the proper administration of the Military Establishment or the proper administration of military justice is absurd.

I certainly appreciate what the Senator from New York has said. We also recognize that a lot of complaints have been made about the

administration of justice by civil or military personnel without foundation. But we have received so many complaints that we are trying to find out whether there is any justification for any of them. We want the law to be administered in all areas of our lives so that people will have respect for it.

I personally believe that it reduces the morale as well as the discipline of the military forces if the fundamental processes of justice are not observed.

I want to say thank you to the Senator from New York for presiding while I had to go to another committee. Thank you.

Senator KEATING. Thank you, Mr. Chairman.

Mr. CREECH. Mr. Finn, you have indicated in your statement that you are very much in favor of the Uniform Code.

Mr. FINN. Yes, sir.

Mr. CREECH. I observe you have directed yourself to some of the statements already made concerning it. One aspect you have not covered is the charge that the code is unwieldy. I know you have pointed out that it worked during the Korean conflict. The allegation has been made that it is unwieldy and would not work in time of war, and that there should not be a different standard for wartime and peacetime.

I realize this is a sort of double statement, so you can direct your attention, if you care to, either to whether you feel that the code provides for uniformity in war or peace, or whether you think the Court of Military Appeals would be able to function equally well during times of war and peace.

Mr. FINN. Well, Admiral Radford is certainly a far more competent military person than I, and he has already said that in the Korean conflict, this code worked admirably. He did say, however, that the manual, which was a product of the regulations of the services, made it considerably unwieldy, and that it was—all of the complaints—it was his view that all of the complaints that arose were due to the fact that the manual was written as it was.

My thought is that the code will work just as well in wartime as it works in peacetime. I think that the claim is that it is so unwieldy and so cumbersome and so productive of delay that the commanding officer will not be able to enforce discipline in time of war. I believe that is the general line of the argument which is made. I can only refer to my own experience.

During World War II, and that was a war of some proportions, we used to get courts-martial months after the offense was committed, and sometimes it was 6 to 8 months and sometimes over a year from the day that the offense was committed before the case was finally signed by the Secretary and passed into the archives, and the files, and the boy was finally either freed, or sent to Portsmouth or some other Federal penitentiary.

Now, that type of delay existed during the last war when we did not have this code. If it did exist then, these complaints about what might be under this code in the next war to me do not run true at all. As I said just a few moments ago, if the services would exercise a little energy in trying to effect the code as it is written instead of trying to throw up roadblocks, this code would work very well. In fact, I think it would work far more to the satisfaction of the American peo-

ple in that the rights and privileges of American boys that are in the service would be far better protected than they have ever been before, than any code that preceded it, although we do feel that there are some small areas where some amendment could be advisedly used.

Is that a response to your question?

Mr. CREECH. I think so, thank you.

I would like to ask you, sir, with regard to the administrative discharge which you have discussed at some length, what did you mean by the statement that many administrative discharges have been given to servicemen because some superior officers believed that it was for the good of the service that they be severed from the service in this fashion? Is that in any way meant to be any indication of command influence?

Mr. FINN. Well, no, I really meant to point out how little review was had of some of these administrative discharges and how the personal idiosyncrasy of an individual could dictate that type of a discharge. And as has been said here, I think two or three times before, a person could be mentally inept but he would receive this type of discharge. And I do not think such a person ought to get that type of discharge. I think he ought to get an honorable discharge.

If he serves in the service well, to the best of his abilities regardless of what those abilities are, I think if he does not commit any crimes or any offenses against discipline, he should get an honorable discharge, and I know a great many people have not gotten honorable discharges. Their only crime has been that they were not smart enough.

Mr. CREECH. In other words, you do not feel that performance should be a factor in considering the type of discharge?

Mr. FINN. Not if you are going to use the word, "honorable."

Mr. CREECH. Sir, do you feel that the possibility that the commanding officer who convened the board might be the same one who brought the charges against the indiviluad involved, in any way militates against a fair consideration of the case?

Mr. FINN. Well, now, are you referring to a court-martial?

Mr. CREECH. No, I am referring now to the administrative discharge boards.

Mr. FINN. Well, I would think that people would look with a little less suspicion on a board which was not under the influence of a person who had set it up and who is ultimately going to be the reviewer. In other words, a court and jury and the appellate court should all be different personnel, in my estimation. I do see how you can avoid having some, at least a suspicion that everything is not as it should be if you do not have some separation in that area.

Mr. CREECH. Sir, I know that you made it clear for the record what your position is with regard to these board proceedings and that you stated that you feel that no one should be discharged on an undesirable discharge without a hearing and a review of his discharge; and you have indicated that, of course, there is full support in your organization for the bill which was introduced earlier.

But I wonder, sir, what your views are on the existing situation and specifically with regard to the representation by counsel at these board proceedings. Has your organization's work adduced information which you have not made a part of your statement here with regard

to the assignment of counsel? The subcommittee was told by the Assistant Secretary of the Army for Manpower that counsel is assigned and that, where reasonably available, counsel who is a lawyer is assigned to an individual who requests it.

Do you have any information with regard to the assignment of counsel in these board proceedings?

Mr. FINN. Now, are you speaking of these boards that deal with the——

Mr. CREECH. Administrative discharge.

Mr. FINN. Administrative discharges?

Mr. CREECH. Yes.

Mr. FINN. No, I don't. I have no information on that.

Mr. CREECH. Well, sir, what would be your feeling with regard to the waiver of counsel at such board proceedings by a serviceman who has not attained his majority—a minor, in other words?

Mr. FINN. We go back to a subject which has been discussed in another area of this record which we have attached marked "A" here. At one time, as you may know, the services requested persons in the military to waive the right of appeal from the decisions of general courts-martial, and generally they asked little boys, shall I say, who were not mature mentally whether they waived their right of appeal. If they waived their right of appeal, certain inducements were held out to them.

We felt that was wrong and I feel that any suggestion that an attorney makes that representation of an individual should be waived is wrong in itself. I think there never should be any such thing.

Mr. CREECH. Sir, the subcommittee has been told that during such hearings, these administrative hearings, either the recorder or junior member of the board presents the evidence and examines the witnesses, including those of the soldier if he is not represented by counsel. What has been the experience of your organization in this regard? Have you found that the representation by the recorder, in your estimation, was the same as or was comparable to representation by counsel, either by private counsel or by assigned military counsel?

Mr. FINN. I don't believe that anybody from the American Legion except in a personal capacity has represented anybody before this type of board. We do have counsel who appear before the Board for the Correction of Military Records and the discharge review boards, but they do not appear as far as I know before this type of board, and I have had no experience in that area and I can't answer that question.

Mr. CREECH. Thank you, sir.

Mr. EVERETT. Mr. Finn, as I understand one of the long-established principles of our jurisprudence, a man who prosecutes should not judge and one should not be a judge in his own case, and I gather, too, that some of these concepts have been embodied in the Administrative Procedure Act. Do you find that in military justice and in the disposition of administrative discharges there is a violation on many occasions of this precept, that he who prosecutes should not judge?

Mr. FINN. Well, there are a few cases which come up in the Court of Military Appeals from time to time which seem to indicate that that concept is violated. How many times this occurs where there is no report of the incident I don't know.

Mr. EVERETT. In what way would this type of violation occur, according to your experience?

Mr. FINN. Well, are you speaking of how the command influence might come into a matter?

Mr. EVERETT. I suppose this would be it. What are some of the means by which command influence might be exercised?

Mr. FINN. Well, they can call the members of the court into session and they can tell them that—if you will bear with me just a moment, in the case of *Deain*, which is reported at 5, page 44, of the Court of Military Appeals, a retired rear admiral assigned by the Bureau of Naval Personnel for said duty indoctrinated the fellow members of his court-martial, who were all juniors to him, in his beliefs to the effect that persons in the military had no constitutional rights and that anyone sent before the court for trial had to be guilty of something. He further explained that the law of desertion was that one who was away from his station and duty over 60 days was guilty, and the law says there must be an intent shown. He also prepared the fitness reports of the members of the court. The Court of Military Appeals reversed that conviction.

That is an example, I think, of command influence to some extent.

In the case of *Zagar*—incidentally, I think the Court of Military Appeals has thoroughly disabused the services of the notion that they can continue this type of thing—in the case of *Zagar*, a staff officer told the court members before a trial, in effect, that only guilty cases were presented for trial and it was up to the accused to prove his innocence.

That was reversed.

In the case of *Hunter*, the commanding officer told the court members before trial how bad the accused was and that his last trial had resulted in an inadequate sentence.

There are many others.

Mr. EVERETT. With reference to the case that you referred to in some of your earlier testimony where questionnaires were sent to the court members by the assistant staff judge advocate, do you recall any civilian cases involving questionnaires sent to juries by counsel?

Mr. FINN. I never heard of any such thing and it would seem to me that whoever sent such a questionnaire to a juror, when you impanel a jury generally, while it is being impaneled, counsel generally have the right to inquire into the background and beliefs, in a criminal case particularly, of a prospective juror. But I am afraid a person who is a lawyer might be subject to some penalties from a bar association if he made a practice of going around talking to all prospective jurors before they were called to determine what their attitudes were.

Mr. EVERETT. As I understand it, you have had extensive experience in the Federal courts and hold a significant position in the Federal judicial system at the present time. Have you ever heard of any practice in civilian courts, Federal civilian courts, whereby questionnaires were used for communicating with jurors before they sat in a case or where any type of statement was allowed to the jury prior to the time that it was impaneled?

Mr. FINN. I would like to answer this question out of my own personal experience of some 30-odd years as a lawyer. I would never

attempt it because I would think that I would be subject to being censured and perhaps disbarred for doing anything of that type, and I think that the courts would look upon—this is my view of what the courts would do—that they would look upon any such activity as heinous.

Mr. EVERETT. In connection with some of your earlier testimony concerning the right of counsel in a proceeding where a discharge under other than honorable conditions will be meted out, would you consider it desirable or even necessary to have some qualified lawyer present to serve as a law officer or judge in this type of hearing? That is, prior to the time that the discharge under other than honorable conditions could be issued?

Mr. FINN. Well perhaps—rather than answer your question directly, I would like to say this: Our conception is that when the military try a person, they ought to try him in a decent trial. We are not too much interested in what they do administratively within the service itself, but when they say that they are going to try a person for an offense, then we conceive that that trial should be conducted in such manner that no criticism, to the effect that it is contrary to American concepts, should ever be able to be leveled at it.

We feel also that when and if a conviction is had or a type of discharge is to be given to an individual as a result, either of administrative action or a court-martial, that before the man gets out of the service and before that discharge becomes effective, he should be—that matter should be thoroughly reviewed by a board, and we have submitted to this committee proposed legislation and we think they are the people that ought to look at this type of a discharge, any type of discharge, if it is other than an honorable discharge because we feel that civilians having put the people in the service should look at the kind of discharge they get before they get out of the service.

I know this is not, in any way, going to be acceptable to the military services, perhaps. I think such a board was in the contemplation of Congress when that Reorganization Act was passed and they set up these boards, but as we feel by regulation the military has completely nullified or vitiated the ability of those boards to act as Congress intended that they should act. Now this is one step beyond the point where you are at.

Mr. EVERETT. In the report which was an attachment to the statement, the report of 1956, on page 23 there is a recommendation that military justice be returned to the conditions under article-of-war 92 of the 1920 code and article-of-war 74, which, in effect, would amount to giving back jurisdiction, or giving a priority of jurisdiction, to civilian tribunals to try service personnel accused of offenses of a civil nature.

In that connection I would like to ask you: First, what is the criterion for determining exactly what is an offense of a civil nature; and second, in light of the calendar congestion that exists in some civilian courts, would it not be undesirable from the standpoint of speedy trial to turn over this jurisdiction to the civil court?

Mr. FINN. Well, it might well be, but in defense of the Federal courts, may I say that I don't believe there is much congestion in the Federal courts insofar as criminal activity is concerned. The delays

that people complain of in connection with delays in courts are usually, I believe, in State courts and generally are in connection with civil matters. In other words, the civil dockets are pretty well loaded down, but I am convinced from my experience that in the Federal courts, the vast majority of them anyway make tremendous efforts to keep their docket pretty well up to date insofar as criminal matters are concerned. Now——

Mr. EVERETT. Well, Mr. Finn, while that may be true in the District of Columbia, wouldn't you have some misgivings even as to the Federal courts in districts where one judge has to try cases in several different communities? For example, in the middle district of North Carolina one judge or two judges have the responsibility for holding court in several cities, and they come to some of the cities only twice a year.

Mr. FINN. But you don't have much crime down there. So they don't get many cases.

But may I refer you to page 54, Mr. Everett. I don't think there would be any difficulty about this to be frank with you.

At the top of page 54, this is the exact mandate under which we are operating:

We ask the Congress to—

Reenact article-of-war 74 of the 1949 Articles of War so that the civilian courts will have priority of jurisdiction in peacetime offenses of a civil nature committed within the limits of the States of the Union and the District of Columbia.

And second—

Reenact that part of article-of-war 92 of the 1949 Articles of War which deprives courts-martial of *jurisdiction to try, in time of peace*, an offender for a capital offense which is a civilian offense, i.e., rape or murder, committed within the geographical limits of the United States and the District of Columbia.

I only say they should have prior jurisdiction. If the district attorney wanted to waive the jurisdiction to the military authorities, he could, and as I understand it, the practice is now in many cases the military does waive their jurisdiction to the civil authorities. So that this is being accomplished in some measure in some cases at this time.

I attach copies of the various regulations which pertain to action to be taken when a civil conviction is obtained against personnel of the Army, Navy, and Air Force, respectively, about which I was asked.

(The information referred to is as follows:)

Bureau of Naval Personnel manual—Part C:

"C–10312 *Discharge of enlisted personnel by reason of misconduct*

"(1) Enlisted personnel may be separated by reason of misconduct with an undesirable discharge, or with a higher type discharge when it is warranted by the particular circumstances in a given case. A discharge by reason of misconduct, regardless of circumstances, will be effected only when directed by or authorized by the Chief of Naval Personnel.

"(2) The Chief of Naval Personnel may direct the discharge of an enlisted person for misconduct in any of the following cases:

"(a) Conviction by civil authorities (foreign or domestic) or * * * For the purpose of this subparagraph only, an individual shall be considered as having been convicted even though an appeal is pending or is subsequently filed."

Army Regulations No. 635–206: Personnel separations; misconduct discharge by reason of conviction by civil court:

"21. APPEALS. An individual shall be considered as having been convicted or adjudged a juvenile offender even though an appeal is pending or is subsequently filed. The discharge or recommendation for discharge, however, will not be

effected or submitted until the individual has indicated in writing that he does not intend to appeal the conviction or adjudication as a juvenile offender, or until the time in which an appeal may be made has expired, whichever is the earlier, or if an appeal has been made, until final action has been taken thereon.

"24. RETENTION IN SERVICE. Individuals who have been convicted by domestic or foreign courts of offenses which do not involve moral turpitude or which do not provide for punishment by confinement in excess of 1 year under the cited codes, and those adjudged juvenile offenders for offenses not involving moral turpitude, will, as a general rule, be retained in the service. If the offense is indicative of an established pattern of frequent difficulty with the civil authorities, his military record is not exemplary, and retention is neither practicable nor feasible, a recommendation for discharge may be submitted through the major command headquarters, Department of the Army, etc."

Air Force Regulation No. 39-22: Discharge of airmen for misconduct because of civil court disposition:

"11. APPEALS OF AIRMEN TO CIVIL COURT DISPOSITIONS. An airman subject to discharge under this regulation may be processed for discharge or waiver even though he has filed an appeal to the civil court action in his care or has stated the intention of doing so. However, it will be the general policy to withhold the execution of an approved discharge pending outcome of the appeal. In the event the appeal results in the conviction being set aside the airman will not be discharged under this regulation, although he may be considered for discharge under other regulations, if appropriate * * *. In the event the execution of a discharge under this regulation is considered appropriate, without awaiting outcome of an appeal, the case will be referred to the Director of Military Personnel, Headquarters, USAF, for a decision."

Senator ERVIN. I just wonder, though, about the wisdom of that recommendation. Now, of course, the military court or the naval court has two questions before it. The first is: Is the accused guilty? The second is: In the light of all the circumstances in the case, the previous conduct of the accused, the opportunities that the accused has had, the temptation to which he was subjected, what should the punishment be?

Now, certainly the civilian criminal court has no jurisdiction to determine what the military should do with him as a matter of punishment or whether he ought to be separated from the service. A court-martial can pass on this question of separation from the service; and, in so doing, they should take into consideration not only the question of guilt or innocence but also all the facts surrounding the case, as well as the man's previous record. And it seems to me that the suggestion of the American Legion in that respect doesn't quite adequately deal with the situation.

Mr. FINN. Well, Senator, I think that, for example, if a person is in a State or Federal court, the probation officer has readily available to the court itself at the time of sentencing the entire record of the individual. At least that is what they are supposed to have.

Now, I notice that a great many of the administrative discharges which have been effected over the past few years have been in cases where the military person was convicted by a State or Federal court outside the military jurisdiction. Now, that would connote to me or denote to me that there are cases which today are being handled by the civil courts of people who are in the military service, and I am quite positive that there are cases where the military waives its jurisdiction at least temporarily to the civil authorities to try these cases.

Now, this is merely—what we are suggesting is merely a return to what the military had, the Army had, before World War II. And they apparently were quite satisfied with it then, and if this is such

an intolerable burden on the military services to try cases under the Code of Military Justice because there are so many cases and they don't have enough personnel to do it, it seems to me that this is a very fine avenue to divert some of that business to another area. And not only that, but in my estimation when the case is sent to a civilian court, the prosecution will probably be a little better and certainly the defense will be better.

Senator ERVIN. You still are confronted with the fact, though, that, unless the military is going to be put under an obligation to give a man a dishonorable discharge for the offense which was the basis of the civil court conviction, regardless of the mitigating circumstances or regardless of the man's previous record, then the Legion proposal complicates the situation rather than simplifies it. After all, you can't just say that, if a man is convicted of a certain offense, a certain type of offense, then he is automatically going out of the military service. And that is about the only way you could handle the matter if you turn jurisdiction over. You would have to adopt some policy like that in order to turn it over to the civil courts, it seems to me.

Mr. FINN. If I am correct, Senator, the military now does just that.

Senator ERVIN. But the question is whether that is the proper way to do it.

Mr. FINN. That is why we suggest we ought to have a board of civilians look at these things and they can consider all of these elements and they can give the man the type of discharge to which he is entitled, and I am sure you know that nobody in the American Legion is trying to demean the value of an honorable discharge. I have one. I certainly don't want to have it in any way derrogated or any denigration of it, and I don't think any of us do. We want to see the military succeed. We are not trying to hamstring them in any way. But we do feel if they go through what they call a court system, let's have a court system. Let's not have something which masquerades as a court system and is full of injustices and practices which nobody can condone, which can be remedied without any diminution of efficiency or without any deprival of rights of any person.

Senator ERVIN. Now, switching to another subject, what is your opinion as to the Board for Correction of Military Records, the boards which are authorized to change discharges? What is your experience as a lawyer in appearing before those boards with respect to the adequacy of the hearings that are granted?

Mr. FINN. I think they give very adequate hearings, Senator, but I don't think the end result is any good. They listen. They hear it. But they don't do anything about it. This is what we complain of.

Initially in the report which is before you, we asserted that nothing was accomplished. Many lawyers have told us that they don't even go before them because it is a waste of time. But our people from the American Legion who appear before the Board for the Correction of Military Records have informed me as recently as a couple of weeks ago that they have had some success there and they feel that the board should be kept. We are not saying the board should be abolished. What we are saying is there ought to be another board superimposed on it.

Senator ERVIN. Now, there is testimony here to the effect that the Navy has established Boards of Review, each of which has a civilian

member, and that, every time a person is going to be separated from the service by sentence to a punitive discharge they automatically review the case. I wonder if you have had experience before those boards which would enable you to express an opinion as to the adequacy of that review.

Mr. FINN. Well, these are two different sets of boards, Senator. The boards that you are now referring to are the ones that are set up——

Senator ERVIN. Yes.

Mr. FINN. To review courts-martial.

Senator ERVIN. Before a man goes out.

Mr. FINN. Well, I think—I want to be sure we understand one another. As I understand it, the board that you are now speaking of is the one which is set up under the Code of Military Justice and not under the Reorganization Act, which is the other board which I just finished discussing.

Senator ERVIN. Yes.

Mr. FINN. Well, on those boards in the Navy they have a civilian, and I know some of these people on these boards personally. I know them to be very conscientious, decent people and well versed in the law, but one of the difficulties with that type of board, Senator, is that they keep changing all the time. They rotate the personnel. And, of course, judges die and judges change, too, I realize, but these changes are made every 3 years or so. No military people serve a long period of time. And a person is just about at the point where he is well able to perform his functions properly when he is shifted under the regular system that they have in the Navy and the other services, to another post and another duty.

Senator ERVIN. I infer from that statement that you think there should be a substantial continuity of service on the theory——

Mr. FINN. We recommend that——

Senator ERVIN. On the theory that experience is the best teacher of all.

Mr. FINN. The only kind of people that should be on those—in fact, initially we felt that they should be all civilians. This was a recommendation which we made when the code was effected, when it was under consideration, that these ought to be civilians, but the Army doesn't have any civilians and the Air Force has none. I think the Coast Guard does have civilians.

I think that all civilians would be a good idea. Then there would not be this rotation and we have recommended consistently that there be not any of this Manchu Act, which is what they call it, that is in effect on these boards whereby people are assigned to them, serve some 2 or 2½ years and then spend 6 months worrying about which place they are going to be sent to next, and at the end of that 6 months, they are sent somewhere and then they are given an entirely different function to perform not in any way connected with the law in some instances. I don't think that is proper. It is a waste of manpower, a waste of the taxpayers' money as well as being not conducive in any way to justice.

Mr. EVERETT. I have two questions, Mr. Finn. In the first place, with reference to some of the American Legion's proposals, it has been suggested that, instead of having lawyers in the Army, you need

an army of lawyers to execute them. Where do you get the lawyers to carry out some of the recommendations that are made in the 1956 report?

Mr. FINN. Well, I don't agree with that criticism which has been made, obviously. And I don't believe that the persons who advance it have any concrete reason for stating it except that they just say that that is so and therefore, ergo, we should take it and you should take it. I don't believe it is true.

On the other hand, it may well be that additional lawyers are required. But if so, what of it? We spend a lot of money around the world in various areas on various matters. Why shouldn't we spend a few dollars and see to it that our American soldiers and sailors are properly taken care of? If they need lawyers, we should hire them. I don't believe that the objection is well taken. And even if it might be in some small measure well taken, I don't think it is a good objection.

Mr. EVERETT. Since the time of your report, the Army introduced a circuit rider system. I gather that you would approve of that innovation.

Mr. FINN. We not only approve it but we think it ought to be made a matter of law so that the next Judge Advocate General that comes along can't say, "I am going to abolish that. I don't like that system."

In other words, this is one of the main difficulties which we have always had. All these things that are good, that crop up from time to time, they last as long as the person who has initiated them desires them to last and if his position is changed and he is transferred elsewhere, that whole system which he has inaugurated and carried on is abolished perhaps.

We think that all these things should be reduced to writing and should be made a part of a law and they should be compelled to do these things, and if it is good, as the Army seems to think it is good, and I do, then why not have it in all the services and why not have it under the aegis of the law?

Mr. EVERETT. Would your same argument apply to administrative discharges which, as a practical matter, are simply left in a vacuum at the present time legislatively? Should there be legislation providing specific safeguards for the issuance of administrative discharges?

Mr. FINN. There should be no discharge other than an honorable discharge except where the Congress dictates.

Mr. EVERETT. Now, my last question: Several witnesses have testified, including at least one judge and perhaps more from the Court of Military Appeals, that it would be desirable to eliminate the summary court-martial, increase the authority of the commanding officer to give company punishment under article 15, and give a mandatory option in all services for the accused to elect trial by court-martial instead of article 15 punishment. How do you feel about such an approach?

Mr. FINN. This approach was taken up with our committee in Denver by the Judge Advocates General and their assistants last fall, and I have here now a letter from General Kuhfeld asking what our position is with reference to this. We have consistently maintained

that the summary court-martial was not very effective at all. In fact, we thought it might well be abolished.

I am now writing—I have written to the various members of my committee asking them for their attitude on this particular proposal which you mention. I am satisfied in my own mind that we probably will be in favor of the greater part of it, but I would prefer not to indicate final approval in that area until I have had at least the views of all the members of the committee, but we have stated and we are on record as being of the opinion that the summary court-martial served no useful purpose.

Mr. EVERETT. Are there any changes in position that have occurred since 1956 when this report was promulgated?

Mr. FINN. Any changes?

Mr. EVERETT. Yes. Would your committee and the Legion take a different position on any of these matters?

Mr. FINN. None; none.

Mr. EVERETT. Would you personally subscribe to all the recommendations that are contained in this report or have you changed your viewpoint toward any of them?

Mr. FINN. I may have mellowed a trifle in some areas, but I don't think so. I would adhere to that report and its recommendations.

May I say just one thing finally? I may not have made myself clear, but one of the reasons why we believe there ought to be a board to review all of these administrative and other discharges than honorable discharges is that now these boards are being handled in the four different services in four different ways by four different groups. There is a considerable rotation of personnel involved. The application of different principles in different services constantly is evident and existent, and there is a varied disposition of cases. In other words, a lack of uniformity in the decisions that are reached. And we feel that this isn't right. It isn't proper that a boy goes into the Navy, for example, and he gets one kind of treatment, even if he becomes an offender, but if he went into the Army he would get another type of treatment.

I am a bleeding heart. The offender should be punished but the offender should be punished the same way every place and under the same law.

And I want to thank you very much for your attention.

Senator ERVIN. The committee wants to thank you for making your appearance here and we thank Mr. Mears for coming with you. Your committee has done a tremendous amount of work in this field, taken under consideration many serious problems, and we appreciate very much the study that the American Legion committee has given to this subject and the recommendations that they have made, the thoughtful and considerate recommendations they have made.

Mr. FINN. Thank you.

(Mr. Finn's complete statement follows:)

STATEMENT BY JOHN J. FINN, CHAIRMAN, SPECIAL SUBCOMMITTEE ON UNIFORM CODE OF MILITARY JUSTICE AND COURT OF MILITARY APPEALS, OF THE AMERICAN LEGION

Mr. Chairman and gentleman of the subcommittee, I thank you on behalf of the American Legion for this opportunity to address you concerning the study

upon which the committee is engaged of military discharges and of military justice generally.

I have been a member of the bar of the Commonwealth of Massachusetts for 33 years and am a member of the bars of the District of Columbia, the Commonwealth of Virginia, the U.S. Supreme Court, and the Court of Military Appeals, among others. I spent 33 months as a naval officer in the Office of the Judge Advocate General, U.S. Navy, during World War II. My duties in that capacity included the review of courts-martial of all types, and service on many boards concerning questions of discipline and legal personnel in the Navy.

I am now chairman, and have been a member since its inception, of the Special Committee of the American Legion on the Uniform Code of Military Justice and the U.S. Court of Military Appeals. The function of this committee is to investigate into the operation of the Uniform Code of Military Justice and the U.S. Court of Military Appeals and their administration. After many hundreds of hours of investigation, perusal of thousands of documents and examination of many witnesses, this committee reported to the 1956 National Convention of the American Legion held at Los Angeles, Calif., September 3–6, 1956. Shortly thereafter a copy of the report of said committee was placed in the hands of all Senators and Congressmen. I desire to incorporate a copy thereof (marked "A") into these remarks, and I respectfully request that the report be made a part of the record of these hearings, since no aspect of military justice can be fairly considered without knowledge of and reference to certain basic facts. These basic matters are set out in the committee report and supply the reasons for the conclusions stated therein and the remarks and recommendations I make here today.

I. MILITARY DISCHARGES

In the newspaper reports of the scope of the investigation of this committee, it was indicated that an investigation would be had into the facts causing the following statement made by the U.S. Court of Military Appeals in its annual report for the period ending December 31, 1960:

"The unusual increase in the use of the administrative discharge since the code became a fixture has led to the suspicion that the services were resorting to that means of circumventing the requirements of the code. The validity of that suspicion was confirmed by Maj. Gen. Reginald C. Harmon, then Judge Advocate General of the Air Force, at the annual meeting of the Judge Advocates Association held at Los Angeles, Calif., August 26, 1958. He there declared that the tremendous increase in undersirable (sic) discharges by administrative proceedings was the result of efforts of military commanders to avoid the requirements of the Uniform Code. Although he acknowledged that the men thereby affected were deprived of the protections afforded by the code, no action to curtail the practice was initiated" (The Judge Advocate Journal, Bulletin No. 27, October 1958, pp. 5, 6).

This quotation calls attention to and echoes a complaint made by the American Legion 6 years ago about a reprehensible practice resorted to by the services to avoid submission to the U.S. Court of Military Appeals.

I have referred above to the report of the special committee of the American Legion, and I urgently suggest that it be considered in its entirety to obtain an understanding of the position of the American Legion. For convenience, however, I set out here what was said in 1956 by this special committee in the area of discharges:

"6. DISCHARGE PROCEDURES

"It has come to our attention that the services have effected many discharges in the past few years since the inception of the code without resort to any legal proceedings. These discharges are given out for medical and for many other reasons.

"It is realized that a military organization, particularly under a system where men are drafted, many times acquire the services of misfits and persons who are for physical or mental reasons unable to serve properly in such an organization. It is further realized that medical examinations prior to induction may not expose the particular difficulty which subsequently causes the failure of the individual to fit into the military organization. However, we conceive that it is grossly unfair to American youth to induct them into the military or naval services and shortly thereafter discharge them under conditions which attach to them a stigma which lasts throughout their lives.

"Our complaint is that many of these discharges which we shall lump together under a term "administrative" are handed to servicemen without any hearing

before the board, court, or tribunal of any kind. Many people in civilian life are wary of employing a young man who, for example, has received any type of administrative discharge from the services. They are loath to hire a young man who has been in the service and cannot show a certificate indicating an honorable discharge or a discharge under honorable conditions. Many administrative discharges have been given servicemen because some superior officer believed it is for the good of the service that they be severed from service in this fashion.

"There have been witnesses who have appeared before us who have stated that the services have resorted to administrative discharges to circumvent the Code of Military Justice perhaps on the theory that such discharges are not reviewable by the Court of Military Appeals or any other board or tribunal outside the service.

"As we have stated in the past, many military people do not seem to realize the effect of a bad conduct, dishonorable, or other discharge from the military or naval service which is not an honorable discharge, or one under honorable conditions. Some method must be set up to eliminate the apparently indiscriminate awarding of discharges other than honorable, or under honorable conditions. If a person is properly convicted of a crime in accordance with the laws of the land and the proper authorities determine that a bad conduct or dishonorable discharge should be meted out to the offender, such punishment is just and deserved. However, in the many cases which have occurred where no hearing of any kind has taken place and a person is severed from the services with an administrative discharge, he has been unable to attend schools because the schools will not admit him; he has been unable to obtain jobs and thus his career is blighted, sometimes for reasons over which he has no control. The American people believe a hearing is a necessity before a punishment is handed out to an individual. Any discharge other than honorable or one under honorable conditions is a punishment.

"It is, therefore, the recommendation of the committee that no discharge of any type except an honorable discharge, or one under honorable conditions, may be given to any person once properly inducted into the military service, unless and until the circumstances of the dismissal have been reviewed by a board of civilians which Congress should set up for the sole purpose of reviewing such discharges.

"In view of the fact that the American Legion has strongly favored universal military training and that because of its diligent action National Security Training Act was enacted (by which all American youth is subject to military training of one kind or another) it is most important that the American Legion insure to the mothers of America that their boys will return to civilian life after any military service under the same aegis as that which put them into the service. In short, when civilians put them in, for example by means of draft boards, then civilians should review the type of discharge received, if said discharge is one other than honorable or under honorable conditions.

"In this connection, it is pointed out that the experience of many practitioners before the Board for the Correction of Military Records and the board for the review of discharges and dismissals, set up in the various services following World War II, has been unsatisfactory and sorely disappointing. While the experience of different services varies, the general experience has been that little, if anything, is accomplished by these boards toward righting or remedying wrongs which have occurred. In fact, some attorneys feel that it is a complete waste of time to take a case before any of these boards. We suggest that the personnel who staff these boards constitute a considerable number of individuals who, since they are not accomplishing much in the way of rectifying errors which have occurred, could well be employed in other pursuits.

"It is believed that the criticism with regard to the operation of these boards stems from the interpretation, administratively arrived at by the judge advocates general of the various services, as to the nature and scope of the work of the boards. In short, since the board for the review of discharges and dismissals and the board for the correction of military records, must pass upon a case or record which previously has been processed in the office of the judge advocate general, and since the offices of the judge advocates general have control over these boards by way of assignment of officers and personnel, the boards are often reluctant, if indeed they do not find it impossible, to overrule a conclusion reached by their superior officer.

"These boards could perform a most useful function if intelligently and fearlessly administered and operated. However, under the rules set up by the judge advocates general, and the other circumstances indicated above, which restrict the boards in many respects, it is difficult to understand how the boards can do much else than confirm actions already taken by the Services involved. To overrule the action is to admit that error existed. Experience has shown that the military and naval services are somewhat reluctant at any time to admit errors.

"It is further realized that the Secretaries of the various services have the power and right of review of the actions of the boards. In fact, the boards are answerable to them. On the other hand, with the tremendous volume of administrative detail which falls to the lot of any Secretary of the services, in these details much work of this nature is delegated to subordinates, many of whom are assigned to the work by the judge advocates general. Overruling of the action of a board or of the judge advocates general, even by a person acting in the capacity of a delagee of the Secretary of a particular service would not be conducive to subsequent promotion.

"Your committee recommends that the Congress conduct an investigation into the activities of the boards of review of discharges and dismissals, and the Board for the Correction of Military Records at the earliest possible time. We recommend that close attention be directed to the question as to whether or not said boards have been carrying out the intent of Congress."

The views expressed in the quotation above were based upon the direct testimony of the witnesses who appeared before the special committee. We do recognize that the boards have accomplished some good but we feel that there is room for great improvement, especially in the area of consistency of action. The quotation from the Court of Military Appeals report and experience have fortified and justified all that is stated in our special committee report. In furtherance of our interest in this connection, the special committee on the Uniform Code of Military Justice and the U.S. Court of Military Appeals held a meeting in Denver, Colo., preceding the 1961 National Convention of the American Legion (September 11–14), at which time there appeared Maj. Gen. Albert M. Kuhfeld, the Judge Advocate General, U.S. Air Force; Col. G. C. Ackroyd, Chief, Military Justice Division, U.S. Army; and Capt. Mack K. Greenberg, Assistant Judge Advocate General for Military Justice, U.S. Navy. It was admitted that administrative discharges had been issued in substantial numbers but that the services were cognizant of the criticism of the Court of Military Appeals and others of the practices which had arisen and that the use of this type of separation was being curtailed. As evidence thereof, the services offered to furnish figures supporting this claim. Subsequently the committee was furnished with the following figures from each of the services:

AIR FORCE

| Fiscal year | Discharges | Type of discharge | | |
|---|---|---|---|---|
| | | Honorable | General | Undesirable |
| 1958 | 137,347 | 115,130 | 12,664 | 8,300 |
| 1959 | 112,867 | 97,192 | 7,380 | 7,124 |
| 1960 | 110,186 | 97,933 | 7,246 | 4,189 |
| 1961 | 105,698 | 96,236 | 7,160 | 1,699 |

NAVY AND MARINE CORPS

| Fiscal year | Discharges | Honorable | General | Undesirable |
|---|---|---|---|---|
| 1958 | 91,238 | 71,887 | 10,010 | 4,902 |
| 1959 | 74,620 | 56,043 | 10,308 | 5,041 |
| 1960 | 71,561 | 55,181 | 9,009 | 4,564 |
| 1961 | 80,999 | 65,912 | 8,099 | 4,576 |

NAVY

| Fiscal year | Discharges | Honorable | General | Undesirable |
|---|---|---|---|---|
| 1958 | 66,135 | 52,883 | 6,901 | 3,527 |
| 1959 | 53,627 | 40,725 | 7,346 | 3,555 |
| 1960 | 53,505 | 42,773 | 6,342 | 2,697 |
| 1961 | 64,722 | 54,353 | 5,866 | 2,972 |

MARINE CORPS

| | | | | |
|---|---|---|---|---|
| 1958 | 25,103 | 19,004 | 3,109 | 1,375 |
| 1959 | 20,993 | 15,318 | 2,962 | 1,486 |
| 1960 | 18,056 | 12,408 | 2,667 | 1,867 |
| 1961 | 16,277 | 11,559 | 2,233 | 1,604 |

ARMY

| | | | | |
|---|---|---|---|---|
| 1958 | 347,018 | 321,690 | 7,814 | 17,514 |
| 1959 | 335,729 | 318,244 | 6,269 | 11,216 |
| 1960 | 257,507 | 239,238 | 10,715 | 7,554 |
| 1961 | 288,433 | 268,225 | 11,889 | 8,319 |

In connection with these figures we are informed that in 1959 the military service separation regulations were liberalized so as to permit better types of discharges in many areas. In addition, an amendment to Universal Military Training and Service Act of 1958 (72 Stat. 424; 50 U.S.C. app. 454) allows the weeding out prior to induction of personnel who experience has shown provide a disproportionate amount of disciplinary and administrative difficulties.

The Army has taken advantage, it is claimed, of this amended statute and under the changed regulations during the fiscal year 1961 (*a*) the Air Force Discharge Review Board upgraded 232 general and undesirable discharges; (*b*) The Air Force Board for Correction of Military Records upgraded 23 less than honorable discharges; (*c*) the Secretary of the Air Force under the provisions of article 74b, Uniform Code of Military Justice, substituted general administrative type discharges for bad conduct discharges adjudged by courts-martial in 11 cases, and (*d*) the Secretary of the Air Force Personnel Council, upon recommendations of the Army-Air Force Clemency and Parole Board, upgraded punitive type discharges previously adjudged by courts-martial in 10 cases.

These figures speak for themselves.

While it is appreciated that some of the severances other than honorable may have been due to medical reasons, there is no doubt that a too substantial number were effected to circumvent the U.S. Court of Military Appeals, thus depriving the serviceman involved of the protections contained in the Uniform Code of Military Justice. Certainly, there has been a deliberate attempt on the part of the services to thwart the will of Congress. The system devised by the Congress of the United States for the protection of service personnel has been deliberately disregarded. We feel no one should be discharged with an undesirable discharge without a hearing and a review of his discharge.

What is the lesson to be drawn from this? We do not indict all of the people in the military service and we realize that perhaps those who appear before you from the services will not, and do not condone these practices. But there apparently always will be those in the military services who, through ignorance or deliberation, are not willing to abide by American concepts of justice. Insofar as possible, such persons should be restrained.

We therefore suggest a system be set up for the review of all discharges other than honorable discharges. To effect this suggestion which the American Legion has been proposing for several years, we attach hereto suggested legislation (marked "B"), pursuant to mandates of successive national conventions of the American Legion since 1956, to create a board consisting solely by civilians to be appointed by the President, whose duty it will be to review such discharges, with full authority to recommend clemency and pardon and to replace any discharge other than honorable discharge with any type of discharge said board may, in the exercise of its discretion, deem to be just and proper. Such board shall be responsible to the President only and shall not be connected with any existing governmental department or agency. With respect to clemency and pardon, we feel that the board should have the authority to exercise those powers, where indicated. We recognize that there may be some legal or constitutional obstacles or that, in fact, the Congress may not wish to bestow that authority upon the board. Thus, our draft bill empowers the board only to recommend clemency and pardon to the President.

Most military law is based upon the premise that the service volunteer enters into a contract with the Government under the terms of which he waives constitutional rights afforded the nonservice individual. In the early days of this Republic, such a premise may have been warranted but at this time, and

probably since World War I inasmuch as the vast majority of those who have served in the Armed Forces since then have been drafted therein, such a concept no longer has validity. It is ridiculous to hold that a draftee has contracted away his constitutional rights. A draft board of civilians of his own community puts him in the service. When he is discharged with a type of severance other than honorable, we believe civilians should examine the type of discharge received by him and that those civilians should be free of any military influence.

II. MILITARY JUSTICE

On the question of military justice generally I submit the following:

The Uniform Code of Military Justice is a splendid example of progressive, enlightened legislation. It represents the first real and comprehensive effort to create a true legal system in the Armed Forces protecting the investment of the Nation in strong Military, Air, and Naval Establishments by insuring that commanders are able to enforce discipline but at the same time providing the means whereby the American system of law and equity is applied to the armed services to an extent many thought impossible in military organizations. Its provisions are as well known to each of you as to me. The 10 years that this code has been in operation have provided the broad experience upon which we base our proposals.

The American Legion is an organization of citizens who served in time of war. We do not desire, and are not in any way attempting, to destroy the ability of responsible commanders to enforce discipline in the armed services or to prevent them from carrying out their duties by imposing upon them a system which prevents their functioning efficiently in peace or war.

While the substantial majority of military personnel on the officer level think and act like most enlightened Americans, in their approach to legal matters and problems, experience under the code, as demonstrated by a perusal of the opinions of the Court of Military Appeals among other things, shows that there still remain some commanding officers who cannot be entrusted with power.

The committee studies have produced what we consider to be ample evidence of a need for amendment of the Uniform Code of Military Justice in several areas to make the code more efficient and more reflective of American concepts of justice and fair play.

All our proposed amendments are directed to the end that lawyers in the service act like, and are to be treated as, lawyers; that any trials in the services shall be conducted, as nearly as possible, in the manner of trials in civil courts; that some of the falderol and trappings of military trials be eliminated; i.e., as to nomenclature, procedures, and personnel; that trials be presided over by a judge, call him what you will; that no circumscribing of appeals available to an accused, or restriction of appeals, be countenanced—rather, that greater rights of appeal be granted; that wider and greater discretion be lodged in boards of review and the Court of Military Appeals; and that boards of review, trials, and all persons connected therewith be as independent as possible of command or of any outside influence and divorced from any influence of that character.

A copy of our proposed bill is attached hereto. It will be noted that we submitted this bill as H.R. 3455 to the 1st session of the 86th Congress (marked "C"). No action was taken thereon, however.

The bill implements 19 of the 24 affirmative resolutions set out on pages 53 through 55 of the report of the special committee. It should be noted, however, that the No. 1 resolution in said report, relating to the creation of a Judge Advocate Corps in the Air Force and Navy, is implemented to the extent deemed possible without requiring a major overhaul of overall organization, personnel, and legislation, as it pertains to the military and naval services. However, this recommendation is implemented to the extent that it would place judge advocates of the Air Force and legal specialists of the Navy in a status comparable to that of members of the Judge Advocate Corps of the Army, effectively preclude undue command influence over such personnel, and strengthen their career opportunities based solely on legal qualifications and performance of legal duties.

Thank you for your consideration in receiving the views of the American Legion on these important matters.

Mr. CREECH. The next witness is Mr. Evans, Lewis W. Evans, attorney at law, Washington, D.C.

Mr. Evans.

## STATEMENT OF LEWIS W. EVANS, WASHINGTON, D.C.

Senator ERVIN. Mr. Evans, we are delighted to have you with us today. I understand you are a fellow "Tarheel."

Mr. EVANS. Yes, sir.

Senator ERVIN. We will be glad to hear any observations you may wish to make.

Mr. EVANS. Thank you, sir. I have a prepared statement and I believe the most sensible way to start out on it is for me to read parts of it and then I would be happy to try to answer any questions that the committee might have.

It was my understanding, of course, that you are particularly interested in the administrative discharge proceedings in the Armed Forces. And I would like to state that most of my experience has been with the Army procedure as distinguished from the Navy and the Air Force.

I further assume that the committee is familiar with the statutes and regulations governing the administrative discharge of personnel, and I will, therefore, not go into detail concerning these provisions as written, but I will confine my comments to an expression of what my experience has led me to believe should be changed concerning them and their administration.

I should note that in my opinion any discharge from the Armed Forces which is less than honorable constitutes a serious handicap for the rest of one's life. It limits one's ability to obtain any responsible position and in many instances completely precludes one from entering certain fields of employment, particularly any field involving security.

Such a discharge, therefore, cannot realistically be considered anything other than punishment. It is my view that before such punishment is given an individual, he should be accorded certain fundamental rights, which at present in many instances he is not being accorded.

In its report to Congress for the year 1960, the United States Court of Military Appeals stated that the—

> unusual increase in the use of the administrative discharge since the code became a fixture has led to the suspicion that the services were resorting to that means of circumventing the requirements of the code.

I am convinced that this suspicion is true. One particular example comes to mind. In that case, an Army major, with 15 years of service, and with nothing but excellent character and efficiency reports, was accused of having participated in three specific homosexual acts. Administrative elimination proceedings were started against him. He demanded trial by court-martial. The commanding general replied in writing that his demand was refused because there was not sufficient evidence to sustain a court-martial conviction even if a conviction could be obtained.

In my opinion this is not as it should be because if a man did the acts or was guilty of the acts that he was alleged to have done, he should have been dismissed from the service and perhaps even confined. However, if he did not do so, nothing should happen to him. There should be no bad consequences to him.

However, the general admitted in writing that he did not have sufficient evidence to convict this man by court-martial and even if he were

successful in convicting him, that he wouldn't be able to sustain it on appeal, and therefore he decided not to court-martial the man.

At present, after an individual has been given an administrative discharge he may appeal his case to the Discharge Review Board here in Washington. He has the right to appear before this board in person and by counsel at his own expense. This board is composed of service officers. In my opinion, it is governed by that tradition, valid in other circumstances, to "uphold your subordinates." In one instance which comes to mind, I represented a man before that board who had been given an undesirable discharge. Proceedings had been started against this officer when investigators in another Government agency had obtained a statement from an admitted homosexual that he had had one homosexual act with the officer, and had been present on two other occasions and observed the officer engage in such an act with an identified third party. The officer denied all of these things under oath. The identified third party denied the acts under oath, and they both denied even knowing the person who made the original statements. A Government psychiatrist reported there was no indication that the officer had homosexual tendencies. This was all the evidence before the board, yet it did not see fit to change the nature of the discharge.

In view of these matters, and other matters which were testified to by the previous witness, I believe that I will just now go to what I believe the Congress should do.

First, I believe that Congress should devise some means whereby before such a discharge is issued administratively the case can be reviewed by an independent body, where fundamental rights of the individuals are protected. For example, there should be a requirement that there be some competent and material evidence to support the findings that the individual be afforded the right to counsel at all proceedings, that he be given adequate notice and a chance to prepare his case, and that he be allowed a hearing where he has the right to force the attendance and testimony of witnesses and to confront the witnesses against him to the same extent as in a court-martial trial.

Second, I heartily endorse the recommendation of the U.S. Court of Military Appeals that provision be made by Congress for the judicial review of questions of law relating to administrative discharge proceedings which have resulted in a less than honorable separation from the service.

Third, there should be a provision for the review after the issuance of a less than honorable discharge by a body independent of the military departments. Such a provision is embodied in a draft bill which is recommended by the American Legion. With certain minor reservations I endorse that proposal.

Senator Ervin. Now, we have testimony here, virtually all from the services, to the effect that in many cases the party prefers to take an undesirable discharge and be released, separated from the service on that basis, rather than undergo court-martial. And there certainly is some ground to infer perhaps in many cases that the party in question really gets off much lighter by that system than he would if he underwent court-martial.

Now, I am just asking this. Don't you think it would satisfy the essentials of due process of law to establish a system under which a person could be given the option of taking an undesirable discharge

as a means of separation from the service or insisting on a hearing before a board, before such discharge could be given to him?

Mr. EVANS. Well, sir, if you mean before an administrative board and the right to a hearing, I should think that if he is afforded the right of counsel and has had a chance to consult with counsel, in other words, knows what he is doing when he makes a choice, I don't see anything fundamentally wrong with allowing him to say, "OK, I will take an undesirable discharge rather than have a hearing, if this is done with these other safeguards," the fact that he knows what the evidence is and has had a chance to consult with counsel—when I say counsel, I mean a qualified lawyer, I don't mean——

Senator ERVIN. Someone who can advise him what the result is going to be and what his rights are.

Mr. EVANS. That is right.

Senator ERVIN. And in that case, you then say that as far as the person who exercises an option of demanding a hearing is concerned, that hearing should be conducted in such a way as to satisfy at least the rudiments of what Daniel Webster described as the law of the land and also proceed upon inquiry and only after notice of hearing.

Mr. EVANS. That is correct, sir.

Senator ERVIN. And, of course, in the case where a person is tried by a court-martial and the court-martial adjudges a dishonorable discharge, there is now an adequate opportunity to have that reviewed under the Uniform Code by the Court of Military Appeals.

Mr. EVANS. Yes, sir. I don't have any—I have not made a specific study in this area but I am somewhat familiar with the proceedings and he has a right—any sentence of a court-martial, of course, which results in a dishonorable discharge or a bad conduct discharge is automatically reviewed by a board of review of the service involved which generally consists of officers of that service. As I understand, in the Navy they do have one civilian on that board. But then after the board of review acts on the case, the only way, unless it involves a death sentence or some other things, the only way he can get to the Court of Military Appeals is to petition that court for review, and it is somewhat similar, as I understand it, to a petition to the Supreme Court for an issuance of a writ of certiorari.

I think in general that it is fairly adequate. I certainly think that the Court of Military Appeals has done a tremendous job and just in the fact of its being there, it has improved the administration of justice in the Army greatly in my opinion.

Senator ERVIN. But you are firmly of the opinion that the consequences of an undesirable discharge are so great to the man who receives it in afterlife, that he ought not to be compelled to take such a discharge without having an opportunity to present the reason why he thinks that he should not receive such a discharge.

Mr. EVANS. That is correct. Administratively in many instances a person is just given an undesirable discharge without any of what we would call fundamental rights being afforded this man, and in my opinion, and I think that the previous witness pointed it out very clearly, the effects of an undesirable discharge are almost the same as a dishonorable discharge after one is released from the service.

I can think of hardly any employer who would hire anybody who had an undesirable discharge, and as the previous witness pointed

out, there are some employers who won't hire a person unless he has an honorable discharge. And therefore I feel that any type of discharge which is anything other than an honorable discharge is such that Congress should provide a procedure whereby due process of law is afforded to the person before he is issued that type of discharge.

Senator ERVIN. This all arises out of the fact that the American people have such a deep veneration for what an honorable discharge historically and traditionally represents.

Mr. EVANS. I think so, Mr. Chairman.

Mr. CREECH. Mr. Evans, you have stated that you are convinced by the statement of the Court of Military Appeals that the unusual increase in the use of administrative discharges since the code became a fixture has led to the suspicion that the services were resorting to that means to circumvent the requirements of the code. You say you are convinced this is true. I wonder if apart from the case which you have cited for the subcommittee you have any additional information on this subject which you would care to bring to the subcommittee's attention and whether this is based on actual experience in service, or since then, and the practices——

Mr. EVANS. I am convinced, as I said—I am not sure that I can document this with 100 cases or even 10 cases but I am convinced from comments that I have heard people in the service make at various times and also from the experience that I have had involving several cases—the most notable one I have cited here. If the committee is interested in the citation of a few other specific examples, I would certainly be happy to supply that information. These other cases which I can give you specific examples of and also conversations which I have had with acquaintances and friends who are in the service have led me to this conclusion.

Mr. CREECH. Sir, the subcommittee has been told informally and unofficially that as recently as 1958, there were quotas more or less assigned—that it was agreed that a certain percentage of men should be separated from the services through means of administrative separations. Has your investigation or experience indicated anything such as this might be true?

Mr. EVANS. No, sir. I can't say that it has. This is the first I have heard of that.

Mr. CREECH. Now, the subcommittee was told by the Deputy Secretary of the Army for Manpower that prior to the commencement of formal proceedings, every effort is made to rehabilitate the individual.

Mr. EVANS. Excuse me. Repeat the first part. Before what is started?

Mr. CREECH. Before the commencement of formal proceedings, hearings and referral to the boards, every effort is made to rehabilitate the individual. Only when reassignment, counseling or other rehabilitative efforts have proven fruitless is he considered for separation with less than an honorable discharge.

I should like to inquire about the cases with which you have been concerned. Have you found that the individual involved had been counseled or that there had been rehabilitative efforts?

Mr. EVANS. In answer to that question I would say—and this is purely an estimate on my part—but I would say that in half of the cases I have been connected with and know anything about, that this

procedure has been followed. In the other half of the cases this procedure has not been followed. This to me is somewhat irrelevant in that this depends on the personnel involved, the people involved who happen to be the commanders in charge of particular areas, and so forth, and is not—it doesn't go to what can be done. In other words, it seems to me that in no cases is this required by any regulation and certainly by no statute is this procedure required.

It may be done, and in my experience it has been in some cases and probably half of the cases I know of, but in the other half it hasn't been.

Mr. CREECH. These were cited as safeguards which are available to each individual. Do I infer from your answer, sir, that in half the cases with which you have been concerned, you would feel the individual had not received such counsel?

Mr. EVANS. That is certainly what I think. Furthermore, I wouldn't want to characterize them as safeguards, at least in the sense that I use the word "safeguards" in my statement. I mean legal safeguards.

Mr. CREECH. He goes on to state that in each stage of processing thereafter; that is, after the board convenes, safeguards are established to assure that the rights of an individual are fully protected, and then he enumerates these. He speaks of the medical examination if there is some reason to feel that this might be a consideration. And he discusses the availability of counsel and says that he is entitled to military counsel, a legally qualified counsel, if reasonably available, or civilian counsel.

What has been your experience, sir, with regard to this reasonable availability of counsel?

Mr. EVANS. I think those statements are absolutely true concerning counsel. They do provide military counsel and if what they consider reasonably available occurs, they will provide legally qualified military counsel, and the person does have the right for individual counsel provided for himself at his own expense.

My position, of course, is that this is inadequate because my experience has been that in almost all cases that I know anything about, there has not been legally trained counsel available. There has been military counsel made available but not a lawyer. In other words, some military person was assigned to the business of defense counsel.

Mr. CREECH. I realize that you have made it clear that you feel that counsel should be available in each of these instances and also that these boards should have the subpena powers; is that correct?

Mr. EVANS. That is correct. I think the person under investigation should have the right, the same right to call witnesses and to subpena witnesses as he would have in a trial by court-martial.

Mr. CREECH. And you also favor a review of these determinations such as the American Legion has endorsed.

Mr. EVANS. I would think that there should be somebody who is independent, completely independent of the military establishment, that could review after its issuance and after the person is out of the environment, could review the issuance of this discharge. This body should be, in my opinion, completely independent of the Military Establishment.

Mr. CREECH. Sir, you say in the statement, "These boards are usually appointed by the same commanding officer who brought the proceedings in the first place," and then you go on to say that the commanding officer can disapprove the findings of the board. Here, sir, are you inferring that there is opportunity for command influence over the board?

Mr. EVANS. Well I certainly think there is command influence, although that is not exactly the force of what I was trying to say there. I think that the point is that these commanders decide—the reports come into the commander and he says; "OK, this man should go out." And then he says: "All right," to his executive, "appoint three officers to get this man, three officers to sit on a board and eliminate this man." And then these three people, or whatever number, are appointed and they know what the commander wants. And therefore they go out and do it.

This is certainly command influence. So far as I know, there is not the official stigma placed on command influence in the administrative procedure field as there is in the court-martial field. There is a specific statutory provision against it in the code concerning military justice matters, but when you get into this administrative procedure business, there is no specific prohibition of command influence.

One point I think should be mentioned is why not let the commander do it himself, and then let it be reviewed at higher headquarters with the safeguards that I have outlined? In other words, it seems to me to be a futile gesture to let the local commander, who has already made up his mind, appoint three other people who know he has already made up his mind, to go through this formal procedure which would then give the people, who are trying to sustain these actions above, the chance to say he had a hearing; he went before a board and look what the board recommended. Well, that is, it seems to me, just a waste of time unless you can give him some safeguards which I mentioned before.

Mr. CREECH. I realize that you are indicating your experience has been primarily with the Army, and in discussing the Discharge Review Board, you stated that the Board is composed of service officers and in your opinion it is governed in many instances by the tradition "to uphold your subordinates."

What would be your recommendation, then, with regard to the Army Discharge Review Board to avoid this type of situation?

Mr. EVANS. Well I think that if the total program which I have suggested were put into effect, there would be no need to have this Board. There is another Board that would take its place. However, absent that, I don't really have any specific suggestion except that I have the feeling that it is really sort of a waste of time and that its functions could be fused with the Correction Board. In other words, maybe the Correction Board could handle all this, except there is only one thing wrong with that. You don't have a right to appear in all cases before the Correction Board.

Mr. CREECH. So it is your feeling that this is sort of a rubberstamp and there is no purpose served in having the Discharge Review Board.

Mr. EVANS. I wouldn't like to go quite that far, because there have been instances where the Discharge Review Board has granted relief

to persons. But there are so many others with their—well where in my opinion relief should be granted that it hasn't been, and I don't see how—I think they don't have the proper safeguards below and I—in other words, this whole thing needs to be one package. But talking about the Discharge Review Board, specifically, I think that if that is all that is going to be attacked or approached, that it should be made up of civilians at least.

Mr. CREECH. But you would favor an entire civilian membership on the Board?

Mr. EVANS. If the setup is going to stay the way it is, except for changing this Board, I would be in favor of entire civilian membership, and I would also be in favor of combining them all and putting them in the Department of Defense rather than having each service have its own separate one.

Mr. CREECH. Sir, speaking of each service having its own separate Board, what is your feeling with regard to a separate JAG Corps? Have you given that some consideration?

Mr. EVANS. Well, I am inclined to agree with what I believe Senator Keating said, that there was no reason why there couldn't be one, and I think it would be an excellent idea. One of the problems that we ran into when I was on active duty in the Army was the problem of command influence on lawyers in the Army. And I think everything should be done by Congress which is possible to be done to take the lawyers who sit as judges and the lawyers who act as defense counsel, at least those two categories of service lawyers, completely out from under the influence and command of commanders who start criminal proceedings against members of the Armed Forces. And I think one way to accomplish that would be a separate JAG Corps.

Mr. CREECH. Sir, what is your view with regard to the Army's law officer plan? Do you feel that it is desirable, and if so, do you feel that it would be desirable to have it expanded to the other services?

Mr. EVANS. Well I really haven't had too much direct experience with this new program, but certainly from what I hear about it, and what little I do know about it, having read some records of trials that have come up under the new program, I think that it is an excellent idea. I certainly wouldn't want to endorse each aspect of it because I don't know that much about it, but the general idea is a very good one and I can see no reason why the other services shouldn't do it. And I agree with what the previous witness said, that it shouldn't be left up to the whim of the particular judge Advocate General as to whether he is in favor of this or not. The Congress should make a judgment in this field and then fix it by statute so that it can't be changing back and forth all the time, depending upon the individual who happens to occupy a particular slot.

Senator ERVIN. Now the services take the position that if you delegate entirely to the civilians, the power to say what kind of a discharge a man should get, you would have a resulting system under which civilians rather than the military would be determining the standards of conduct for the man in service.

Mr. EVANS. I don't agree with that charge. I would like to make it perfectly clear that I think the Army or any of the services should have the authority to set standards. First of all, as to who they are going to take; second of all, set the standards as to who they are going to keep.

My concern is with what they do to him for the rest of his life when they decide they don't want to keep a particular person. They should have an absolute right to decide they don't want to keep a person, and nobody, no civilian outsider, should say, "Well, you have to keep this person."

My only concern is with the stigma that is attached to him, if they happen to decide that he should get an undesirable discharge, for example, in any situation. I don't think that has anything—I don't think that even goes to the argument that——

Senator ERVIN. Well if you make the separations from the service dependent upon the commission of specific offenses, whether civil or military, there would be opposition to that. The services have a general discharge which is a discharge under honorable conditions, and the testimony before us is that that discharge is utilized to separate from the service men who are nonsuitable to the service, not in the sense that they have done anything willfully, but they just haven't got the mental capacity to meet the demands of the service or do not have enough energy to meet the demands of the service. Some of them are good, but they are good-for-nothing.

They use the general discharge under honorable conditions to rid the services of those men on account of their unsuitability. And the services say that it is not fair to the men who do meet the standards, when they release them from the service, to give them the same kind of a discharge that you give the man who manifests his unsuitability through no fault of his own.

Now, what do you have to say to that position?

Mr. EVANS. Well, Senator, I think the service has a perfect right to give a person who is good-for-nothing a general discharge under honorable conditions and not give him an honorable discharge which they give to somebody who may be the most valuable person in the world.

My point, and I think the point of those who object to the present setup, is that before the Army does give a general discharge under honorable conditions, or any less exemplary type of discharge, that they should be required to afford this person the opportunity to defend himself. That in a nutshell I think is what we are talking about.

Senator ERVIN. In other words, your position is that where you need some relief is in respect to the undesirable discharges.

Mr. EVANS. I think that certainly that is the most pressing need, the undesirable discharge, but I certainly think also that it should be required to prove that the person is good-for-nothing before they give him a general discharge under honorable conditions because I believe that this attaches a stigma to the person, not as much as an undesirable discharge, but certainly it attaches some sort of stigma to the individual.

Senator ERVIN. Well, it is about the same kind of stigma as to those of us who go to school and make 70's while others are Phi Beta Kappa.

Mr. EVANS. Yes, but, Senator, you have a chance to defend yourself. When you go 4 years to school and you come out with a particular average, that is probably what you have earned. But the way the procedure is in many instances here, you don't even know what hit you. It is as if you enroll in school one day and somebody sees you walking into Sam's Beer Hall, and then the next day the school authorities

kick you out and say, "You are no good scholastically." It doesn't have anything to do with your scholastic ability at all.

Senator ERVIN. Well, there are indications that the Air Force and Army are improving somewhat in their practice in this field, or maybe everybody is behaving a little bit better. But I am glad to note that undesirable discharges in the Air Force, according to Mr. Finn's figures, decreased from 8,300 in 1958 to 1,699 in 1961, a decrease of 6,601. And during the same period of time, undesirable discharges in the Army decreased from 17,514 to 8,319, a decrease of 9,195.

That would indicate those two branches of the service are, at least in my judgment, getting a little bit more parsimonious with the issuance of undesirable discharges, and one might make another inference, that they are getting a better standard of men. One or the other.

Mr. EVANS. It could mean either or both of those, Senator, I think. And I hope that they are applying fairer proceedings. However, the thrust of what I am saying is that even assuming this is true, I don't believe that the statistics necessarily prove anything. You have to have too many other statistics about how many people are in and what the standards were for acceptance in the first place, and many other factors have to be considered before you can really draw any valid conclusions from these figures.

But the question is not what is actually being done by a certain group of particular individuals at a particular time but what they can do and what they have done and what they may do in the future unless there are standards set up by Congress to prevent them from doing it. That is the thrust of what I am saying.

Mr. CREECH. Mr. Evans, I would like to inquire as to whether you feel it is a consistent position of the military representatives that administrative elimination is necessary in order to have a quick and effective means of getting rid of undesirable individuals in the service. Does this justify refusal to grant a court-martial to an individual in cases where the individual asks for a court-martial?

Mr. EVANS. I think that if the nature of the accusations is such that it is a serious crime, in other words, if the allegations are true, a serious crime has been committed, then I think that a person in the military should have the right to demand, if he wants to, trial by court-martial, and that he should then have either the right—either they have got to try him or they have got to drop it in my opinion. In my statement certainly nowhere have I set up what the standards are, but I think the Court of Military Appeals in various cases has set out standards of what a felony is in the military.

Now, certainly if the allegations amount to this type of misconduct, the person should have the right to demand trial by court-martial, and if they don't proceed by court-martial, then they would have to drop it and that would be the end of it. They shouldn't be able to circumvent the requirements of the Uniform Code of Military Justice by these administrative proceedings.

Mr. CREECH. The subcommittee has been told that one basis for administrative discharge proceedings is a consistent unwillingness to pay one's debts. I wonder, sir, if and whether you have any comments on this type of case?

Mr. EVANS. I really haven't had too much experience with the administrative discharge of the consistent failure to pay debts. I

have been involved in a case the other way around, where they were court-martialing a man that I thought should be handled administratively, but that is sort of the other way around.

Mr. EVERETT. Mr. Evans, as I understood it, in one of your answers you referred to the command influence on lawyers in the military. Do you have a personal knowledge of this, personal observation, personal experiences, or is this, as it were, hearsay?

Mr. EVANS. Well, I suppose there is a close line in determining in some instances what hearsay is. I have had told to me by lawyers things that happened to them when they were in the military which they consider and which I consider command influence.

However, I would like to state that this never happened to me personally during my military service.

Mr. EVERETT. What were some of the episodes related to you? What type?

Mr. EVANS. I will give you one example. There was a case where a friend of mine went to a post and as he was a first lieutenant who had just gotten into JAG, he was naturally assigned as defense counsel.

Mr. EVERETT. He was what?

Mr. EVANS. He was naturally assigned as defense counsel. And a case arose—I don't remember the offense but a valid defense that should have been used in that case was the defense of entrapment. The staff judge advocate brought in this lieutenant and said, and I can almost quote what he said to me, "Don't use the defense of entrapment."

Well, this friend of mine, nevertheless, being under a moral obligation as well as a legal obligation to use any defense he had, did use the defense of entrapment and the next time it came time for efficiency reports, which the staff judge advocate rendered on the lieutenant, my friend received—at that time there were, as I recall, for efficiency, seven steps, Nos. 1 through 7. Seven was high and one was as low as you could get. He got one. And in another area where there were five steps, one being the lowest, he got the one there. And on the written part of his comments, it was stated that he was "the most disloyal, untruthful, incompetent lawyer and officer I have ever seen."

This was what the staff judge advocate wrote about this lieutenant who used the defense of entrapment against orders.

Mr. EVERETT. What is the significance of this type of fitness report? What impact does it have, if any, on this man's career?

Mr. EVANS. Well, if this man had been a career officer, I would say his career was over.

Mr. EVERETT. Was it your impression that there was a difference between Reserve officers assigned as defense counsel and Regular officers assigned as defense counsel under the circumstances? Well, let's put it career officers and noncareer officers. That is a better way.

Mr. EVANS. No. In this particular example of influence being exerted on defense counsel, he was a Reserve officer who was not a career officer. But I have known of other instances of command influence being exercised on lawyers who were career officers.

Mr. EVERETT. What type of instances?

Mr. EVANS. For example, a career officer who was a staff judge advocate—and this is a case that was told me also by somebody who knew the facts, but, except from hearsay, I don't know this either—a

trial occurred and the staff judge advocate thought that because there was not sufficient evidence to sustain a conviction if a particular witness were not believed, which the staff judge advocate had reason to believe that this witness had lied, therefore he was going to recommend that it be reversed, but the commanding general said, "to heck with this. Don't you recommend that because I am going to confirm it anyway."

Well, he went back and changed his opinion and said in his opinion the evidence was sufficient.

Now, this may or may not be significant because the commanding general could have disagreed with the staff judge advocate anyway. But then that would have put him under the gun as to why, for the higher-ups, why did you disagree with what your staff judge advocate recommended, so he coerced his staff judge advocate into agreeing with what he thought. I think this is a good example of command influence on lawyers.

Mr. EVERETT. Under those circumstances who reviews that type of case? In the situation you mentioned it was referred to trial by the convening authorities more or less over the informal advice of the staff judge advocate. Who were the persons who would review that conviction in the first instance?

Mr. EVANS. The convening authority would be the first one, of course. The staff judge advocate would give his opinion on it, then the convening authority, and then it would come up to a board of review—assuming it was a general court-martial situation, which it was in this case.

Mr. EVERETT. In answer to one of Mr. Creech's questions pertaining to the administrative discharge you mentioned that the board which hears the case knows that the commanding officer has made up his mind that he wants a discharge. What is the difference between that and a court-martial? Wouldn't the members of the court-martial know that the commanding officer had a certain result in mind when he referred the case to trial?

Mr. EVANS. That is one of the real problems that people have been having in trying to administer the code. I don't think there is any real difference in kind, only in degree. I think there are many statements, almost anybody who sits on a court knows that well, the accused is supposed to be innocent until he is proven guilty beyond a reasonable doubt, and they hear many statements throughout their military cases, they are supposed to decide the case on the evidence presented, whereas they don't get this training in connection with the administrative procedure boards, and so forth. But still it is not different in kind, I don't think.

Mr. EVERETT. In the example that you related you had heard about, you referred to the friend "naturally" being assigned as defense counsel since he was just on active duty. Was this assignment because of his lack of experience? What are the policies, if any, that govern the assignment of lawyers as defense counsel or trial counsel?

Mr. EVANS. That is hard to say and I would not be qualified to say what it was in all commands. I can only say when I was on active duty, which by the way ended in 1957, and my experience since then would give me no further information on this policy, but from 1954 to 1957 roughly, in many commands, it was the policy to assign either

the most inexperienced lawyer as defense counsel or the most incompetent.

Mr. EVERETT. With reference to your comments that the administrative discharge was used to circumvent the requirements of the Uniform Code, could you indicate which requirements, if any, of the code were viewed as so onerous that they would be circumvented in this way?

Mr. EVANS. Well, a requirement that there be some evidence, some competent evidence to sustain a finding. And the requirement that at least in general court-martial situations that the accused be represented by competent counsel, and in any event, by counsel of equal competence with the prosecution. The eventual review that especially a general court-martial would receive. Offhand that is just about all the ones I can think of.

Mr. EVERETT. My final question relates to an answer you gave earlier. You spoke of the criterion for determining whether a lawyer was reasonably available to act as a defense counsel. Did reasonable availability mean simply whether there were enough lawyers to assign to this particular person who requested an attorney, or was there in some of the commands that you were acquainted with a policy of not assigning lawyers as defense counsel on——

Mr. EVANS. I can't say whether it was a general policy because my experience in that area has been somewhat limited, and I have had only maybe one case in any particular command or any particular group. So I couldn't say. But in the cases I am familiar with, there has seldom been a lawyer assigned as defense counsel for the reason that one was not reasonably available.

Mr. EVERETT. Thank you.

Senator ERVIN. Thank you very much, Mr. Evans, for coming before the subcommittee and giving us the benefit of your observations. We appreciate your coming.

Mr. EVANS. Thank you, sir.

Mr. CREECH. Mr. Chairman, the next witness is Mr. Neil B. Kabatchnick who is a member of the bar of the District of Columbia and secretary of the Military Law Committee of the District of Columbia Bar Association.

Senator ERVIN. We are delighted to have you, Mr. Kabatchnick.

## STATEMENT OF NEIL B. KABATCHNICK, SECRETARY OF THE MILITARY LAW COMMITTEE OF THE DISTRICT OF COLUMBIA BAR ASSOCIATION

Mr. KABATCHNICK. Mr. Chairman, I am Neil B. Kabatchnick, a member of the bar of the District of Columbia, secretary of the Military Law Committee of the District of Columbia Bar Association, and I am presently serving as chairman of a subcommittee of the military law committee on administrative separations.

I have previously submitted to the committee a prepared statement outlining the views of the membership of the subcommittee and of the Military Law Committee of the Bar Association of the District of Columbia. If it please the chairman I will address my remarks specifically to those areas which I have set out in detail in this statement, or if the chairman so desires, I will read the text of the statement. I

realize the lateness of the hour and I feel if I can confine my remarks to the statement——

Senator ERVIN. I will direct that your entire statement be put in the record at the conclusion of your remarks, and I would like to say that I have read your statement and I think you have done a very fine job in preparing it.

Mr. KABATCHNICK. Thank you, Mr. Chairman.

Senator ERVIN. It is an extremely useful, lucid statement and it shows a great amount of understanding of this problem.

Mr. KABATCHNICK. Thank you, Mr. Chairman.

In my statement I indicated that we feel that with regard to administrative separations, there are four basic areas which warrant exhaustive study not only by our committee but by this subcommittee as it affects constitutional rights of the serviceman.

First we feel that it is significant to address ourselves to the basis for the discharge.

Secondly, to the procedures of the discharge.

And thirdly, the review process once the serviceman is eliminated or discharged from the service. And in that regard, the procedures for review of discharges before the Board for Correction of Military Records.

As I indicated in my statement, Mr. Chairman, the basis for the discharge today, of the administrative discharge, generally falls in the four categories of unsuitability, unfitness, security reasons, and misconduct. Although we do not have specific statistics before us, we do feel that the great majority of cases of administrative discharges entail the first two categories of unsuitability and unfitness.

At the present time the administrative regulations governing the administrative discharge of military personnel set out with a great deal of precision the criteria for the discharge, such as the dishonorable failure to pay debts, unclean habits, homosexuality, and things along this line.

However, we do feel that there is a need in certain areas of greater specificity of the criteria, particularly as indicated in our statement. We feel that there are two specific areas that need clarification. One is the criteria involving what has been described as frequent involvement with civil or military authorities. The significance of the need for clarification in this area is that the regulations do not indicate whether an article 15 offense and two special courts-martial and one summary court-martial, or whether five article 15 punishments or three special courts-martial will serve as a basis for criteria for initiating administrative separation action. We feel there is a great need for clarification in this regard.

The other criteria which we feel needs clarification deals with the criteria of what we call or what is designated as conduct of a discreditable nature. Here again we feel that this is a catchall phrase. It is unclear, and there is great need for clarification in this area.

Now, in the matter of unfitness—well, before I go into that, there are two other things that I would like to comment on, Mr. Chairman. With regard to unsuitability, we feel that the criteria or the principle there of the basis for the discharge not being necessarily that of willful behavior, such as where there is a personality or character defect, these individuals should be eliminated from the service.

However, in this regard we do feel that the practice of not affording the man an absolute right to be heard before he is eliminated is an extremely persistent and prevalent defect in this system which should be corrected.

With regard to unfitness, this type of elimination or separation from the service involves, generally speaking, what might be described as deliberate or premeditated acts on the part of the individual. This entails sexual perversion, drug addiction, what is described as established patterns of shirking, and established patterns of dishonorable failure to pay debts. Where there is willfulness of deliberate premeditated action on the part of the individual, I think it is quite appropriate for the service to have the authority to eliminate such an individual. However, we feel that there is some need for clarification of certain of the criteria, and more important, an examination of the procedures under which the individual is eliminated from the service.

Probably the most difficult case that falls under the category of unfitness is the case involving sexual perversion, and in this category the most prevalent type of case is the individual who is accused of homosexual practices or indulgences or tendencies. It has been my own personal experience that in this type of a case you not only have to argue the actual facts and to convince the intellect of your court or board, as the case may be, but you have to also deal with the emotional factor. In our society this type of behavior is not condoned and certainly within the Military Establishment it is a very serious type of case and one which, as the system exists today, is felt that this type of individual must be most expeditiously eliminated from the service.

With regard to the procedures for discharge, I have had the privilege of observing the proceedings before this subcommittee during several of its sessions, and I do not want to sound repetitious because I think the committee—our subcommittee's position is quite clear from our statement. I do wish to comment briefly upon certain of the existing procedural practices which we feel merit the committee's attention and possibly the promulgation of either statutory criteria for procedures such as the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure. The process of initiating an administrative separation action, generally speaking, is accomplished through a notice being tendered by the individual's commanding officer setting out that it is deemed appropriate that he be considered for elimination from the service because of certain conduct or occurrences or events which have come to the attention of the commanding officer.

This is put in writing and under existing regulations the serviceman is advised of the general nature of his chances, his right to counsel, of his entitlement to file a statement in reply to the charges, to request a hearing or to waive his right to be heard and to tender a resignation.

We feel that one of the greatest deficiencies in the existing system is with regard to the time factor in which an individual is afforded the opportunity to respond to the proposed action. It has been my personal experience that in the average situation the serviceman is given somewhere between 24 and 48 hours in which to make a decision

which will affect him the rest of his life. We feel in this regard that it may be well that the regulations be changed to accord the man, say, 7 to 10 days in which to make his decision as to the manner in which he will proceed.

With regard to the matter of counsel, the regulations provide that the man shall be advised that he can have military counsel furnished by the military service or he can select military counsel of his own choosing, or he can retain civilian counsel at his own expense.

With regard to the existing regulations and procedures, one of the things that we feel is a deficiency in the system is the term "military counsel" or the term "counsel." As many of the witnesses have indicated here today, and as a practical matter, counsel provided to the man is not necessarily a member of the bar. Usually he is an individual within the chain of command of the convening authority, or he may, if the man knows another officer in whom he feels he has confidence, he will ask him to represent him before this board of officers.

We feel there is need for the clarification of the term "counsel." The ideal situation, as every witness who has appeared before probably has said, is that these individuals who appear before these administrative boards should be furnished counsel who are members of the bar.

With regard to the practice of affording the man an opportunity to furnish a statement in reply to the charges that are made against him, we feel that there is an extreme need for improvement of the system. In many of these cases, if not the vast majority, or almost invariably, counsel is confronted with the situation of not only responding to charges made against the man but also to admissions or statements that the man has made before he retained counsel. This again, we feel, is an area in which clarification is needed.

Another problem is with regard to the composition of the boards. As two of the preceding witnesses here today indicated, and as many of the other witnesses that appeared before this committee have indicated, we feel that there is need for reconsideration or further examination of the practice under which the boards are established and particularly with respect to removing any possibility whatsover of command influence.

Another area in which we feel that the procedures warrant further consideration is with regard to the matter of the rules of evidence and procedure governing these various boards of officers. Hearsay evidence, irrelevant evidence, not the best evidence, is almost invariably introduced into the proceedings, and particularly with regard to those situations where a man has made a statement, where conceivably his constitutional rights, particularly his right against self-incrimination, have been violated.

We have in our Federal judicial system today the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. We have the Uniform Code of Military Justice. We feel that it is just as important in this phase of judicial or administrative practice, that firm legal standards and procedures be established by which these boards of officers will be governed and required to adhere in their adjudication of administrative proceedings within the Military Establishment.

Mr. Chairman, I think just a few moments ago you commented on the number of cases that are involved. Whether it is 8,000, or

30,000, or 80,000 cases, these are cases where the rules should be uniform and that the rights of the individuals are fully protected. This, we feel, is probably the most important and urgent need today as far as administrative separations are concerned.

Before these boards of officers, and in conjunction with rules of procedure, as it affects the constitutional rights of the individual, we feel that there is an absolute and imperative and urgent need for the provision for subpena power before these boards and also provision for pretrial discovery. These are nonexistent today. We feel that these are urgently needed in order to protect the rights of individuals who appear before these various boards. Without the right of subpena power and without discovery procedures the rights of these servicemen are being daily, and continuously, prejudiced by these boards.

With respect to the provisions for formal procedural requirements, I believe that it has always been the intent of Congress in creating administrative agencies or forums and administrative practices and procedures, that it has delegated down to these administrative bodies functions which might otherwise be considered in constituted judicial bodies such as our Federal court system. I think that in delegating this power down to these administrative bodies, Congress has continuously attempted to preserve the rights of the individual as protected under the Constitution of the United States.

Today, without these procedures, without subpena power, without discovery procedures, without standard rules of evidence, we do not have full protection under the Constitution of the United States.

With respect to the review of military discharges, as indicated in my statement, Mr. Chairman, we feel that as long as one individual today walks the streets of this Nation with an other than honorable discharge and as long as administrative discharges will continue to be used as a vehicle for the separation of an individual from the service, we do feel that there is a need and an imperative need for a discharge review board system.

I am not cognizant of whether or not this subcommittee has had it brought to its attention that the discharge review boards are boards of very limited jurisdiction. They can only change the character of the discharge. The criteria for the change in the discharge is whether or not the discharge was issued improperly or inequitably. There is no provision for an evaluation of whether or not the discharge was issued illegally.

I think that in this regard broader jurisdiction of the discharge review boards might be appropriate. In this regard also, as I have indicated, with respect to the board of officers, there is today no provision for subpena power or for discovery procedures before the discharge review boards. The burden of proof is upon the applicant. He has the burden of showing the discharge review board that his discharge was issued improperly or inequitably, and this places a tremendous burden upon the applicant. Amongst other considerations it requires him to go out, and to seek witnesses who had direct knowledge of the circumstances or the occurrences under which he was separated. In many cases the individual witness is no longer in the service or he might be a hostile witness, and in those circumstances, and it has been my own personal experience, it is almost humanly im-

possible to secure at least, say, even a written statement from these witnesses as to their personal knowledge of the occurrences.

It is our observation that there is a most urgent need that the organic act governing the discharge review boards be amended to provide for subpena power and discovery procedures.

As I recall the testimony of one of the witnesses that previously appeared before this subcommittee, reference was made to the fact that the serviceman who leaves the service with an other than honorable discharge, is afforded an opportunity to appeal to two boards, the Discharge Review Board and the Board for Correction of Military Records.

However, I do not think it was brought to the committee's attention that the Boards for Correction of Military Records, as they function today, do not afford the man the right to be heard. It is a matter of grace or privilege that he be heard by the Correction Boards.

It is the feeling, I would say, of every lawyer that has ever practiced before the Correction Boards that the organic act of the Correction Boards should be amended to provide the man a right to be heard.

It is true that in discharge cases the individual has at least one forum, the Discharge Review Boards, where he has the right to be heard. However, the man who has an other than honorable discharge is confronted with an extreme dilemma by virtue of the limited jurisdiction of the Discharge Review Boards, where he can only have the character of the discharge reviewed. He does not have a right to be heard in those cases where, for instance, he would want to be restored to active duty in the event his discharge was deemed to have been improper or inequitable. In other words, if a man is eliminated for homosexuality, and is given an undesirable discharge, he has as a matter of law today, the right to go to the Discharge Review Board and to be heard as to whether the character or the nature of the discharge was improper or inequitable. But if that man has a good case, or in his judgment he has a good case, and he feels that not only was he improperly put out of the service but that he should be given the right to be restored to active duty and to finish out his military career, particularly in those cases—and I can think of one case, Mr. Chairman, where the man had 19 years and 2 months of service and he wanted to get back in to finish up those couple of months or couple of years, he cannot get that relief from the Discharge Review Boards. He has to elect whether he will exercise his right to a hearing before the Discharge Review Board or go to the Correction Board and sort of go for broke as far as getting not only relief from the character of the discharge but getting back on active duty.

The important thing in making a decision, in resolving that dilemma, is that the man does not have the right to be heard before the Correction Board.

We feel also that second only to the matter of having the right to be heard, that the organic act of the Correction Board should be amended to provide for subpena power and discovery procedures which today are nonexistent. Here again the applicant is confronted with the situation of having the burden of securing probative evidence to indicate that the testimony of a witness would result in relief in the case—but he has no power of compelling the testimony of that witness.

In this regard we fell that this is a second only to the matter of the right to be heard. This is a matter which should be immediately resolved through legislation.

In this regard also there is the defect we feel in the use of advisory opinions by the Correction Board. In the review of the prior discharge action, the matter may be referred by the Correction Board to a staff agency such as the Judge Advocate General's Office for a legal opinion, or to an investigative agency for interrogation of witnesses or something along that line. The report is then furnished to the Board but the applicant is not afforded an opportunity to cross-examine the individuals furnishing the advisory opinions to the Board.

Here again we feel that the applicant is being deprived of his right of confrontation and cross-examination in being denied access to these witnesses.

Another problem as far as due process of law is concerned is the matter of the applicant not having available to him a complete record of all of the information that is being or was used as the basis for discharge.

For instance, the applicant is being denied access to investigative reports from intelligence agencies or intelligence agents who interviewed witnesses, the results of polygraph tests, and the results of even medical evidence used by the Boards in their evaluation of a man's service. This is a deficiency in the system which we feel affect the constitutional rights of the man and should be corrected.

Basically the function of the Discharge Review Boards and the Correction Boards is meritorious. We feel that there is a need for these Boards particularly for the Correction Boards.

One other point, Mr. Chairman, which we feel may be of value to this committee in affecting its judgment on the constitutional rights of servicemen is the use of not only boards of officers functioning under unsuitability and unfitness regulations but other types of boards under which an individual can be separated from the service, and before which he has few, if any rights whatsoever. I am referring to such boards as the Active Duty Boards, the Boards for Medical Survey, Disability Appeals Boards, and Selection Boards where the man has no right to be heard or representation. There are also Physical Evaluation Boards, Elimination Boards, Reduction Boards, and Disability Review Boards.

In these latter categories there is some provision for hearing or an opportunity to be heard, but the same deficiencies which I have noted with respect to boards of officers exist, if not more so within the framework of these boards. Of course, as a result of consideration by these boards, a man will be, or can be, separated from the service or relieved from active duty. The functioning of these boards warrants very exhaustive consideration and study.

Probably one of the most important pieces of legislation which is needed, and I think Mr. Kendrick, Chairman of the Military Law Committee, will comment upon it in greater detail, is the need for subpena power under article 32 of the Uniform Code of Military Justice. What we are also concerned with, and I think an area where probably the most frequent occurrence of violation of constitutional rights takes place is with respect to the warnings which are furnished

a man or the requirements under article 31 of the Uniform Code of Military Justice. Judge Ferguson, of the U.S. Court of Military Appeals, I believe, the other day was asked about this point of the warnings furnished a man or the necessity of counsel, and I think Judge Ferguson pointed out the problem quite succinctly and clearly when he said, "the time when a man needs a lawyer most is usually when he is just arrested." And in this regard I would say that in the vast majority of these administrative discharge cases, you are fighting the man's own statement, which may have resulted from the violation of his constitutional rights against self-incrimination, and also degradation.

There has been reference made to the matter of the availability of counsel in these administrative boards, the fact that there are tens of thousands of cases and that there are only slightly in excess of a thousand lawyers on hand.

We have not studied the problem in our community specifically, although I just briefly brought the matter to the attention of Mr. Kendrick, Chairman of the Military Law Committee, but we feel that if there is such a shortage of lawyers in the Military Establishment, that the local bar associations in the jurisdictions where military installations exist, that there could be some arrangements made whereby the service of lawyers in the vicinity of installations could be made available, something through the legal aid system or the lawyer referral services that are now in operation throughout the country. This is something that may help to alleviate the problem of the shortage of lawyers.

I think also in that regard that as a practical matter there is need for possibly greater incentives for young lawyers leaving law school to stay on in the military service. The emoluments presented to them in the military may be improved and therefore may serve as an incentive for their staying on in the service.

In summation, Mr. Chairman, with regard to the correction boards, we feel that the most urgent piece of legislation is an amendment of the organic act to provide for an automatic hearing, particularly because of the various types and ways which servicemen can be eliminated where they have no right to be heard whatsoever. Secondly, is the urgent need for giving the correction boards, the discharge review boards, and the various boards of officers, subpena power, pretrial discovery procedures, and formal standards or rules of evidence.

Senator ERVIN. Is there any legal or practical objection to consolidation of the Discharge Review Boards and the Boards for Correction of Military Records?

Mr. KABATCHNICK. Under the existing legislation I would answer—and this is my own personal judgment, Mr. Chairman—under the existing legislative authority, as long as the man does not have the right to be heard by a board for correction of military records there is an imperative need for the preservation of the Discharge Review Boards. Until such time as the Congress sees fit to amend the organic act of the Boards for Correction of Military Records, to afford the man the absolute right to be heard, I think that the existing system of at least giving the man at least one opportunity to be heard must be preserved. I think that one of the prior witnesses from one of the

service departments indicated or brought to the attention of the committee the fact that in the discharge review boards you have military personnel and in the correction boards you have civilian personnel. However, there are two different standards for relief. At the discharge review boards, in theory all you have to show is that the discharge was either issued improperly or inequitably. The standard of relief, in theory, before the correction boards is whether the applicant has been subjected to a material error or injustice. But in addition to this burden of proof, a greater burden is placed on the applicant; namely, furnishing a basis to warrant a hearing. This lack is formidable as evidenced by the fact that in the vast majority of cases the applicant is even denied a hearing before the correction boards.

Now, the statute, the organic statute does not set out the test for relief other than to say that the Secretary may, through boards of civilian officers, and employees within the respective departments, correct records where an error and injustice has been done. If my recollection of the statute is correct that is the only standard, the only guide, that was established.

Now, what the services have done, they have established administrative regulations under the procedural authority granted to the Secretaries whereby they have established a discretionary authority for the granting of a hearing. In addition to that, they not only say that you do not have the right to be heard, but they place a test which we feel is extremely nebulous, to say the least, that you must give an indication of material error and/or an injustice being done.

Now, we feel that there have been numerous cases where if nothing else but an indication of error and injustice has been submitted to the board, the man has even been denied an opportunity to be heard by the board. So that the man really has a tremendous, an almost insurmountable burden placed upon him in order to get relief. Not only relief, but at least the opportunity to be heard by the board. And as I say, and I wish to emphasize, Mr. Chairman, that there are not only these boards of officers who eliminate a man, but you have these other boards such as active duty boards, selection boards and boards of medical survey by which a man is cut off not only from continuation of his career but he is deprived of his constitutional rights to defend himself before such action is taken.

So that until such time as Congress sees fit to change their statute to provide for an automatic hearing, it is the consensus of opinion of the members of the Military Law Committee, and it is my personal opinion, that the existing system should not be changed. There is a need for a change definitely. There is a definite need for a change.

Senator ERVIN. That is the reason I was asking the question whether it would be desirable to create a post-discharge board with the jurisdiction of both of these boards and with the right to be heard, because it certainly is not one of the principles of justice to say that a man can be admitted into a courthouse only by discretion.

Mr. KABATCHNICK. Well, I think the closest analogy I can come to is the process under which we proceed before the Supreme Court of the United States, but I think that the intent of Congress was to afford the serviceman a forum in which he could be heard—where injustices, inequities have been done to the man, that he would have a forum for

relief. But I think as long as the man is being deprived of the right to be heard, the intent of Congress has been frustrated. And it is being frustrated. And the individual serviceman's constitutional rights are deprived him.

Senator ERVIN. I think it is possibly due to the fact that I have had my judicial experience in a state which gives a man an absolute right to appeal, providing there has been a final judgment against him.

Mr. KABATCHNICK. At least in the judicial system you have had your day. In the system you have had your day in court, you have been in trial court, and then your intermediate appelate bodies or the circuit courts of appeal. So at least you have had two forums in which your case has been considered. But here, particularly in those cases not involving a board of officers, you have absolutely no right to be heard whatever.

I would be glad to answer any questions which the Chair or members of the committee might have.

Senator ERVIN. Well, you have made a most thoughtful statement and you make some very thoughtful suggestions and recommendations which the committee appreciates very much.

Mr. CREECH. Mr. Kabatchnick, with regard to the Board for Correction of Military Records, can the board restore an applicant to active duty status?

Mr. KABATCHNICK. Well, as the committee is probably aware, the board merely makes recommendations to the Secretary of the respective service. It has the power to recommend that not only that the discharge be declared to be in error and unjust but that the man be restored to active duty or, for instance, in the case of a break in service, they can even create service. They can correct the record to show that a man has served X number of days, months or years, and they do have plenary power to recommend that the man be restored to active duty.

For instance, in an analogous field of disability retirement cases they can correct a record to show that the man was retired by reason of physical disability on X day rather than, say, discharged for years of service or retired or something along that line. So that they can recommend to the Secretary that he not only vacate the discharge, wipe out the discharge, but to restore him to active duty retroactive to the date that he was actually discharged.

Mr. CREECH. Now, in the case where the recommendation is made that he be restored to service or be granted relief, and the Secretary agrees to do so, then the individual involved receives compensation for service from that date?

Mr. KABATCHNICK. That again is discretionary. The relief of correction boards is discretionary in nature. In other words, they can provide for the payment retroactive to the day that the man is discharged. If, for instance, in a disability case he should have been retired by reason of physical disability, they can provide for the payment of the emoluments to which he would otherwise have been entitled.

Another thing that the correction boards can do is this: they can recommend that the man's discharge be vacated and that a waiver be granted to him. As a practical matter, this is mechanically one way that it can be done, and probably the most feasible way to be done,

that when the man is completely out of the service, he has to be placed back into a duty status and he can be granted, say, a waiver for reenlistment purposes, assuming he is in physical condition to be returned to a duty status. They can do it that way also.

There was one other factor which I overlooked which I would like to address myself to, and that is with regard to the time limitation.

I understand that there is legislation pending to extend the time limitations as far as the correction boards are concerned. At the present time it is a 3-year statute with an escape clause. I presume that the 3-year statute will be strictly enforced except for unusual cases of mental irresponsibility. We have generally a 6-year statute of limitations in a cause of action against the Federal Government. Before the discharge review boards you have a 15-year statute of limitations. And in the Court of Claims you have a 6-year statute of limitations.

We feel that for purposes of uniformity a minimum of 6 years should be established. Ten years would be fine, or 15 would even be better to conform to the statute of limitations governing the discharge review boards. There should be that uniformity.

I might also point out that we feel that if the serviceman is going to be eliminated from the service via an administrative discharge, he should be furnished notice of his right to appeal to the discharge review boards and/or the correction boards. Many, many of the cases that have come to the attention of the members of the bar in this jurisdiction are cases which are barred by the statute of limitations, either in the Federal courts or otherwise, and we feel that this is another procedural point which should be corrected.

Mr. CREECH. You would make that provision, then, mandatory?

Mr. KABATCHNICK. Yes.

Mr. CREECH. Would a case in which a serviceman was restored to duty as of a retroactive date, a situation in which no compensation was provided for, be the basis for the serviceman's bringing a suit against the Government for compensation for that period?

Mr. KABATCHNICK. Yes, sir. I think that with a showing that such a withholding of compensation was arbitrary and capricious, arbitrary and/or capricious, I think that might be a basis for a claim in the U.S. Court of Claims, and I think there have been cases on that point. There has been a recent case on that point.

Mr. CREECH. It is our understanding unofficially that this is one of the objections of some of the military people to this type of position. They are afraid if this is done extensively that it will open up all sorts of litigation in the Court of Claims seeking compensation from the Government.

Mr. KABATCHNICK. Well, this is a very sensitive subject personally with me because time and again, and even within these very hearings, it has been said, well, the workload will be increased on costs, and so on and so forth. As long as one individual's constitutional rights are being placed in jeopardy or prejudiced, I feel that there is no limit of money that should be expended to see that that right is protected.

In this regard one witness indicated that the subpena power of boards of officers and discovery procedures would be burdensome and expensive to the Government because witnesses would be overseas

or the boards would have to be held overseas and the individuals would be here in the zone of the interior.

This I think is an extremely fallacious argument because the simple way it could be resolved is through the propounding of interrogatories, if nothing else, if depositions were not available—interrogatories and cross-interrogatories. So I think saying that it would be burdensome, expensive, and cumbersome, as far as discovery and subpena power, would be and is extremely fallacious.

Mr. CREECH. Pursuing that line, would you care to comment on the questions which have been posed earlier concerning the safeguards which are available to the individual when he is called before a board which has the authority to give him an administrative discharge?

Mr. KABATCHNICK. Well, as I have indicated earlier, probably one of the most perplexing prevalent and extreme problems as far as the violation of constitutional rights is concerned, is the matter of the availability of counsel. Now, you have got to bear in mind, if I may say so, that in many of these administrative discharge cases, particularly in the case of the homosexual, the man is not what might be described as the—I loathe using the term, but it may be appropriate here—the criminal type of individual.

Through one means or another an allegation is made that the man committed a homosexual act or manifests the existence of homosexual tendencies. I can think of a case which transpired within the last 6 months where an individual was—an accusation was made along that line. The accusation is so repugnant to our society that I would venture to say that in 90 percent of the cases, the man, when confronted with the allegation, number one, goes through a traumatic period where he just doesn't know what to do.

He doesn't want to confide in his family or doesn't know who to turn to or what can be done. The only one logically he could routinely turn to would be his counsel. He is afraid of exposure to his family. He is afraid of exposure to his contemporaries. So the easy way out that is proposed to him is to sign a waiver.

He will then turn to his counsel. The question comes up, now, What evidence do they have against you? How can this be defended? What witnesses would you call and how would you defend the case?

These are extremely difficult cases and a lot of times it involves the credibility of witnesses or the opinion of expert medical testimony, and if I may say so, it is difficult for a member of the bar to evaluate this type of evidence. So that I feel that until such time as the individual serviceman has the benefit of trained legal counsel, his opportunity of having his constitutional rights denied is quite great.

I can think of a board proceeding where the legal member of the board asked the military counsel: "Have you ever had any experience in this type of case?" And the military counsel said: "Well"—and this was a proceeding in late 1960 or early 1961, and on the record the military counsel said: "Well, I was a recorder back in 1953 and I have forgotten most of the procedures." And yet the board of officers proceeded with the case with full knowledge of this on the record and gave the man an undesirable discharge.

Hence we feel that there is a great need for counsel.

Mr. CREECH. You do not feel recorders necessarily are always adequately informed and necessarily a neutral party?

Mr. KABATCHNICK. Sir?

Mr. CREECH. With regard to the recorder, you do not feel that he is necessarily always informed or a neutral party?

Mr. KABATCHNICK. I think the other day the question arose as to whether or not administrative board-of-officer proceedings are adversary proceedings. It is my personal opinion these are the most fundamental of an adversary type of proceeding. They call them show-cause proceedings or elimination board hearings or board-of-officer hearings, but they are still an adversary proceeding in every sense of the word, and I just think it is most repugnant to our American judicial system. As I think Judge Ferguson said, or Chief Judge Quinn said: "It takes an awfully strong individual to represent both sides of the fence." And I think it should be made a mandatory requirement that the individual at least be afforded, if nothing else, "military counsel."

I might note that in the District of Columbia, in our divorce proceedings, which I feel are not quite as important as the discharge proceeding, but in the District of Columbia before an individual can be granted a divorce, the law requires that the defendant be furnished counsel, a member of the bar of the District of Columbia. I think that if the Congress has seen fit to make it a mandatory requirement that in a divorce proceeding an individual has the right to representation by counsel, I think it is one hundredfold more important that an individual who is going to be faced with serving a life sentence by virtue of an undesirable or an other than honorable discharge—I think the requirement of counsel is pointed out quite clearly.

Mr. EVERETT. I have only one question, Mr. Kabatchnick. If the subpena power is extended to the various boards as you contemplate, isn't there a possibility of abuse—as has occurred in some cases where the defendant who was accused requested that everybody from the commanding general on down, some 30 or 40 witnesses, be subpenaed?

Mr. KABATCHNICK. I am not aware of a case where this type of situation has arisen.

Mr. EVERETT. There is one in the——

Mr. KABATCHNICK. But I will say this. It has been my personal experience that I have had to justify time and again why I wanted the statement of my own man. Why did I want my own man's statement? What use did I want to make of it? Why did I need the results of a lie-detector test? Why did I need the names of witnesses?

I think that it is grossly in error to make such a representation, and I think this: I think that it is a most fallacious argument, especially if there are members of the bar representing the individual, because we have subpena power available to us every day in the week in the Federal courts and in our local courts, and I am sure, Mr. Everett, you have had the same opportunity available to you in your jurisdiction. And I have not had one complaint ever come to my attention where a member of the bar of the District of Columbia abused his use of subpena power, and I don't think that in military cases you would find that it—it may be a rare or unique occasion where subpena power would be abused but I think it is quite fallacious to say on that premise that subpena power would be abused.

Mr. EVERETT. I was thinking particularly of the *De Angelis* case where the defendant in Europe requested the presence of everybody from General Eisenhower on down. That is the case I was thinking of.

Mr. WATERS. I have a couple of questions. As I understand it, you are requesting authority for subpena for a witness presumably on behalf of the defense in these board hearings.

Mr. KABATCHNICK. Yes, sir. At least for the defense.

Mr. WATERS. And the reason for that is because the authorities can usually secure the testimony of such witnesses they need by military orders?

Mr. KABATCHNICK. Yes, sir.

Mr. WATERS. Would you also provide that depositions could be taken on behalf of the defendants proper application?

Mr. KABATCHNICK. Yes, sir. In other words, as it exists now, there is absolutely no provision for discovery procedures. It is said: "Yes, the man can submit statements in his own behalf," that he can bring in his own witnesses that are at least, say, reasonably available. But in many of these cases, particularly where that might be, say, as brief a period as a month's time involved between the charges and the hearing, many of these witnesses are transferred to other installations or may be discharged from the service, so that the individual has nothing but his own good will that he has established in the past to ask these individuals to come forward. And also it is extremely important in the case of a hostile witness. It is extremely important.

For instance, in many of these homosexual cases, time and again it is a matter of a civilian police authority making the accusation, and then when a board of officers or an elimination board is convened and the respondent says: "All right, now, let's bring in the police officer," the civil authorities will find some reason, such as the unavailability of funds to transport him to the military installation, to make him nonavailable.

So until such time as the respondent has subpena power, and concurrently with that or as the result of that the right of confrontation and cross-examination, his constitutional rights are being violated. He does not have the right of confrontation today. He does not have the right of cross-examination. And this extends not only to the cases involving a board of officers. It extends to the discharge review boards and to the correction boards, and to these other various boards which I have alluded to.

Mr. WATERS. Your suggestion, then, would be that the defense be provided with a deposition right similar to that available under the Federal Rules of Civil Procedure.

Mr. KABATCHNICK. Yes. I think very easily the system for the establishment of rules of procedure comparable to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure and/or the Uniform Code of Military Justice could be applied to these cases.

Mr. WATERS. One other point you brought up was that of utilizing the services of local counsel in areas where military counsel might not be—the term is "reasonably available." Was it your suggestion likewise that compensation be provided for these local lawyers through some type of public defender system?

Mr. KABATCHNICK. I will be very frank to say that Mr. Kendrick and I only discussed this briefly. The thought came into my mind with regard to this problem or the allegation or representation that there is a shortage of personnel. There is an extreme one when you consider that there are 15,000, 8,000, 10,000 or 15,000 of these cases a year and you have 1,000, 1,200, or 1,400 military lawyers who also have to cover claims, contracts, eminent domain cases, real property cases, patent cases. The workload of the average military lawyer—he has a tremendous burden, and if these cases are going to be thoroughly reviewed, thoroughly investigated and the individual given good and adequate representation you have got to have the time to do it and it takes in our experience quite a bit of a lawyer's time to really investigate these cases, to interrogate witnesses and even sometimes just to review the military record that he has before him. The American Bar Association has a committee for furnishing legal assistance to the military authorities at the various military installations throughout the country. Also the bar association in almost every State—well, every State bar association and many of the municipal bar associations have a lawyer referral service in which attorneys who are experts in the various fields are available for the individual who needs a lawyer in a particular field at a patricular time. So it would seem to me that, through these facilities, the need for counsel could to a marked degree be alleviated.

Mr. WATERS. What bearing would civilian participation have on military justice?

Mr. KABATCHNIK. Frankly, I think it would improve it.

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

Senator ERVIN. The committee is indeed grateful to you for your appearance.

Mr. KABATCHNICK. I consider it a privilege on behalf of our committee, Mr. Chairman. Thank you very much.

(The prepared statement of Mr. Kabatchnick is as follows:)

STATEMENT OF NEIL B. KABATCHNICK

Inevitably, in a society as large and complex as the Military Establishment, there are and will be individuals who, for a variety of just and appropriate reasons, must be involuntarily removed from the service in the interest of national security, the preservation of good order and discipline, and for the sound and efficient operation and administration of the military services. In order to accomplish the removal or discharge of such individuals there will continue to exist within the framework of the armed services the need for administrative types of discharges. Commensurate with the need for such discharges, there exists the further requirement for the maintenance of uniform standards and procedures for effecting the separations. Of paramount import, there is a very definite need for the perpetuation of a system for reviewing the separation actions to insure that they have been accomplished properly and equitably, consistent with the concept of due process of law. In view of the number of individuals who are affected, as well as those potentially affected, by administrative separations as evidenced in the statistics quoted in Report No. 515 of the House of Representatives dated June 13, 1961, and in view of the drastic effects on an individual in receipt of an other than honorable discharge in civilian life, it appears that past experience has demonstrated the necessity for the evaluation or appraisal of certain aspects of the system for accomplishing these separations. Fundamentally, the areas for consideration in such an evaluation appear to concern the basis, reason, or authority for discharge; the procedures to be followed in effecting the separation; and finally the process for review of the discharge action.

### BASIS FOR DISCHARGE

The existing criteria for the administrative separation of those individuals whose character, behavior, or performance are considered of such a nature as to warrant separation has been rather clearly defined. Basically there are four broad general categories, that is unsuitability, unfitness, misconduct, or security. Within each of the general categories specific factors have been designated as the standards for determining the initiation of a separation action. In evaluating the existing system for the administrative discharge of military personnel it appears appropriate that these categories and specific standards be examined.

*Unsuitability*

In the interests of sound and efficient operation and administration of the military services it is imperative that the Armed Forces have the authority for the elimination of those individuals deemed to be unsuitable for continued service. Within this category fall those individuals who, generally, through no fault of their own, manifest an ineptness or inability to adjust to a military environment. These are individuals who, because of a physical or mental impediment, or who possess character or behavior defects or deficiencies, or lack minimal aptitude levels, impair the functioning of the individual's organization. The necessity for their removal is self-evident.

Although not expressly stated therein, the regulations governing the separation of unsuitable personnel indicate that they are intended to provide for their discharge expeditiously and without any adverse effect on their future endeavors in civilian life resulting from the discharge action. Individuals deemed unsuitable as a general rule are furnished an honorable discharge although existing administrative regulations provide for the issuance of a general discharge under honorable conditions. Depending upon his length of service an individual deemed unsuitable is afforded the opportunity of appearing before a board of officers convened to determine the appropriateness of the individual's separation and the character of the discharge.

Absent any willful behavior or conduct on the part of the member, it appears that the issuance of an honorable discharge should be mandatory in these cases since the discharge action is basically precipitated by conditions or circumstances beyond the control of the individual. If there is evidence of willfulness, it appears that the separation should be characterized as being undesirable. In those cases where the separation action is initiated because of some deficiency observed in the execution of the individual's duty the performance factor now considered in the determination of the character of the discharge is inappropriate. This factor should be eliminated in the characterization of the discharge of unsuitable personnel.

Existing administrative regulations provide for the separation of an individual considered unsuitable following his being furnished notice of the proposed action and his being given the opportunity to submit a statement in his own behalf, or as indicated above, depending upon his length of service, he is granted a hearing by a board of officers unless expressly waived. Since the basic reason for the determination of unsuitability in many, if not most, of the cases within this category result from a mental deficiency or a personality disorder it is felt that merely affording the individual an opportunity to submit a statement in his own behalf is grossly inadequate. In the interest of according the individual the fullest protection of his rights it would appear that these separations should be accomplished only after the case has been considered by a board of officers at which he is represented by counsel. The criteria of length of service suggests discrimination and should be eliminated.

*Unfitness*

The regulations governing the discharge of individuals because of unfitness reflect that they are basically intended to cover acts involving deliberate or willful behavior. Existing regulations cover such activities as frequent involvement of a discreditable nature with civil or military authorities; sexual perversion; drug addiction; established patterns of shirking; established patterns showing dishonorable failure to pay just debts; and for "other good and sufficient reasons." The need for regulations authorizing the discharge of individuals whose conduct or behavior falls within these categories is apparent. Past experience does show, however, that there is a need for clarification or abolition of certain of these grounds utilized in a separation action. Of par-

ticular concern in evaluating the effectiveness of the existing grounds are the categories pertaining to "frequent involvement of a discreditable nature with civil or military authorities" and "sexual perversion."

The Uniform Code of Military Justice, articles 15, 133, and 134, provide commanding officers with an instrumentality for invoking sanctions for minor offenses or those acts not otherwise specifically covered in the punitive articles of the code. As to offenses committed in the civil society the punishment of such offenses rightfully remains within the purview of the civil authorities. It appears, therefore, that if an individual has committed an offense in either the civil or military society there are adequate sanctions available to both authorities. To additionally impose upon an individual the further sanction of an other than honorable discharge as a result of his conviction, or receipt of nonjudicial punishment, seems obviously unjust. Of greater importance in the application of this basis for an individual's discharge is the need for clarification of the terms "frequent involvement" and "discreditable nature." The existing regulations do not set out what occurrences are construed to be acts of a "discreditable nature" nor do they disclose a schedule of the number which shall warrant the initiation of a separation action. If the acts are of "discreditable nature" they are subject to disciplinary action, depending on their gravity, under either article 15 or articles 133 or 134 of the code. It would seem, therefore, that the utilization of such occurrences as the basis for discharge constitutes what might best be described as administrative double jeopardy assuming, as is usually the case, that punitive sanctions have been previously imposed on the individual for the basic offenses committed.

The problem of the disposition of homosexuals in the Armed Forces is in all probability the most difficult issue to be resolved in an evaluation of the existing system of administrative separations. In view of the susceptibility of such individuals to blackmail their elimination from the service as potential security risks is deemed imperative. Similarly, the possibility of the contamination of other military personnel within the individual's organization is considered another fundamental reason for the necessity of their immediate separation from the service. These are very cogent reasons for the administrative discharge of homosexuals, absent circumstances warranting the imposition of punishment under article 125 of the code. The problem which appears to exist, however, is the case wherein an individual is not a "true" or "confirmed" homosexual. These are the cases, for example, where an individual discloses that he has participated in a homosexual act as a result of his curiosity (particularly in his early youth) or who consented or otherwise participated in a homosexual act while in a state of intoxication. Accusation or admission to participation in such occurrences invariably results in the individual undergoing a preliminary investigation which, with extremely rare exception, results in a determination that the evidence disclosed by the investigation is of such a sufficient magnitude to warrant the immediate initiation of separation action. Although the separation processing entails an evaluation of the individual's medical status, individuals accused of, or admitting to, participation in such activity, absent the most unusual circumstances, are not submitted to psychiatric evaluation with a view toward the counseling, orientation, or rehabilitation of the individual despite the presence of factors which may appear to be in mitigation or extenuation such as the individual's qualifications, age, or years of service. If the elements of curiosity or intoxication are shown, they are construed to manifest the existence of homosexual tendencies warranting separation for unsuitability. In view of the inherent hostility of our society to homosexuality, individuals accused of being homosexual or possessing, manifesting, or exhibiting homosexual tendencies rarely will exercise the opportunity of defending themselves before a board of officers. Invariably the individual will execute a waiver, or resignation, which by inference at least, is construed as an admission of guilt and results in his being summarily discharged from the service. Despite the necessity for removal of homosexuals from the service, the zeal with which such individuals are eliminated should be tempered to the extent that justice is not sacrificed for expediency.

It is suggested, therefore, that the separation of individuals accused of being homosexual be accomplished only when it is definitely ascertained that the individual is beyond the reach of counseling or rehabilitation; that to preclude errors of judgment in the execution of waivers or resignations from the service it be made mandatory for the consideration of the individual's case by a board of officers in those instances where there is no evidence of participation in an overt act during a current period of service, where participation in an isolated

occurrence is involved, or where there is evidence to indicate that the act of the individual is that of a passive participant and where it appears that psychiatric counseling would be of immediate benefit to the individual concerned. Insofar as other forms of sexual perversion are concerned, such as indecent exposure, it is also suggested that extreme care be taken in evaluation of the individual with a view toward psychiatric counseling and ultimate rehabilitation. Sex offenses resulting from premeditated and deliberate acts by an individual warrant punitive action. Absent these elements and the reasonable expectation of success in counseling or rehabilitation the individual should be eliminated from the service.

*Security*

Individuals who violate the criminal sanctions of the code are subject to punitive action. The participation in activities adverse to the national security must result in elimination. In this regard, in order to preclude the possibility of a miscarriage of justice, the administrative regulations providing for discharge of security risks should provide for a mandatory hearing of the case by a board of officers.

*Misconduct*

The existing regulations providing for the elimination of individuals who have committed certain acts of misconduct embody such matters as fraudulent enlistment, conviction of certain offenses by civil authorities, and remaining absent without leave for prolonged periods. As long as these individuals are afforded the opportunity of being heard, particularly if there is evidence of rehabilitation or other mitigating circumstances, separation under any one of these circumstances appears appropriate.

## Procedure for Discharge

Administrative discharge action, under existing regulations, provides for notice to the inidvidual concerned wherein he is advised of the proposed separation action, the basis for the proposed action, and, depending on the circumstances, his opportunity to either submit a statement in his own behalf or to request a hearing before a board of officers or to waive such a hearing. In addition to a recitation of the specific factors considered as warranting the proposed action, the notice usually includes some reference to the commander's effort at rehabilitation of the individual, which is a prerequisite to an administrative separation action.

Although statistics are not available to substantiate the conclusion, it is generally felt by those interested in the matter of administrative separations that in the vast majority of cases the individual concerned executes a waiver (or submits a resignation) thereby waiving his opportunity to have the charges made against him considered by a board of officers. This practice gives the individual an opportunity to leave the service without subjecting himself to disciplinary action and obviates the necessity of the service proving the allegations. Invariably execution of a waiver (or submission of a resignation) is, as indicated above, construed as an admission of guilt. Presumably, to avoid error of judgment the practice has been initiated of having "counsel" available for the individual. The acceptance of the waiver is now conditioned on one consulting counsel, unless declined, and having counsel endorse the waiver or resignation. Availability of counsel should be made mandatory. One of the unfortunate circumstances in the utilization of these waivers is the practice of invoking what may be an unwarranted or prejudicial time limitation, usually 24 or 48 hours, in which the member must make his decision with respect to whether he will execute the waiver or tender his resignation.

In those cases where an individual elects to have his case considered by a board of officers the board is usually comprised of personnel, at least in part, who are within the chain of command of the convening authority or the individual's commander or of the same organization of the individual concerned. Board members are afforded an opportunity of examining the respondent's file prior to the hearings. "Military counsel is extended to the individual, but is believed that in the vast majority of cases he is not a member of the bar. Counsel is usually junior in rank to the president of the board and a member of the same organization of some of the members of the board. A recorder is appointed who functions in the nature of a trial counsel or prosecutor. The boards are not governed by the rules of evidence which consequently enable hearsay and other-

wise prejudicial evidence to be considered by the board. Supena power is nonexistent. Formal discovery procedures are essentially nonexistent. On occasion the individual's commanding officer is senior to the president of the board which creates a very real possibility of command influence particularly if the board members are subject to the command of the individual's commanding officer. The proceedings of the boards of officers are usually recorded. The member may be furnished a copy of the proceedings but there is no provision for his filing a rebuttal, or otherwise seeking reconsideration of the board's recommendations. Subsequent to the hearing by the board of officers the case is submitted to the officer exercising discharge authority who will take final action. The action of the discharge authority may be based upon a review for legal sufficency but this is not necessarily a prerequisite in effecting all administrative discharges.

With the exception of possible violation of the fifth amendment in the course of investigation of suspected acts which, if established, would serve as the basis for an administrative discharge, it appears that the area most susceptible to violation of any constitutional rights in administrative separations is at the hearing level. In this regard, exhaustive consideration or study should be directed to such matters as the necessity for the documentation of the precise efforts made at counseling or rehabilitation of the individual; the practice of using "statements" in separation action; the establishment of standing boards of officers comprised of personnel who are not within the respondent's organization; provision for subpena power and formal discovery procedures; adherence to formal rules of evidence and procedures; definition of the degree of proof required to warrant a recommendation for discharge; provision for a fixed time for the election by the respondent of his decision to waive a hearing by a board of officers (preferably 7 or 10 days); elimination of the practice of furnishing board members with records pertaining to the issues involved in the case prior to the hearings; and the consideration to be given to certain offenses by minors. Adoption of these practices would markedly reduce the possibility of the violation of an individual's rights.

### Review of Discharges

So long as administrative discharges are utilized as an instrument for the discharge of military personnel and there are individuals who by statute, or otherwise, are entitled to seek recourse in the review of a separation action, it is imperative that a system for review of military discharges, in the nature of that which now exists, must be preserved and maintained. The various discharge review boards, in the absence of judicial review, de novo, of separation actions, are an absolute necessity. Their utility is self-evident.

Procedurally, there appear to be two major deficiencies in the operational scheme of the discharge review boards, namely the lack of subpena power and of formal discovery procedures. In proceedings before the discharge review boards the burden of proof rests with the applicant. In order to sustain this burden, the applicant is confronted with the task of securing evidence sufficient to show the discharge action was improper or inequitable. To satisfactorily accomplish this end the applicant inevitably must attempt to obtain evidence from those who participated in the occurrences serving as the basis for discharge or who had personal knowledge of information pertaining to the discharge. In many instances these prospective witnesses are no longer in the military service, or in a position to willingly testify or personally appear before the board. As a result of the lack of subpena power and formal discovery procedures, the applicant is without an effective means for securing not only the best evidence, but essential and probative evidence to prove his case. This is particularly true in the case of a hostile or potentially hostile witness.

An individual who possesses an other than honorable discharge is a second class citizen. He is serving a "life sentence." If nothing else he is deprived not only of the ordinary benefits or gratuities flowing from honorable service, he is denied the basic right to possess the equal opportunity to earn a living or to live a normal life in his community. It is submitted, therefore, that the necessity for according an individual the fullest protection possible from being improperly or inequitably deprived of an honorable discharge is abundantly clear. Under existing procedures this cannot be done in the absence of the discharge review boards having subpena power and formal discovery procedures.

### BOARDS FOR CORRECTION OF MILITARY RECORDS

As they relate to the review of military discharges the function of the boards for correction of military records appear to serve two purposes. They accord the applicant a forum for appeal from an adverse decision of the discharge review boards, a review conducted by civilian personnel. Secondly, since the scope of relief obtainable through a discharge review board is limited to effecting a change in the character of the discharge action, it is incumbent upon an individual to seek further or broader relief from the boards for correction of military records. This is particularly true in the case of an applicant's concurrent request for restoration to an active duty status.

Under the existing regulations governing the procedures of the discharge review boards, there is provision for an applicant seeking reconsideration by a discharge review board in the event he is able to secure new, additional and material evidence sufficient to warrant a change in the character of a discharge. As a practical matter, therefore, the only sound basis for review of a discharge case by a board for correction of military records is in the event the decision of a discharge review board is, in itself, materially in error or unjust, or the scope of relief sought by an applicant extends beyond merely attempting to secure a change in the character of his discharge.

The individual who initially is desirous of seeking relief beyond a change in his discharge is, under the existing administrative procedures of the boards for correction of military records, confronted with a very serious dilemma. In seeking relief from the discharge review boards the applicant does have the right to a hearing. Under existing administrative regulations governing the procedures of the boards for correction of military records the applicant does not have the right to a hearing. In addition to sustaining the burden of proof required to achieve relief, the applicant must also furnish the correction board with evidence indicating the existence of a material error or injustice such as to merit his being given the privilege, as distinguished from the right, to be heard. These are formidable tasks for an applicant. These are tasks which, as in the case of the discharge review boards, must be accomplished without the benefit of formal discovery procedures or subpena power, and, in the overwhelming majority of cases, solely with the gratuitous aid of a service representative from a veterans' organization. Although the boards for correction of military records, under existing practice, are the appropriate forums for seeking relief beyond a change of discharge, the practical consideration of whether an applicant will at least be heard detracts from the feasibility of an applicant utilizing the boards for correction of military record as the forum of original jurisdiction. This is of paramount concern in those instances where the applicant is denied a hearing and would then alternatively proceed to seek partial relief from the discharge review boards.

The organic act establishing the boards for correction of military records makes no provision or reference to whether an applicant will be granted a hearing. The procedure for making provision for a hearing discretionary and the criteria for determining the basis for authorization of a hearing, furnishing evidence of material error or injustice, is purely of administrative origin and extremely nebulous. There are no standards for guidance in the determination of whether an applicant shall be granted a hearing. There is an imperative need for the opportunity to be heard, not only in cases involving administrative discharges, but also in other types of separations where there now exists no provision for hearings at any level such as in cases involving administrative relief from active duty, or failure of selection for promotion, as well as other matters subject to administrative review. The most significant action that could be taken in the furtherance of the protection of an applicant's fundamental rights, particularly the right of due process of law, would be to amend the organic act establishing the boards for correction of military records to provide for a hearing on each application.

In addition to provision for the right to be heard by the board for correction of military records, there is an urgent requirement for provision for formal discovery procedures and subpena power; extension of the time limitation, preferably to 6 years; opportunity for cross-examination of witnesses advising the boards as in the case of the authors of advisory opinions furnished to boards by staff agencies; uniformity in the regulations or policies pertinent to the production of copies of military records; and furnishing the applicant with the basis for denial of an application by the boards for correction of military records.

Consideration should also be given to the operation and staffing of the boards for correction of military records on a full-time basis, as in the case of the discharge review boards, particularly in view of their broader jurisdiction.

CONCLUSION

In view of the far-reaching effects of administrative discharges it is submitted that it is a subject meriting a most careful and exhaustive study. The foregoing does not purport to be a comprehensive review of the various aspects of administrative discharges. At most it is intended to note impressions or observations on certain of what are considered to be salient factors in the evaluation of the subject matter in the light of the constitutional aspects pertinent thereto.

---

I hereby concur in, and approve, the foregoing statement of Neil B. Kabatchnick, attorney at law, who is the chairman of a subcommittee on administrative separation of the Military Law Committee, the Bar Association of the District of Columbia.

JOHN A. KENDRICK,
*Chairman, Military Law Committee,*
*The Bar Association of the District of Columbia.*

Senator ERVIN. The committee will stand in recess until 10 o'clock Friday morning.

(Whereupon, at 5:50 p.m., the committee was recessed, to reconvene at 10 a.m., Friday, March 9, 1962.)

# CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL

---

FRIDAY, MARCH 9, 1962

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to recess, at 10:15 a.m., in room 357, Old Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee), presiding.

Present: Senator Ervin (presiding).

Also present: William A. Creech, chief counsel and staff director; and Bernard Waters, minority counsel.

Senator ERVIN. The committee will come to order.

Call the first witness.

Mr. CREECH. Thank you, Mr. Chairman.

Mr. Chairman, the first witness this morning is Mr. John A. Kendrick, chairman of the Military Law Committee of the Bar Association of the District of Columbia.

Mr. Kendrick.

## STATEMENT OF JOHN A. KENDRICK, CHAIRMAN, MILITARY LAW COMMITTEE OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

Mr. KENDRICK. Mr. Chairman, I have already submitted a statement to the committee which I respectfully ask be received in the record, and if I may just highlight some of the remarks that I have made in that statement, and then open myself to such questions as the Chair may wish to pose.

Senator ERVIN. That will be fine.

Let the statement be printed in full in the record.

Mr. KENDRICK. May I first say, sir, that I, as the committee counsel has pointed out, am chairman of the Military Law Committee of the Bar Association of the District of Columbia, and I appear here with the approval and consent of the bar association, through its board of directors.

Secondarily, I would like to say I have read and am thoroughly conversant with and am wholly in accord with the statement made the other day by Mr. Kabatchnik, the secretary of the military law committee, and chairman of the subcommittee on administrative separations from the service. That statement was authored by Mr. Kabatchnik, and a meeting of the military law committee unanimously approved it.

The one thing that I am particularly concerned about and would like to bring to the attention of the chairman is this matter of subpena power for the various separation administrative boards in the service.

We feel that a lawyer faced with the defense of a case before an administrative separation board, being denied the right to subpena is denied the very heart of a defense which we, as lawyers recognize is necessary to the defense of any type of action particularly where the result of it may well be a separation from the service under conditions other than honorable.

All administrative boards set up by the Congress, the Federal Trade Commission, the Civil Aeronautics Board, SEC, all of them have subpena power, and that subpena power extends over the United States. Of course, as the Chair is so well conversant in the courts the subpena power is extensive, is used extensively and is essential.

As I pointed out in my statement I recently completed the defense of a court-martial in this area in which we found it necessary to subpena witnesses from not only the continental limits of the United States, but from abroad for the defense of a court-martial.

The courts-martial themselves, of course, have full subpena power. There is no restriction on them there except for sometimes the unavailability of a military witness because of the exigencies of the service. But, by and large, the power is unrestricted. But when it comes to one of these separation boards in which so many cases are heard resulting in the termination of a military man's career, when it comes to them there is no subpena power, there is no discovery procedure.

We have even seen instances where a record of an individual, his military record was unavailable for inspection by counsel, simply because the excuse was given that it was either difficult to produce or it was too voluminous, and that in any event it would be before the board at the time of the hearing, and you can read it at that time.

In other words, do your research while you are in the presence of the board, which as I think the lawyers here well recognize is an impossible situation for a lawyer to properly prepare a case when he has to do it in the courtroom.

I have also commented on and I would like to stress at this time, may it please the Chair, that the article 32 investigator, which is the immediate procedure prior to the preferment of charges much in the nature of a grand jury, usually, well, always, is a single officer, appointed by the prospective convening authority, to make an investigation of the facts to determine essentially if a prima facie case exists. And if he makes such a determination he then recommends that formal charges be brought and that it be referred to a court-martial or that it be dropped or a lesser court than a general court.

I have recently had two cases to which I have alluded in my remarks in which it was necessary to call civilian police, to interrogate them, they being the original arresting authority. But by virtue of regulations particularly in this local area, the civilian police were not available unless they were subpenaed.

The purpose, I think, essentially is to protect them from possible suit in a sense of coming in as volunteers to testify. So that it became necessary in these two cases to which I referred, both of which were Navy cases, to convene a court of inquiry, that being the only agency of the lowest agency that has subpena power.

There you have three officers sitting instead of one, but essentially performing the same function that the one article 32 investigator could perform.

I submit, if nothing else than as a matter of economy, if the article 32 investigator could be supplied with subpena power he could perfectly well function. Without it, of course, he is denied access to the very source of the information which led to the arrest and preferment of charges in these two cases which I have mentioned.

I have cited from four cases, and I would just like briefly to comment on them again, each of them in this instance being an officer case rather than an enlisted person, but having to do with these administrative discharges or administrative separations in the case of an officer. I feel they definitely point up the fact that these administrative devices are used in lieu of the more difficult proof which is required in a court-martial.

One was a lieutenant colonel in charge of a Reserve center. Because of differences of opinion, inspections were made, and as the result of inspections, charges were brought. The principal one for which he could have been court-martialed was that originally when he applied for a commission as a second lieutenant he falsified his record as to his educational attainments. He had stated that he was a college graduate whereas in fact it was demonstrable that he had never even gone to college.

Then over the course of the years after that, as the Chair probably knows in the course of an officer's career he is required at various times, particularly for security investigations, to execute personal history statements in which again much of the same information is gone into including educational attainments and in each case he again stated that he was a college graduate.

There was also a very serious question as to misuse of the unit funds in his outfit, which amounted practically to embezzlement, and also a relatively minor charge that he had misused Government transportation for personal use.

Two of those charges were definitely charges of the nature that would amount to a court-martial, could be brought under a court-martial. Instead he was called upon to show cause why he should not be removed from the active list. Why he chose this course of action I am not in a position to say, but he accepted it. He felt, in effect, that there was no use fighting it, so he accepted it and he was removed from the active list.

Then proceedings were brought to take even his commission away from him administratively. He fought that and as it so happened he was successful.

Another case which I have cited, and I think is a shocking case, was a major. He was rotated back to the United States in the usual course of rotation of service, and after he had been back here a number of months charges were preferred against him alleging that he had engaged in homosexual activities with nationals in the country to which he had been assigned overseas.

This selection process is an interesting process in itself. It is called selecting you to show cause. It is sort of an odd type of selection, but that is what it is called. You are selected by a board of five general officers to show cause and you may at that point resign under condi-

tions other than honorable, but you state you are doing so to escape trial by general court-martial or you may elect to appear before a board of three general officers.

This officer so elected and he appeared before the three general officers and the evidence, and this is what I think is shocking, were Thermo-Fax copies of statements given to service investigators by these nationals in which they alleged the occurrence of these events overseas.

They were unsigned because the Thermo-Fax didn't pick up the signature, the written inked signature.

They apparently were Thermo-Faxed before the oath was administered because there was no indication that an oath had been administered, and, of course, they were Thermo-Fax, not even originals, and, as was pointed out by his military counsel before the first board, they could easily have been produced right there on the base where this hearing was being held.

There was no way of looking to the credibility of the witnesses, and, of course, the witnesses themselves were overseas. The investigators were also overseas and their appearance before the board was refused.

So that on the basis of unsigned, unsworn, Thermo-Fax copies this officer was relieved of his commission.

Still a further case that I have indicated was a captain, who was called upon also to show cause why he had falsified his original application for a commission, in stating his educational attainments. Also that he had neglected or deliberately overlooked setting forth a number of different jobs that he had had so he had a faulty chronology in his employment and also he had failed to state that he had a conviction for forgery. False official statements are subject to trial by court-martial but instead he was called upon in this administrative proceeding to show cause why he should not be relieved from active duty and thereafter have his commission stripped from him.

He did defend the case, and as it so happened he came through successfully.

One final one that I did not mention in my statement to the committee, and which I would like to briefly state now, involved a full colonel with 18½ years' service. He was the commander of a base. He had previously gone before one of these administrative boards which alleged that he should show cause why he should not be relieved from active duty as a colonel, because of his ineffectual handling of his position and in that he showed traits not requisite to his command.

Nonetheless, of course, he had, by the same group that were asking him to show cause, reached the rank of full colonel.

He faced that board with military counsel and came out successfully. He was then allowed to go back to his regular assignment, and then one night while returning to his base from a card game he inadvertently went down a one-way street in a small town in the South, ran through a red light, and when the civilian police caught up with him he was alleged to have assaulted the two individuals.

Being in the rank that he was, the commander of a local base, it hit the headlines immediately of the papers and of the nearby papers where his command level was.

He was called upon to show cause why he should not be relieved because of his assult of civilian police and violation of local traffic regulations, all the subject of a court-martial. But he was asked or

required to show cause why he should not be relieved, and in that board hearing the earlier case was all reopened, read into the record, as a basis of this new proceeding, together with what had occurred in this particular instance and as a result of which he was relieved of his command and thereafter stripped of his commission through another administrative regulation.

All of those, we submit, are instances where administrative separations are used in lieu of a court-martial particularly where the evidence may be a little shaky as to whether a conviction could really be sustained under the scrutiny of a board of review or even later the Court of Military Appeals.

If I may now pass to another subject. Two of our services have been using for some time, and the witness here before you has had personal experience with them, the so-called circuit judge system, whereby legal officers are designated by the Judge Advocate General to act as law officers of general courts.

They come out of the Office of the Judge Advocate General. They are not susceptible to command control of the individual convening authorities in cases where they are being tried. We of the Military Law Committee feel that this is a very effective system. The command influence, the command control problem that so often arises, we think is largely obviated by this system, because this officer is not in any way answerable to the commander in the particular area in which he is trying a case.

His efficiency reports or effectiveness reports, which is always a matter of concern to an officer, are made out by the Judge Advocate General and not by the local commander where he may be trying a case.

The question arose whether or not it would be advisable to have these officers or these judges civilians rather than military officers. In the experience that I have had, I feel that the system has worked very well, and unless there are some abuses of which I am unaware, which have come to the attention of the committee, I would favor continuing them as military officers, law officers, rather than creating a new judiciary in a sense, by setting up of civilian judges to hold those positions. In that connection, I do concur and our committee concurs with the testimony which was given the other day by one of the judges of the Court of Military Appeals, and that was in the recommendation that the boards of review, the intermediate appellate authority which now exists, be made a judiciary with probably the same rank as circuit courts of appeal.

I have in many instances, in addressing a court-martial, pointed out to them that they are on the same level, the same jurisdiction, have the same authortiy as a U.S. District Court. They sitting as a Federal court of primary jurisdiction. Where there is an apeal as a matter of right to the Boards of Review, I think very well that they should, for the sake of continuity, for the sake of experience, be recognized as Circuit Courts of Appeal, and be probably staffed by civilians. If some part of them were continued as officer panels, at least that a minimum period of time be set that they would sit on such a board so as to give them more continuity and more experience in the handling of reviews of courts-martial.

I was very interested in the colloquy between the chairman and Senator Keating the other day, in which Senator Keating brought

out the fact that he had read an article in which this committee's efforts were criticized as being in effect a mollycoddling of the service and by an effort to sort of be mother hens to servicemen. I agree certainly that this is not the purpose of this committee in any way.

I do feel that there is in what I may characterize as the military mind a feeling that when a man in the service gets in trouble of some type, it is essentially and in the view of many wholly a disciplinary matter. There is no question in my mind, I have been in the Service myself, I have been around the Service a great deal, there is no question but that if our armed services are to serve the purpose that they do of the defense of our country, discipline is absoluetly paramount.

But I feel this, and I will analogize it with a civilian situation if I may: I feel that once a man has gotten into trouble which is trouble of a nature cognizable under the Uniform Code of Military Justice that it then no longer is a disciplinary matter but it is then a legal matter and I analogize it to the civilian setup.

The police of our community are essentially there to preserve the peace, maintain discipline in a sense. But once a man is arrested for the violation of a law by civilian police, the law is very clear that he must immediately then be taken before a committing magistrate. The effect is to take him out of the hands of the disciplinary authorities, put him before a man who is in a position to say from a review of the the facts that the police tell him, there is a prima facie case and he will hold it for the grand jury or dismiss the case or whatever.

So in the military, I feel that once a person has violated the military code or committed an offense which would be considered such as common law, then it is out of the hands of the disciplinary authorities and should be in the hands of the legal authorities of the service. Every requirement of law should be rigidly met and his rights should be just as equally protected as they would be in civilian life.

I feel that it is much the same and should be the same, as the division of powers in the civilian government, the executive, the judicial, and the legislative, and that there should be a legal system set up in the services which would handle these matters exclusively as legal matters, aside from the pure discipline feature.

I was asked to comment on, and I will very briefly, the matter of the lecturer system which has been used by some commanding officers and by some staff judge advocates to prospective members of the court.

I condemn it, I feel it is improper, and here again I revert to my civilian experience. I feel that the practice would be the same as if a judge in a civil court were to call the jury into his chambers and say: "Now, you are about to try a case for murder. Murder is a heinous offense. We expect that murder will be stamped out and it is your duty as members of this jury faced with this problem to help us stamp it out."

It is the same sort of thing.

Now, it is true that our civilian judges give general instructions to a jury as to what their function generally is as jurors. Particularly is this so when a new jury is empaneled, one that has probably not had a great deal of exeprience in trials of cases and the judges generally outline their duties to them as jurors. I think that is ap-

plicable also to a military jury in a sense which a court is, or a court-martial, and if such instructions are deemed necessary.

I had an example very recently, in which the law officer, in the presence of counsel, in open court, and on the record, stated to the members of the court essentially what their functions were, and that they were not, of course, to jump to any conclusions, that they were not to permit anyone to talk to them about the case, they were not to talk among themselves and they should keep an open mind until all the evidence was in and they had received instructions from the court and heard the arguments of counsel.

I feel that is proper to do, particularly in open court and in the presence of counsel who are in position to object should improper remarks be made to the jurors or the members of the court.

I believe that basically completes my statement, Mr. Chairman, and I would be very glad to answer any questions that you or your staff might have, sir.

Senator ERVIN. Off the record.

(Discussion off the record.)

Senator ERVIN. Back on the record.

I infer, Mr. Kendrick, from what you state very clearly, that in your opinion, the handling of this question of undesirable discharges should be left in the first instance in the hands of the military, subject to such safeguards as would make it certain that the man whose fate was involved in the case should have reasonable opportunity through subpena powers, and through the assistance of counsel, to present whatever defense he has, to present his cause, and also subject to the right to have some review by a tribunal in the nature of a board of review.

Is that correct?

Mr. KENDRICK. I believe that accurately states it. Yes, sir.

Senator ERVIN. I am inclined to agree with you on that because I wouldn't favor giving somebody control over the military. I think from all the evidence we have taken that the Uniform Code of Military Justice has been working fairly well, and that the U.S. Court of Military Appeals has been doing a good job in this field.

As a matter of fact, I have their reports and have tried to read as many of the cases as I can.

Mr. KENDRICK. I think that is true.

My only concern, there are so many cases resulting in separation but never under the Uniform Code and never subject to review by boards of review of the Court of Military Appeals.

Senator ERVIN. Yes.

As a matter of fact, under the present law the Court of Military Appeals has no jurisdiction over a separation from the service administratively.

Mr. KENDRICK. That is correct, sir.

Senator ERVIN. I think you spoke of two of the services which have set up a system under which they had a law-trained man who was in the service and part of the service, and who acted in these matters in the first instance. Do you think that system has worked very well in the two services?

Mr. KENDRICK. You refer to the circuit judge system as it is popularly called?

Senator ERVIN. Yes.

Mr. KENDRICK. Yes, sir, I do. I have had personal experience with it and I think it is a very effective system.

Senator ERVIN. This has been a very interesting investigation to me. I have a very high respect for the military; I have a very high respect for the judge advocates. As a matter of fact, I have a son who is a Major on the staff of the 30th Division. He is one of the judge advocates of the 30th Division, in the National Guard; I have a son-in-law who was trained in the Navy school at Rhode Island——

Mr. KENDRICK. Newport.

Senator ERVIN. Who is now a service reservist in the Marine Corps and he has had a lot of trial experience on both sides of the service, and I think that most of our trouble arises in cases like this in not having the right kind of system setup.

The great majority of the people in the military, and not in the military, want to do the right thing, but there are certain fundamental things that are basic to law and one is that a man should have an opportunity for notice and an opportunity to be heard, and I would hope that the military services who do not have the systems you mentioned about the law officers would set up something like that.

I certainly agree with the fact that a man, whatever he is, is entitled to a basic constitutional right, such as due process.

I certainly wouldn't want anything done to force the military to give an honorable discharge to a man who ought to have a dishonorable discharge.

Mr. KENDRICK. That is correct. I agree with that.

Senator ERVIN. And I certainly concur in the very fine statement you made about the necessity for discipline in the Armed Forces.

In most all petty offenses, I think all of these troubles could be worked out better through sort of an optional method of what we used to call company punishment, where a man gets his option to take a summary court or receive the punishment, disciplinary punishment prescribed by his commanding officer. Most of them would take disciplinary punishment because it is not put on their records and in the hands of a wise commanding officer it is a much better alternative than trial before the lowest court, such as your summary court.

Mr. KENDRICK. Sir, if I may differ with you in just one respect; that is put on the record, and has been used in some of these administrative proceedings as a basis for separation, the fact that he has undergone such previous punitive action by summary court.

Senator ERVIN. It may be put on the record if they try him later; but I used to have to enforce it in the National Guard very rarely and we didn't make a record of it; and some of the services do not, as I have heard in testimony.

If a man has been troublesome to them and they bring him up later, why they show all of these things. It ought not to be considered against him, though.

Mr. KENDRICK. No. It shouldn't, that is the point.

In the regular service books which are used for enlisted personnel, there is a page for that very thing to be entered, and that goes right through his service career.

Senator ERVIN. Do you have any questions?

Mr. CREECH. Yes. Thank you, Mr. Chairman.

Mr. Kendrick, in continuation of the chairman's question, with regard to the circuit judge system, you have indicated that you feel that it works well.

I wonder, sir, if you feel that this system could be used effectively, or should be used, in connection with the administrative discharges. I mean a similar system providing for boards?

Mr. KENDRICK. Yes, I think it could be, and I think it would lend that degree of legal guidance which we feel doesn't exist now.

Mr. CREECH. Sir, do you feel that it could also be used in matters not referred to general courts-martial, such as special court-martial matters.

Mr. KENDRICK. Well, I think this, Mr. Creech.

Where you get into the legal field you have got to have lawyers. I mean if you go before the police court here this morning charged with failure to observe a stop sign or whatever, you have a magistrate there who is a legally trained man.

Under many circumstances you would have the case presented by an assistant corporation counsel who, of course, is a lawyer and you are entitled to counsel of your own, either by appointment or by retention. I feel that where you get into any phase of the legal area you should have lawyers, someone legally trained who is there to at least administer the thing.

Mr. CREECH. Sir, you have indicated that you and the members of your committee feel that all separation-type administrative boards, as well as the boards for the correction of military records, should have full subpena powers.

This subject is one about which the subcommittee has received conflicting points of view. It has been said by some of our witnesses that there would be abuses of this power, that in some instances this might be used as a harassing technique in asking to subpena numbers of witnesses in various parts of the world.

I wonder, sir, do you feel there should be any limitations placed upon this power?

Mr. KENDRICK. If I may answer you in this way: We have an attorney who practices here in Washington, who will remain nameless, but what I am about to say may indicate who he is, who follows a practice invariably of subpenaing everyone he can possibly get his hands on including the judges of the court in which he is trying a case to the point where it becomes a farce.

Well, that, I feel, is a matter for control of the judicial officer before whom he is appearing. If he just lets it become a farce why that, of course, is unfortunate.

But if he is any kind of judge he will weed out and deny and quash subpenas where they are issued, obviously for the purpose of harassment. And I think the same would be true here.

I don't think there should be built-in limitations on the subpena power because no matter how carefully it was gone over in building limitations you couldn't possibly anticipate all the possible eventualities which would come out which would lead to a burden and abuse.

But I think that's up to the board or the court or whomever he is appearing before, to regulate that, with the idea that if they, in turn, abuse their discretion they are subject to review and the case may very well be reversed because of that abuse of discretion. The same would

be true if a judge in a civilian court were to quash a subpena, he is subject to review when it gets to an appellate court.

So, I don't think there should be, as such, limitations.

Mr. CREECH. Sir, you said that the Navy, for one, has a procedure whereby, when a case is such that there is evidence which can be produced only by the issuance of a subpena, a court of inquiry usually comprising three officers is convened.

I should like to inquire, sir, do the other services utilize this procedure as well?

Mr. KENDRICK. I don't believe they do.

I know that this particular provision is contained in the Navy supplement to the manual for courts-martial, and I am not offhand certain about the other two services.

Mr. CREECH. I gather from what you have said here that you would feel it would be desirable for them to do so.

Mr. KENDRICK. I think the article 32 investigator should have subpena power and it would obviate the necessity of three officers sitting when one could perform the same function.

Mr. CREECH. But in the absence of changing article 32?

Mr. KENDRICK. Well, yes, I think without question.

Mr. CREECH. Sir, I would like to inquire for the record what type of discharge did Colonel One, whom you describe, receive and under what conditions was he discharged?

Mr. KENDRICK. Colonel One?

Mr. CREECH. Yes.

Mr. KENDRICK. He was relieved of his active duty status as a lieutenant colonel. He was relieved of active duty without severance pay or entitlements of any sort. Then a further proceeding which he elected to fight, was one that would have relieved him of his commission, and he was successful in that. It so happened that he had, prior to being commissioned, been an enlisted or an NCO, a noncommissioned officer. He then went back to his noncommissioned status, which he was able to continue until retirement time, and then having had the reserve commission of a lieutenant colonel, he retired with benefits of that rank.

Mr. CREECH. What type of discharge was it when he retired at that time?

Mr. KENDRICK. Well, that was honorable.

Mr. CREECH. An honorable one?

Mr. KENDRICK. Yes.

Mr. CREECH. So he did receive an honorable discharge?

Mr. KENDRICK. Yes, that is correct.

Mr. CREECH. Now, sir, on the third case which you mention, Major Three, again with regard to the subpena power, even had he had the subpena power, I gather from what you say there that he was dealing with foreign nationals.

I wonder, sir, what procedure you would suggest to overcome this difficulty?

Mr. KENDRICK. Depositions.

Mr. CREECH. Depositions?

Mr. KENDRICK. Yes, sir.

That would be a part of the discovery procedure that we favor.

Now, as to the service investigators themselves, they could be subpenaed with relative ease.

Mr. CREECH. So in addition to subpena powers, you feel that the deposition should be introduced also?

Mr. KENDRICK. The right to take them, yes, sir, as it is provided for in the Uniform Code.

Senator ERVIN. If I may interrupt at this point, the subpena power, it seems to me, would be advantageous to what I would call the prosecution as well as to the defense in matters before the board.

Mr. KENDRICK. I think that is correct.

Senator ERVIN. Because both sides have difficulty in getting certain recalcitrant witnesses to come to the hearing.

Mr. KENDRICK. Very true, sir.

I think—well, as a lawyer it is the only way to present a fully developed case from both sides.

Senator ERVIN. I am sure you have had the same experience in the practice of law, you have had experience that they wouldn't tell you anything about a case until you put them under subpena?

Mr. KENDRICK. That is very correct, sir.

Senator ERVIN. Further questions?

Mr. CREECH. Mr. Kendrick, you have spoken here about command control, and the desirability of placing the court-martial under a legal officer.

I wonder, sir, going back to command control over the courts-martial, how do you feel the members of the court-martial should be appointed and, if we are to avoid command influence altogether, who should make the decision to refer cases for trial in the first instance?

Mr. KENDRICK. Well now, if I understand your question, it is twofold; is it not? Who should decide to refer a case for court-martial, and who should determine the selection of the court?

Mr. CREECH. Yes, sir.

Mr. KENDRICK. Well, right offhand I don't know that there is any way of avoiding the present system of having a convening authority refer a case for trial. In the way the military structure is, it probably is as logical a way as any to bring it to a head.

As for the selection of the court members, that is something that has worried me for a long period of time. I recently had an instance of it where it was pretty obvious that the court was being selected by the officer who was going to have to review it later for the convening authority. I think that possibly, if a purely legal department, call it JAG or whatever you would call it, were set up into which all of the legal aspects of an individual service or the services combined were put, then some way could be devised of having officers selected by that department for service, much as a jury commission operates out of our Federal courts with a panel that they pick by means which are not normally known to the public, but a panel for each month from which jurors are selected, so that you would not have that possibility of some command influence over officers in a particular command who were selected by their senior officer to serve on a court which he has convened.

Mr. CREECH. Sir, with regard to senior officers' influence over members of the various boards of review, what is your feeling, your opinion with regard to the rating system whereby in some instances the chairman of the board of review rates junior members of the board?

In other words, their efficiency or performance ratings.

Mr. KENDRICK. Now, you are speaking of the boards of review in the Pentagon itself?

Mr. CREECH. Yes.

Mr. KENDRICK. Well it perhaps is not the best system, but I think the man who is immediately a senior has got to be relied upon for some comment on the service of his juniors, and I don't know that you can avoid it particularly, because he certainly is most conversant with their work, and I can see that abuses might creep in and there might be the possibility, again, of some command influence by virtue of his seniority.

But I don't know that you can avoid it particularly. Everybody in any establishment is rated by someone senior to them.

Mr. CREECH. You feel there is no particular objection or you foresee no difficulty in adequate rating if it isn't done by the senior member of the board?

Mr. KENDRICK. There is a possibility of some difficulties, but I don't know that there is any inherent problem there or at least I don't feel that there is.

Mr. CREECH. I would like to clarify for the record this case which you mentioned of the colonel who had 18½ years' service. You indicated that he had been arrested by civilian police and charged with certain acts. You did not state whether he was convicted of these by the civilian court.

Mr. KENDRICK. It didn't go into a civilian court. It was directly turned over to the military.

Mr. CREECH. It was turned over to the military?

Mr. KENDRICK. Yes.

Mr. CREECH. I see.

Senator ERVIN. It would be pretty hard to devise any system in which you wouldn't have a convening authority, isn't that so?

Mr. KENDRICK. Well, I think that is true.

Senator ERVIN. You would have to make a fundamental alteration in the structure of the Armed Forces to reach that point.

Mr. KENDRICK. Unless—no, I think I agree with you, Mr. Chairman.

Senator ERVIN. In other words, of course, the administration of justice is the primary purpose of establishing civil governments but the administration of justice in the Armed Forces is for the purpose, either of enforcing discipline or ridding the service of persons who are unsuited or unfit for military or naval service.

Mr. KENDRICK. Yes, sir.

Senator ERVIN. And in the very nature of things a man who is charged with the responsibility for the men is going to have to have enough supervision here to ascertain, either through himself or through another officer in his command, whether there is any sufficient basis in the first place to prefer charges against a soldier.

Mr. KENDRICK. Yes, sir; I think that is right.

Senator ERVIN. I just wonder if we can't indulge in the presumption that, in the great majority of cases, convening authorities are desirous of having justice done.

The convening authority is as equally concerned ordinarily, with a man's vindication, if he should be vindicated, as he would be with his conviction, if he should be convicted.

Mr. KENDRICK. Well I would agree with you by saying that I think basically most men are fair minded. I do feel that there is this comingling of the idea of discipline with justice in which justice suffers.

Senator ERVIN. But it's one of these fields, though, to a certain extent like the subpena power, where the law has to repose power in some person or some agency. It is impossible to prevent all abuses of that power.

In other words, we are not smart enough to prevent all abuses of the use of power.

Mr. KENDRICK. I certainly agree with you.

Senator ERVIN. I certainly agree with what you said about the subpena. You have ordinarily got to leave those things up to the discretion of individuals.

Fortunately most individuals exercise their discretion very wisely. You sometimes have a bizarre person. I remember we had one person who subpenaed me—there were 137 of us—to court to produce a certified copy of my oath as a Member of Congress, which I had taken orally; and it was a matter that none of us knew anything about so the judge who handled the thing—I thought very well—just told counsel to state what he expected to prove by each of us, to state it, and it turned out he didn't expect to prove anything by each of us.

I think we can agree with this. We would like to see a system devised, if humanly possible, which would interfere at a minimum with the basic necessity on the part of the military or the naval authorities to perform their functions and to compel such discipline as the performance of their function required, without sacrificing the basic constitutional rights of persons involving our concept of due process.

Mr. KENDRICK. Yes, sir; that would be utopia, of course.

Senator ERVIN. It would. And it is a situation that calls for a lot of serious thought and serious study. The attainment of this goal is what this committee is fundamentally interested in; and that is what the bar is fundamentally interetsed in; and that is what the Armed Forces have assured us, through their judge advocates who have appeared here, they are interested in. By a consideration of all these points, we hope to reach some kind of a solution for a most difficult problem.

Do you have any questions?

Mr. WATERS. Thank you, Mr. Chairman.

Mr. Kendrick, perhaps you could tell us, based on your experience, have there been some indications that the servicemen who might be adversely affected by a finding of the board of review are not generally furnished with the conclusions of law on which this board relies prior to the time they are forwarded to a higher authority?

Have you had some experience in that connection, sir?

Mr. KENDRICK. Now, you said board of review; I wonder if you don't mean Board for Correction or Discharge Review?

Mr. WATERS. Yes, sir.

Mr. KENDRICK. Because the boards of review, I believe in all instances, write opinions, but as to the other, yes, I have had that experience. It is just a fiat, no relief and that is it, without any basis being given for it.

Mr. WATERS. In that connection, do you feel it would be desirable that some conclusions or findings of fact be made available so that the higher authortiy would have a transcript of the evidence or its salient points made available to it?

Mr. KENDRICK. Well, when you say higher authority, I assume you mean the Secretary. Of course, they are designees of the Secretary of the particular service involved, and if we indulge in the presumption that the Secretary, in fact, reviews their findings without some findings, I don't know what he would have to review; so, yes, I think there should be some basis or bases, stated for their conclusions.

Mr. WATERS. Based on your experience, do you have any comment on the composition of the correction boards?

Mr. KENDRICK. Yes, I do. I think they should be given a longer tenure simply to better acquaint themselves with their duties. To give them more of an overall approach to the general problems that come before the board for the correction, and just as in any type of establishment, that is, reviewing an overall picture until they have had some experience, they just don't have the know-how to carry out their function, I don't believe. I think they should be given more tenure.

I have the feeling with so many of them that maybe at the last minute someone is pulled out of the section on analysis of some branch to sit on a board for correction.

The chairman of most of them continue on for a fairly good period of time. Usually the executive director, whatever his title may be called, is there for a good period of time although he doesn't vote.

But I feel that essentially tenure is one thing that is important with them.

Mr. WATERS. In connection with the possibility of the Navy Judge Advocate Corps being formed, do you have any comments on the desirability or feasibility of such a separate corps for the Navy?

Mr. KENDRICK. Yes, I feel very strongly on that subject.

I so happen to teach at the George Washington University, and we have had over the course of the years any number of marine and naval officers take the law course. It has always appalled me, that in so many instances, once they have gotten their degree and they pass the bar, and I have one particularly in mind who is a flier, who was immediately taken back and put on flying duty and until very recently had had no legal service whatsoever. I understand he is now performing legal duties.

But I think that the so-called legal specialist system that there is at the present time in the Navy, would be better "beefed up" by having a JAG Corps in the Navy itself, as there is in the Air Force and in the Army.

Mr. WATERS. Thank you, Mr. Kendrick; thank you very much, Mr. Chairman.

Mr. CREECH. Mr. Kendrick, I noticed you have endorsed the statement made by Mr. Kabatchnik, and I wonder, sir, if there were any further comments on that statement. I see that he is accompanying you.

Is there anything further which was to be added to that statement by you or by him?

Mr. KENDRICK. No, other than to again reiterate that we feel very strongly on this subpena power and the power of discovery similar

to what there is provided under the Uniform Code insofar as these administrative boards are concerned.

Also that I think that there should be either rules of procedure or a code of some sort set up to guide these boards in their deliberations, to set standards by which a lawyer who appears before them can intelligently defend a case and know what the standard is for bringing a person before it and what the standards are for the procedure of the board, and also one matter that Mr. Kabatchnik did, I believe, touch on and that is in regard to article 32, which is as you probably remember, the warning article whereby an investigator is required to warn a member of the service that he does not need to make any statement but if he does it may be used against him. I have seen too many instances, and I think probably all of us have who handled military cases, where that is given out in almost a singsong fashion much as you would, and I don't say this irreverently, but much as a child would recite the Lord's Prayer without any real thought of the meaning behind it. I have seen instances in the service where they hand him a slip of paper and say, "Here, read this," and it states on here, "I have been advised of my rights," and so on, not really knowing whether some young kid, perhaps, can intelligently understand what he is reading.

I have felt, I have had an instance a year or so ago, where an officer was advised in much that same fashion and he asked to be allowed to consult counsel which is, of course, very important and as Judge Ferguson, I believe, the other day said, that the time when a man needs counsel most is when he is arrested.

Well, they didn't deliberately refuse counsel because they were familiar with the *Gunnels* and the *Rose* cases, but they made it so difficult that he finally abandoned his request for counsel and allowed himself to be interrogated.

I think that definite provision should be made at that point for someone to definitely consult counsel to see if their rights have been invaded before they are brought in, not forced but brought in to make a statement. I believe other than that I can only say that I do concur completely with Mr. Kabatchnik's statement.

Mr. CREECH. Thank you.

Senator ERVIN. Mr. Kendrick, the committee is deeply appreciative of your appearing before us to give us the benefit of your experience and study and observation on these very serious problems.

Mr. KENDRICK. It has been an honor to appear before you, sir.

(The prepared statement of Mr. Kendrick follows:)

WASHINGTON, D.C., *March 5, 1962.*

Hon. SAM J. ERVIN, Jr.,
*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR SENATOR ERVIN: Your staff asked me to supply some material, by way of personal biography, in connection with my proposed testimony before your subcommittee on March 6, 1962.

I was born in Washington, D.C., on September 25, 1917, and was educated in the public schools of the District. I received both my A.B. and LL.B. degrees from the George Washington University. I entered the U.S. Army as a private on May 3, 1943, and was separated from the Army in May of 1946 as a first lieutenant in the Military Intelligence Service. I resigned my Army commission in March of 1951 in order to accept a commission as a captain in the Judge Advocate General's Department of the Air Force of the United States. I thereafter

remained active in Reserve duties, being assigned as a mobilization assignee as an appellate defense counsel. Upon my separation in 1946 from the Army, I entered into the private practice of law under my own name and so practiced until 1950 when the present firm, of which I am a partner, was formed. During the years of my practice, I have acted as defense counsel in general courts-martial as well as appearing before administrative separation boards of the several services, in addition to discharge review boards and boards for the correction of military records. I have been a member and am currently the chairman of the Military Law Committee of the Bar Association of the District of Columbia.

I have read and am thoroughly conversant with and endorse the statement made by Niel B. Kabatchnik, Esq., secretary of the military law committee.

I should like, initially, to comment on the committee's interest in the subject of the granting of subpena power to the various administrative boards concerned with the separation of servicemen as well as the several boards for the correction of military records. The military law committee, of which I am chairman, has canvassed its members and they are of the opinion that all separation-type administrative boards as well as the boards for the correction of military records should have full subpena power. We believe that this view is also endorsed by the Judge Advocates General, which was expressed to the members of the military law committee at a meeting of the committee which was held with the Judge Advocates General or their designated representatives in January 1962. It is felt that substantial prejudice results when the right to subpena persons and documents is denied to a serviceman who is faced with defending against charges which may well result in his separation from the service under conditions other than honorable. Ofttimes the very key to a successful defense is denied to the serviceman by virtue of his inability to require production of the evidence by the issuance of a subpena. This witness is acquainted with a number of instances where a witness could not be produced before a separation board because of unwillingness to testify or not being reasonably available, and the only way to correct a situation would be by the issue of a subpena. As a consequence the serviceman has been unable to give the full and complete picture to the board sitting in judgment of him. Of course, in a general court-martial full subpena power exists. In fact the witness recently completed the defense of general court-martial in which witnesses were subpenaed not only from various parts of the continental United States but also from England and Germany. However, as will be pointed out later on in this testimony, there are many cases which result in a less than honorable separation from the service but are accomplished by means other than a general court-martial. We fully believe that legislation should be introduced, and, if the committee would care for us to do so, we will draft it, providing for subpena power for not only the various administrative boards, but for the so-called article 32 investigating officer. It is believed that an article 32 investigator should be armed with subpena power in that without such power the investigator himself is ofttimes denied access to the direct testimony of persons who could shed valuable light on the case being investigated. The Navy, for one, has a procedure whereby if a case is such that there is evidence which can be produced only by the issuance of a subpena a court of inquiry, usually comprising three officers, is convened. This court does have subpena power, but the same result could be achieved by the granting of a subpena to a single investigating officer and thus obviate the time and expense of having two additional officers sit on the court. This witness is familiar with two of such recent cases in the local area in which it became necessary to interrogate civilian policemen as to their knowledge of the alleged offenses. The only way that the police could be produced was to direct their presence by a subpena, and in each instance it finally became necessary to convene a three-man court as a single investigating officer was powerless to issue a subpena. The subcommittee has asked for my comments on the use of various types of elimination procedures and administrative discharge boards as substitutes for courts-martial. I have gone through my own files and have selected a number of cases on which I would like to comment, and, in view of the fact that they are actual cases, I would refer to them by number rather than by name.

Colonel One was a Reserve officer on extended active duty as the commander of a Reserve center. He had at the time been on active duty for 18 years and had achieved an outstanding record. As a result of an increasing lack of harmony among the civilian reservists in his unit, a series of inspections were made by

colonel's superiors. Subsequent to the inspections, charges were preferred against him under an administrative regulation directing him to show cause why he should not be removed from the active duty list. Among the charges on which he was to show cause was one that he had falsified his educational qualifications when he first applied for a commission. This same falsification was continued throughout the years in a number of personal history statements which were required for security purposes. There was also an allegation that he had used a Government staff car for personal trips and that there was a question regarding the improper use of his unit's funds. Any one of these charges would be the subject of a court-martial, assuming that there was sufficient evidence to support the charge. However, administrative proceedings were brought in lieu of a court-martial. Whether this officer exercised sound judgment at this point is difficult to say, but he accepted the administrative action and was removed from the active duty list. Then proceedings were commenced under a different regulation to strip him of even his Reserve commission. He decided to fight this action because this would also materially affect his retirements rights. He was successful in the defense of this action and was retained on the Reserve list and was able to finish out his years until he was retired and under the provisions of law which permit one to retire with the benefits based on the highest rank attained he retired as a lieutenant colonel.

Captain Two was called upon to show cause why he should not be removed from the Reserve officer list in that when he applied for a commission while he was in officer candidate school he made a number of misstatements as to previous employers and the reason for termination of employment, together with his failure to list a conviction for forgery before entering the service. Making false official statements is an offense under the Uniform Code of Military Justice for which a serviceman may be court-martialed. Nonetheless, this officer was called upon to show cause why he should not be removed from active duty through administrative procedures. He successfully defended the case.

Major Three was rotated back to the continental United States from oversea duty and some months after his return he was called upon to show cause why he should not be removed from the active list. The charges were that he had engaged in perverted activities with a number of nationals in the country in which he had been stationed. He attempted to demand a court-martial but this was denied him, and he thereafter appeared before an administrative separation board. The evidence consisted of photostat copies of unsigned and unsworn statements purportedly given to service investigators by the complaining witnesses. The board refused to produce even the investigators. The case was initially heard by a board of three general officers, and the recommendation was made that he be removed from the active list. It was then appealed to a higher board on which five general officers sat, and the same recommendation was made. Finally it was appealed to the Secretary of the service involved, with the same result, and the officer was removed from active duty. Then proceedings were instituted under a separate regulation to administratively strip him of his Reserve commission, and, feeling that it would be futile to fight it in the light of what had gone before, he accepted that administrative action.

Major Four was on extended active duty when it was determined that he was suffering from cirrhosis of the liver believed to have been associated from overindulgence in alcohol for a protracted period of time. It was finally determined by the physical evaluation and physical disability boards that the cirrhosis was not as the result of any misconduct on his part and that it was incurred in the line of duty and that he should be returned to active duty. The service then released him in an overall reduction in force program. While the service denied that this was done as a punitive measure, it is difficult to believe in the light of what followed. Proceedings were then instituted under an appropriate regulation to divest the officer of his Reserve commission, claiming that, among other things, he had been drunk on one occasion and had fired rounds from a carbine through the roof of his quarters, back in 1944 (the statute of limitations had long since run), and then there was a reference to his conduct and character which were incompatible with exemplary standards of personal conduct, and the proof of this was the fact that he had ended up with cirrhosis of the liver. He successfully met these charges and retained his Reserve commission, but he was unable to take the next step and retrieve his active duty status although it was obvious that the reduction in force as applied to him stemmed from the allegation of alcoholism.

Two of the armed services had been making very effective use of what is properly known as the "circuit judge system." This provides for the appoint-

ment of law officers of general courts-martial from a group of officers who operate out of the office of the Judge Advocate General of the respective service. They have no official contact with the particular convening authority and their efficiency reports are prepared by the Judge Advocate General and not by a commander under whose jurisdiction they are acting as a law officer in an individual case. These officers therefore are completely independent of the commands they serve, and it is believed that a higher quality of law and justice is thereby achieved. This witness has had experience with this circuit judge system in both of the two services that have adopted it and is in hearty accord with its use. The officers themselves who are attached to the service feel that they are able to give a much better performance as law officers in that they devote their full time to the duties and they do not have to be concerned in any way as to the views or wishes of a particular commander where a trial is being held. If this system functions as well for the law officers, as it does, it would appear that it could also be established for the selection of defense and trial counsels. At the present time the trial counsel and, if he is in the military, the defense counsel are both subject to the jurisdiction of the particular convening authority. There have been cases which have come to the attention of the Court of Military Appeals in which the actions of both trial counsel and the defense counsel were practically dictated by the commanding officer and of course there is always the lingering fear that if the wishes of the commander are not carried out it will be adversely reflected on the officer's efficiency report. There may also be other more subtle disciplinary action taken. Insofar as general courts-martial are concerned, both defense and trial counsel are required to be certified as competent by the Judge Advocate General of the service involved, it would seem entirely feasible to place these officers under his direct command rather than to have them primarily responsible to the convening authority of the field installation. The circuit judge system has worked so well that this witness is not prepared to say that it would be desirable to substitute civilian "judges" for the present military law officers. Unless some abuses have arisen in the circuit judge system which have come to the attention of this subcommittee, I believe it would be better to continue to let the system operate rather than to establish a new judiciary.

Command control is a difficult thing to detect and to eliminate. This is particularly true when most military men feel that the commission of an offense by a serviceman is a matter involving discipline as well as a legal matter. Of course if the Armed Forces are to retain the strength necessary for the defense of our country, rigid discipline is a must. However, it is the view of the witness that once a person has gotten into the "toils of the law," then it is purely a legal problem and should be so handled. Undoubtedly one way to eliminate a great deal of command influence is to remove the legal system from the command control and place it entirely under the control of legal officers. This would not be unlike the tripartite separation which we recognize in the civilian government.

Some glaring instances came to light shortly after the enactment of the Uniform Code of Military Justice and its implementing order, the Manual for Courts-Martial, of commanders or staff judge advocates lecturing to the personnel of a court as to their duties and, in a few instances, the results desired. It is believed that this practice has pretty well died out because of the very severe action of the Court of Military Appeals to such practices. They are of course wholly improper and should be viewed in the same light as would be if a civilian judge were to call a jury into his chambers out of the presence of counsel. If any instructions are thought necessary as to the general function of court members, it should be done on the record and in the presence of counsel, preferably by the law officer.

Respectfully submitted.

JOHN A. KENDRICK,
*Chairman, Military Law Committee of the Bar Association of the District of Columbia.*

Senator ERVIN. Call the next witness.

Mr. CREECH. Mr. Chairman, the next witness is Prof. A. Kenneth Pye, associate dean, Georgetown Law Center.

Professor Pye.

Senator ERVIN. We are delighted to welcome you before the committee.

Mr. PYE. Mr. Chairman, I ask that my statement be incorporated in the record; I will make several comments in addition to it and answer such questions as you desire.

Senator ERVIN. Let the statement be printed in the record in full at this point.

## STATEMENT OF A. KENNETH PYE, ASSOCIATE DEAN AND PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

Mr. PYE. Mr. Chairman, I agree thoroughly with the comments of my predecessor, Mr. Kendrick, and the other witnesses who have testified before the committee to the effect that the Uniform Code of Military Justice is an excellent piece of legislation and is generally working very well.

I think only a comparison with the hearings held by Senator Chamberlain in 1920, and the hearings that preceded this code will show that most of those unfortunate conditions which at one time existed in the administration of military justice no longer exist.

There are, of course, some problems which exist, perhaps because of the inherent nature of the system. I agree with Mr. Kendrick's comments that the great problem is permitting the military services to maintain that degree of discipline necessary for the successful performance of their mission, while at the same time protecting the rights of defendants who appear before them.

I think that perhaps the most effective way that this can be done is by clearly delimiting what is disciplinary authority from what is judicial authority. If the rights of a commander were expanded in the disciplinary area so that he could give appropriate punishment for servicemen who breach rules of discipline without the necessities of a judicial trial, I would think that this would be desirable.

At the same time it seems to me absolutely necessary that if a serviceman is being charged with what would be a felony in civilian life the demands of discipline must be subordinate to the demands of a fair and just procedure.

I cannot go so far as some of the witnesses before this committee in their impression that the uniform code provides such a marvelous system that the average serviceman would prefer trial by court-martial to trial in a civilian court. This has not been my experience, either personally as counsel or in my discussions with servicemen who have had that honor.

There are many factors, of course, which we can never hope to duplicate insofar as our civilian rights are concerned.

There are a couple of matters which seem to me to deserve the committee's attention concerning the present method of doing business under the code.

One matter in which I have a great deal of concern is the sentencing provisions. Although the services are attempting ambitious programs of rehabilitation, there is no formal statutory authority to my knowledge, by which a court-martial could sentence a defendant under the Youth Correction Act. The vast majority of servicemen being tried by court-martial are within that age group where if they commited crimes in civilian life they would be sentenced under the Youth Correction Act with a general rehabilitative program in the Federal penal system.

This would be true even for serious offenses where in the opinion of the judge the particular offender can be salvaged. Too often, I am afraid, in the military system the court-martial simply sentences him to confinement and what happens to him later depends upon the prison to which he is sent.

If he is sent to Fort Leavenworth then he may be treated just as a confirmed criminal would be treated because he has a long sentence; this may be true even where this same individual, if he were tried in a Federal civilian court would have been sentenced under the Youth Correction Act and sent to a Federal prison such as Lewisberg.

Another factor which concerns me a great deal in this system is the independence of the defense counsel. I have no reason to believe that most defense counsel do not competently perform their functions with complete integrity.

However, I think that the same reasons that justify the law officer field judiciary system, also justify a system by which defense counsel would not be subject to the command of the officer who referred the case to trial.

Several witnesses before this committee have pointed out how well the Army's field judiciary system has been operating. This system by which a law officer is not subject to the command of the staff judge advocate or the convening authority but goes into a command completely free from the control of those officials and performs his duty is extremely desirable.

I see no overwhelming reason why a defense counsel could not also ride circuit with him.

As a matter of fact, the Army has a system for this which they plan to put in operation in time of war, the so-called trial team system, by which defense counsel, trial counsel, the court reporter, and the law officer would move from one command to another trying cases, depending upon the local staff judge advocate for logistical support.

It seems to me that this degree of immunity, at least from the appearance of command control would be an effective device for giving greater freedom to defense counsel.

I do not believe that the defense counsel in the military service stands in the same position as a defense counsel in civilian life. Try as he will, if he is an officer with 18½ years service, is a lieutenant colonel, and is in the zone for selection for colonel, he fully realizes that any effort which he takes which antagonizes the staff judge advocate or his general may result, not in a letter of reprimand, not in a transfer to Siberia, but simply by a "satisfactory" efficiency report which is just exactly like saying, "You are going to retire as a lieutenant colonel," or, "You are going to be subject to one of these elimination proceedings."

This unconscious fear, I think, exists in some people. I have experienced no problems as I have talked with many friends in the military service of having defense counsel indicate that they feel a little bit queazy when they raise command influence.

I think the system is operating well largely because of the large number of defense counsel who don't care what happens to their professional advancement in the Army because they are reserve officers on a 3-year tour of duty. I am not positive that all of the

command influence cases which have come before our courts would have come before our courts in the absence of this fact.

Basically, therefore, I would recommend that consideration be given to a field judiciary concept in which the defense counsel was mobile, with the law officer, each being appointed by the Judge Advocate General, each traveling on a circuit, each free from the control of a particular convening authority.

I agree with the comments of the chairman that there is no way to avoid the situation where the convening authority appoints a court-martial. I think, however, that gradually we are reaching a point where a court-martial is beginning to feel that it is an independent factfinding body.

I do remember a southern judge of my acquaintance, who once told me, "just let me appoint the jurors and you can have any procedure you feel like, and I am not going to be worried about the result." I don't think this is quite as true now in military justice as it once was.

I must confess that on one occasion I was representing a lieutenant colonel charged with sodomy in a court-martial in the District of Columbia in which we had 11 full colonels sitting on the court and I asked these gentlemen whether or not in their opinion the accused was probably guilty when a major had referred a serious charge such as sodomy against a lieutenant colonel, where the case had been investigated by a senior officer, examined by a staff judge advocate who was a colonel and referred to trial by a major general, and every single man there said no, he didn't think this indicated the accused was probably guilty.

It certainly indicated to me that the accused was probably guilty if those people were doing their job, but this is a thing I think we have to live with. This is the kind of area in which we would have to tear apart the fabric of military life to change it and I thoroughly agree that what we should be trying to do is to change those things which we can change without destroying the efficiency of our military service.

A traveling defense counsel is consistent with this. To change the status of the convening authority in my estimation, is not.

There is one matter which causes me great concern, and this is the inequality of treatment which servicemen are receiving in the various services, and I refer here particularly to the action of the Army changing the code in effect with reference to the jurisdiction of special courts-martial.

As the code was written it was intended that a special court-martial would be able to award a bad-conduct discharge. This is the way it is administered in the Navy and Air Force. The Army passed a regulation which said no Department of the Army funds could be used for a reporter before a special court-martial. The code requires that no court-martial may give a bad conduct discharge unless there is a verbatim record. By this internal regulation the Army has deprived the special court-martial of authority to give a bad conduct discharge.

The justification for this is that a bad conduct discharge is extremely serious, and that every person who is subject to receiving a bad conduct discharge should be represented by counsel in a proceeding tried before lawyers.

The other services had covered this by providing lawyers at special courts-martial.

In any case the result, because of a certain statutory pattern, works quite unfavorably on an Army defendant. It does so in two different ways.

Every case that goes before a special court-martial in the Army is a case in which everyone concerned with it knows it can never reach the Court of Military Appeals. There is consequently no chance of reversal by anyone except the staff judge advocate.

Consequently, either of two things may happen: You may send a case before a special court-martial without the fear of reversal if something improper occurs. After the defendant has been court-martialed by a special court-martial and received a light sentence, you may then use the special court-martial conviction as a basis of eliminating him through an administrative discharge proceeding.

From the administrative discharge there is, of course, no judicial review and thus we have, by combining the two systems, disposed of an individual in a system by which he has never had any judicial review—the difference being that he now has an undesirable discharge instead of a bad conduct discharge, which doesn't mean much to the soldier.

The second alteration is equally grave: If it is a case which, in the opinion of the commander, is a case where a bad-conduct discharge may be an appropriate sentence, he may not send it to a special court-martial. He must send it to a general court-martial.

Now, two things happen at this stage, in my opinion: In the first place, when a case is sent to a general court-martial, it is generally regarded as being a more serious case. The limitations upon the power to punish which apply to special courts-martial do not apply. The Department of the Army statistics which have been submitted to the committee indicate that for the very same offense the punishment imposed before a general court-martial is much greater than if the case had been sent to a special court-martial.

So we start out with the probability that this man will get more than he would have if it had gone to a special court-martial.

More important, however, if he gets the same thing, simply a bad conduct discharge, by the operation of title 38, a different result attains.

If he gets a bad-conduct discharge from a special court-martial he does not automatically lose his rights before the Veterans' Administration. If he gets the same discharge from a general court-martial he does lose his rights automatically before the Veterans' Administration.

I think this is an important differential. Taking the very same case involving the very same serviceman who, in the opinion of the same convening authority should get a BCD in the Army, it is sent to a general court-martial, probably he will get a DD. If he doesn't get a DD and gets a BCD, the BCD has more serious consequences than would a BCD which had been awarded by a special court-martial.

I think this is an important difference in the way that Army servicemen are treated, which Congress did not intend. I am not saying there are not virtues in the Army's system, but it was my understanding that one of the chief purposes of this code would be that all service-

men would be treated equally and by use of this administrative regulation the Army has achieved a status in which they are not being treated equally.

The third matter upon which I would like to comment is the status of the boards of review which review appeals from general court-martial convictions. My remarks in this regard must be confined to my experience before the boards of review in the Office of the Judge Advocate General of the Army.

I had the honor of serving there 2 years as a Government prosecutor and I have had several cases before these boards subsequently in a civilian capacity.

It is my firm impression that these boards serve no useful function, as they are presently constituted except to reduce sentences. Your statistics will indicate that almost every case is affirmed and in almost no cases are any opinions written.

The sole relief that the average defendant can hope to obtain is a reduction of sentence. This has not been my experience before the boards of review of the other services. My experience has not been so extensive before those boards. It seems to me, to the extent that an intermediate appellate board is desirable, that the suggestions which have been made before this committee are good suggestions.

We should have a board which has some state of judicial standing. I am not concerned that the Judge Advocate General writes the efficiency reports of the members of the board of review. I don't think that affects the performance of the board members. I think what affects it to a much greater extent is that they are reviewing the work of their close friends in the field, including men whom they may serve under in their next assignment.

If, for instance, I am a junior colonel on an Army board of review, and I am called upon to determine the propriety of what the staff judge advocate of 1st, 2d, or 3d U.S. Army has done, I, at least, would be aware of the fact that my very next duty assignment may be under his command.

Perhaps I shouldn't consider this, but my mind works in such a way that I would consider this, and I think this is a much more insidious type of effect than is an efficiency report signed by the Judge Advocate General.

During the 8 years in which I have had some knowledge of the operation of these boards, I have seen no effort by the Office of the Judge Advocate General to control the independence of these board members, since the first year of the operation of the code when the Army devised another one of these extraordinary legal remedies by which there was a sentence review and coordination board in which, after the board made their independent opinions, it was sent to the brigadier general who had a special little board who decided whether their sentences were good and whether their opinions were good.

But I think everybody appreciated that this was hardly consistent with the spirit of the code and it has disappeared long ago.

It seems to me, however, that at the very least these boards could be combined into panels. I think experience has shown that what you need on an appellate bench of this nature are trained lawyers with a certain degree of independence, that intimate knowledge of the military service is not a particularly great asset.

The Navy has proved this through the use of civilian members on their boards. I see no reason why a board of review composed of an Air Force officer, a Navy officer, and an Army officer could not function as well as a board composed of three Army officers when you are sitting as an appellate bench. Whether or not they should all be civilians I am not so sure. I think you would achieve a great degree of independence if you had a unified board. You would also achieve a very, another very, desirable function.

These boards have the power to determine the appropriateness of a sentence. At the present time it is my belief that the sentences in the Army run considerably greater than they do in the Navy for the very same offense.

Part of this is due to the fact that so many of them are tried by general court-martial where the Navy tries them by special court-martial. But if you had a unified board determining the appropriateness of the sentence I think you would go a long way toward getting a more uniform sentence structure between the three services.

Another matter concerning which I would like to comment is one where I am afraid I shall be accused of really going off in an ivory tower and this is the question of whether or not it is constitutional for courts-martial to try servicemen in this country in time of peace for nonmilitary offenses.

By a nonmilitary offense, I mean an offense which is not committed against the person or property of a member of the military service and which is not committed on a military installation.

If I may give an example: The case in which I represented this colonel who was charged with sodomy with a little boy in Washington, D.C.; is it constitutional for a court-martial to try him for this offense?

This is a matter which has not been determined by the Supreme Court. It was not until 1916 that the Congress gave the general power to the military to try servicemen in time of peace for civilian-type offenses.

It has never been litigated to the extent that we have a final definitive ruling.

One hundred years of history show a gradual attempt by the services to gain this authority culminating in 1916. In the hearings on the Uniform Code only one person raised this question.

Nevertheless a historical study conducted by Mr. Robert B. Duke and Mr. Howard S. Vogel, published in the March 1960 Vanderbilt Law Review, demonstrates convincing reasons, in my estimation, why this is not, in fact, consistent with our own Constitution.

Both Hale and Coke at common law held that for a court-martial to sit in time of peace to try a person for a capital offense which then included all civilian-type offenses, would be murder on the part of a court-martial. This is a matter which I respectfully submit has not been the subject of appropriate consideration to date.

We now are in a somewhat ridiculous situation that if a Marine from Camp Lejeune attacks a girl in Greenville, N.C., he is going to be tried by a court-martial or may be tried by a court-martial. This Marine's only right to trial by jury is if he commits the offense in England. If he commits the offense in England, by virtue of the Status of Forces Agreement, the English are going to try him.

If he commits the offense at home he has no right to trial by jury. He is probably going to be tried by a court-martial.

The Federal departments have worked out an understanding between themselves whereby if a serviceman commits an act which is both an offense under the Uniform Code and under title 18 there is a priority of jurisdiction. Generally this arrangement recognizes the idea that the offense is properly cognizable in a Federal district court if the offense has no military significance. I respectfully submit that as a matter of constitutional law, it is questionable whether courts-martial should have the power to try civilian-type offenses and as a matter of desirability it is also questionable whether they should have this power.

Let me say in this regard many of the problems that we have in trying to accommodate the necessities of discipline with the procedures which we usually consider to be a minimum in a criminal hearing occur in the trial of these civilian-type offenses which have no disciplinary significance at all.

I think most of us would agree that where you have a case of someone who has insulted an officer or struck a noncommissioned officer, who has been AWOL or desertion, this is a disciplinary matter primarily.

The problem comes when he has committed larceny off the post or violated the Dyer Act or something of this sort. Many of the problems which we have in accommodating these two objectives could be solved if military jurisdiction was limited to military-type offenses—offenses against the person or property of the military or offenses committed on a military reservation.

The final matter to which I would like to advert in my comments concerning the Uniform Code is the problem which has resulted from the series of Supreme Court cases in *Toth*, *Smith*, *Covert*, *Guagliardo*, and the remainder.

As the committee is aware, in those cases, the Supreme Court has determined to be invalid the provision of the Uniform Code which permitted the service to try a serviceman for an offense committed while he was in the service after he left the service; the provision which permitted the military to try civilians accompanying the Armed Forces abroad; and the provision which permitted the military to try dependents accompanying the military abroad.

All of these matters cause a grave hiatus in our pattern of criminal jurisdiction. We have had a number of cases which have arisen already, which point this out, I think. If the person commits a crime in France then perhaps we can say, all right, we will have the French take care of him. If it is a serious offense the French will wish to. If it is not a serious offense then perhaps we can solve it by sending the civilian home.

But what about Antarctica where there is no local court or Eritrea where we may not wish an American serviceman to be tried by a local court.

At the present time there is no statutory jurisdiction for us to try an American who commits an offense such as murder abroad. There have been several suggestions made. One has been made by Prof. Arthur Sutherland of the Harvard Law School in his recent address at St. Johns Law School.

Another was made originally by Senator Hennings, the former distinguished chairman of this subcommittee.

I personally support the proposed legislation which Senator Hennings submitted some 5 years ago, to place jurisdiction in a Federal district court in the United States with venue in the first Federal district into which the defendant was brought, as is done in our treason cases, to try any act which is an offense against the uniform code committed by a civilian accompanying the Armed Forces abroad.

I do not think there would be many prosecutions because of the problems of obtaining witnesses, because of the practical logistical problems and because of the fact that usually we just let these matters rest after awhile.

It seems to me there ought to be this authority to take care of the extreme case, however. If another Mrs. Covert or another Mrs. Smith kills her soldier husband abroad, and for some reason the local country does not prosecute, it seems to me that the integrity of our processes would require that we seriously consider prosecuting this citizen when the citizen returns home.

Some problems would result with reference to our Status of Forces Agreements by this solution. Under our Status of Forces Agreement at the present time a receiving state has exclusive jurisdiction over any crimes committed by members of the American forces which could not be punished by the military authorities of the United States. Because of unfortunate language in the draftsmanship of these agreements the fact that we could try the person in a civilian court back in the United States does not give us concurrent jurisdiction over our own civilians.

My experience in talking to prosecutors and lawyers in six of these NATO countries at the time when I was conducting a study of these matters, indicates that there probably would be no objection to trying an American after the American returned home. This is not a subject of their interest. The purpose of this provision was to discourage any type of American court operating on foreign soil with the exception of a court-martial.

I consequently suggest that the legislation which Senator Hennings originally introduced to cover the *Toth*-type situation, be extended in its language to cover the cases involving civilian employees and dependents of American servicemen.

I have just a few comments concerning the administrative discharge situation.

This in my estimation is a much more serious problem than are the problems arising under the uniform code.

I do not have the experience of Mr. Kabatchnik or Mr. Kendrick in administrative discharge cases except in elimination proceedings involving officers. I have spent some 5 years now on the study of procedures of various types. I can honestly say that in no country and in no system have I observed a system which I consider more basically unfair than the system utilized by the U.S. Army in the elimination of officers.

I ask you to conceive of your status as a counsel in a proceeding where unknown to an officer a group of people have selected him to show cause why he should not be eliminated, and a hearing is then set up before three general officers in which he has the burden of proof to establish why he shouldn't be eliminated.

In this proceeding he has no right of compulsory process, he has no right of confrontation, and the board has been informed in advance that he does have the burden of proof.

This makes the situation almost insurmountable in some cases.

I represented a lieutenant colonel before an appellate board 2 years ago. This officer had 18½ years of effective service. He had never been passed over. He had only one efficiency report below satisfactory and this was the result of unfortunately fulfilling his duties to the letter of the law if not in the spirit.

This resulted in one very bad efficiency report.

These efficiency reports were put in the Army's OEI system and it resulted in a report before the Adjutant General, which was then referred to a selection board.

This report indicated that this officer had never served in combat when he had an arrowhead for an invasion. It also indicated that he was in the lowest 10 percent of provost marshal lieutenant colonels.

A hearing was held at Pueblo, Colo., in which three generals were flown in, heard evidence for one day in a hearing that lasted 9 hours because one of the generals was busy the next day. It was determined that he had not shown cause why he shouldn't be eliminated.

If he had not appealed as most of these officers do not, he would have been eliminated from the military service with no retirement after 18 years of conscientious service.

He did, in fact, appeal, and we were able to prevail upon an appellate board in one of the five cases that year in which they reversed a lower board, that this officer should not be discharged when only once in an 18-year career had he been found not to be satisfactory.

The problem, however, of being a counsel in a case in which you have the burden of proof against you and you have no compulsory process and no right of confrontation is almost insurmountable.

You frankly feel like throwing your hands up in the air.

As has been pointed out, witnesses before this committee have questioned whether the subpena power should be accorded counsel representing a respondent in this type of a proceeding.

I thought that by now one thing that lawyers could agree on was that an essential to a hearing process was that you have the right to have witnesses. I see no real danger of any type of overbearing conduct on the part of counsel.

In the first place, we have to assume that counsel are ethical and they will not behave improperly by calling unnecessary witnesses.

If this is not a solution in itself, we have a clear statutory pattern in rule 17 of the Federal Rules of Criminal Procedure in which the indigent defendant has a right to have witnesses subpenaed only after he swears to a statement indicating the name of the witness, the purpose of his testimony, and wherein it will be relevant. This is then heard by or presented to the judge who then determines based on this affidavit whether or not the subpena should issue.

I would have no objection to a proceeding in which counsel or his client were required to file an affidavit stating wherein the evidence which would be elicited from this particular witness would be relevant.

This has worked extremely well in our Federal system since 1948 in criminal cases, and I see no reason why it could not work before these administrative tribunals.

Next to the problem of the subpena power is the problem of confrontation. I would not require that a witness be physically present at the time of the hearing. It seems to me, however, not to be unreasonable to require at some time that the witness be present before the respondent or his counsel. The deposition procedures referred to by Mr. Kendrick would be my idea of how that should be done.

I represented an officer who was a major in the Army, who had 16 years' experience after graduation from West Point, was eliminated from the service on the charge of being a homosexual in a proceeding where not one witness appeared. All that appeared was a single photostat of a piece of paper as to some answers which he had given the CID and what one other witness had given the CID. There was no corroboration for his statement.

The statute of limitations had run the particular acts testified to. I had no opportunity to cross-examine any witness whatsoever. It does not seem to me to be unreasonable to say, "All right, if the exigencies of the military service prevent us from having the witness present at the hearing, then what we will do is after we send out the CID to take an affidavit from this person or a simple unsworn statement from this person, then we will permit a counsel to go. We may not have to provide counsel but we will at least permit counsel to interview the witness whose statement is being used against the officer. So that there is some opportunity for counsel to go behind the flat conclusions of the witness."

Thank you.

Mr. CREECH. Mr. Pye, you have indicated that you have served as a member of the Government Appellate Division in the Office of the Judge Advocate General and obviously in that position you have come to know a number of men who have worked in the Judge Advocate General's Corps.

The subcommittee has received testimony to the effect that in some instances when defense counsel become very proficient in defending servicemen they are transferred or assigned as prosecution counsel and an allegation actually has been made that the least competent men are assigned to defend servicemen.

Would you care to comment on this type of allegation?

Mr. PYE. In the Government appellate division I saw no indication of this at all. I probably thought we had a better office than they did but I am inclined to think this is true of any law firm when you look across the street. I saw no evidence, however, of any officer being transferred from the defense appellate division because he was doing his job. I saw no type of command control over any of them.

The problem when I was in the service, was that we had the same number of officers that they did, and since they had to read every record to see if there was an error we had a tremendous advantage in the time available for briefing a case over what they had. There was that type of administrative disparity but none as far as command influence.

I think, however, that what you suggest is relatively customary in the field. I have known a number of officers who when they left the Judge Advocate General's School their first duty was as defense counsel. When they became more proficient they were transferred to the role of trial counsel and the next newest officer coming into the command was the defense counsel.

I have seen this happen on a number of occasions.

I have also seen this happen on occasions in these administrative proceedings. Quite frequently the officer assigned to represent the respondent is an officer who knows very little about it.

In one case in military district of Washington, since the defendant had a right to have military counsel, I requested the four officers whom in my opinion were the best qualified officers in the command to represent him. Each one was determined not to be reasonably available.

One of the officers who had been declared not reasonably available to represent my client subsequently appeared as the Government prosecutor or recorder.

Now, that type of situation, I think, does happen but I cannot say of my knowledge in the appellate division that it did.

Mr. CREECH. In this particular case you mentioned was any reason given why these men whose services you had requested for your client were not available?

Mr. PYE. I was told because he was the best man and he was going to be the recorder.

Mr. CREECH. Then a recorder in such a proceeding, you do not consider to be a disinterested party?

Mr. PYE. Well, the recorder is a prosecutor. We are playing games. This is like an administrative hearing before the Federal Trade Commission in which the Commission has issued a complaint and counsel appears. He is not appearing as an impartial person who doesn't have any purpose.

No, the recorder proceeds to cross-examine my witnesses and the questions he asks of his own witnesses establish a prima facie case.

This is, in my opinion, a prosecutor. The only difference is that I have the burden of proof.

Mr. CREECH. The subcommitee has been told by representatives of the Defense Department that, in such cases where the defendant or the individual who is being considered for administrative discharge is not represented by counsel, the recorder may interrogate witnesses in his behalf—ask questions supposedly designed to adduce testimony that is going to be beneficial to that individual.

Mr. PYE. Well, I am sure this is the case. In the same way as the U.S. Attorney under the *Berger* case has the obligation to be completely impartial and bring out evidence on either side of a criminal case so as not to suppress any evidence. The recorder is appointed, however, after the general has said that this person should show cause why he shouldn't be eliminated.

He's there to present the Government's evidence. I am sure he does not suppress evidence, I am also sure he does not give a closing argument in favor of the respondent.

Mr. CREECH. Sir, some of the representatives of the services have said that this is not considered an adversary proceeding.

What is your view?

Mr. PYE. The only time it is not considered an adversary proceeding is when he doesn't have a counsel. If a counsel is doing his job when you are representing a man whose entire life may be affected by the loss of retirement income, by the social stigma attached to being branded as a homosexual, this is as much of an adversary proceeding as I have ever been in and I certainly regard it as such.

If by this they mean that military defense counsel do not regard it as an adversary system then we are really in bad shape.

Mr. CREECH. I believe you indicated that you feel that an individual appearing before such a board should always have the right to counsel?

Mr. PYE. Yes, sir.

Mr. CREECH. I wonder, sir, what is your view with regard to the waiving of counsel especially by younger servicemen?

Mr. PYE. This is a situation in which I frankly have a problem because I don't know any solution to it.

I am positive that no person is deprived of counsel. He is given this right. Perhaps reference should be made with reference to the remarks Mr. Kendrick made in the manner in which article 31 is read to someone. The manner in which you inform someone of these rights makes a lot of difference to an uneducated schoolboy as to whether he thinks the right is important or not.

I remember a case once under article 31 in which they read him his rights in English and the boy was Puerto Rican and didn't speak English and this was affirmed all the way up the Army channels. The same thing is true in their proceedings. The boy is brought in before a colonel and is told, "We are going to give you a board proceeding. Do you want a counsel?"

"This isn't an adversary proceeding to put it in their language. What we have is a recorder to represent everybody here. Now, do you want a counsel?"

He is quite apt to say no, but I don't know any solution to it. It seems to me that a solution should be that a counsel should be appointed automatically for him from officers in the staff judge advocates offices. After the judge advocate talks to him then if the person wants to decline counsel, counsel will withdraw.

This is the usual manner in which is is handled in the Federal court.

If a young man is brought up on a crime no matter how serious, before the municipal court, and the judge sees that the defendant is a young immature boy, he will say, "Look, I am going to appoint counsel for you. You talk to him. If you don't want counsel, then we will let him out of the case."

But in the administrative system if the boy has a choice he may not realize how important it is. If you appoint a lawyer for him and the lawyer talks to him and tells him how important it is, the chances are he is going to utilize the services of a lawyer, I would favor that type of procedure by which at the commencement of one of these proceedings, the respondent is assigned a counsel from the judge advocate's office. This counsel will then inform him of what it means to have counsel. If the serviceman then wishes to waive counsel then let him waive counsel. But have the judge advocate inform him and not have that come through command channels where his commanding officer is doing the informing.

Mr. CREECH. Sir, you have indicated that you feel that there is room for improvement in this type of procedure, and the subcommittee has received testimony to the effect that it would be desirable to have the administrative proceedings reviewable by either a judicial body or eventually by the Court of Military Appeals.

I wonder what your feeling is with respect to these suggestions?

Mr. PYE. I think they should be reviewed by some administrative body. I frankly have not conducted a sufficient study to know what the scope of the review should be.

The present review is a de novo review before another board. This type of review, I do not think would be consistent with the usual operation of a judicial body that we are talking about now.

To the extent that the Court of Military Appeals would get into the act it would seem to me we should at least have supervisory jurisdiction similar to certiorari on points of law that might arise in a proceeding.

Let me give you an example of this. The statute provides with reference to the rights of a defendant to obtain records, that the respondent shall have all records relevant to his case. The Army regulations supposedly implementing this statute provide that he shall have access to the records of the hearing including all documentary evidence referred to the selection board.

Now, if I have a case in which there is a CID report which is the basis of starting out the proceedings and then that report isn't sent to the selection board but only the conclusions of an officer who has read that report, under this situation under the statute I am entiled to get to the CID report.

Under the regulation I am not entitled to get to it.

If I could go to the Court of Military Appeals for a writ requiring it, it would be of tremendous assistance to me. If, at the proceeding, the recorder instructs improperly, then it would be of tremendous assistance to me to be able to have a review of this.

Whether this should be the Court of Military Appeals or some other body I am not so sure. It seems to me that we have an awful lot of boards here which are doing substantially the same thing right now.

I am not at all sure that we could not set up an independent administrative tribunal to handle reviews from all of the services by a merging of the various discharge review boards and the boards for the correction of military and naval records into one board which would sit with panels for all the services.

Perhaps this board would be able to review the same manner in which the various boards now review. But if a question of law arises you could go to the Court of Military Appeals and have that determined, something of that order.

Mr. CREECH. Sir, you speak of article 98, and you say that you know of no trials under it; that so far as you are concerned, it is a dead letter; and that enforcement of the rights given to a serviceman by Congress ultimately depends upon the Court of Military Appeals.

Do you have additional suggestions with regard to how article 98 might be made more effective?

Mr. PYE. I doubt very much from a realistic point of view whether it is ever going to be more effective. This is like the problems of police brutality or police violating the Mallory rule. I don't expect U.S. attorneys to try police for it, because realistically this wouldn't work. You would lose the confidence of your people.

If there is any chance at all, however, 98 has to be taken out of military control. Witnesses before the Senate and House committees in 1950 requested that the authority to try someone for violating a serv-

iceman's rights should be placed in the U.S. district court in a proceeding by the U.S. attorney because they predicted there never would be a conviction of a senior officer. Their predictions have proved true.

I can think of one case, for instance. This is a case in which a witness before the committee, Mr. Evans, represented the Government. It is a case in which a lieutenant was charged with assault with intent to rape a WAC officer, if memory serves me correctly.

He was convicted and was sentenced to 10 years. During the process of review civilian counsel entered the case for the defendant, and much to our amazement he established that the fingerprint on the bedpost which was the vital evidence had been placed there by CID agents who had taken a fingerprint of the lieutenant from the table during the interrogation, with scotch tape, put it on the bedpost and then sworn under oath they took it from the bedpost.

Of course, the case was washed out.

There never was any trial of these individuals. If something like that isn't going to be the subject of trial, I don't think there is ever going to be a case that is.

I would, to answer your question, however, prefer to take the exact language of 98, making it an offense and put it in title 18 to the extent there is any possibility it is going to have to be initiated by a U.S. attorney.

Mr. CREECH. Sir, you have proposed, among other things, trial teams of law officers and defense counsel and trial counsel, and you say that the Army intends to implement this system during times of war, and you ask the question, Why not begin the system now?

I wonder, sir, has your experience and information indicated to you why this has not been done?

Mr. PYE. I have no idea why it hasn't been done. It has been in the experimental stage for 3 years, and they have gone to the extent of providing for it by Army regulation. There are Reserve teams established in the JAG Reserve for it. They have summer duties together in which they put it into implementation. One of the reasons why it was started was a realization that in time of war military necessity requires greater mobility. We are not going to be able to have large staff judge advocate headquarters close to the frontlines in an atomic war and what they are thinking of is something that is extremely mobile. I suspect that the reason is that I think these things can be used to avoid command influence, they are thinking of using them in order to get greater mobility.

Mr. CREECH. Sir, you have brought out here your feeling about a negotiated plea; would it be more desirable to have negotiated pleas on record instead of the civilian practice of informal arrangements between counsel and the prosecutor?

Mr. PYE. I think it probably would be. The great difference here in the negotiated plea is that when I deal with the U.S. attorney I accept his word that he is going to dismiss an indictment as to three counts when I plead my man as to one count, I know that this is going to happen. He is not dealing with me in terms of the ultimate sentence involved because the judge is going to give the sentence and the best I can hope for is that he will give a recommendation of a certain amount.

When I am dealing with the prosecutor in the Army I realize he doesn't have any of this authority. All he is, is a representative of the staff judge advocate's office.

What I am dealing for here is a promise from the staff judge advocate that he will recommend to his convening authority that a sentence not exceeding a certain amount will be granted.

I am also in a different situation in that when I deal with the U.S. attorney the first thing I am trying for is to get the case dropped altogether which he has the authority to do.

When I am dealing with a trial counsel he doesn't have this authority or if he does I have never seen it exercised. For these reasons, I think a greater degree of formality would be important. A greater degree of formality also would be important to avoid the appearance of evil.

There are former officers whom I know who fear that a system of negotiated pleas would result in defense counsel not doing his job. My experience has not showed that to be the case. I think counsel have adequately represented clients by entering into negotiated pleas in the same way as their civilian counterparts do.

When we start out with the assumption that most of these people probably are guilty or they probably would not be charged you have to reach the conclusion that the role of counsel may be adequately served by getting them a light sentence in some cases instead of going for broke with tragic consequences.

Senator ERVIN. That really is the chief value of counsel in a case where a man is guilty: to try to convince the prosecutor or the court that there are enough mitigating circumstances to entitle him under all circumstances to a comparatively light sentence.

Mr. PYE. In this, military system gives defense counsel a great deal of leeway. If I say, "Look, you are going to recommend a sentence not exceeding 3 years, and a DD let us say, for a robbery case, and I will plead him guilty," I will have my full chance before the court-martial to persuade the court-martial to give less than that.

If the court-martial gives less than that, that is what he is going to get. All I have got is built-in security that my man isn't going to get any more than the deal.

This is a terrific tactical advantage to a defense counsel, in my estimation.

Mr. CREECH. Sir, I would like to ask you about your feeling with regard to the boards of review.

You have stated among other things, that you question whether they perform any function whatsoever except to reduce sentences in most cases. You go on to say that it is almost impossible for the Government to lose a case and I realize you are speaking of your experience primarily before the Army.

Mr. PYE. This includes three in which I confessed error and which were affirmed.

Mr. CREECH. You have indicated that perhaps the only function that they really serve in some instances besides reducing sentence is to delay the processing of a case.

I wonder if you feel that these boards should be abolished or combined. Under the existing situation, would you favor the abolition of these boards as a means of expediting the handling of the cases?

Mr. PYE. I wouldn't for another reason. Right now, the only chance a case in which he does not get a general court-martial sentence of being reviewed is under article 69 being referred to to a board.

In those cases it is the only method of review.

I am not prepared to say that they should be abolished although I am not prepared to say that they shouldn't be. I am not sure in this yet.

This thing bothers me a great deal. The accused is led to believe he has had a full and clear review of his case by a board of review. He is then asked if he wants to go further by petitioning the Court of Military Appeals. A substantial number of accused never exercise their statutory right of seeking review of the Court of Military Appeals and it is quite reasonable if you think of it in terms that "The case has already been reviewed and they didn't find anything wrong with it so why should I go up another chain."

Now, to that extent the boards are performing an unfortunate function. But from time to time you do get a good board that improves military law. When I was in the service there was a board, the chairman of which was Col. John Gordon O'Brien who is now Brig. Gen. John Gordon O'Brien, staff judge advocate for USAREUR.

It was quite a shock to me when I appeared before this board. Colonel O'Brien was a very distinguished lawyer; I promptly lost five cases; opinions were being written. When the other two members would just short-form it, General O'Brien would write a dissent which was just like raising a red flag to grant review of the case. I would hate to take out the system this element of a fine judge advocate performing his duties in a magnificent manner to the benefit of both the Army and the individual accused.

For that reason I would not be prepared to recommend there be abolition, but I think substantial changes should be made.

Mr. CREECH. Thank you.

You have indicated that one of the chief disadvantages of a unified board would be to stifle further career incentives of capable legal officers by limiting their capacity.

Mr. PYE. That would be a civilian board, sir. I can conceive of a unified board which did not involve civilians.

Mr. CREECH. My question was going to be, if you considered a mixed board such as the Navy board of review where in some instances there are civilian members.

Mr. PYE. I think it does to this extent. Properly, service on a board of review should be regarded as the highest position which an Army judge advocate or a Navy legal specialist could hope to aspire to other than Judge Advocate General. I don't think it is. I don't think that it is regarded in the services as being nearly as important duty as the job of Army judge advocate, the staff judge advocate for 1st, 2d, or 3d Army or as chief of any of the major divisions in the Office of the Judge Advocate General.

If it is properly placed where it is the highest honor, however, I should think you would want to keep as many spots open as possible. I don't know enough about the Navy system to say whether it is more advantageous than the Army's or not. I am concerned about this lack

of career incentive for officers to do the very best job possible, however. I think this is largely the problem in the Marine Corps where a large number of their judge advocates are preparing to retire after 20 years. I am somewhat of an expert on this because we are hiring some of them. They are excellent law teachers and these are officers who have just been stifled in their career incentive because they were lawyers in the Marine Corps. I am afraid this is happening in the Navy as well.

Mr. CREECH. Sir, you have posed the question of whether it is constitutional to try in time of peace an offense committed by a serviceman within the United States where the nature of the crime is exclusively civil in the sense that it isn't committed on military installations.

Now, sir, how do you differentiate between those which are civilian offenses and military offenses, particularly in light of the provisions of article 134 of the Uniform Code?

Mr. PYE. I would not hesitate to say 134 which carries a maximum sentence of 6 months is constitutional. Traditionally at common law this type of offense was triable by court-martial. This was any offense which is prejudicial to the maintenance of good order or discipline. By the same act a serviceman may commit a civilian crime and a breach of discipline, and I would not mind the court-martial trying him for the breach of discipline.

This was always what was done up to the constitution, in England.

Then we added another phrase of 134, "or of a nature to bring discredit upon the Military Establishment," which never existed at common law. I wouldn't hesitate to permit this, either. Let the military punish him but not give him more than 6 months because the military is punishing him, not because he committed larceny or sodomy or robbed a bank, but because he has breached a rule of discipline. But as to the civilian-type offense which he has committed for which he may get a substantial sentence this should be tried in the State or Federal court which usually would have jurisdiction over him.

Mr. CREECH. Now, sir, we are all familiar with the delays in the civilian courts, both at the State and Federal level. I wonder whether you feel that the right to a speedy trial might be jeopardized in any way by returning jurisdiction to the civilian courts?

Mr. PYE. I don't think so.

I know of no delay which now exists which deprives anyone of a prompt and speedy trial in the constitutional sense. Even in the States where we have our worst backlog we are talking about 6 months. The status of the soldier would be no different than that of any civilian who committed the same crime. If it is not a denial of prompt and speedy trial for the civilian, then it wouldn't be for the soldier.

Mr. CREECH. Sir, going to the administrative discharges, in one case which you cited before the committee, you mentioned that the man involved had been told that he was found to be in the lower 10 percent of his classification.

Was it ever indicated to you how the Service arrived at this?

Mr. PYE. I sent a letter to the Adjutant General asking for a list of the people who fitted in the 5 percent below him and the 5 percent above him, and I got back a letter saying, "No, they didn't keep any

such list," at which I raised the point, "How did you know he is in the lowest 10 percent?"

And the answer was that by virtue of their OEI's, their Officer Efficiency Index, I think it's called, a certain percentage of people have to fall on their graph if everything works right in a certain percentage, and, based on his score, they predicted he would be in the lower 10 percent.

Mr. CREECH. This was his score for the overall 18-year period, or whatever it was?

Mr. PYE. Well, it is not an 18-year period. I have forgotten how many years it goes back—4, I think.

Mr. CREECH. Sir, the allegation has been made that at one time in certain branches of the service—the allegation was made specifically with regard to certain bases—quotas were assigned for administrative discharges. According to the allegation, this was an unofficial thing; but it was indicated to the commanding officer what percentage they should be expected to eliminate administratively.

Have you any information on this or can you comment on the basis of your experience?

Mr. PYE. I know nothing of this. I have come across a totally different problem in this regard, and that is if you compare the rates of discharge or the rates of court-martial and the administrative discharge rates of different divisions, you will come to the conclusion, I think, that there is a wide disparity. Depending on the staff judge advocate he may utilize the administrative discharge or the court-martial to get rid of people, that there is no general policy governing the staff judge advocate in this area.

Senator ERVIN. I found it rather difficult to accept any such inference that he is assigning a quota of men for getting rid of them by administrative discharges regardless of whether they had association with Communist organizations or whether they were the best men in the service.

Mr. PYE. I have a great deal of difficulty in thinking anyone would do that but I don't know.

Mr. CREECH. Sir, you have stated, in your statement, that you are strongly convinced that these administrative proceedings are being used to eliminate officers for misconduct when the Army cannot obtain conviction in a court-martial, where the accused is afforded his rights under the uniform code.

Is it your feeling, sir, that a man is entitled to a court-martial if he requests it?

Mr. PYE. No, I can't say that. I think the Department of the Navy ought to be commended for its candor in answering the committee's questionnaire in which the Department of the Navy says, "Yes, we use this where we have a homosexual whom we can't convict of a court-martial."

The Army does this, too. There is no doubt about it. Their answer to the effect that the regulations say they don't is just nonsense.

The record of the people who have appeared before the committee, I think, establishes that each of us has had cases involving administrative discharge for misconduct. I don't object to discharging a man because he is a homosexual even though they can't convict him of a crime. I don't think the services should be required to have a homo-

sexual stay on active duty simply because they don't have a sufficient amount of corroboration or that the statute of limitations has run since the last homosexual act.

What I would ask for is to let them discharge people for misconduct but do so in a proceeding where the man has the usual rights that you would have in a civilian proceeding.

Since there is going to be stigma attached, and he is going to lose, substantially, his accrued retirement rights, then he ought to have some type of legal protection, but not necessarily those of a criminal trial.

Senator ERVIN. You would agree with me it is very difficult to imagine anything that would be more destructive of morale of any unit than to have the feeling in that unit that some of its members were homosexuals.

Mr. PYE. Or that his commander was and that the only reason we are not touching him is that the statute of limitations has run since the last provable act.

I think the Army should be able to eliminate that man. But they ought to give him a hearing in which he doesn't have the burden of proof in which he has the right to subpena a witness or witnesses and in which he has the right to cross-examine his accuser.

Senator ERVIN. And that would be a case, wouldn't it, in which, to use a civilian term for it, the prosecution in many cases would be advantaged by having the subpena power so they could produce——

Mr. PYE. Certainly, sir.

Senator ERVIN. Witnesses who were reluctant to come and didn't want to come.

Mr. PYE. Well, I am not sure that in view of the way they are operating that they are suffering any disadvantage. They will just take a letter from somebody and introduce it.

Quite frankly, the only thing, the only comparable thing, from an evidentiary standpoint that can compare with what they are doing in these cases are the Japanese war crimes case when newspapers and everything else were marked up, and this is just about what is happening now.

Senator ERVIN. Mr. Waters?

Mr. WATERS. Thank you, Mr. Chairman. Mr. Pye, I am just wondering that perhaps, based on your experience as a lawyer who has tried civil cases, you might find, in some of these instances, where a man has been subpenaed that the counsel for the respondent might stipulate to his testimony.

Mr. PYE. Certainly; I would. For instance, if I have a situation where I am trying a Federal criminal case, and it is an interstate transportation of forged checks, and there is no question in my mind from the FBI report that there was no deposit in the Los Angeles bank, I do not consider that I have a requirement or requiring the Government to bring a witness from the west coast here to establish something as to which there is no dispute and I freely stipulate to it. I think other counsel do, as well.

Counsel would be expected to stipulate as to any matters which the other side is going to be capable of proving, except where the presence of the witness would permit cross-examination, which would damage the other's case, and I would expect the same thing to follow here.

Mr. WATERS. You feel that would be workable in the Military Establishment as well?

Mr. PYE. Yes. But I think that you should have the right, if in your opinion the presence of a witness is necessary, either to have him present or have a right to be present at the taking of his deposition someplace.

Mr. WATERS. In connection with these teams of traveling counsel, is it contemplated that the prosecutor of that team would be vested with the discretion to go further with that case; would he be authorized to drop it?

Mr. PYE. I am not sure. I do not think so. I think that the question of whether he is going to be charged or not is made by the convening authority for the area in which they go. The trial counsel just comes in and tries it; the decision to drop the case would have to be made by the convening authority, not by the trial counsel.

Mr. WATERS. Is it further contemplated that these traveling counsel might be relieved of, shall we say—that they would have the benefit of assistance from people on the scene who would be relieved of any responsibility?

Mr. PYE. Yes, they would get——

Mr. WATERS. Decisions would be made by the counsel.

Mr. PYE. That is exactly the idea as I understand it. They would get such logistical support that they needed from the command in which they traveled. That might be such as an assistant counsel to round up witnesses, an assistant counsel to gather up the evidence but the primary responsibility would be placed upon the person who is not in the command.

Mr. WATERS. Thank you, sir.

Thank you, Mr. Chairman.

(The prepared statement of Mr. Pye follows:)

STATEMENT BY A. KENNETH PYE, ASSOCIATE DEAN AND PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

Mr. Chairman and members of the committee, I am the associate dean and a professor of law in Georgetown University Law Center. I am a captain in the Judge Advocate General's Corps, U.S. Army Reserve, and in that capacity serve as a mobilization designee at the Judge Advocate General's School, Charlottesville, Va. During the years 1954 and 1955, I served as a member of the Government Appellate Division of the Office of the Judge Advocate General and in that capacity I represented the Army in appeals from general courts-martial before the boards of review and before the U.S. Court of Military Appeals. Since leaving active duty in 1955 I have from time to time represented individuals before administrative boards of the Army, courts-martial of the Army and the Navy, boards of review of the Army and Air Force, and before the U.S. Court of Military Appeals. During 1959–60 I was vice chairman of the Military Law Committee of the Bar Association of the District of Columbia. In 1956, with the Reverend Joseph M. Snee, S.J., I visited most of the major Army, Navy, and Air Force legal offices in NATO, preparatory to the publication of a study of the operation of the criminal jurisdiction provisions of the NATO Status of Forces Agreement. The views which I will express before this committee are not necessarily the views of any of these organizations with which I have had the privilege of being associated.

For the purpose of clarity I shall discuss separately my opinions concerning the rights of servicemen in proceedings conducted under the Uniform Code of Military Justice, and the rights of servicemen before administrative tribunals. My experience has been principally with Army courts and boards and my remarks refer to these tribunals, unless otherwise stated.

## I. PROCEEDINGS UNDER THE UNIFORM CODE OF MILITARY JUSTICE

I join with prior witnesses before this committee and with numerous commentators in expressing the view that the Uniform Code of Military Justice is basically an excellent piece of legislation. Clearly, there has been improvement in the administration of justice in the Armed Forces during recent years. Many of the practices described in the famous Chamberlain hearings of the 66th Congress and in the hearings which preceded the Uniform Code no longer occur.

I fully recognize that in some particulars the serviceman has been accorded greater procedural rights than has his civilian counterpart. The right to be informed that he is not required to make any statement, the right to be present and participate at the pretrial investigation, the right to counsel before arraignment, the right to extensive discovery before trial—all are rights which the average defendant before a civilian criminal proceeding would desire.

I think, however, that it would be improper to conclude that the existence of these rights necessarily results in a fairer procedure than in civilian courts or that any well-informed defendant would prefer trial by court-martial to trial in a civilian court. There are still many rights which the serviceman does not have. Bail is unknown in the military service. Trial by jury does not exist. A unanimous verdict is not required except in capital cases. The concept of the nolle prosequi, by which the prosecutor in his discretion may drop a case if in his independent opinion justice can be achieved without a trial, is virtually unknown. The concepts of concurrent sentences, indeterminate sentences, and probation do not exist in the sense that we know them in the civilian courts. The youthful offender is not entitled to the special treatment of the Youth Correction Act to which he would be accorded if he were being tried in a Federal district court. The lifelong stigma of a bad conduct or dishonorable discharge may be attached to conduct which would have resulted in probation if a trial in a civilian court had occurred instead of a court-martial.

Furthermore, when we discuss the procedural rights of an accused, we are as a practical matter describing his rights in a general court-martial, at least insofar as the Army is concerned. Article 98 making it an offense to knowingly and intentionally fail to comply with any provision of the code regulating the proceedings before, during, or after the trial of an accused is a dead letter. I know of no trials under this article. Any study of the case law which has developed in the last 10 years leads to the conclusion, in my opinion, that the enforcement of the rights given to a serviceman by the Congress ultimately depends upon the U.S. Court of Military Appeals. No case arising in a special court-martial or a summary court-martial in the Army can reach the Court of Military Appeals. The serviceman tried before either of these tribunals must depend upon the local commander and the local staff judge advocate for his protection.

In addition, even before a general court-martial there still exist factors, perhaps inherent in the nature of the system, which cause the reasonable observer to wonder if ever we can approach perfect justice to the same extent in the military as we do in civilian life. The members of the court are still chosen by the general who is their commander. The efficiency report of the defense counsel is still prepared by the staff judge advocate who had recommended that there was probable cause for believing that the defendant was guilty. The defense counsel is still under the command of the officer who referred the case to trial. The members of the court-martial are usually officers and during the course of their training have become aware of the fact that a case should not be referred to trial unless it has been investigated and unless competent authority has determined that there is probable cause for believing that the defendant is guilty. Yet these officers must presume that he is innocent. The staff judge advocate who prior to trial has recommended that the case be tried, has the responsibility after trial to review impartially the case to determine, among other things, if the evidence is sufficient to sustain the conviction.

I do not suggest that most commanders or staff judge advocates attempt to interfere with the faithful performance of their duties by court members and counsel. I do think, however, that the fear of causing displeasure to superiors is considered by many court members and counsel. The defense counsel who has the option of asserting a defense which will embarrass his commander or staff judge advocate appreciates that this officer may ruin him professionally

simply by marking his efficiency report "satisfactory" without utilizing any letter of reprimand, transfer or punitive measure. Perhaps this fear does not affect the courageous officer. I think, however, that there are officers who, looking forward to promotion or retirement, are not oblivious to the practical realities of military life.

There are several specific matters upon which I would like to comment. It seems clear to me that one of the principal objectives of the framers of the Uniform Code was that servicemen should receive uniform treatment regardless of whether they were in the Army, Navy, or Air Force. Regrettably, however, in my opinion the administrative actions by the various services have not been consistent with this objective in several particulars.

The Army has initiated the field judiciary system—a system in which a law officer "rides circuit." This system has the advantage of permitting a few officers sufficient experience to develop expertise in military law. In addition it frees the law officer from any pressure or appearance of pressure which might result from serving under the command of the convening authority. The results have been good. Errors by law officers have been reduced. I know of no allegations of command influence exercised over law officers since the program has been initiated. The Navy is considering adopting this system. Regrettably, however, the Air Force does not intend to employ the field judiciary concept. Consequently while an Army serviceman charged before a general court-martial will get a law officer from a different command who is a specialist, the Air Force serviceman will get one from his own command, who may or may not be an expert.

The reasoning which justifies the use of the law officer circuit rider applies with equal vigor to the defense counsel. It is the defense counsel who has the most to fear from the command influence. It is he who is most likely to find a conflict between his sworn duty and the desires of his commander. I can see no reason why there could not be established a circuit riding system for defense counsel. To the extent that defense counsel needs the facilities of the local command for investigation, an associate counsel to assist him could be made available by the command in which the trial is being conducted. But the responsibility for making the decisions at trial could well be placed in an officer whose efficiency report is not being written by the person who has recommended that the defendant be tried.

It may be argued that no significant number of defense counsel are being intimidated by the thought that their performance will be evaluated by their own staff judge advocate who has recommended trial. Even assuming this to be true, the resulting increase of confidence in the system by servicemen merits the application of the circuit principle to defense counsel. Trial teams of law officers, defense counsel, and trial counsel who move from one command to another trying cases are already planned for use in war. Why not begin the system in time of peace?

The Army has also transplanted the concept of the negotiated plea from civilian criminal proceedings. This permits the defense counsel to talk to the trial counsel concerning the maximum sentence which his staff judge advocate will recommend in the event that a plea of guilty is made to the charges. This system of "bargaining" with the prosecutor exists in virtually every civilian jurisdiction. In my opinion the Army innovation in military law has advantages. In some cases needless trials have been avoided. Some defendants have been protected by obtaining pretrial assurances against inappropriate severity on the part of courts-martial.

The system could well be improved. In a civilian criminal proceeding, when the defense counsel talks to the prosecutor concerning the possibility of pleading a client guilty, he is talking in a context where the prosecutor has the authority to drop the charge altogether or permit him to plead to a lesser included offense. The area of bargaining is considerably narrowed in the military. The trial counsel does not have authority to drop the charges against the defendant. Usually the bargaining is done only on sentence although in some commands it may be possible to reduce the charge as well.

In any case the negotiated plea is an important part of the structure of the administration of criminal justice in both civilian communities and in the Army and the Navy. The Air Force, however, has steadfastly refused to permit this practice.

Article 19 of the Uniform Code of Military Justice empowers special courts-martial, under such limitations as the President may prescribe, to adjudge

any punishment not forbidden by the code except death, dishonorable discharge, dismissal, confinement in excess of 6 months, hard labor without confinement in excess of 3 months, forfeiture of pay exceeding two-thirds of pay per month, or forfeiture of pay for a period exceeding 6 months. The article then provides that a bad conduct discharge shall not be adjudged unless a complete record of the proceedings of testimony before the court-martial has been made. The Manual for Courts-Martial, United States, 1951, likewise contemplated that a special court-martial should have the power to adjudge a bad conduct discharge.

The Army, by regulation (AR 22–145) has provided that reporters may not be appointed for special courts-martial without special authorization from the Secretary of the Army and that a verbatim record may not be made. The result of this regulation is that a special court-martial of the Army may not adjudge a bad conduct discharge. Thus by regulation a power given to a special court-martial by the code and confirmed by the President has been taken away. The convening authority is placed in the position that when he thinks a bad conduct discharge may be appropriate, he must send the case to a general court-martial.

This regulation has been justified on the grounds that it was reasonable and proper to deprive a special court-martial of the power to adjudge a bad conduct discharge in order to insure that an accused would have the protection of a general court-martial proceeding in any case where a punitive discharge was adjudged. This desire to protect a defendant is laudable. However, certain distinct disadvantages to defendants in the Army have resulted as a result of this regulation.

It seems clear that the Army is granting a much higher percentage of dishonorable discharges in cases where a punitive discharge is deemed appropriate, than are the other services. Thus, during the fiscal year 1961 the Army imposed 560 dishonorable discharges and 693 bad conduct discharges. During the same period the Air Force imposed only 119 dishonorable discharges but 1,507 bad conduct discharges. Only 10 men were separated from the Navy with a dishonorable discharge during this period, although 1,521 received bad conduct discharges. Part of this may be due to the fact that the Army has a higher percentage of draftees than do the other services. Part I think, however, is due to the fact that officers appointed to a general court-martial usually are of the opinion that the solemnity of the proceeding is such that if the defendant is guilty, strict punitive measures are appropriate. In other words, I suspect strongly that dishonorable discharges are being received by men tried before general courts-martial where a bad conduct discharge would have been deemed appropriate if the offender had been tried before a special court-martial composed of the same officers. Army statistics demonstrate that sentences imposed by general courts-martial greatly exceed special court-martial sentences for the same offense.

Even if the general court-martial in the Army adjudges a bad conduct discharge instead of a dishonorable discharge the defendant has been prejudiced. A bad conduct discharge awarded by a general court-martial does not have the same effect as a bad conduct discharge awarded by a special court-martial. The bad conduct discharge does not automatically deprive a defendant of his veterans' benefits, if imposed by a special court-martial. Each case is determined by the Veterans' Administration on its merits.

The bad conduct discharge adjudged by a general court-martial, has the exact effect as a dishonorable discharge upon veterans' benefits. The serviceman is barred from all rights administered by the Veterans' Administration without any necessity for adjudication (38 U.S.C. 3103). Thus by Army regulations soldiers have been treated differently with dire results in some cases. The serviceman in the Navy or Air Force who receives a bad conduct discharge does not automatically lose his veterans' rights. The one who receives the same discharge in the Army does.

There are strong reasons to support the Army's viewpoint, that before any discharge is given, the defendant should be represented by a lawyer and tried before someone who has roughly the position of a Federal judge. It seems clear, however, that this decision should not be made by the Army, but by the Congress. Congress intended that servicemen be treated equally. By result of the Army's action they are not being treated equally.

I think legislation is necessary to eradicate these inequalities of treatment. Perhaps the answer lies in the recent proposals—to abolish the present system of courts, to broaden the disciplinary powers of the commander for minor offenses,

and to require the trial of all other offenses by a court resembling a general court-martial of today.

Appeals from general courts-martial are considered as a matter of right before boards of review. In the Navy it is the custom for civilians to sit on these boards. In the Army and Air Force no civilians sit.

My experience has been almost exclusively before Army boards, and was primarily during the period of 1954 and 1955. Conditions may have changed materially since that time. I make these qualifications because I feel very strongly about these boards of review. I question whether they perform any function whatsoever except to reduce sentences in most cases. When I appeared before them as Government counsel, with the exception of one board of review, which was presided over by an outstanding lawyer and officer, Brig. Gen. John Gordon O'Brien, it was almost impossible for the Government to lose a case. This was true even when the Government confessed error. Most of the cases were "short-forms"—that is, the members of the board signed their name on a stamped form which stated that they had reviewed the case, found no error, and that the sentence was appropriate. In some cases, the sentence would be reduced. Only rarely would a rehearing be ordered or charges be dismissed.

Defense counsel are treated courteously before the board but must approach their duties, in my estimation, with a certain feeling of frustration. If they expect to obtain a rehearing, or dismissal of charges or even an opinion, they are doomed to disappointment in most cases.

The rules before these boards provide that "civilian counsel who do not have a copy of the record of trial make arrangements with appellant defense counsel to examine a copy of the record of trial in the office of the Judge Advocate General and to make a copy of the whole, or any part thereof, without expense to the Government" (rule VI). The argument in support of this rule is that civilian counsel have the accused's record of trial. This may or may not be true. The appellant's record of trial, however, does not contain such papers as the recommendation of the staff judge advocate to the convening authority, the investigating officer's report, or the post-trial review by the staff judge advocate. On one occasion where a client was in transit from Europe to Fort Leavenworth I filed a formal motion urging that the board of review order the Defense Appellate Division to permit me to use "their" copy of the record for the period of 4 days in my offices in order to permit me to copy those parts of the record before the board which were not in my copy. My client had requested that military counsel withdraw from the case. My motion was opposed by the Defense Appellate Division, not by the Government. The Board of Review denied my motion on the ground "it had no jurisdiction or authority to direct the use of disposition of papers, files, or documents in the control or custody of the Judge Advocate General." I am not sure that every member of this board had been "oriented as to his absolute independence in the exercise of his duties." The matter was subsequently settled informally when the chairman of the board graciously thermo-faxed the papers I desired and sent them to me as a personal accommodation. On other occasions I have experienced no difficulty in obtaining a copy of the necessary papers. I cite the incident only to show the general atmosphere which I found to prevail. I appreciate that many members who have served on the board of review have been dedicated officers who have performed their functions with integrity and learning. I would be less than candid, however, if I did not suggest to this committee that most counsel of my acquaintance who have appeared before the boards view it simply as a necessary step to perfect an appeal to the Court of Military Appeals.

I do not know enough about the Navy's system of civilian membership upon the board to know whether the situation is better or worse with civilian members. I think, however, that consideration should certainly be given to civilian membership, if for no other reason than increasing the confidence of the servicemen in the integrity of the system. The presence of civilian members on the boards of review in the Navy would seem to indicate the Navy's conclusion that membership in a particular service is not absolutely necessary for competent performance of the functions of an appellate bench. The Navy's experience may indicate the possibility of a unified board of review to hear appeals from the various services. Such a board could do much to avoid the inequalities in sentencing practices which now exist. The chief disadvantage of civilian membership, in my opinion, would be to stifle further the career incentives of capable legal officers by limiting their opportunity to serve in a judicial capacity.

Most of the matters which I have discussed thus far do not deal with constitutional rights, except the concept of equality of treatment before the law. There is a matter which is of great concern to me which deals directly with the constitutional rights of servicemen. This is the question of whether it is constitutional for courts-martial to try in time of peace, an offense committed by a serviceman within the United States where the nature of the crime is exclusively civil in the sense that it is not committed on a military installation, against military property or military personnel, and does not involve any matter affecting the maintenance of military discipline. I invite the committee's attention to the excellent analysis of this matter by Messrs, Robert D. Duke and Howard S. Vogel which appears in volume 13 of the Vanderbilt Law Review. In my opinion, these gentlemen demonstrate that prior to the Constitution military courts-martial did not have general jurisdiction to try soldiers for civilian-type offenses in time of peace. No general jurisdiction to try soldiers for civilian-type offenses existed in the early legislation in this country. During the last 100 years, however, there has been a gradual erosion of the common law concept that soldiers like civilians should be tried in civilian courts for civilian offenses.

The first statutory authority for the military to try civilian crimes regardless of whether the circumstances of their commission prejudiced good order or military discipline was granted in 1863, but was limited to time of war. In 1916 for the first time court-martial jurisdiction was extended to noncapital civil offenses committed in time of peace. The same Congress gave the Army the power to try murder or rape committed outside the United States in time of peace. Despite the recommendation of the Army, Congress at that time denied authority to the Army to try murder and rape committed within the United States in time of peace. The Uniform Code for the first time permitted court-martial jurisdiction over capital offenses in the time of peace.

No Supreme Court case has squarely faced the issue of whether the grant of jurisdiction to try servicemen for capital and noncapital civilian type cases in time of peace is constitutional. My preliminary research indicates no historical precedent which would justify the conclusion that the Founding Fathers intended that anything other than disciplinary punishment should be exerted by the Armed Forces in time of peace, within the United States.

The trail of a serviceman for a capital offense in time of peace in a military court when civilian courts are open and available to hear the case raises grave constitutional difficulties. Both Hale and Coke denied the authority of court-martial to try an offender for a civilian-type offense in time of peace. Both in the United Kingdom and in the courts of our other NATO allies, military jurisdiction is restricted. The argument that every offense committed by a soldier involves the military has been rejected in most of the other civilized nations of the world.

As a result of our code, a soldier may be tried without the rights to which he would be entitled in a civilian criminal court, simply because he is a soldier, without any reference to the nature of the offense which he has allegedly committed. He may be tried again by the State in which the offense was committed because of the concept of dual sovereignty.

Abroad where American courts are not sitting, or in time of war, a serviceman traditionally has been tried by a military tribunal. To place a military tribunal sitting in the United States on an equal footing with a State or Federal court for civilian-type offenses is in my opinion both undesirable and possibly unconstitutional.

The possibility of implementing such a system has been demonstrated under the Status of Forces Agreement. At the present time, the soldier who is charged with a murder in England will be entitled to a jury trial. If he is charged with murder in North Carolina, he will be tried by court-martial.

In discussing this matter with military officers the argument has been made that it is of great advantage to the defendant to be tried by court-martial rather than suffer the vagaries of State criminal procedure. In my opinion the average defendant would prefer to take his chances with a State judge and a jury of his peers rather than undergo trial by court-martial. In the event that this argument is determined to have merit, however, it seems to me quite clear that legislation could be passed empowering Federal district courts to try servicemen for civilian type offenses.

Before leaving the subject of the operation of the uniform code there is one other area in which legislation seems to me to be desirable. In the first place Congress has never passed legislation to cover the situations involved in *Toth*, *Covert*, *Smith* and *Guagliardo* cases.

I would prefer legislation which placed jurisdiction in a U.S. district court sitting in this country to try offenses committed by a former serviceman abroad or by civilians, dependents or employees abroad. I think it should be recognized that substantial problems involving the Status of Forces Agreements will result from this legislation or any other legislation dealing with this problem. The right to try our citizens for offenses committed in foreign lands has been permitted by the countries concerned only in cases where the offender is subject to the military jurisdiction of the United States. I do not think that an insurmountable problem would be encountered where the foreign country chose not to try an American civilian and we then desired to try him after he returned to the United States. Our studies indicate, however, that vigorous opposition would be taken in almost any NATO nation to the idea of a U.S. district judge trying a case by a jury within the national boundaries of any NATO country.

For this reason even though some modification of existing treaties might be necessary, I would recommend legislation which makes the offenses now prohibited by the uniform code and some of the offenses prohibited by title 18 if committed within the United States, punishable in a U.S. district court if committed by a dependent or civilian employee accompanying the Armed Forces abroad or by a serviceman who has been discharged after commission of an offense abroad. The defendant should not be subject to trial if he has already been tried in a foreign court for the same offense.

From a practical point of view very few cases would be tried under this statute. However, I think it desirable that the Government have authority to prosecute an American wife who commits a crime against our interests abroad if the case is an appropriate one. Special consideration would have to be made for areas such as the Ryukyus or Antarctica. This could, in my opinion, be covered by including these areas within the maritime jurisdiction of the United States.

### II. PROCEDURES IN ADMINISTRATIVE DISCHARGE CASES

My experience in dealing with administrative tribunals in the services has been almost entirely in officer elimination proceedings in the Army. I have, however, had the opportunity to study the regulations governing discharges of enlisted personnel in the Army and in the other services. Many of my comments which I make with reference to elimination proceedings of officers in the Army, apply equally to administrative proceedings involving enlisted men. My basic position is that the present system is unfair. It is unfair for the reason that the standards are too vague. The proceedings are unfair because the respondent does not have compulsory process and he may be discharged or eliminated entirely on affidavit without ever having the privilege of confrontation or cross-examination. The proceedings are unfair because the burden of proof is placed upon the serviceman. The proceedings are unfair because by regulation the Army has limited the area of discovery to an area considerably less than that which Congress permitted by the statute.

I think that a description of the procedure leading to the elimination of an officer presents a graphic illustration of the nature of these proceedings. Elimination proceedings may begin with a recommendation of elimination originated by an officer's commander. It is transmitted through the chain of command to the Department of the Army. After review in the Department of the Army, it is referred to a selection board. The only papers before this board are the papers which have been referred to it by the Army. The officer is not aware that the board is meeting nor is he given an opportunity to appear before it or submit matters in his behalf. The selection board determines whether the officer should be required to show cause why he should not be eliminated. If the selection board determines that the officer should be required to show cause, he is for the first time informed of what has been happening. The matter is then referred to a board of inquiry. According to the Army regulations "the impression that it is the responsibility of the Government to establish its case before this board, in much the same manner as is done in court-martial, is erroneous. The burden of proof rests with the respondent to produce convincing evidence that he should be retained. In the absence of such a showing by the respondent, the board must find for elimination."

Prior to the convening of the board the board members are informed that the burden of proof rests with the respondent; that a prima facie case for elimination has been established by the action of the selection board in the absence of convincing evidence advanced by the respondent; and that while a

record of good performance or good conduct in the remote past does not negate a record of progressive deteriorating efficiency or conduct, that stress should be placed on the value of old reports and records in establishing a pattern of mediocrity or misconduct. The board is also informed that allegations involving a defect in character or integrity cannot be offset by a rebuttal which attempts to emphasize other qualities in the officer's favor. The board members are informed that the proceeding is not subject to the rules and procedures governing court action and that inappropriate delays or undue emphasis on legal technicalities is not permitted. They are also informed that if they recommend retention the case is closed, but if they recommend elimination the case will be reviewed further, and that clemency, defined as any proposal short of elimination, may be granted only by the Secretary of the Army. They are informed that the fact that the officer has been promoted does not necessarily furnish proof that he should be retained. They are warned that a record of recent improvement of performance may result from an unusual effort on the part of the respondent after learning he was recommended for elimination action. The board members are told that the weight to be given letters of commendation, appreciation, or expressions of the value of the officer to the service which have been solicited by the respondent is "of considerable question." Furthermore, the board members are informed that if they eliminate the officer for reasons other than misconduct, he may be permitted to continue in an enlisted status, and that, "therefore, it is not expected that an officer will be retained out of sympathy for his long service * * *."

The officer has no right to confront the witnesses whose statements have been utilized against him. He may request the appearance of "members of the Army" or "civilian employees of the Army" and such a request will be honored by the board "if the witness is considered reasonably available and his testimony will add materially to the case." The officer is not reimbursed for expenses incident to the appearance of civilian witnesses.

Congress provided that the officer should have access to "records relevant to his case." (10 U.S.C. 3785.)

The Army regulations permit him to have access only to the "records of the hearing, including all documentary evidence referred to the board." There are obviously situations in which there are records relevant to his case which were not before the selection board. The regulations provide that the officer will be allowed to present his case without undue interference by the board, but that "nonessential delaying tactics will not be tolerated."

Grounds for elimination include the following: Failure to exercise necessary leadership or command of an officer of his grade; mismanagement of personal affairs which detrimentally affect his performance of duty; acts of intemperance and/or personal misconduct; existence of homosexual tendencies; apathy, defective attitudes, or other character disorders to include inability or unwillingness to expend effort; and conduct unbecoming an officer.

It is difficult to conceive of criteria more vague. I cannot imagine a procedure more slanted against a litigant. It is hard to describe the sense of futility which you feel when you are engaged in attempting to meet the burden of proof that an individual does not have homosexual tendencies, or is not apathetic in a proceeding where you have no right to cross-examine the witnesses against you and no power to compel the attendance of witnesses in your own behalf. Of course fairminded officers on the board may save the respondent. If justice is obtained it is because of the integrity of the triers of fact and not because of any virtues of the system established by the regulations.

I am strongly convinced that these proceedings are being used to eliminate officers for misconduct, where the Army cannot obtain a conviction in a court-martial where the accused is afforded his rights under the uniform code. The regulations give clear evidence of this. Although it is piously provided that "elimination action, * * * will not be used in lieu of disciplinary action under the Uniform Code of Military Justice," it then proceeds to list as a ground for elimination "conduct unbecoming an officer" which is specifically made an offense by article 133 of the code (Par. 11(a)(8), A.R. 635–105). It later provides that "certain acts such as knowingly passing a worthless check, public drunkenness under circumstances which bring discredit to the military service, et cetera, portray an undesirable officer so unmistakenly that no amount of evidence as to professional proficiency will overcome it." (Par. 10, appendix I, A.R. 635–105)

These regulations are frequently used to eliminate officers suspected of being homosexuals where proof which would satisfy a court of law simply doesn't exist.

In one case involving an allegation of homosexual tendencies, my client requested a court-martial and received a reply that court-martial would not be granted because the evidence was insufficient to warrant trial by court-martial.

The combination of the administrative discharge regulation with special court-martial provides a particularly insidious technique. A defendant may be convicted of offenses without any chance of obtaining review by the Court of Military Appeals. The fact of these convictions may then be used as the basis for administrative discharge in the type of proceeding which has been described to you by other witnesses.

I do not object to the Army possessing the authority to discharge individuals who are unfit or unsuitable, even if the basis is misconduct and a criminal conviction is infeasible. I do object to procedures which are so basically unfair and standards which are so vague that the individual is defenseless.

I disagree strongly that a Reserve officer or a Regular officer has no constitutional rights when the Government seeks to deprive him of his livelihood and reputation. I agree that the Army should be able to require an officer to leave active duty. The utilization of these proceedings, however, to stigmatize an officer as is the case where he is "found to possess homosexual tendencies" and to deprive him of substantial property rights as is the case when an officer with the 18 or 19 years active service is eliminated immediately prior to his planned retirement under circumstances where he has never been passed over for promotion, seems to me to be the antithesis of every thing which we consider to be important in the law.

These proceedings are not customary in military law. They are a recent innovation. I am sure that they alleviate the problems caused by poor judgment of planners who permitted too many officers to remain on active duty after World War II and who promoted them regularly thereafter. However, I do not think that a nation which prides itself upon the fairness of its legal processes can permit the continuation of such procedures.

Other witnesses have adequately described the procedures used to eliminate enlisted personnel. I agree fully with them that these procedures are undesirable. If a man is to go the rest of his life bearing the stigma of an undesirable discharge it seems to me that we can afford at least the kind of quasi-judicial hearing which is utilized before a civil service employee is fired.

I see no reason why the Government should not be required to prove its case; why compulsory process should not be granted; or why a serviceman should not have the opportunity to confront his accuser, at least at the taking of a deposition.

I know little about procedures in the review boards. Many of the deficiencies previously discussed exist here as well. I see no reason why so many boards are necessary. The functions of the Discharge Review Board and the correction boards could easily be combined.

I wish to thank the committee for extending me the invitation to appear before it.

Senator ERVIN. We were very anxious to have Father Snee appear, but I am informed that he is ill and I would appreciate very much if you could convey word to him we would be glad to receive any written statement he would prepare if he doesn't feel physically able to come.

Mr. PYE. Thank you, Senator. I am sure he would be honored by your sentiments.

Senator ERVIN. On behalf of the committee I want to thank you for a most illuminating presentation on some of the serious problems in this field and for your observations as to possible solutions to these problems. We are deeply grateful to you.

Mr. PYE. Thank you, sir.

Senator ERVIN. The committee will stand in recess until Monday morning at 10:30.

(Whereupon, at 12:30 p.m., the committee recessed to reconvene at 10:30 a.m., Monday, March 12, 1962.)

# CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL

---

**MONDAY, MARCH 12, 1962**

U.S. Senate,
Subcommittee on Constitutional Rights
of the Committee on the Judiciary,
*Washington, D.C.*

The subcommittee met, pursuant to recess, at 10:35 a.m., in room 357, Old Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee), presiding.

Present: Senators Ervin and Carroll.

Also present: William A. Creech, chief counsel and staff director; Robinson O. Everett, counsel; and Bernard Waters, minority counsel.

Senator Ervin. The committee will come to order.

Counsel will call the first witness.

Mr. Creech. Mr. Chairman, the first witness this morning is Col. Frederick Bernays Wiener, attorney at law, Washington, D.C.

Senator Ervin. We are glad to have you with us.

Mr. Wiener. Thank you, sir.

## STATEMENT OF FREDERICK BERNAYS WIENER, WASHINGTON, D.C.

Mr. Wiener. Mr. Chairman, my name is Frederick Bernays Wiener. I am a member of the District of Columbia bar. I am a colonel, U.S. Army Reserve, retired.

I believe the commitee has a copy of a statement of my qualifications and of an outline of my statement on elimination. I should like to say by way of preliminary, that my observations are based not only on my experience as private counsel before boards and before courts, but also on duty assignments during the time that I was still in the Active Reserve, and was on duty with the Headquarters, Department of the Army.

I should like to address myself with your permission, sir, to the matter of elimination procedure under chapters 359 and 360 of title 10 of the United States Code.

There is one of those cases which is now pending in the Supreme Court, that is the case of Beard against Stahr and others. It is number 648. Since it is sub judice and since I am counsel in the cause it would be improper for me to express opinions on the merits of the issues.

I think, however, it will be helpful if I state briefly what the issues are, without comment.

That is an action to enjoin an elimination on the ground of the unconstitutionality in two respects of the underlying statute, namely, chapter 360.

The two questions raised, the two allegations of unconstitutionality are, first, that the statute shifts the burden of proof to the respondent officer to prove his innocence. The second allegation of unconstitutionality is that in a proceeding whereby he stands to lose his livelihood on accusations of misconduct and stands to receive a discharge less than honorable, he is not entitled to and was denied the right of confrontation.

That case came before a three-judge district court here in the District of Columbia, and that court held that, in enacting the elimination legislation, Congress was not bound by the due process clause or by the Bill of Rights or by any other provision of the Constitution, and that opinion has just been reported at 200 Federal Supplement 766.

It is now pending in the Supreme Court on a jurisdictional statement. A motion to affirm filed by the appellees, which interestingly enough, takes the ground, not that Congress is not constitutionally circumscribed in passing such legislation, but that the provisions are fair. And then a brief in opposition has been filed, and there may be a ruling on that appeal next Monday, I don't know.

(The brief is as follows:)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

---

No. 648

---

J. B. BEARD, *Appellant*,

v.

ELVIS J. STAHR, JR., Secretary of the Army; STEPHEN AILES, Under Secretary of the Army; and Major General JOE C. LAMBERT, The Adjutant General of the Army

---

**Appeal from the United States District Court for the District of Columbia**

---

## JURISDICTIONAL STATEMENT

---

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Ave., N. W.,
Washington 6, D. C.,
*Counsel for the Appellant.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

## INDEX

Page

Opinion below ........................................ 1
Jurisdiction ........................................ 2
Questions presented ........................................ 2
Statute involved ........................................ 3
Statement ........................................ 3
The questions are substantial ........................................ 12
Conclusion ........................................ 23
Appendix A—Opinion below ........................................ A1
Appendix B—Judgment below ........................................ A19
Appendix C—Statute involved ........................................ A20

## AUTHORITIES

CASES:

*Benson* v. *Schofield*, 236 F. 2d 719, certiorari denied, 352 U.S. 976 ........................................ 21
*Bland* v. *Connally*, 293 F. 2d 852 ........................................ 13, 15, 16
*Bonaparte* v. *Camden & A.R.Co.*, Bald. 205, Fed. Case No. 1617 ........................................ 22
*Cafeteria Workers* v. *McElroy*, 367 U.S. 886 ........................................ 15
*City Bank Farmers Trust Co.* v. *Schnader*, 291 U.S. 24 ........................................ 21
*City of Lincoln* v. *Power*, 151 U.S. 436 ........................................ 11
*City of Miami* v. *Prymus*, 288 F. 2d 465 ........................................ 21
*Clackum* v. *United States*, C. Cls., No. 246-56, Jan. 20, 1960 ........................................ 20
*Cleary* v. *Weeks*, 259 U.S. 336 ........................................ 16, 19
*Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770, affirmed, 278 F. 2d 871 ........................................ 21
*Davis* v. *Stahr*, 293 F. 2d 860 ........................................ 15, 16
*Greene* v. *McElroy*, 360 U.S. 474 ........................................ 15
*Guarro* v. *United States*, 237 F. 2d 578 ........................................ 15
*Kelly* v. *United States*, 194 F. 2d 150 ........................................ 15
*Kwong Hai Chew* v. *Rogers*, 257 F. 2d 606 ........................................ 19

Page

*Ledford* v. *Curran*, 366 U.S. 948 .................... 14
*Leedom* v. *Kyne*, 358 U.S. 184 ...................... 21
*Mattox* v. *United States*, 156 U.S. 237 ............ 15
*McElrath* v. *United States*, 102 U.S. 426 .......... 22
*Mimmack* v. *United States*, 97 U.S. 426 ............ 22
*Ogden* v. *Zuckert*, D.C. Cir., No. 16283, Dec. 14, 1961 ........................................ 21
*Orloff* v. *Willoughby*, 345 U.S. 83 ................ 13
*Reed* v. *Franke*, C.A. 4, No. 8270, Nov. 7, 1961 ...... 22
*Rittenour* v. *District of Columbia*, 163 A. 2d 558 ... 15
*Rogers* v. *United States*, 270 U.S. 154 ............ 19
*Sims* v. *Everhardt*, 102 U.S. 300 .................. 21
*Swift & Co.* v. *United States*, 276 U.S. 311 ......... 21
*Tacey* v. *Irwin*, 18 Wall. 549 ..................... 21
*United States* v. *Burney*, 6 USCMA 776, 21 CMR 98 13
*United States* v. *Clay*, 1 USCMA 74, CMR 74 ...... 13
*United States* v. *Corson*, 114 U.S. 621 ............ 22
*Williams* v. *Zuckert*, D.C. Cir., No. 16345, Nov. 9, 1961 ........................................ 16
*Wood* v. *Hoy*, 266 F. 2d 825 ...................... 19

STATUTES:

Articles of War (other than in Uniform Code of Military Justice):
AW XLVII of 1775 ...................... 19
Sec. XIV, Art. 21 of 1776 .................. 19
AW 20 of 1786 .......................... 19
AW 83 of 1806 .......................... 19
AW 61 of 1874 (R.S. § 1342) ............. 14
AW 22 of 1916-1948 ..................... 16
AW 95 of 1916-1948 ..................... 19
AW 101 of 1916-1948 .................... 16

Uniform Code of Military Justice (10 U.S.C. §§ 801 *et seq.*):
Art. 43(c) .......................... 6
Art. 46 ............................ 19
Art. 51(c)(4) ....................... 19
Art. 67 ............................ 19
Art. 133 ........................6, 14, 19

Page

United States Code:
- 10 U.S.C. [1926-1946 eds.] § 571 ........... 16
- 10 U.S.C. 593(a) ........................... 16
- 10 U.S.C. § 593(b) ......................... 16
- 10 U.S.C. § 1162(a) ........................ 16
- 10 U.S.C. § 1163(c) ........................ 16
- 10 U.S.C. § 1552 ........................... 22
- 10 U.S.C. §§ 3791-3797 ..............3, A20-A23
- 10 U.S.C. § 3791 ........................... 5
- 10 U.S.C. § 3792 ........................... 6
- 10 U.S.C. § 3793 ........................... 8
- 10 U.S.C. § 3796 ........................... 11
- 10 U.S.C. § 3911 ........................... 11
- 10 U.S.C. § 3963(a) ........................ 11
- 37 U.S.C. § 232(a) ......................... 11
- 37 U.S.C. § 233 ............................ 11

MISCELLANEOUS:

Army Regulations:
- AR 605-200 ................................. 19
- AR 635-89 .................................. 8
- AR 635-105 ...............................6-7, 9

F.R. Civ. P., Rule 65(b) ..................... 10

Hearings before Subcommittee No. 1, House Committee on Armed Services, on S. 1795, 86th Cong., 1st sess., p. 3802 ........................ 17

*id.*, p. 3816 ............................... 20

H. R. Rep. 1406, 86th Cong., 2d sess., pp. 12, 13, 14 .. 17

*Manual for Courts-Martial, U.S., 1951,* ¶ 115 ...... 19

17 Op. Atty. Gen. 297 ........................ 22

18 Op. Atty. Gen. 18 ......................... 22

30 Op. Atty. Gen. 177 ........................ 12

Supreme Court Rule 16(3) ..................... 20

Winthrop, *Military Law & Precedents* (2d ed. 1896; 1920 reprint):
- pp. 712-713 ................................ 14
- pp. 747-754 ................................ 22
- pp. 957, 969, 974, 983 ..................... 19

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

---

No. 648

---

J. B. BEARD, *Appellant*,

v.

ELVIS J. STAHR, JR., Secretary of the Army; STEPHEN AILES, Under Secretary of the Army; and Major General JOE C. LAMBERT, The Adjutant General of the Army

---

**Appeal from the United States District Court for the District of Columbia**

---

## JURISDICTIONAL STATEMENT

---

### OPINION BELOW

The opinion of the three-judge District Court upholding the constitutionality of 10 U.S.C. §§ 3791-3797 has not yet been reported. A copy thereof is attached as Appendix A (*infra*, pp. A1-A18).

## JURISDICTION

1. This was an action seeking a preliminary injunction to restrain the enforcement and execution of 10 U.S.C. §§ 3791-3797 on the ground of repugnancy to the Constitution of the United States, viz., denial of procedural due process.

2. On December 19, 1961, the three-judge District Court entered an order (Appendix B, *infra,* page A19) granting appellees' motion for summary judgment, denying appellant's motion for summary judgment, denying appellant's motion for preliminary injunction, and dismissing appellant's complaint.

The notice of appeal was filed in the District Court on December 20, 1961.

3. The jurisdiction of this Court to review on direct appeal the order of the three-judge District Court denying appellant's motion for a preliminary injunction is conferred by 28 U.S.C. § 1253.

4. The text of the statute of the United States challenged on the ground of repugnancy to the Constitution is set forth in Appendix C (*infra,* pp. A20-A23).

## QUESTIONS PRESENTED

1. Whether, as held below, statutory provisions purporting to authorize the administrative elimination of an officer from the Regular Army are unlimited and unrestrained by anything in the Due Process Clause of the Fifth Amendment.

2. Whether the procedural guarantees of the Due Process Clause apply to administrative proceedings to eliminate an officer from the Regular Army, where such proceedings are based on allegations of moral dereliction, shift the burden of proof to him to disprove those allegations, result in a discharge less than honorable and in the

loss of a substantial retirement annuity, and stigmatize him so that he would be demonstrably hindered in obtaining further employment.

3. Whether the provisions of 10 U.S.C. §§ 3791-3797 are unconstitutional in that, both on their face and as applied in this case, they authorize the elimination of an officer of the Regular Army for alleged moral dereliction without providing any means for the witnesses against him to be produced for confrontation and cross-examination.

4. Whether the provisions of 10 U.S.C. §§ 3791-3797 are unconstitutional in that, both on their face and as applied in this case, they shift to the accused officer the burden of disproving the *ex parte* allegations made against him.

## STATUTE INVOLVED

The statute involved, 10 U.S.C. §§ 3791-3797, is set forth in Appendix C (*infra*, pp. A20-A23).

## STATEMENT

This was an action to restrain appellant's elimination from the Regular Army pursuant to 10 U.S.C. §§ 3791-3797 (*infra*, pp. A20-A23), on the ground that those provisions, both on their face and as applied to him, are unconstitutional, in that they deprive him of his office and of valuable retirement rights thereunto appertaining, without due process of law, in two respects, viz.:

(a) They deny him the right to be confronted by and to cross-examine his accusers; and

(b) They shift to him the burden of disproving *ex parte* allegations made against him, which, when taken as true, would (i) deprive him of his office, (ii) place a stigma upon him, (iii) separate him from the service with a second-class discharge, and (iv) subject him to the loss of retirement rights whose present value over and above severance pay is approximately $92,000.

Simultaneously with the filing of his complaint, appellant moved for a preliminary injunction to restrain the execution and enforcement of the cited statutes, and moved further that a three-judge court be convened. The latter motion was granted, and the case was heard and determined by a district court of three judges, on cross-motions for summary judgment.

The evidence, all of which is documentary, may be summarized as follows:

Appellant is an officer of the Regular Army with the permanent rank of Major and the temporary rank of Lieutenant Colonel, living with his wife and five minor children at his duty station, Fort Monroe, Virginia. He served in the Army in World War II, where he was awarded a Bronze Star Medal for valor in New Guinea. Then, following renewed Army service that began in 1948, he was commissioned in the Regular Army in 1958. At the present time he has had over 19 years of active Federal service, and he will be eligible for retirement in November 1962 upon completion of 20 years. But for the incident about to be described, his military record reflects exemplary conduct and high efficiency ratings.

As set forth by the court below (*infra*, pp. A3-A4):

> "This case had its origin in an episode that took place on September 21, 1960. That morning the plaintiff arrived in Washington, for a two-day official conference at the Pentagon. After the first day's session he took a walk about the city during the early evening. As he was passing the YMCA, he entered the building and went downstairs to the men's room. When he returned to the lobby and was about to leave, a stranger stared at him and made a hardly perceptible nod in the direction of the stairs. The stranger then went down toward the men's room and the plaintiff turned around and followed him. According to the police officer involved in the matter, a conversation ensued between them. It began with an exchange of innocuous remarks and then in rather vulgar phrase-

ology the stranger indicated to the plaintiff that he was looking for a partner for a homosexual act. The plaintiff made a reply that seemed to acquiesce in the stranger's suggestion and also touched the stranger's body through his clothing in an indecent manner. The stranger then identified himself as a police officer, exhibited his badge, and placed the plaintiff under arrest.

"The plaintiff was then taken to Police Headquarters, where he was questioned and at the request of his interrogators wrote on a typewriter his own version of the event. His summary of what took place does not substantially differ from the detective's account, except in its choice of words. In addition, the plaintiff stated that he was not a homosexual, and had no intention of engaging in an unnatural act; that he suspected the stranger of being homosexual and was curious to know how such a person acted and what he said, and for this reason engaged in the conversation. The plaintiff further asserted that he had been on the verge of terminating the encounter and leaving when the stranger took a stand between him and the door and identified himself as a police officer. In a later statement the plaintiff indicated that his curiosity originated in the fact that he had recently handled such cases administratively, although he had never seen any such persons. The plaintiff was not charged at Police Headquarters, but was turned over to the military authorities who questioned him further and then released him to return to duty."

Thereafter, on May 3, 1961, a selection board of general officers convened under 10 U.S.C. § 3791 (*infra,* p. A20) called on appellant to show why he should not be removed from the active list of the Regular Army for the following reasons:

"1. An existence of homosexual tendencies.

"2. Conduct unbecoming an officer."

The selection board based its order to show cause entirely on documents, and did not call or hear any witnesses who

had personal knowledge of the facts on which the foregoing allegations were based. Appellant was not given a hearing by the selection board, and did not and could not appear before that board.

Conduct unbecoming an officer and a gentleman is an offense in violation of Article 133 of the Uniform Code of Military Justice (10 U.S.C. § 933), governed by the two-year statute of limitations of Art. 43(c), UCMJ (10 U.S.C. § 843(c)). Although the incident that was the basis of the elimination proceedings against appellant that are now under review occurred, as has been shown, on September 21, 1960, up to the present time no court-martial charges have been served on appellant.

In respect of the elimination proceedings, appellant had a hearing on July 19 and 20, 1961, before a board of inquiry convened pursuant to 10 U.S.C. § 3792 (*infra*, pp. A20-A21). The recorder of that board called no witnesses, and introduced only documents into evidence. Appellant appeared and testified in his own behalf, and adduced the testimony of numerous witnesses. Appellant also requested the presence of Detective Arscott of the Metropolitan Police of the District of Columbia, the policeman of the incident quoted *supra*, pp. 4-5, whose solicitation to an immoral act, a solicitation admitted by him in writing, was the basis of the allegations made against appellant. This request was refused on the stated ground that Detective Arscott was unavailable and because "This Board has no subpoena power."

The regulations under which the board of inquiry proceeded, Army Regulations (hereinafter simply "AR") 635-105, Personnel Separations, Eliminations, 13 Dec. 1960, provided among other things as follows:

> "The impression that it is the responsibility of the Government to establish its case before this board [of inquiry], in much the same manner as is done in a court-martial, is erroneous. The burden of proof rests

with the respondent to produce convincing evidence that he should be retained. In the absence of such a showing by the respondent, the board must find for elimination.'' Appendix I, ¶4*a*, p. 19.

* * * * *

''**10. Instructions to boards of inquiry on their mission.** These instructions will be given by the appointing authority, his designated representative, the president or recorder of the board, or may be formalized in a specific letter of instructions to the board of inquiry. The instructions will include, but need not be limited to, items listed below applicable to the case being considered:

''*a.* Informing the board members that selection of an officer to show cause for retention is a 'prima facie' case for elimination in the absence of convincing evidence advanced by the respondent for further service; and, that the adverse finding of the selection board, standing alone, is sufficient to support elimination.

''*b.* Emphasizing that the burden of proof rests with the respondent to show why he should retain his present status.'' Appendix I, ¶¶ 10*a*, *b*, p. 24.

Pursuant to the provision last cited, the board of inquiry was duly advised by the recorder thereof that ''The burden of proof rests with the respondent to show why he should retain his present status.''

Following the hearing, the board of inquiry found as follows:

''1. As to the allegation of existence of homosexual tendencies, that cause for retention has not been shown. This finding is based on the following reason:

''The evidence presented by the respondent has not refuted or rebutted the homosexual tendencies exhibited by the actions which took place in the YMCA, Washington, D. C., on the night of 21 September 1960.

> "2. As to the allegation of conduct unbecoming an officer, that cause for retention has not been shown. This finding is based on the following reason:
>
> > "The actions of the respondent in permitting himself to be lured by a complete stranger into a latrine, and in that latrine acting in such a manner as to cause his arrest, are completely incompatible with the conduct expected of an officer."

Accordingly, the board of inquiry recommended "Elimination, and that a General Discharge, under Honorable Conditions, be issued."

On September 19, 1961, the recommendation of the board of inquiry that appellant be eliminated from the service was approved by the Commanding General, Second United States Army, and the proceedings were forwarded to the Department of the Army.

On October 24, 1961, the proceedings of the board of inquiry thus approved were considered by a board of review of three general officers convened pursuant to 10 U.S.C. § 3793 (*infra*, p. A21). Appellant was not present, and under the governing regulations could not be present. The recorder of the board of review introduced the record made before the board of inquiry, advised the board of review that the objections made by appellant's counsel before the board of inquiry were not well taken, and read lengthy excerpts from the Army Regulations governing homosexuals, AR 635-89.

The recorder did not advise the board of review that, at the board of inquiry hearing, the Army medical officer who had examined appellant testified regarding him that "In terms of the statement in the Army Regulations, I cannot say that he is a homosexual." The recorder similarly did not advise the board of review that a civilian doctor testified that appellant was not homosexual, or that five lay witnesses had testified to the same effect.

Following this presentation, the board of review found that appellant "has failed to show cause why he should be retained in the Army," and recommended that he be eliminated and issued a General Discharge—one degree lower than that recommended by the board of inquiry.

The present action was brought on the following day, October 25, 1961, before action on the proceedings had been taken either by the Secretary of the Army, or by his delegate in elimination cases, the Under Secretary of the Army, both of whom were defendants below and are appellees here.

The Army Regulations governing eliminations make no provision for the officer sought to be eliminated either to appeal to or to appear before the Secretary of the Army or his delegate (AR 635-105, *supra*).

The record shows that, in a request addressed to the present Secretary of the Army, an appellee here, by counsel for an officer in a somewhat similar elimination case, the request being that the proceedings be disapproved because of the shift in the burden of proof and because of the denial of confrontation and cross-examination, the present Under Secretary of the Army, also an appellee here, replied on April 4, 1961:

> "If, as you allege, the Army regulations which prescribe procedures for elimination of substandard officers are inconsistent with the statutes which they are designed to implement, and if, as you also allege, these statutes are unconstitutional as applied to your client, considerable revision of Army elimination procedures will be required. On the basis of the information available to me, and my examination of the briefs filed in the pending litigation, I do not believe that such a revision is necessary or desirable at this time."

Following the filing of the complaint, the District Court (McGarraghy, J.), after a hearing in chambers at which the appellees were represented by counsel, signed a tem-



84154 O—62——38

porary restraining order on the afternoon of October 25, 1961, that restrained the appellees "from taking any steps looking to the removal of the [appellant] from the active list of the Regular Army pursuant to or by reason of anything appearing in the elimination proceedings commenced against him on May 3, 1961."

That order by its terms permitted the Secretary or his delegate to disapprove those proceedings. On the following morning, however, counsel for the Secretary and his co-defendants sought a modification of the order to permit the Secretary to approve the elimination proceedings. Judge McGarraghy denied the motion, with the comment, "The order is in accordance with my intentions."

On November 2, 1961, following the oral granting of the motion to convene a three-judge court, appellant sought an extension of the temporary restraining order, which on that day had expired by its terms. Over objection by counsel for the Secretary, the District Court (Holtzoff, J.) extended the restraining order for the 10-day period allowed by Rule 65(b), F.R. Civ.P.

Inasmuch as the three-judge court was not scheduled to convene until after the expiration of that period, appellant applied to Circuit Judge Bastian, who by then had been designated as the senior member of the three-judge court, for a further stay, to preserve the jurisdiction of that court by preventing any act by the Secretary that would render the case moot. Again counsel for the Secretary sought an order that would permit that officer to approve the elimination proceedings. Judge Bastian, however, entered a new stay in the terms originally framed, to remain in effect until the three-judge court heard and disposed of appellant's motion for preliminary injunction.

The record shows that, although the Army changed appellant's duties after the elimination proceedings now in

question were commenced, he was continued on duty, and he is still on duty as of this time.

If appellant is eliminated from the Army prior to November 4, 1962, he will not have sufficient service to qualify for retirement, and hence will be given $8940 by way of severance pay pursuant to 10 U.S.C. § 3796 (*infra*, pp. A22-A23). If, however, he continues on the active list through the date mentioned, he will be eligible to retire in the grade of lieutenant colonel and to receive retirement pay at the rate of $4650 per year.[1]

The present value of an annuity of $4650 per annum for a man of appellant's age by November 1962 is approximately $100,000, so that, if appellant is eliminated, he would stand to lose the difference between the value of his retirement annuity and his severance pay, or some $92,000.[2]

After hearing the parties' cross-motions for summary judgment, the three-judge court ordered appellant's complaint dismissed, holding, in an opinion written by Judge Holtzoff (*infra*, pp. A1-A18), that in enacting the challenged elimination statute, Congress was not limited either by the Due Process Clause, the Bill of Rights, or by any other provision of the Constitution.

---

[1]As of November 4, 1961, appellant had 19 years of active Federal service, but, for pay purposes, which includes inactive duty as well, see 37 U.S.C. § 233, he had 21 years, 1 month, and 24 days of service. Therefore his present base pay, see 37 U.S.C. § 232(a), is $745 a month; and his severance pay would be 12 times that amount.

By November 4, 1962, appellant will have had over 22 years' service for pay purposes, and will be entitled to retire in the grade of lieutenant colonel, with retired pay of $387.50 per month or $4,650 per year. See 10 U.S.C. §§ 3911, 3963(a).

[2] Appellant was born on May 29, 1921, and hence will be 41 years old when he reaches November 4, 1962, his retirement eligibility date. The present value of his retirement annuity would therefore be a matter of computation (see *City of Lincoln* v. *Power*, 151 U.S. 436, 441, mortality tables may be judicially noted), although it also appears in the record.

The order dismissing the bill of complaint was entered on December 19, 1961, and, over objection by counsel for the Secretary, appellant was granted a 10-day stay of his discharge, conditioned on the filing, within that period, of a notice of appeal and of an application to the Circuit Justice for a stay of his discharge pending the disposition of appellant's appeal. Both documents were duly filed on the following day, December 20.

The latter application had not been acted on when the present document went to press.

## THE QUESTIONS ARE SUBSTANTIAL

The holding of the court below, that the statutory elimination process now being challenged "is not subject to the limitations of the due process clause" (*infra,* p. A13), and that "Dismissals of officers are not limited or controlled by the Bill of Rights" (*infra,* p. A13), places the decision under appeal on a constitutional ground that is at once the broadest possible—and also the least tenable.

No decision is cited for those propositions, and none, so far as known, is available. (It is due counsel for the appellees below to point out that they did not urge the foregoing views upon the District Court.)[3] For whatever may be the power of the President, as Commander-in-Chief, to separate officers from the armed forces in the absence of statutory restraints, for any reason or for none at all; whatever may be the power of Congress to direct the President in the matter of qualifications for appointment or selection (cf. 30 Op. Atty. Gen. 177); here the question concerns the validity, in respect of procedural due process, of

[3] "A reading of the elimination statutes * * * readily discloses that the method provided for elimination of army officers by the Congress is, on its face, fair and reasonable *and as such affords constitutional procedural safeguards.*" Memo. of Points and Authorities * * * in Support of Defendants' Motion to Dismiss, p. 5 (italics added).

an Act of Congress purporting to confer the power of separation, not on the President, but on the Secretary of the Army (or, as in actual practice here, on his delegate, the Under Secretary), for specified grounds and under a procedure prescribed in detail.

Therefore the holding below amounts to this, that an officer facing elimination from the Regular Army because of alleged moral dereliction, a step that will cost him his livelihood and a valuable retirement annuity as well, that will stigmatize him, and that will sharply curtail his future employment possibilities (see *Bland* v. *Connally,* 293 F. 2d 852 (D.C. Cir.), at 853 note 1, and 858 notes 9 and 10), is not entitled in the course of the elimination process to the minimal protection of procedural due process of law.

The present action does not ask the courts to assume "the task of running the Army" (*Orloff* v. *Willoughby,* 345 U.S. 83, 93), or to substitute their judgment for those of the military authorities in respect of appellant's fitness to retain his commission; indeed, the complaint does not so much as request an evaluation of the sufficiency of the evidence. All that it asserts is that a statute purporting to authorize an officer's elimination must be weighed in the balance of the Due Process Clause, and that, so tested, the statute now challenged has been found wanting.

The Court of Military Appeals, which early held that the soldier's protections were statutory rather than constitutional (*United States* v. *Clay,* 1 USCMA 74, 77, 1 CMR 74, 77), has insisted that, except for the right to presentment by grand jury and to trial by petit jury, an individual in the military service has every right and privilege guaranteed to any citizen by the Constitution (*United States* v. *Burney,* 6 USCMA 776, 796, 803, 21 CMR 98, 118, 125). But the court below holds that, once a citizen is commissioned as an officer, he is *caput lupinum* in respect of procedural fairness.

That holding alone, it is submitted, requires the noting of probable jurisdiction of the present appeal. But the narrower questions now presented are also substantial.[4]

*First.* Appellant's insistence on a right to confrontation by and cross-examination of the only other participant in the incident on which his proposed elimination is based is not in any sense a matter of formality or of the *elegantia juris.*

Two persons were present, appellant and Detective Arscott, and the basic question is whether appellant was guilty of conduct marking him unfit thereafter to associate with honorable men, or whether what he did was simply an unfortunate lapse, an ill-advised yielding to curiosity.[5]

As has been seen, the board of inquiry, having only appellant before it, regarded adversely his "actions * * * in permitting himself to be lured by a complete stranger."

---

[4] *Ledford* v. *Curran,* motion for leave to file petition for mandamus denied, 366 U.S. 948, is not *contra* on the need for a three-judge court in the present case. There the petitioner was sought to be eliminated for misconduct under a statute that reached only inefficiency; here the elimination proceeding falls squarely within the challenged statute—which was enacted in 1960, during the pendency of the earlier litigation (and no doubt in response thereto). Accordingly, while Judge Curran denied the motion to convene a three-judge court in the earlier case, Judge Holtzoff granted such a motion here—and it was the three-judge court that entered the judgment now being appealed.

[5] "The fitness therefore of the accused to hold a commission in the army, as discovered by the nature of the behaviour complained of, or rather his worthiness, morally, to remain in it after and in view of such behaviour, is perhaps the most reliable test of his amenability to trial and punishment under this Article." Winthrop, *Military Law & Precedents* (2d ed. 1896) *1106 (1920 reprint, pp. 712-713), commentary on AW 61 of 1874, Conduct Unbecoming an Officer and a Gentleman, the current version of which is Art. 133, UCMJ (10 U.S.C. § 933).

Articles of War will hereafter be referred to simply as "AW."

How can such conduct be judged without seeing the decoy? For the rationale of confrontation is that, by producing the witness, the tribunal can "judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox* v. *United States*, 156 U.S. 237, 242-243. It is significant that, in the present area, the District of Columbia Circuit has commented disapprovingly on the use of police decoys (*Guarro* v. *United States*, 237 F. 2d 578, 582), and has imposed a rigid rule of corroboration (*Kelly* v. *United States*, 194 F. 2d 150). (For more of Detective Arscott's apparently routine activities, reference may be made to the opinion of the D. C. Municipal Court of Appeals in *Rittenour* v. *District of Columbia*, 163 A. 2d 558.)

The right to confrontation and cross-examination, it had been supposed, was settled by this Court in *Greene* v. *McElroy*, 360 U.S. 474, 496-497:

> "We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative and regulatory actions were under scrutiny. * * *" [Citations and footnotes omitted.]

And, unlike *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, here appellant's loss of livelihood was involved.

Moreover, in *Bland* v. *Connally*, 293 F. 2d 852, and *Davis* v. *Stahr*, 293 F. 2d 860, the District of Columbia Circuit held applicable to military cases the confrontation-and-cross-examination principles of *Greene* v. *McElroy*, in situations where, as here, the discharges in question were less than honorable, and the accusations involved a stigma.

The basic proposition that the complaint in this case advanced therefore appeared to be settled.

The court below, however, distinguished the *Bland* and *Davis* cases on the ground that they concerned merely inactive reservists. But that circumstance, far from weakening those decisions, makes the present an *a fortiori* case. Reserve officers, who below general or flag officer rank are appointed by the President alone (10 U.S.C. § 593(a)), may be discharged at the pleasure of the President (10 U.S.C. §§ 593(b), 1162(a)), or, where such separation is under conditions other than honorable, pursuant to a far simpler procedure (10 U.S.C. § 1163(c)). Regulars, therefore, have far more statutory protection in respect of their military status than Reservists—from which the court below deduced that they have fewer constitutional rights! Such a curious calculus of constitutional values plainly qualifies as a substantial question.[6]

*Second.* Here, as the legislative history indicates, the elimination statute itself was designed to shift the burden

---

[6] In order not to lengthen this Jurisdictional Statement unduly, two subsidiary contentions under the present heading may be briefly mentioned in the margin:

(a) *Williams* v. *Zuckert*, D.C. Cir., No. 16345, Nov. 9, 1961, relied on by the court below (*infra*, page A17), does not support its holding. There (p. 3, slip opinion) the appellant "failed to use available administrative means to arrange for the appearance of witnesses as provided by the Civil Service Commission Regulations." Here, admittedly, no means to arrange for Arscott's appearance, administrative or otherwise, were available.

(b) *Cleary* v. *Weeks*, 259 U.S. 336, was very different, since under the statute there involved the officer concerned could appear before a *court* of inquiry (10 U.S.C. [1926-1940 eds.] § 571), a tribunal which had the same power to summon witnesses as a court-martial (AW 101 of 1916-1948, 10 U.S.C. [1926-1946 eds.] § 1573), viz., the nation-wide subpoena powers of United States courts in criminal cases (AW 22, 10 U.S.C. [1926-1946 eds.] § 1493).

of disproof to the accused officer. As Committee counsel frankly said (*Hearings before Subcommittee No. 1, House Committee on Armed Services, on S. 1795, 86th Cong., 1st sess.*, p. 3802):

> "Apparently when you take a case to Federal court today the individual is always right. In other words, the problem is with the Army being on the defensive, for the failure of the language to be completely clear as to what was intended. I think with all this discussion that we have here on the record now, it must be mighty clear that the subcommittee means that the individual officer—make sure we get this down—means that the individual officer has the burden of establishing that he should be retained and if he fails to establish that he should be retained, and if his removal is recommended to the Secretary of the Army, that the Secretary of the Army may take action on the basis of that recommendation. That is what is intended."

The report of the House Committee shows that it adopted in all respects the views of its counsel (H.R. Rep. 1406, 86th Cong., 2d sess., pp. 12, 13, 14).[7]

---

[7] "The principal difficulties experienced in administering the present law are the following:

"(1) The burden of proof required to effect an officer's removal. While the law technically requires the officer to 'show cause' why he should not be removed, the actual burden of justifying the officer's removal is imposed on the services.

* * * * *

"In order to resolve these difficulties, the committee recommends that the present chapters 359 and 859 be revised. These chapters, as revised, will refer only to elimination for substandard performance of duty. The following major changes have been made in these chapters.

"(1) Sections 3781, 3782, 3783 (the Army sections) and sections 8781, 8782, 8783 (the Air Force sections) have been amended to clearly establish that an officer who has been identified by a screen-

The foregoing Congressional intent to shift the burden of proof to the accused officer was implemented by the Army Regulations quoted *supra,* pp. 6-7, and by the advice specifically given the board of inquiry by its recorder (*supra,* p. 7).

Having regard to the fact that the elimination process established by the challenged statute has four stages, three of which are *ex parte,* with the burden of disproof placed on the accused at the only stage that is not *ex parte* and where alone he is permitted to be heard, it is plain that a scheme better calculated to make accusation do service for proof could hardly be devised. Accordingly, the statutory scheme now being challenged is so palpably unfair as to deny procedural due process.

The fact that the statute established "an administrative machinery" (*infra,* p. A16) does not make it any less vicious in respect of its fundamental unfairness. What is sought

---

ing board as one whose performance of duty is substandard, must assume the burden of establishing that he should be retained.

* * * * *

"These chapters will be utilized for Army and Air Force officers whose performance of duty is substandard.

"The proposed new chapters 360 and 860 will provide for the Army and Air Force, respectively, the authority to remove officers for moral or professional dereliction, or for security reasons. The procedures for removal are similar to those proposed in the case of officers being eliminated for substandard performance of duty. However, in view of the nature of the reasons for which removal is authorized by these chapters, the provisions differ in the following respects:

* * * * *

"(2) With respect to officers who are being eliminated and who are not qualified for retirement, they may be 'discharged' rather than 'honorably discharged' as is provided in the case of officers being eliminated for substandard performance of duty."

In view of this Committee report, appellant abandons as untenable the non-constitutional ground set forth in par. III(5) of his Notice of Appeal.

to be accomplished here is a change of status to the detriment of the individual concerned. Since, therefore, the burden of proof cannot be shifted to aliens resisting deportation (*Kwong Hai Chew* v. *Rogers*, 257 F. 2d 606 (D.C. Cir.); *Wood* v. *Hoy*, 266 F. 2d 825 (C.A. 9)), it may not be shifted to a citizen defending his title to, and the substantial emoluments of, an office conferred by the President with the advice and consent of the Senate.

Here again, the present case raises a substantial constitutional question of basic fairness.[8]

*Third.* The second allegation against appellant was "Conduct unbecoming an officer." This has been a military offense in the American Army ever since the beginning. AW XLVII of 1775; Sec. XIV, Art. 21, of 1776; AW 20 of 1786; AW 83 of 1806, all set forth in Winthrop, *supra*, 1920 reprint, at pp. 957, 969, 974 and 983, respectively; AW 61 of 1874, in R.S. § 1342; AW 95 of 1916-1948 (10 U.S.C. [1926-1946 eds.] § 1567); Art. 133, UCMJ (10 U.S.C. § 933).

But—under Art. 51(c)(4) of the Uniform Code of Military Justice (10 U.S.C. § 851(c)(4)), as everywhere else in American law, the burden of proof is on the prosecution. Moreover, pursuant to Art. 46, UCMJ (10 U.S.C. § 846) and par. 115 of the presidentially-prescribed *Manual for Courts-Martial, U. S., 1951,* an accused is entitled to compulsory process for witnesses. Finally, the Uniform Code renders every conviction by court-martial reviewable by a civilian tribunal, the United States Court of Military Appeals. Art. 67, UCMJ (10 U.S.C. § 867).

The obvious surmise, that it was the existence of those provisions which militated against appellant's being haled

---

[8] The elimination procedure considered in *Cleary* v. *Weeks*, 259 U.S. 336, and in *Rogers* v. *United States*, 270 U.S. 154, did not shift the burden to the officer concerned; there the court of inquiry was required to find as a fact whether or not the adverse allegations had been established (AR 605-200, Feb. 6, 1935, par. 3*c*).

before a court-martial, does not rest on innuendo, for that much was boldly asserted during the course of the Subcommittee's consideration of the statute now under scrutiny. See *Hearings, supra,* at p. 3816:

> "A lot of these moral dereliction cases in a court-martial, where you have to have more than a preponderance of the evidence to convict, are very difficult, and so they will use a board proceeding here and charge them with moral dereliction even though they may not be able to establish overt acts."

In a somewhat similar case, the Court of Claims held invalid resort to such administrative procedure to give a female airman a discharge "under conditions other than honorable" where court-martial procedures were available but not used. *Clackum* v. *United States,* No. 246-56, decided January 20, 1960, but not yet reported.[9]

*Fourth.* Lest any effort be made here to support the result below on procedural grounds, a few words on that score will be added now, with a view to avoiding the need for any reply brief under Rule 16(3).

---

[9] There the Court of Claims said (p. 4 of slip opinion):

"The Government defends this remarkable arrangement, and its operation in the instant case, on the ground that it is necessary in the interest of an efficient military establishment for our national defense. We see nothing in this argument. The plaintiff being a member of the Air Force Reserve, on active duty, the Air Force had the undoubted right to discharge her whenever it pleased, for any reason or for no reason, and by so doing preserve the Air Force from even the slightest suspicion of harboring undesirable characters. But it is unthinkable that it should have the raw power, without respect for even the most elementary notions of due process of law, to load her down with penalties. It is late in the day to argue that everything that the executives of the armed forces do in connection with the discharge of soldiers is beyond the reach of judicial scrutiny. *Harmon* v. *Brucker,* 355 U.S. 579."

Appellant here, being an officer of the Regular Army, of course cannot be discharged at will.

1. Appellant's action, filed before the Secretary acted, was not premature for that reason.

As has been seen (*supra,* p. 9), the regulations did not provide for any appeal to the Secretary. There being no administrative remedy, "There was thus nothing to exhaust." *City of Miami* v. *Prymus,* 288 F. 2d 465 (C.A. 5). Moreover, since the validity of the statute is being assailed, a matter not curable by the Secretary, the doctrine of exhaustion of remedies would be inapplicable in any event. Cf. *Leedom* v. *Kyne,* 358 U.S. 184.

Further, since the very officials concerned had previously expressed their approval of precisely those features of the elimination process being attacked here (*supra,* p. 9), there was, very plainly, no need once more to appeal to them; the law does not require the doing of a useless act. *Tacey* v. *Irwin,* 18 Wall. 549, 551; *Sims* v. *Everhardt,* 102 U.S. 300, 310.

Additionally, since the Secretary has been shown determined to approve the present proceedings, appellant was not required to await, with a species of split-second timing, the precise moment between the making and the effectuation of the Secretary's decision as the only occasion when the courts would be open to him for redress. A litigant is not obliged, at his peril, to apply for equitable relief just midway between the Scylla of prematurity and the Charybdis of mootness. *City Bank Farmers Trust Co.* v. *Schnader,* 291 U.S. 24, 34; *Benson* v. *Schofield,* 236 F. 2d 719, 721 (D.C. Cir.), certiorari denied, 352 U.S. 976; *Commercial State Bank of Roseville* v. *Gidney,* 174 F. Supp. 770, 776-777 (D.D.C.), affirmed, 278 F. 2d 871 (D.C. Cir.). An injunction, after all, looks to the future. *Swift & Co.* v. *United States,* 276 U.S. 311, 326.

2. Nor is appellant's failure to resort to the Army Board for the Correction of Records any bar, as indeed the District of Columbia Circuit has just held. *Ogden* v. *Zuckert,* No. 16283, Dec. 14, 1961. The Fourth Circuit,

true, held the contrary in *Reed* v. *Franke,* No. 8270, Nov. 7, 1961, but it is not necessary to resolve that conflict of circuits here, for this reason: The power of altering a military record "to correct an error or remove an injustice" is, ultimately, vested in the Secretary himself by the statute, 10 U.S.C. § 1552. But here it is the very same Secretary who will have approved appellant's elimination. Thus the appeal would be, not from Philip drunk to Philip sober, but from Philip drunk to Philip still besotted. That being so, no rule of law required this appellant, as a condition precedent to invoking what Mr. Justice Baldwin in *Bonaparte* v. *Camden & A. R. Co.,* Baldw. 205, 218, Fed. Case No. 1617, 3 Fed. Cas. at 827 (C.C.D.N.J.), called the "protecting preventive process of injunction," to go through the futile motions of requesting the present Secretary to change his mind.

3. It was argued below on the Secretary's behalf that appellant had an adequate remedy at law by way of an action for a declaratory judgment, and that, if appellant were ultimately successful, the Secretary then could and would restore appellant to the rolls. But unlike the situation of civilian employees, who can be so restored with back pay, such a step in the case of a Regular Army officer like appellant would be beyond even the President's power under a long line of decisions and rulings. *McElrath* v. *United States,* 102 U.S. 426; *United States* v. *Corson,* 114 U.S. 621; *Mimmack* v. *United States,* 97 U.S. 426; 17 Op. Atty. Gen. 297; 18 Op. Atty. Gen. 18; Winthrop, *supra,* 1920 reprint, pp. 747-754. Moreover, no decision now on the books even remotely suggests that a court of the United States can order the Secretary of a Military Department to do what under the Constitution requires Presidential appointment and Senatorial confirmation pursuant to appropriate authorizing legislation, viz., to place on the roll of officers of the Regular Army an individual who by reason of his elimination therefrom has become a civilian.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that probable jurisdiction of this appeal should be noted.

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Ave., N. W.,
Washington 6, D. C.,
*Counsel for the Appellant.*

JANUARY 1962.

# APPENDIX



84154 O—62——39

# APPENDIX A

## OPINION BELOW

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3528-61

J. B. BEARD, *Plaintiff*,

v.

ELVIS J. STAHR, JR., Secretary of the Army,
STEPHEN AILES, Under Secretary of the Army, and
MAJOR GENERAL JOE C. LAMBERT, The Adjutant General,
United States Army, *Defendants.*

### Opinion

Frederick Bernays Wiener, of Washington, D. C., for the plaintiff.

David C. Acheson, United States Attorney; Joseph M. Hannon and Harold D. Rhynedance, Jr., Assistant United States Attorneys; all of Washington, D. C., for the defendants.

Before BASTIAN, Circuit Judge, and PINE and HOLTZOFF, District Judges.

HOLTZOFF, D.J.—This is an action brought by an officer of the regular Army against the Secretary of the Army, the Under Secretary and the Adjutant General, to enjoin them from removing him from the active list pursuant to elimination proceedings conducted under 10 U.S.C. §§ 3781 *et seq.*, which established a procedure for dismissing officers of the regular Army on certain specified grounds. It is contended in behalf of the plaintiff that the statute is unconstitutional, and accordingly this three-judge court was convened. The attack on the statute is based on the claim that it is violative of due process of law under the Fifth Amendment in that it places the burden of proof on the officer to show cause for his retention on the active list;

and in that it fails to require that he be confronted with witnesses against him. The matter is now before the Court on the plaintiff's motion for a preliminary injunction, and on cross-motions for summary judgment. We hold that the statute is valid.

The statute, 10 U.S.C. § 3781 to § 3797, became law on August 10, 1956, 70A Stat. 218, and was amended and expanded by the Act of July 12, 1960, 74 Stat. 386. In brief, it authorizes the Secretary of the Army to convene a board of officers at any time to review the record of any commissioned officer on the active list of the regular Army, in order to determine whether he should be required to show cause for his retention on the active list because his performance of duty had fallen below the standards prescribed by the Secretary, or because of moral or professional dereliction, or because his retention would not be clearly consistent with the interests of national defense. It is provided further that Boards of Inquiry, composed of three or more officers, shall be convened to receive evidence and make findings and recommendations whether such an officer should be retained on the active list of the regular Army. The statute expressly requires the board to give the officer a fair and impartial hearing. If the Board of Inquiry determines that the officer has failed to establish that he should be retained on the active list, it is required to send the record of its proceedings to a Board of Review. The Secretary of the Army is authorized to convene Boards of Review, each composed of three or more officers, to review the records of officers recommended by Boards of Inquiry for removal from active service. If such a Board determines that the officer has failed to establish that he should be retained on the active list, it transmits its recommendation to the Secretary, who in that event is authorized to remove the officer from active service. The Secretary's action is final and conclusive. Admittedly this statute has been construed as placing upon the officer the burden of proving that he should be retained in the service.

and in that it fails to require that he be confronted with witnesses against him. The matter is now before the Court on the plaintiff's motion for a preliminary injunction, and on cross-motions for summary judgment. We hold that the statute is valid.

The statute, 10 U.S.C. § 3781 to § 3797, became law on August 10, 1956, 70A Stat. 218, and was amended and expanded by the Act of July 12, 1960, 74 Stat. 386. In brief, it authorizes the Secretary of the Army to convene a board of officers at any time to review the record of any commissioned officer on the active list of the regular Army, in order to determine whether he should be required to show cause for his retention on the active list because his performance of duty had fallen below the standards prescribed by the Secretary, or because of moral or professional dereliction, or because his retention would not be clearly consistent with the interests of national defense. It is provided further that Boards of Inquiry, composed of three or more officers, shall be convened to receive evidence and make findings and recommendations whether such an officer should be retained on the active list of the regular Army. The statute expressly requires the board to give the officer a fair and impartial hearing. If the Board of Inquiry determines that the officer has failed to establish that he should be retained on the active list, it is required to send the record of its proceedings to a Board of Review. The Secretary of the Army is authorized to convene Boards of Review, each composed of three or more officers, to review the records of officers recommended by Boards of Inquiry for removal from active service. If such a Board determines that the officer has failed to establish that he should be retained on the active list, it transmits its recommendation to the Secretary, who in that event is authorized to remove the officer from active service. The Secretary's action is final and conclusive. Admittedly this statute has been construed as placing upon the officer the burden of proving that he should be retained in the service.

It must be emphasized that the statute is not intended to provide a judicial trial or even a quasi-judicial hearing on specific charges. It merely prescribes an administrative routine for the elimination of officers who are deemed unsuitable.

The present proceeding arose out of the following facts. The plaintiff, J. B. Beard, is a Lieutenant Colonel in the United States Army, in which he has served for about nineteen years, having been inducted as a private and then worked his way up through the ranks. He has had an excellent record, and during World War II he received a Bronze Star Medal for gallantry in action. He is married and lives with his wife and five children. During the pertinent period he was stationed at Fort Monroe, Virginia.

This case had its origin in an episode that took place on September 21, 1960. That morning the plaintiff arrived in Washington, for a two-day official conference at the Pentagon. After the first day's session he took a walk about the city during the early evening. As he was passing the YMCA, he entered the building and went downstairs to the men's room. When he returned to the lobby and was about to leave, a stranger stared at him and made a hardly perceptible nod in the direction of the stairs. The stranger then went down toward the men's room and the plaintiff turned around and followed him. According to the police officer involved in the matter, a conversation ensued between them. It began with an exchange of innocuous remarks and then in rather vulgar phraseology the stranger indicated to the plaintiff that he was looking for a partner for a homosexual act. The plaintiff made a reply that seemed to acquiesce in the stranger's suggestion and also touched the stranger's body through his clothing in an indecent manner. The stranger then identified himself as

a police officer, exhibited his badge, and placed the plaintiff under arrest.[1]

The plaintiff was then taken to Police Headquarters, where he was questioned and at the request of his interrogators wrote on a typewriter his own version of the event. His summary of what took place does not substantially differ from the detective's account, except in its choice of words. In addition, the plaintiff stated that he was not a homosexual, and had no intention of engaging in an unnatural act; that he suspected the stranger of being homosexual and was curious to know how such a person acted and what he said, and for this reason engaged in the conversation. The plaintiff further asserted that he had been on the verge of terminating the encounter and leaving when the stranger took a stand between him and the door and identified himself as a police officer. In a later statement the plaintiff indicated that his curiosity originated in the fact that he had recently handled such cases administratively, although he had never seen any such persons. The plaintiff was not charged at Police Headquarters, but was turned over to the military authorities who questioned him further and then released him to return to duty.[2]

[1] The evidence shows that complaints had been received by the Metropolitan Police Department of Washington, D. C., that homosexuals were in the habit of frequenting the men's room at the YMCA and, accordingly, detectives were assigned to keep the place under surveillance. Their practice was to enter into conversation with a suspicious person in order to determine whether he would make a proposition to perform a homosexual act, or for the police officer to make such proposition to the suspect in order to ascertain what the suspect's reaction and reply would be. In this instance, apparently, the second course was followed.

[2] It is not clear on what charge the plaintiff was actually arrested, since apparently no formal charge was placed against him. The arrest could not have been on a charge of soliciting an immoral act, because the solicitation originated from the officer. It may have been a charge of assault in that the plaintiff indecently touched the officer's body.

Subsequently, a Removal Selection Board appointed by the Secretary of the Army to review the records of commissioned officers determined that the plaintiff should be required to show cause for his retention on the active list. Accordingly, on July 3, 1961, a formal notice was issued to the plaintiff notifying him to that effect and enumerating the following reasons:

(a) an existence of homosexual tendencies;
(b) conduct unbecoming an officer.[3]

A Board of Inquiry, composed of two Major Generals and one Brigadier General, was then convened and met at Norfolk, Virginia on July 19 and 20, 1961, devoting two days to this matter. The transcript indicates that the proceedings were conducted patiently and thoroughly, and that full opportunity was accorded to the plaintiff, who was represented by military counsel, to present evidence not only concerning the specific facts involved in the case, but also regarding his military record and character. The evidence in behalf of the Army was presented by an official known as "Recorder". It was entirely documentary. As proof of the incident that took place at the YMCA in Washington, there was introduced a formal written statement contemporaneously prepared by the detective. Counsel for the plaintiff had requested that the latter be produced in person, in order that he might be subjected

[3] The self-evident importance of eliminating homosexuals from the armed forces is emphasized by Army Regulations AR 635-89, Paragraph 2, a:

> "Homosexual personnel irrespective of sex will not be permitted to serve in the Army in any capacity, and prompt separation of homosexuals, as defined in these regulations, is mandatory. Homosexuals are unfit for military service because their presence impairs the morale and discipline of the Army, and homosexuality is a manifestation of a severe personality defect which appreciably limits the ability of such individuals to function effectively in society."

to cross-examination. Efforts to obtain his presence were made by the Board, but proved unavailing because the Metropolitan Police Department declined to pay his expenses to Norfolk, and the Board lacked subpoena power. At the hearing, the plaintiff's counsel stated that his client was most appreciative of the efforts made to secure the attendance of the police officer. Actually, since there were no substantial discrepancies between the two narratives, and as the crucial question was what were the plaintiff's intention and mental operations in engaging in the encounter with the police officer, the presence of the latter could hardly have thrown very much light on this vital issue. The documentary evidence introduced by the Army further showed that on one occasion when stationed in the Pacific during the War, the plaintiff had been a passive victim of a momentary, unconsummated homosexual attempt on the part of another officer. This information was elicited from the plaintiff during exhaustive interviews with him after the incident in Washington.

An Army psychiatrist, who had examined the plaintiff in behalf of the Army, was called as a witness by the plaintiff. He expressed the view that the plaintiff was not a homosexual and recommended that that the plaintiff be retained in the Army, but also suggested that the plaintiff receive psychiatric out-patient treatment, preferably in a civilian facility. The plaintiff testified at length in his own behalf and was searchingly cross-examined. He maintained throughout that he had no intention to engage in any homosexual practice, but that he had participated in the conversation with the detective, thinking that the latter was a homosexual, merely to satisfy his curiosity as to how such persons reacted. He admitted that his conduct had been very foolish. Witnesses were called and documentary evidence submitted showing the high quality of the plaintiff's military record, and attesting to his good character and reputation.

The Board of Inquiry then made the following findings and recommendations:

"1. As to the allegation of existence of homosexual tendencies, that cause for retention has not been shown. This finding is based on the following reason:

> The evidence presented by the respondent has not refuted nor rebutted the homosexual tendencies exhibited by the actions which took place in the YMCA, Washington, D.C., on the night of 21 September 1960.

"2. As to the allegation of conduct unbecoming an officer, that cause for retention has not been shown. This finding is based on the following reason:

> The actions of the respondent in permitting himself to be lured by a complete stranger into a latrine, and in that latrine acting in such a manner as to cause his arrest, are completely incompatible with the conduct expected of an officer.

"In view of such findings, the Board recommends:

"Elimination, and that a General Discharge, under Honorable Conditions, be issued."

This action came before a Board of Review, composed of a Major General and two Brigadier Generals, on October 24, 1961. Such a Board proceeds *ex parte* solely on the record before the Board of Inquiry, and neither the respondent nor his counsel appear or is heard. It made the following findings and recommendations:

"The Army Board of Review for Eliminations, having reviewed the records of this case, in closed session and by secret written ballot, the majority of the member of the Board concurring, finds:

That Lt. Col. J. B. Beard, 084450, AGC has failed to show cause why he should be retained in the Army.

RECOMMENDATION

> "The Army Board of Review for Eliminations, in closed session and by secret written ballot, the majority of the members of the Board concurring, recommends that Lt. Col. J. B. Beard, 084450, AGC,
>
> a. Be eliminated from the Army.
>
> b. Be issued a General Discharge."

The matter was then transmitted to the Secretary of the Army for final action, and this suit followed. A temporary restraining order was issued enjoining the Secretary for the time being from separating the plaintiff from the service, and this order was continued until the determination of the pending motions by this Court.

We now reach a consideration of the sole issue to be determined by this Court, namely, the constitutionality of the statute under which the action of the Army separating the plaintiff from the active list, is being taken. This discussion must be based on two provisions of the Constitution.

Article II, Section 2, provides that:

> "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 the actual service of the United States; . . ."

Article I, Section 8, which contains an enumeration of the powers of Congress, in Clause 14, provides that the Congress shall have power

> "To make Rules for the Government and Regulations of the land and naval Forces;"

An historical review of the usages of the executive and legislative branches of the Government in connection with the dismissal of Army and Naval officers, will show a continual practice and an unvarying understanding on the

part of the President and the Congress, that the two provisions of the Constitution comprize plenary discretionary power, not limited by any other clause of the Constitution, to dismiss officers from active service in the armed forces at will at any time. While continuous legislative and executive construction is not conclusive, nevertheless, it is entitled to great weight in interpreting the Constitution, especially if the practice is uninterrupted and has been acquiesced in for a long period beginning with the adoption of the fundamental instrument. *Springer* v. *United States,* 102 U. S. 586, 599; *The Laura,* 114 U. S. 411; *Field* v. *Clark,* 143 U. S. 649, 691; *Fairbank* v. *United States,* 181 U. S. 283. It seems useful and desirable, therefore, to make a brief chronological survey of the continuous practice in this field.

From the early days of the Republic until the Civil War, the President exercised the power to dismiss officers entirely in his discretion. It was deemed a part of his constitutional authority as Commander in Chief.

Winthrop in his classic treatise on *Military Law,* Vol. 1, 1056, 1057, discusses this question in the following manner:

> "The summary dismissal or discharge of officers of the army and navy has been, from the earliest period, a prerogative of the British sovereign . . . In this country, the power, having been employed by Congress antecedently to the adoption of the Constitution, was subsequently exercised by its successor in the executive department of the government, the President, from the period of the debate of 1789 on the subject, in the House of Representatives, down to the passage of the Act of 1866, . . . .
>
> * * * *
>
> "Prior to the late war, indeed, summary dismissals or discharges of officers of the army by the order of the President, though from time to time resorted to, were not frequent. But during the war—especially between July 1861 and October 1865—these dismissals and discharges were numerous; about one hundred and

fifty, of officers of all grades, and for various causes, being published in the General Orders, and upwards of fifteen hundred in the Special Orders, of the War Department. In the great majority of cases, no trial or investigation by a military court had preceded the action taken."

Again, Winthrop states (p. 1066):—

> "It will appear from this review that the construction of the Constitution in favor of the executive power of removal, however doubtfully arrived at in the beginning, had, prior to the legislation of 1886, (incorporated in Art. 99) become firmly established by the acceptation and judgment of the legal authorities and the continued and unquestioned practice of the executive department."

In 1806 the Congress expressly recognized the power of the President to dismiss an officer in Article 11 of the Articles of War enacted on April 10, 1806, 2 Stat. 359, which contained the following clause:

> "neither shall a commissioned officer be discharged from the service, but by order of the President of the United States, or by sentence of a General Court Martial."

During the Civil War, by the Act of July 17, 1862, 12 Stat. 596, it was provided in Section 17—

> "That the President of the United States be, and hereby is, authorized and requested to dismiss and discharge from the military service either in the army, navy, marine corps, or volunteer force, in the United States service, any officer for any cause, which, in his judgment, either renders such officer unsuitable for, or whose dismission would promote the public service."

The use of the word "request" may have some significance, as it is subject to the inference that the Congress considered that the President had inherent power in the matter, and was requesting him to exercise it under certain

circumstances. After the hostilities ceased, this provision was repealed by the Act of July 13, 1866, Section 5, 14 Stat. 92, and the following was substituted:

> ". . . no officer in the military service or naval service shall in time of peace, be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

Article 99 of the Articles of War, contained in the Revised Statutes of 1878, Section 1342, p. 239, reenacted in substance the above mentioned clause from Article 11 of the 1806 edition, and provided that

> ". . . no officer shall be discharged or dismissed from the service except by order of the President, or by sentence of a general court-martial."

It added the clause introduced in the Act of 1866 that

> ". . . in time of peace, no officer shall be dismissed except in pursuance of a sentence of court-marital, or in mitigation thereof."

The Act of October 1, 1890, Section 3, 26 Stat. 562, authorized the President to prescribe a system of examinations for all officers of the Army below the rank of major in order to determine their fitness for promotion. It further provided that any officer who failed in two successive examinations should be discharged.

Article 118 of the Articles of War of 1916, Act of August 29, 1916, 39 Stat. 650, 669, reenacted the former Article 99, to the effect that no officer should be discharged from the service except by order of the President or by sentence of a General Court-Martial; and in time of peace, except in pursuance of a sentence of a court-martial or in mitigation thereof.

The Army Reorganization Act of June 4, 1920, Section 24(b), 41 Stat. 773, established an administrative procedure for eliminating officers from the Army. Such officers were

classified in what was denominated as Class B. Before being placed in Class B, an officer was given an opportunity to appear before a court of inquiry. Its recommendations were forwarded to a Classification Board, which took final action that was not subject to further review, except upon the order of the President. An officer placed in Class B was either discharged or placed on the retired list, depending upon whether his unfitness was due to his own neglect, misconduct, or avoidable habits.

By the Act of June 29, 1948, Title I, Section 101, 62 Stat. 1081, the Secretary of the Army and the Secretary of the Air Force were directed to convene Selection Boards to review the records of all officers on the active list of the regular Army, or the regular Air Force, to determine which of them should be required to show cause why they should be retained. Such selection was to be based upon the officers' failure to achieve such standards of performance as the Secretary might prescribe. Every officer so named was to receive a hearing before a Board of Inquiry. An unfavorable recommendation of such a Board was to be submitted for consideration to a Board of Review. If the latter recommended dismissal, the matter was to be transmitted to the Secretary, whose action was to be final and conclusive.

The Uniform Code of Military Justice, which became law on May 5, 1950, 64 Stat. 146, reenacted Article 118 of the Articles of War, 50 U. S. C. §739, (now 10 U.S.C. §1161).

On August 10, 1956, the statute invoked in this case became law, 10 U.S.C. §§ 3781 *et seq.* 70A Stat. 218. It was amended and expanded on July 12, 1960, 74 Stat. 386, and has been previously summarized.

The conclusion is inescapable that it was the continuous, uninterrupted, accepted understanding and practice from the adoption of the Constitution that an officer of the armed forces was subject to removal at any time by the President

in his discretion, except as such discretion was limited by an Act of Congress; and further, that Congress might establish a procedure for the elimination of officers, who either are surplus, or not regarded as meeting the high standards that should be exacted from officers. Such a procedure is not subject to the limitations of the due process clause, or any other Constitutional provision.

Obviously, it is indispensable that the morale and efficiency of the armed forces be maintained at all times on the highest possible level, and that in order to attain this aim an excellent quality of performance, character and conduct must be exacted from officers. The safety of the nation may depend upon the nature of its armed forces and the leadership of their officers. High standards among the personnel of the armed forces are indispensable in the interests of national defense. They cannot be secured by the courts. Insofar as possible the Commander in Chief and the officers acting under him, must be left untrammelled and unfettered to keep the armed forces on a high level at all times.

Armies cannot be maintained and commanded, and wars cannot be won by the judicial process. Supervision and control over the selection, appointment and dismissal of officers are not judicial functions. Dismissals of officers are not limited or controlled by the Bill of Rights.

The decisions of the Supreme Court have throughout our history recognized the inherent power to dismiss officers of the armed forces and have sustained statutory provisions creating an administrative routine to attain this result. No case has been cited holding any such statute repugnant to the Constitution and independent research has disclosed none.

Thus, in *McElrath* v. *United States,* 102 U. S. 426, 437, the Supreme Court, in an opinion by Mr. Justice Harlan, held that under the Act of 1862, the President had the power to dismiss an officer from the service summarily.

In *Blake* v. *United States,* 103 U. S. 227, 231, in an opinion again rendered by Mr. Justice Harlan, it was stated:

> "From the organization of the government, under the present Constitution, to the commencement of the recent war for the suppression of the rebellion, the power of the President, in an absence of statutory regulations, to dismiss from the service an officer of the army or navy, was not questioned in any adjudged case, or by any department of the government."

If unbridled and unlimited power to dismiss officers is inherent in the President unless limited by Acts of Congress, it follows *a fortiori* that such statutory restrictions and administrative procedure as may be imposed or created by Congress, are not subject to the limitations of the Bill of Rights or any other constitutional provisions.

In *Reaves* v. *Ainsworth,* 219 U. S. 296, the Court sustained the Act of 1890 above mentioned, under which an army officer was to be discharged from the service if he failed to pass two successive examinations for promotion. The Court observed (p. 302) that in that case the examining board had refused to call witnesses as to the officer's physical condition on the ground that the physicians named had already filed certificates. The Court further noted that the Board did not even allow the officer to call witnesses, to inspect exhibits presented to the Board, or to cross-examine the surgeons as to their reports. The Supreme Court found no basis for criticizing this procedure. In summarizing its views the Court made the following penetrating observations (p. 306):

> "*The courts are not the only instrumentalities of government. They cannot command or regulate the army.* To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the army. . . . If it had been the intention of

Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined." (Emphasis supplied.)

In *Wallace* v. *United States*, 257 U. S. 541, 544, Mr. Chief Justice Taft made the following comments:

> "Before the Civil War there was no restriction upon the President's power to remove an officer of the Army or Navy. The principle that the power of removal was incident to the power of appointment was early determined by the Senate to involve the conclusion that, at least in absence of restrictive legislation, the President, though he could not appoint without the consent of the Senate, could remove without such consent in the case of any officer whose tenure was not fixed by the Constitution."

In *French* v. *Weeks*, 259 U. S. 326, 327-328, the Supreme Court sustained the validity of the Act of June 4, 1920, which, as stated above, provided for a classification of all officers in Class A and Class B, the latter not to be retained in the service.

In *Creary* v. *Weeks*, 259 U. S. 336, 343, decided on the same day, Mr. Justice Clarke wrote as follows:

> "The power given to Congress by the Constitution to raise and equip armies and to make regulations for the government of the land and naval forces of the country (Art. I, §8) is as plenary and specific as that given for the organization and conduct of civil affairs; . . . . It is difficult to imagine any process of government more distinctively administrative in its nature and less adapted to be dealt with by the processes of civil courts than the classification and reduc-

> tion in number of the officers of the Army, . . . In its nature it belongs to the executive and not to the judicial branch of the Government."

The specific objections advanced by the plaintiff against the validity of the present statute can be disposed of briefly. The first criticism is that it places the burden of proof on the officer instead of on the Government. Bearing in mind that the purpose of the statute is not to provide for trial of officers on specific charges, but to create an administrative machinery and routine for eliminating officers who do not meet the required standards, there is no constitutional objection to placing the burden of proof where it is deemed appropriate to do so in the interests of the public welfare. The essence of the statute is that if a doubt arises whether a particular officer should be retained in the service, he has the onus of convincing his superiors that he should not be eliminated. No constitutional objections to this provision is discernible.

The second objection is that there is no provision for confronting the officer with witnesses against him. The constitutional provision for confrontation is a vital feature of the Bill of Rights. It is intended, however, for trials in the criminal courts and is a safeguard in the administration of the criminal law. It does not necessarily have an essential function in other activities of Government. For example, the Civil Service Act, 5 U.S.C. §652, provides that a civil service employee shall not be dismissed except on charges. It not only fails to provide for confrontation with witnesses, but it does not even accord a hearing to the employee. It requires merely that the employee be given notice of the charges and an opportunity to file a written reply. The validity of this provision is unquestioned and has been consistently applied and judicially approved since its enactment in 1912.[4]

---

[4] *Bailey* v. *Richardson*, 86 U.S. App. D.C. 248, 256 *et seq.* affirmed by equally divided Court, 341 U. S. 918.

In *Williams* v. *Zuckert,* decided by the United States Court of Appeals for the District of Columbia Circuit, on November 9, 1961 (not yet reported), it was held that a civilian employee of the Government who has veterans' preference is not entitled to the production of witnesses for cross-examination, in a case in which affidavits were the basis of charges against him. The Court called attention to the fact that statutes authorizing the dismissal of civilian employees by an administrative process, do not require the Government to produce for cross-examination the persons whose affidavits or statements supply the factual basis for dismissal. No reason is perceived why these remarks are not equally applicable to the statute here under consideration. The necessary inference from the opinion in *Williams* v. *Zuckert,* is that there is no constitutional infirmity in the statute because of that circumstance.

The Court, therefore, concludes that the statute under consideration is not repugnant to the Constitution.

The cases on which the plaintiff relies are distinguishable. *Greene* v. *McElroy,* 360 U. S. 474, did not involve members of the armed forces, but concerned a civilian employee of a Government contractor. He was dismissed by the latter because the Government denied him clearance to security information, and the employer was unable to use him on work of other types. The case does not bear on the rights of the Government as against officers of the armed forces. Moreover, the effect of this case has been considerably narrowed by *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, in which it was held that an employee of a concessionnaire on a military or naval installation could be summarily deprived of right of access to the area.

*Bland* v. *Connally,* 293 F. 2d 852, and *Davis* v. *Stahr,* 293 F. 2d 860, likewise did not deal with active personnel of the armed forces, but concerned inactive reservists. The decisions were based on the proposition that Congress had

not authorized the Secretary of the Navy to issue a discharge to inactive reservists under conditions less than honorable. No constitutional question was determined.

*Harmon* v. *Brucker,* 355 U. S. 579, held that neither statutes nor regulations authorized the Secretary of the Army to issue discharges to soldiers in form other than honorable because of pre-induction activities. It did not involve any constitutional question.

In conclusion the Court may well refer to the famous remarks made by Mr. Chief Justice Taney, over a century ago, in *Decatur* v. *Paulding*, 14 Pet. 497, 516:

> "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them."

Accordingly, the motion of the defendants for summary judgment will be granted, and the plaintiff's cross-motion denied, the motion for a preliminary injunction will be denied, and the temporary restraining order vacated.[5] Counsel may submit an appropriate order.

/s/ WALTER M. BASTIAN
*United States Circuit Judge.*

/s/ DAVID A. PINE
*United States District Judge.*

/s/ ALEXANDER HOLTZOFF
*United States District Judge.*

December 15, 1961.

---

[5] In view of the conclusion being reached, it is unnecessary to discuss the procedural objection interposed by the Government, that the plaintiff's action was prematurely brought in that he failed to exhaust his administrative remedies. In this connection, see *Ogden* v. *Zuckert*, decided by the Court of Appeals, D. C. Circuit, December 14, 1961.

## APPENDIX B

### JUDGMENT BELOW

[CAPTION OMITTED]

### ORDER

This cause came on for hearing on plaintiff's Motion For A Preliminary Injunction and defendants' opposition thereto and, further, on defendants' Motion To Dismiss and Alternative Motion For Summary Judgment and plaintiff's Cross-Motion For Summary Judgment. Upon consideration of the complaint, exhibits, and affidavits, and the parties having filed memoranda of points and authorities in support of and in opposition to the said motions, and after hearing oral argument in open Court on behalf of the respective parties, and it appearing to the Court that there is no genuine issue of material fact, and the Court having filed an opinion herein which shall constitute findings of fact and conclusions of law, it is by the Court on this 19 day of December, 1961,

ORDERED that defendants' motion for summary judgment be and the same is hereby granted and the complaint be and the same is hereby dismissed, and it is

FURTHER ORDERED that plaintiff's cross-motion for summary judgment be and the same is hereby denied, and it is

FURTHER ORDERED that defendants' alternative motion to dismiss be and the same is hereby denied as moot, and it is

FURTHER ORDERED that plaintiff's motion for a preliminary injunction be and the same is hereby denied, and it is

FURTHER ORDERED that the temporary restraining order be and the same is hereby vacated.

/s/ WALTER M. BASTIAN
*United States Circuit Judge*

/s/ DAVID A. PINE
*United States District Judge*

/s/ ALEXANDER HOLTZOFF
*United States District Judge*

## APPENDIX C

### STATUTE INVOLVED

The present appeal concerns the following portions of Title 10, U.S. Code, as added by Section 3(a) of the Act of July 12, 1960, Pub. L. 86-616, 74 Stat. 386, 388:

### CHAPTER 360.—SEPARATION FROM REGULAR ARMY FOR MORAL OR PROFESSIONAL DERELICTION OR IN INTERESTS OF NATIONAL SECURITY

**§ 3791. Selection boards: composition; duties**

The Secretary of the Army may at any time convene a board of general officers to review the record of any commissioned officer on the active list of the Regular Army to determine whether he shall be required, because of moral dereliction, professional dereliction, or because his retention is not clearly consistent with the interests of national security, to show cause for his retention on the active list.

**§ 3792. Boards of inquiry: composition; duties**

(a) Boards of inquiry, each composed of three or more general officers, shall be convened at such places as the Secretary of the Army may prescribe, to receive evidence and make findings and recommendations whether an officer, required to show cause under section 3791 of this title, shall be retained on the active list of the Regular Army.

(b) A fair and impartial hearing before a board of inquiry shall be given to each officer so required to show cause for retention.

(c) If a board of inquiry determines that the officer has failed to establish that he should be retained on the active list, it shall send the record of its proceedings to a board of review.

(d) If a board of inquiry determines that the officer has established that he should be retained on the active list,

his case is closed. However, at any future time, he may be again required to show cause for retention under section 3791 of this title.

### § 3793. Boards of review: composition; duties

(a) Boards of review, each composed of three or more general officers, shall be convened by the Secretary of the Army, at such times as he may prescribe, to review the records of cases of officers recommended by boards of inquiry for removal from the active list of the Regular Army under section 3792 of this title.

(b) If, after reviewing the record of the case, a board of review determines that the officer has failed to establish that he should be retained on the active list, it shall send its recommendation to the Secretary for his action.

(c) If, after reviewing the record of the case, a board of review determines that the officer has established that he should be retained on the active list, his case is closed. However, at any future time, he may be again required to show cause for retention under section 3791 of this title.

### § 3794. Removal of officer: action by Secretary of the Army upon recommendation

The Secretary of the Army may remove an officer from the active list of the Regular Army if his removal is recommended by a board of review under this chapter. The Secretary's action in such a case is final and conclusive.

### § 3795. Rights and procedures

Each officer under consideration for removal from the active list of the Regular Army under this chapter shall be—

(1) notified in writing of the charges against him, at least 30 days before the hearing of his case by a board of inquiry, for which he is being required to show cause for retention on the active list;

(2) allowed reasonable time, as determined by the board of inquiry under regulations of the Secretary of the Army, to prepare his defense;

(3) allowed to appear in person and by counsel at proceedings before a board of inquiry; and

(4) allowed full access to, and furnished copies of, records relevant to his case at all stages of the proceeding, except that a board shall withhold any records that the Secretary determines should be withheld in the interests of national security.

In any case where any records are withheld under clause (4), the officer whose case is under consideration shall, to the extent that the national security permits, be furnished a summary of the records so withheld.

**§ 3796. Officers considered for removal: retirement or discharge**

(a) At any time during proceedings under this chapter and before the removal of an officer from the active list of the Regular Army, the Secretary of the Army may grant his request—

(1) for voluntary retirement, if he is otherwise qualified therefor; or

(2) for discharge under subsection (b).

(b) Each officer removed from the active list of the Regular Army under this chapter shall—

(1) if on the date of removal he is eligible for voluntary retirement under any law, be retired in the grade and with the pay for which he would be eligible if retired at his request; or

(2) if on that date he is ineligible for voluntary retirement under any law, be discharged in the grade

then held with severance pay computed by multiplying his years of active commissioned service, but not more than 12, by one month's basic pay of that grade.

(c) For the purposes of subsection (b)(2), a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded.

### § 3797. Officers eligible to serve on boards

(a) No officer may serve on a board under this chapter unless he is senior in regular grade to, and outranks, any officer considered by that board.

(b) No person may be a member of more than one board convened under this chapter for the same officer.

Mr. WIENER. As indicated, I won't discuss the merits of the legal or constitutional issues and I address myself simply to the factual unfairness, what I conceive to be the factual unfairness of this procedure because as I don't have to tell members of this committee there is a great deal of unfairness that might or might not rise to constitutional levels.

It is interesting that these two allegations have not yet been about a statute, as I will explain later.

As the Supreme Court has said several times, we do not write upon a clean slate, and so I think it would be helpful if I discuss briefly with the committee the background of this elimination legislation, and that goes back to the National Defense Act of 1920.

Now, that act provided for a system of promotion by seniority or if one prefers, by senility. If the fellow ahead of you got old or cold you got promoted.

In order to eliminate the deadwood they provided a procedure in section 24(b) of the National Defense Act which was added in 1920, providing for the elimination or the placing in class B of officers who should not be retained in the service.

Now, that provided for a court of inquiry. There was nothing there even remotely suggesting a shift in the burden of proof because the court of inquiry was required to find the facts. There was no problem of lack of confrontation because a court of inquiry has the same power to compel testimony as the judge advocate of a general court-martial and that is the power of a U.S. district court in a criminal case, in other words, a nationwide subpena power.

That procedure was sustained in the courts, but, in fact, it soon broke down at the White House because in the course of these section 24(b) board hearings, it was possible for the respondent officer facing the heave ho to invoke intercession on his behalf.

This was so successful that by the time of the mobilization in World War I it had failed utterly to do what it was supposed to do.

So Congress passed Public Law 190 in 1941, a joint resolution in July 1941, and that provided for a more summary elimination of persons who didn't meet standards or for any other cause deemed good and sufficient by the Secretary. And it provided rather liberal retirement benefits.

Curiously enough, although by 1941 there had been accumulating the breakdown of the class B system over a 20-year period, only 203 officers were required to show cause, that is, one per thousand per year. This was the wartime provision.

When the war was over, the Army felt that it had no permanent legislation. It didn't willingly wish to go back to 24(b) so they introduced a bill in 1947 which, in 1948 became title I of the Army and Air Force Vitalization and Retirement Equalization Act, some such long title like that.

I will suggest later on in my presentation that by reason of the enactment in the interim of the Officer Personnel Act, which substituted a system of promotion by selection for the old system of promotion by senility, there wasn't any need for elimination procedure.

At any rate, when this title I was passing through the Congress, drafted originally in the terms of the 1941 joint resolution, Congress struck out the phrase, "or for any other reason deemed good and sufficient by the Secretary," leaving only elimination for substandard performance of the inept, the inefficient, and the lazy.

As a matter of fact, until the 1954 regulations, that is 6 years after the act became law, the only kind of misconduct which the boards would consider would be misconduct evidenced either by a conviction by court-martial or by nonjudicial punishment under article of war 104 or article 15 of the uniform code.

There were, of course, cases of misconduct, officers eliminated for misconduct, many of them for false official statements on their applications for permanent commissions. They would suddenly lay claim to degrees from institutions that they had never even seen and nobody sought to litigate that in the civil courts, and I don't suppose that anyone who had falsified his educational qualifications would care to be a plaintiff and air his misdeeds and his misstatements in court.

Then in 1954, in the regulations, and I have given the exact citations in my preliminary statement, it was provided that they could eliminate for misconduct whether or not evidenced by prior conviction or nonjudicial punishment. And then just leaving the scope, I come in a moment to a case that I brought in the district court challenging the power of the Secretary to eliminate for misconduct under the 1948 law, which had been reenacted without change in the 1956 revision of title X, United States Code and without going into the details, I think Congress agreed, because in 1960 they amended the law to add a new chapter 360 of title X specifically covering misconduct.

Then in 1957, there came another change. The Army was troubled by the high retention rate in these show-cause proceedings, and they assumed that the defects were in the review proceeding. Just briefly there were then and now four steps, a screening board which would call on the officer to show cause, a board of inquiry which heard witnesses, a board of review which also heard witnesses and virtually tried the case de novo and then the Secretary's action.

And because the retention rate was so high, the regulations following the 1956 report which was written, I think, by Gen. Theodore Parker, they introduced this shift in the burden of proof, saying that the Army has made a determination in the ex parte order to show cause. This is not a court-martial, now you rebut this and the burden of proof is on the accused to rebut the ex parte allegation, somewhat as though a criminal accused were bound by the indictment and would have to prove his innocence.

Also these regulations didn't provide for findings so that an officer might be accused of half a dozen matters, he would be actually cleared mentally at least by the board of inquiry on five of them, held to warrant elimination because of the sixth, and yet the board of review would have to review the whole case de novo because there were no findings.

Now, this shift in the burden of proof in actual application was about as vicious, and I use that adjective advisedly, as could be imagined.

I have in mind a case that Dean Pye may have mentioned; he has told me about it. He was representing a respondent before the show cause board, and he wrote a letter on behalf of his client to the commanding general saying, "I demand trial by court-martial," and the commanding general replied and said, "I can't try this man by court-martial because I haven't got enough evidence, so we are going to eliminate him administratively."

I have in mind another case where, in the course of a domestic relations squabble over how much the deserted husband should pay by way of maintenance, his wife went to the Provost Marshal and talked for 67 pages rehearsing every spat of the 12-year married life and making very serious accusations. It came in charged as acts of personal misconduct.

Well, what acts of personal misconduct?

The burden of proof was against him. The order to show cause established that acts of personal misconduct had been committed. How do you defend against that?

In this particular instance the board of review was out only 7 minutes and recommended retention.

There is another case which is even worse. That was a case in which the file that went to the Selection Board said, "There appears to be a strong probability that Lt. Col. X is possessed of homosexual tendencies, and may have committed homosexual acts, but there is no such positive evidence available as will satisfactorily establish such as facts."

He was charged with existence of homosexual tendencies. Under the shift in the burden of proof that was established and then he had to try to disprove that and to establish his own masculinity, and the weight of the evidence was overwhelmingly his way. But how do you establish that? He happened to be a bachelor. What do you do, bring your girl friends in and have them say, "This man appeared to be normal to me." That is the kind of problem this presented.

All right.

In March of 1959, I was on duty with the Office of the Deputy Chief of Staff for Personnel at the Pentagon, and I was requested to analyze this elimination procedure. I indicated some question about it. I said, "After all, I am on the other side of the table 50 weeks of the year."

They said, "No, Judge, we want a new point of view. Let's get your views."

And I read through the records of 28 elimination cases where the board of review had recommended retention, and submitted a lengthy report, and my conclusion was that the reason the retention rate was so high—and it was about 45 percent—that's practically like a tort claim. I mean if you figure you have a 45-percent chance, and your fellow is hurt, you will take it to court; 45-percent retention and my conclusion was that the reason the retention rate was so high was not because the appellate system was breaking down because, after all, the people on the review board were young, reasonably young, general officers, one- and two-star generals, contemporaries of the same personnel

on the boards of inquiry, frequently working in the same shops with the same personnel on the screening board. Why did they come out with such a very different result.

Well, the answer is that the final board had the entire testimony. It wasn't shackled by this shift in the burden-of-proof regulation as the Board of Inquiry was, and it didn't get just an accusation as the screening board did.

(The material is as follows:)

ASSISTANT SECRETARY OF DEFENSE (MANPOWER),
*Washington, D.C., February 5, 1962.*

Hon. SAM J. ERVIN, Jr.,
*Chairman Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR SENATOR ERVIN: In accordance with your recent request, attached is a copy of the study made in March 1959, subject: "Review of Current Elimination Procedures," by Mr. Frederick Bernays Wiener.

This study was prepared by Mr. Wiener while he was performing 2 weeks of active duty as a colonel, USAR, assigned to the Office, Deputy Chief of Staff for Personnel, Department of the Army.

With regard to the substance of this study, the Department of the Army respectfully suggested that the following information may be of interest to you:

(1) Mr. Wiener questioned the administrative separation of officers on the basis of specific acts of misconduct which would be punishable under the Uniform Code of Military Justice (p. 17). While the Department of the Army has consistently contended that specific acts of misconduct may be the basis for administrative separation of officers, Army regulations have provided that this action would not be taken in lieu of trial by court-marital in proper cases. Moreover, the enactment of the Act of July 12, 1960, Public Law 86–616 (74 Sat. 386) has provided specific statutory authority for the administrative separation of officers for moral or professional dereliction.

(2) Mr. Wiener also questioned the fact that, in the administrative separation procedure, the burden of proof is on the officer to show cause why he should be retained (p. 18). Hearings held in connection with the Act of July 12, 1960, Public Law 86–616, disclose that Congress was aware that this was the case and that it was intended that this be the case under the administrative separation procedures authorized by that act. (See hearings before Subcommittee No. 1, House Committee on Armed Services, on S. 1795, 86th Cong., 2d sess., p. 3802.) In addition, in a recent case in the U.S. District Court for the District of Columbia (*Beard* v. *Stahr*, December 17, 1961) Mr. Wiener unsuccessfully contended that placing the burden of proof on the officer in administrative separation procedures is unconstitutional. The court stated that, since the purpose of the statutes concerned is to create administrative machinery and routine for separating officers, the burden of proof may be placed, where considered appropriate, in the interests of public welfare.

(3) Mr. Wiener also objected to that part of the procedure that requires a board of inquiry to make specific findings only in cases in which the board recommends that the officer be retained (p. 18). Current regulations require each board of inquiry to make separate findings (and to summarize factual data when necessary for clarification) with respect to each allegation against an officer.

I trust that you will find the study, together with the foregoing information, of assistance to you.

Sincerely,
CARLISLE P. RUNGE.

WASHINGTON, D.C., *March 15, 1962.*

Hon. SAM J. ERVIN, JR.,
*Chairman, Subcommittee on Constitutional Rights,*
*Committee on the Judiciary,*
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Thank you for letting me see the comment by Assistant Secretary of Defense Runge dated February 5, 1962, regarding the study I made in 1959, entitled "Review of Current Elimination Procedures," while on duty as a colonel, USAR, in the Office of the Deputy Chief of Staff for Personnel, Department of the Army.

Mr. Runge's letter transmits comments from the Department of the Army on three matters, as follows:

1. The objection that the elimination proceedings then in force (1959) did not authorize elimination for misconduct.

(*a*) As I indicated in my testimony before your subcommittee on Monday, the fact that Congress later amended the law to provide specifically for elimination for moral or professional dereliction (Public Law 86–616, now 10 U.S.C. §§ 3791–3797) strongly supports my view that under the law as it stood in 1959 (10 U.S.C. [1956 revision] §§ 3781–3786) there was no such authority.

(*b*) The chronology on this point may be of interest. On December 18, 1959, I brought suit in the U.S. District Court for the District of Columbia seeking to enjoin an officer's elimination for alleged acts of misconduct on the ground that such action was not authorized by the statute. *Ledford* v. *Brucker et al.*, Civil Action 3583–59. Subcommittee No. 1 of the House Committee on Armed Services then had hearings on the proposed amendments between February 1, and March 15, 1960, and, on March 17, reported out the amended bill that became 10 U.S.C. sections 3791–3797, authorizing elimination for misconduct.

Quite frankly, I consider the fact and scope of those amendments to amount to a recognition of the correctness of my reading of the original act.

(*c*) It is said in Mr. Runge's letter that "Army regulations have provided that this action (i.e., elimination for specific acts of misconduct) would not be taken in lieu of trial by court-martial in proper cases." That is certainly true; see paragraph 3*d*, AR 605–200, June 19, 1949; paragraph 3*d*, AR 605–200, January 26, 1951; paragraph 3*c*, AR 605–200, June 18, 1954; paragraph 4*d*, AR 635–105A, January 2, 1957.

But those provisions were long honored in the breach rather than the observance.

Thus, out of the 28 cases that I reviewed in my 1959 staff study, no less than 8 (Nos. 4, 16, 19, 21 23, 24, 25, 27) were eliminations based on misconduct. So was *Ledford* v. *Brucker, supra.*

I do not expect any official with as many responsibilities as Secretary Runge to plough through a necessarily long memorandum. But it seems a pity that he should have been so thoroughly misinformed by those whose duty it was to read and summarize that memorandum.

2. Shift in the burden of proof. As Secretary Runge states, this issue was decided against my contentions by the district court in *Beard* v. *Stahr*, 200 F. Supp. 766. That case was however appealed to the Supreme Court on January 5 1962, a month before the date of his letter, and is now pending there (No. 648, October term 1961) on the appellant's jurisdictional statement and the appellee's motion to affirm.

The Supreme Court will accordingly determine in due course which one of us is right on the merits of the burden-of-proof issue.

3. Requirement for findings. I am happy to learn that one at least of my recommendations was favorably considered.

It occurs to me that you might care to include Mr. Runge's letter and this reply at some appropriate place in the printed hearings.

Meanwhile, in accordance with your request, I am returning Mr. Runge's letter and the copy of my 1959 report.

Respectfully,

(Signed) FREDERICK BERNAYS WIENER.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

---

No. 752, MISC.

---

LEE B. LEDFORD, JR., *Petitioner*,

v.

The Honorable EDWARD M. CURRAN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA

---

## MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF MANDAMUS, AND PETITION FOR A WRIT OF MANDAMUS

---

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,
*Counsel for the Petitioner.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

# INDEX


Page

Motion for leave to file, &c ........................ 1
Petition for a writ of mandamus ..................... 3
Proceedings below ................................. 4
Jurisdiction ........................................ 4
Questions presented ................................ 4
Statute involved ................................... 5
Statement .......................................... 5
Reasons for granting the writ ...................... 11
Conclusion ......................................... 22

---

Appendix A—Allegations and prayer below ......... A1
(1) Complaint as amended ........................ A1
(2) Supplemental complaint as amended ...........A15
(3) Petitioner's motion for preliminary injunction ..A29
Appendix B—Statutes involved ....................A30
Appendix C—Application below for a three-judge court ......................................A34
(1) Petitioner's motion to convene a three-judge court ..................................A34
(2) Respondent's memorandum denying motion to convene a three-judge court ....................A36


## AUTHORITIES

CASES:


*Bauer* v. *Acheson*, 106 F. Supp. 445 ................ 14
*Baughman* v. *Green*, 229 F. 2d 33 .................... 15
*Board of Pharmacy of District of Columbia* v. *Feldman*, 279 F. 2d 821, affirming 160 A. 2d 100 .......... 17

Page

*Ex parte Bransford,* 310 U.S. 354 ............ 2, 11, 12, 13
*S. Buchsbaum & Co.* v. *Federal Trade Commission,* 153 F. 2d 85, judgment vacated, 328 U.S. 818 ........ 17
*Cole* v. *Arkansas,* 333 U.S. 196 ........................ 19
*Ex parte Collett,* 335 U.S. 897 ........................ 2
*Costello* v. *United States,* 350 U.S. 359 ............... 16
*DeJonge* v. *Oregon,* 299 U.S. 353 .................... 19
*Delaney* v. *United States,* 199 F. 2d 107 ............. 20
*Eastern States Petroleum Corp.* v. *Rogers,* 265 F. 2d 593 .................................... 2, 11
*Farmer* v. *United Electrical &c. Workers,* 211 F. 2d 36 7
*F.H.A.* v. *The Darlington, Inc.,* 352 U.S. 977 ........ 12
*F.H.A.* v. *The Darlington, Inc.,* 358 U.S 84 .......... 12
*Federal Trade Comm.* v. *National Lead Co.,* 352 U.S. 419 .................................... 15
*Fleming* v. *Rhodes,* 331 U.S. 100 .................... 13
*Florida Lime Growers* v. *Jacobsen,* 362 U.S. 73 ...... 14
*Gamble-Skogmo, Inc.* v. *Federal Trade Commission,* 211 F. 2d 106 .................................. 17
*Government of the Virgin Islands* v. *Torres,* 161 F. Supp. 699 ................................. 15
*Greene* v. *McElroy,* 360 U.S. 474 .................. 17, 21
*Griffin* v. *Illinois,* 351 U.S. 12 ....................... 19
*Harmon* v. *Brucker,* 355 U.S. 579 .................... 22
*Jameson & Co.* v. *Morgenthau,* 307 U.S. 171 ........ 11
*Kwong Hai Chew* v. *Rogers,* 257 F. 2d 606 .......... 15
*Lambert* v. *California,* 355 U.S. 225 ................ 15
*Leedom* v. *Kyne,* 249 F. 2d 490, affirmed, 358 U.S. 184 7
*In re Louisiana News Company,* 187 F. Supp. 241 .... 14
*McAuliffe* v. *Mayor of City of New Bedford,* 155 Mass. 216, 29 N.E. 517 .......................... 21
*Moore* v. *Dempsey,* 261 U.S. 86 ..................... 21
*Morgan* v. *United States,* 304 U.S. 1 .............. 15, 17
*Paraiso* v. *United States,* 207 U.S. 368 .............. 15
*Reaves* v. *Ainsworth,* 219 U.S. 296 .................. 22
*Schneider* v. *Herter,* 283 F. 2d 368 ................. 2, 11
*Shepard* v. *United States,* 290 U.S. 96 .............. 20
*Stratton* v. *St. Louis S.W.R. Co.,* 282 U.S. 10 ........ 2, 11
*United States* v. *Perkins,* 79 F. 2d 533 ............. 17
*United States* v. *Provoo,* 215 F. 2d 531 .............. 20
*Ex parte Williams,* 277 U.S. 267 ................... 2, 11
*Wood* v. *Hoy,* 266 F. 2d 825 ......................... 15
*Yick Wo* v. *Hopkins,* 118 U.S. 356 ................... 19

Page

STATUTES:

Act of August 24, 1937, c. 754, 50 Stat. 751:

Section 2 .............................. 13
Section 3 .............................. 13

Act of July 12, 1960, Pub. L. 86-616, 74 Stat. 386 ...... 5
10 U.S.C. § 3037(c)(1) .............................. 7
10 U.S.C. §§ 3781-3786 ..................3, 5, 23, A30-A33
28 U.S.C. § 1252 .............................. 13
28 U.S.C. § 1253 .............................. 11
28 U.S.C. § 2282 ...................3, 5, 11, 12, 13, 22, A30
28 U.S.C. § 2284(1) ..........................3, 12, 22

MISCELLANEOUS:

Army Regulations 635-105B, 2 Jan. 1957, par. 8 ......6, 16
4 Bl. Comm. *215 .............................. 20
2 Davis, *Administrative Law Treatise*, § 11.21, p. 129 .. 17
Opinion of The Judge Advocate General of the Army,
JAGA 1959/264, 28 Sept. 1959 ................ 7

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

---

No. 752, MISC.

---

LEE B. LEDFORD, JR., *Petitioner*,

v.

The Honorable EDWARD M. CURRAN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA

---

## MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF MANDAMUS

---

Now comes LEE B. LEDFORD, JR., and moves that the Court grant him leave to file the Petition for a Writ of Mandamus, annexed hereto, and that, agreeably to its prayer, the respondent, the Honorable EDWARD M. CURRAN, United States District Judge for the District of Columbia, be commanded to proceed to convene a three-judge district court, pursuant to the provisions of 28 U.S.C. §§ 2282 and 2284(1), to hear and determine petitioner's motion for a preliminary injunction to restrain the enforcement and execution of 10 U.S.C. §§ 3781-3786, on the ground that, as

construed and applied, those provisions are unconstitutional, which said motion is now pending in that certain cause in the United States District Court for the District of Columbia, entitled LEE B. LEDFORD, JR. v. WILBER M. BRUCKER, Secretary of the Army, *et als.*, and numbered Civil Action No. 3583-59.

The fact giving rise to the present application are set forth in detail in the Petition annexed, and there are appended to said Petition, in their entirety, the amended complaint, amended supplemental complaint, and the motion for preliminary injunction in the underlying litigation.

Under a long line of cases here, mandamus is the proper remedy to command a District Judge to convene a District Court of three judges. See, e.g., *Ex parte Bransford,* 310 U.S. 354, 355; *Stratton* v. *St. Louis S.W.R. Co.,* 282 U.S. 10, 16; *Ex parte Williams,* 277 U.S. 267, 269.

The relief sought is not available in the Court of Appeals for the District of Columbia Circuit, see *Eastern States Petroleum Corp.* v. *Rogers,* 265 F. 2d 593 (Prettyman Ch. J); *Schneider* v. *Herter,* 283 F. 2d 368 (Fahy, Acting Ch. J.), nor is it available in any other court save this one alone.

WHEREFORE petitioner prays that this motion for leave to file be granted; or, in the alternative, that this motion for leave to file be set down for oral argument, following the course pursued in *Ex parte Collett* and related cases, 335 U.S. 897.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,

*Counsel for the Petitioner.*

JANUARY 1961.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

---

No. 752, MISC.

---

LEE B. LEDFORD, JR., *Petitioner,*

v.

The Honorable EDWARD M. CURRAN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA

---

## PETITION FOR A WRIT OF MANDAMUS

---

LEE B. LEDFORD, JR., your petitioner, prays that a writ of mandamus issue to the respondent, the Honorable EDWARD M. CURRAN, United States District Judge for the District of Columbia, commanding him to proceed to convene a three-judge district court, pursuant to the provisions of 28 U.S.C. §§ 2282 and 2284(1), to hear and determine petitioner's motion for a preliminary injunction to restrain the enforcement and execution of 10 U.S.C. §§ 3781-3786, on the ground that, as construed and applied, those provisions are unconstitutional, which said motion is now pending in that certain cause in the United States District Court for the District of Columbia, entitled LEE B. LEDFORD, JR. v. WILBER M. BRUCKER, Secretary of the Army, *et als.*, and numbered Civil Action No. 3583-59.

## PROCEEDINGS BELOW

Petitioner's amended complaint and amended supplemental complaint are set out in Appendix A, *infra,* at pp. A1-A28. Petitioner's pending motion for a preliminary injunction appears in Appendix A, *infra,* at p. A29.

Petitioner's motion to convene a three-judge court is set forth in Appendix C(1), *infra,* pp. A34-A36. Respondent's memorandum in connection with his denial of that motion (Appendix C(2), *infra,* pp. A36-A37) is not reported. The order effectuating the foregoing denial had not been presented when the present petition went to press, but nothing turns on its form.

## JURISDICTION

The memorandum denying petitioner's motion to convene a three-judge court (Appendix C(2), *infra,* pp. A-36-A37) was entered on January 13, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a).

## QUESTIONS PRESENTED

1. Whether a motion for preliminary injunction that is based on two alternative grounds—first, that the proceeding against which relief is sought is not authorized by an Act of Congress; second, that if the proceeding is indeed so authorized, then the Act of Congress as construed and applied is repugnant to the Constitution of the United States—and which seeks, on the second ground, an injunction against the enforcement and operation of the Act of Congress, must be heard by a district court of three judges.

2. Whether the allegations of unconstitutionality made are substantial.

3. Whether an officer of the Regular Army facing elimination therefrom is entitled to the constitutional guarantee of due process of law.

## STATUTES INVOLVED

The applicable three-judge court provision, 28 U.S.C. § 2282, and the Act of Congress sought to be enjoined on the ground of repugnance to the Constitution of the United States, are set forth in Appendix B, *infra*, pp. A30-A33.

## STATEMENT

Only so much of the underlying controversy will be stated as is necessary to an understanding of the present petition for writ of mandamus.

Petitioner, an officer in the Regular Army (Cmplt., ¶1, *infra*, p. A1), was the subject of elimination proceedings under 10 U.S.C. §§ 3781-3786 (*infra*, pp. A30-A33)* on the basis of four generalized allegations of misconduct (Cmplt., ¶8, *infra*, p. A5).

Briefly, the statute contemplates a review of the officer's record by a selection board, followed by an order to show cause why he should not be removed from the active list of the Army for failure to achieve the standards of performance to be prescribed by the Secretary. Thereafter, the law provides for "a fair and impartial hearing" by a board of inquiry. If that board finds unfavorably, there is a further hearing by a board of review, and if the latter board likewise makes an unfavorable finding, the case goes to the Secretary of the Army for final action.

In this case, following unfavorable action by two boards, petitioner brought suit against the Secretary of the Army, the cognizant Assistant Secretary of the Army, and The Adjutant General of the Army, to enjoin his removal from the active list.

---

* It is common ground between the parties in the District Court that the present controversy is not in any way governed by the amendments effected by the Act of July 12, 1960, Pub. L. 86-616, 74 Stat. 386

The gravamen of the complaint was twofold: first, that the statute authorized administrative removal only for failure to achieve prescribed standards, and not for acts of misconduct not evidenced by conviction by court-martial (Cmplt., ¶7, *infra,* pp. A3-A5); second, that the hearing before the board of inquiry was not "fair and impartial" as required by the statute, and that it was infected by numerous irregularities, of which only the more significant are noted below:

(a) A lack of specificity in the allegations made (Cmplt., ¶9(b), *infra,* p. A6);

(b) Omission of material matters from the record presented to the selection board (Cmplt., ¶¶ 9(f) and (g), *infra,* pp. A7-A8);

(c) Shifting of the burden of proof against the petitioner, under par. 8, Army Regulations 635-105B, 2 January 1957, and related provisions (Cmplt., ¶¶ 11(a), 11(f), 11(g), *infra,* pp. A8-A9, A10, A11);

(d) Refusal to call for cross-examination and confrontation individuals who had submitted adverse statements against petitioner that were considered by the boards (Cmplt., ¶ 11(d), *infra,* p. A10);

(e) Consistent overruling, by the board of inquiry, of all of petitioner's objections, on the say-so of an unsworn legal adviser (Cmplt., ¶ 11(c), *infra,* pp. A9-A10); and

(f) Failure to specify, at any stage in the proceedings, the particular acts of misconduct petitioner was required to meet (Cmplt., ¶¶ 9(b), 11(h), *infra,* pp. A6, A11).

The complaint alleged (¶18, *infra,* p. A12) that the entire proceedings "fell so far below minimal standards of fairness as to amount to taking away plaintiff's office and the pay, allowances, and retirement rights thereunto appertaining without due process of law." The complaint did not attack the constitutionality of the statute.

Included in the complaint (¶22(a), *infra*, p. A13) was an application for a temporary restraining order. While petitioner's counsel was waiting to present this application to the motions judge, the United States Attorney offered a stipulation to maintain the *status quo* pending determination of petitioner's motion for a preliminary injunction, and that stipulation was signed by counsel for the parties and approved by Judge Keech on the same day, December 18, 1959.

Thereafter, the defendants moved for summary judgment on the ground that, by going to court before the Secretary acted, petitioner had failed to exhaust his administrative remedies. Petitioner urged that there was no requirement to do so when further resort to administrative measures would be futile, citing *Farmer* v. *United Electrical &c. Workers,* 211 F. 2d 36, 40 (D.C. Cir.), and *Leedom* v. *Kyne,* 249 F. 2d 490, 492 (D.C. Cir.), affirmed, 358 U.S. 184, and pointing out that The Judge Advocate General of the Army, who by statute, see 10 U.S.C. § 3037(c)(1), is the Secretary's legal adviser, had already ruled, in petitioner's own case, against petitioner's most vital contentions (JAGA 1959/264, 28 Sept. 1959). A copy of that opinion was submitted in opposition to defendants' motion for summary judgment.

Petitioner's motion for a preliminary injunction and defendants' motion for summary judgment came on for hearing on February 15, 1960. The upshot of that hearing was a further stipulation, the substance of which was that both motions were withdrawn without prejudice; that the Secretary would have 120 days to act on the proceedings; that petitioner would have 30 days thereafter to act; and that the *status quo* would be maintained meanwhile. This stipuiation was signed by the parties and approved by Judge Youngdahl on February 26, 1960. By a further stipulation, approved by Judge McGuire on July 15, 1960, petitioner was given until August 22, 1960, to file a new motion for

preliminary injunction, and it was agreed that the *status quo* would be further preserved until the disposition of that motion.

Meanwhile, on June 20, 1960, Assistant Secretary of the Army Short, one of the defendants, had taken action on and approved the proceedings; see Exhibit A to petitioner's supplemental complaint, *infra,* pp. A26-A-28.

Defendants did not, however, answer the original complaint, filed over 13 months ago, and, up to the filing of the present Petition for Writ of Mandamus, have not done so.

On August 18, 1960, within the stipulated period, petitioner moved for leave to file a Supplemental Complaint—motion granted by consent on September 23, 1960—and filed a new motion for a preliminary injunction (*infra,* p. A29).

In his Supplemental Complaint (*infra,* pp. A15-A28), petitioner attacked the Secretary's action as illegal, repeating the grounds theretofore stated in the Complaint—(a) elimination not authorized on the grounds alleged (Supp. Cmplt., ¶ 5*a, infra* p. A17); (b) failure to cure the illegality before all three boards (Supp. Cmplt., ¶¶ 5*b*, 5*c*, 5*d*, *infra,* pp. A17-A18)—and alleging that the Secretary's action was moreover illegal for the following additional grounds:

(c) The Secretary's "findings" were retroactive, inasmuch as no other board had made findings (see Cmplt., ¶9(b), *infra,* p. A6), so that these other boards might have rejected the grounds on which the Secretary acted (Supp. Cmplt., ¶5*f*, *infra,* p. A19);

(d) A number of the Secretary's "findings" made entirely new accusations against petitioner (Supp. Cmplt., ¶¶6*a*(i), 6*d and* ½; *infra,* pp. A19-A20, A21); and

(e) A number of the Secretary's "findings" were without the support of substantial evidence (Supp. Complt., ¶¶6*a*(ii), 6*b*(iii), 6*c*, 6*d*, 6*f*; *infra,* pp. A19-A20, A20-A21).

Petitioner repeated (Supp. Cmplt., ¶7; *infra*, pp. A22-A23) his allegation that the entire proceedings fell so far below minimal standards of fairness as to involve a denial of due process of law; but, once more, did not attack the constitutionality of the statute.

Defendants' countered with a motion for summary judgment, to which was appended, *inter alia*, the complete record of the elimination proceedings. In their arguments in support of the motion, defendants contended that the entire proceedings had been conducted in full conformity with the statute.

Thereupon, on September 29, 1960, plaintiff filed two additional motions:

(1) A motion for leave to amend his supplemental complaint, by alleging—

(a) That the "findings" made by Assistant Secretary Short in this case represented the first instance in the nearly twelve years the elimination statute had been on the books that any Secretary had made specific findings in an elimination case (Supp. Cmplt., ¶6½; *infra*, p. A22); and

(b) That the statute as construed and applied was unconstitutional (Supp. Cmplt., ¶8½; *infra*, pp. A23-A24), viz.:

> "8½. As construed and applied to the plaintiff in the circumstances of the present case, Sections 3781 to 3786, inclusive, of Title 10, U.S. Code, 1956 edition, are unconstitutional, because depriving plaintiff of his office and of the pay, allowances, and retirement rights thereunto appertaining without due process of law, in violation of the Fifth Amendment in that
>
> "(a) Plaintiff was not given adequate notice of the accusations against him;
>
> "(b) The burden of proof was shifted to the plaintiff to prove his innocence of the *ex parte* determination earlier made against him;

"(c) Plaintiff was denied the right to be confronted by and to cross-examine witnesses who had submitted statements against him that were considered at all levels of the proceeding;

"(d) Although no findings were ever made by either of the boards that heard witnesses, the defendant Short proceeded, without hearing witnesses, to make findings adverse to the plaintiff on conflicting evidence which involved credibility;

"(e) Such findings were made after the present litigation commenced and represented the first instance in the twelve years since the statute in question was first enacted that the Secretary of the Army or his delegate had ever made specific findings of fact in any elimination case;

"(f) Such findings in material particulars pertained to matters which had never been charged or even intimated against plaintiff during any prior phase of the proceedings over more than two years; and

"(g) The entire proceedings in their totality fall far below the minimal standards of fairness required by the concept of Due Process of Law."

Petitioner accordingly added a new paragraph praying (Supp. Cmplt., ¶ 10(a)(2), *infra,* p. A25)—

"For an order enjoining the defendants, and each of them, and their officers, agents and subordinates, from enforcing or executing the provisions of 10 U.S.C. §§ 3781 to 3786, inclusive, against the plaintiff."

(2) Plaintiff also filed a motion to convene a three-judge court and to certify the pendency of the case to the Attorney General (Appendix C(1), *infra,* pp. A34-A36).

Petitioner's motion for leave to amend his Supplemental Complaint was granted by Judge McLaughlin on October 12, 1960.

Petitioner's motion to convene a three-judge court was opposed, and, after argument, was denied by Judge Curran, the respondent herein, on January 13, 1961 (*infra,* pp. A36-A37).

**REASONS FOR GRANTING THE WRIT**

As has already been noted, mandamus is the proper remedy whenever a district judge fails or refuses to convene a three-judge court in a situation calling therefor (e.g., *Ex parte Bransford,* 310 U.S. 354, 355; *Stratton* v. *St. Louis S.W.R. Co.,* 282 U.S. 10, 16; *Ex parte Williams,* 277 U.S. 267, 269). Indeed, mandamus here is the sole remedy; litigants in the District of Columbia Circuit have in recent years been specifically told—what of course should have been obvious—that the Court of Appeals lacks power to act in the premises. *Eastern States Petroleum Corp.* v. *Rogers,* 265 F. 2d 593 (Prettyman, Ch. J.); *Schneider* v. *Herter,* 283 F. 2d 368 (Fahy, Acting Ch. J.). Relief must be sought here, since, of course, appeal from a three-judge district court lies only to this Court. 28 U.S.C. § 1253.

Discussion will be confined, therefore, to four questions.

First, are the allegations of the complaint and supplemental complaint, together with the prayer of the motion for preliminary injunction, sufficient to make the case one for a three-judge court under 28 U.S.C. § 2282?

Second, does the circumstance that the complaint alleges an alternative non-constitutional ground preclude convening a three-judge court?

Third, are the constitutional issues urged substantial?

Fourth, is an Army officer facing elimination entitled to the constitutional guarantee of due process of law?

*First.* It is not questioned that an application for an injunction on the ground that particular regulations are not authorized by statute is not one to be heard by three judges (*Jameson & Co.* v. *Morgenthau,* 307 U.S. 171), nor is it questioned that simply to attack the constitutionality of a result is likewise insufficient (*Ex parte Bransford,* 310 U.S. 354). On those points petitioner does not disagree

with Judge Curran. For, as this Court said in the *Bransford* case at p. 361,

> "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court."

Here, as has been pointed out, petitioner originally alleged that the proceedings under scrutiny so far fell below minimal standards of fairness as to involve unconstitutionality (Cmplt., ¶ 18; Supp. Cmplt., ¶ 7; *infra,* pp. A12, A22-A23). At that juncture he was merely complaining of "the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional." At that juncture, no three-judge court was authorized—and none was sought.

Now, however, after the defendants below asserted that the result was in all respects authorized by the statute, petitioner alleges the unconstitutionality of the statute in ¶ 8½ of his Supplemental Complaint as amended (quoted above, pp. 9-10; also set forth below, pp. A23-A24), and in ¶ 10(a)(2) thereof prays for an order enjoining the execution and enforcement of the statute (quoted above, p. 10; also set forth below, p. A25).

Once those allegations were made, the provisions of 28 U.S.C. §§ 2282 and 2284 required that a three-judge court be convened. Indeed, if a single judge had on those allegations granted petitioner all of the relief that he sought, the resultant decree would have to be reversed on jurisdictional grounds alone and the case remanded for consideration by a three-judge District Court. See *F.H.A.* v. *The Darlington, Inc.,* 352 U.S. 977; *F.H.A.* v. *The Darlington, Inc.,* 358 U.S. 84, 87.

The circumstance that petitioner alleged only the unconstitutionality of the statute in its application to him rather than the unconstitutionaliy of the whole of the statute on its face did not in the slightest, *non constat* Judge Curran's views, negative the requirement for a three-judge court. *Ex parte Bransford,* 310 U.S. 354, 361; *Fleming* v. *Rhodes,* 331 U.S. 100. "Litigants may challenge the unconstitionality of a statute only in so far as it affects them." *Id.* at 104.

True, the *Rhodes* case arose under Section 2 of the Act of August 24, 1937, c. 754, 50 Stat. 751, now 28 U.S.C. § 1252, which makes provision for a direct appeal to this Court when any Act of Congress is held unconstitutional by any court of the United States; whereas the present proceeding involves 28 U.S.C. § 2282 (*infra,* p. A30), drawn from Section 3 of the same Act of August 24, 1937, which requires a three-judge court to hear applications for injunctions to restrain the enforcement of an Act of Congress on grounds of unconstitutionality.

But, since both provisions were parts of the same Act, since both represented the culmination of a widespread demand that Congressional legislation be not lightly set aside, and since in both instances provision is made for a direct appeal to this Court, there is every reason to read both sections *in pari materia,* as indeed *Fleming* v. *Rhodes,* 331 U.S. at 102-104, strongly suggests.

Consequently, since under *Fleming* v. *Rhodes* a holding that an Act of Congress is unconstitutional as construed and applied requires a direct appeal to this Court under Section 2, now 28 U.S.C. § 1252, so under Section 3, now 28 U.S.C. § 2282 (*infra,* p. A30), an application to enjoin the enforcement of an Act of Congress on the ground that it is unconstitutional as construed and applied similarly requires that a three-judge court be convened. Cf. *Ex parte Bransford,* 310 U.S. 354, 361. Judge Curran was therefore in error when he held insufficient the allegations of par.

8½ of petitioner's Supplemental Complaint (*infra,* pp. A23-A24; quoted above, pp. 9-10).

It will be noted that petitioner's allegation that the statute was unconstitutional was not lightly made. It was not made until the disinterested litigating lawyers—the United States Attorney and his staff—formally took the position that what had been done to petitioner was authorized by the statute. Only then did petitioner allege that the statute as construed and applied was repugnant to the Constitution of the United States.

*Second.* Petitioner's complaint, supplemental complaint, and motion for preliminary injunction (*infra,* pp. A1-A29) proceed on alternative grounds: the elimination proceeding sought to be enjoined is not authorized by the statute; if it is, the procedure violates the statute; if the procedure is authorized by the statute, then the statute thus construed and applied is repugnant to the Constitution.

The question, therefore, is whether alternative grounds for injunction, some non-constitutional, others constitutional, require a three-judge court. In view of *Florida Lime Growers* v. *Jacobsen,* 362 U.S. 73, decided at the last Term, extended argument on that issue is not necessary; the cited case teaches that the mere presence of a constitutional challenge when enforcement of a statute is sought to be enjoined requires that a district court of three judges be convened.

It may well be, of course, that the three-judge court will decide the case on non-constitutional grounds, and thus never reach the constitutional issues. If so, the case must still be disposed of by the three-judge court. See *In re Louisiana News Company,* 187 F. Supp. 241 (E.D. La.); *Bauer* v. *Acheson,* 106 F. Supp. 445 (D.D.C.).

*Third.* Each of the allegations of par. 8½ of the Supplemental Complaint (quoted above, pp. 9-10; also set forth *infra,* pp. A23-A24) raises a substantial constitutional issue.

1. *Inadequacy of notice; sub-par. (a).* The very essence of due process is notice of the charges to be met (e.g., *Morgan* v. *United States,* 304 U.S. 1; *Federal Trade Comm.* v. *National Lead Co.,* 352 U.S. 419, 427; *Lambert* v. *California,* 355 U.S. 225, 228; *Baughman* v. *Green,* 229 F. 2d 33, 34 (D.C. Cir.)), and while, very plainly, due process does not require adherence to outmoded common law technicalities (*Paraiso* v. *United States,* 207 U.S. 368), an allegation merely of "Acts of personal misconduct", such as was made against petitioner here (Cmplt., ¶ 8, *infra,* p. A5), is obviously insufficient.

This is a matter of substance, not of procedural niceties. For, as is specifically alleged in the Supplemental Complaint (¶¶ 6*a*(i), 6*d and* ½; *infra,* pp. A19-A20, A21) several of the "Findings" by Assistant Secretary Short concerned matters that were never alleged or even intimated during the more than two years that the proceedings against petitioner were in progress in the Department of the Army. See also item 6, *infra,* p. 19.

2. *Shifting the burden of proof; sub-par. (b).* An order to show cause, necessarily and properly, shifts the burden of going forward; but it is a violation of due process and of fundamental fairness to shift the burden of proof to the accused party to prove his innocence—as was done here. Due process is denied by such a shift just as much when the proceeding is frankly criminal, as in *Government of the Virgin Islands* v. *Torres,* 161 F. Supp. 699 (D.V.I.; Maris, Circ. J.), as when its impact on the individual is sought to be softened by use of the label "administrative." *Kwong Hai Chew* v. *Rogers,* 257 F. 2d 606 (D.C. Cir.); *Wood* v. *Hoy,* 266 F. 2d 825 (C.A. 9). When, as here, the agencies of government seek to change an individual's status by reason of acts allegedly done by him, it is the agency which has the burden of proof of establishing that the individual has committed those acts, not the individual who has the burden of proving the contrary.



84154 O—62——42

It is idle to invoke the analogy of the grand jury, which of course acts *ex parte,* in secret, and is not circumscribed by the rules of evidence. E.g., *Costello* v. *United States,* 350 U.S. 359. For in the present case, the selection board's order was not given the effect of an indictment—an accusation in writing—but of a conclusive jury verdict.

This clearly appears from par. 8 of Army Regulations 635-105B, 2 Jan. 1957, which was duly set out in par. 11(a)(ii) of the Complaint (*infra,* p. A9), viz.:

> "The impression that it is the responsibility of the Government to establish its case before this board [of inquiry] in much the same manner as is done in a court-martial is erroneous. The merits of the Government's case have been determined by the selection board prior to the convening of board of inquiry. The board of inquiry does not sit in judgment of this earlier determination, which has concluded that the respondent does not meet prescribed standards. The burden of proof, therefore, rests with the respondent to produce convincing evidence that he should be retained. In the absence of such a showing by the respondent, the board must find for elimination." *

If, the foregoing regulation was indeed authorized by the statute, as the defendants below are urging in their motion for summary judgment, then, having in mind that the selection board acted *ex parte,* without any opportunity for petitioner to be heard there (Cmplt., ¶ 8, *infra,* p. A6), the statute as construed and applied is plainly unconstitutional.

3. *Denial of confrontation; sub-par. (c).* Petitioner's complaint in par. 11(d) (*infra,* p. A10) alleges that the board of inquiry refused to call for examination under oath numerous individuals whose *ex parte* statements, damaging and prejudicial to him, had been considered both by the

---

* The foregoing paragraph was changed on 24 June 1960, which was after the Secretary had acted in the present case.

selection board and by the board of inquiry. Those allegations were repeated with reference to the action of the board of review (Cmplt., ¶ 16, *infra,* p. A12) and of Assistant Secretary Short (Supp. Cmplt., ¶ 5*c*(iii), *infra,* p. A18).

Since petitioner will, if the proceeding succeeds, be deprived of his office and of the financial emoluments thereunto appertaining, due process requires that the witnesses against him be produced for cross-examination, certainly when he has specifically so requested. On this proposition it is only necessary to cite *Greene* v. *McElroy,* 360 U.S. 474.

4. *Findings on conflicting evidence not heard by fact-finder; sub-par. (d).* Here the board of inquiry heard witnesses, but made no findings; the board of review heard witnesses and likewise made no findings; but Assistant Secretary Short, who heard none of the witnesses and who had only the dead pages of the cold record before him, made specific "findings" of misconduct, based in large measure on an incident in respect of which the only participant tried had been acquitted (Cmplt., ¶¶ 10, 11(h); Supp. Cmplt., 5*f*, 6*b*(iii); *infra,* pp. A8, A11, A19, A20).

This was plainly improper, and wholly unfair. Just as a hearing officer who has not heard and seen the witnesses may not, in a case turning on credibility, make findings drawn from testimony adduced before another hearing officer (see *Gamble-Skogmo, Inc.* v. *Federal Trade Commission,* 211 F. 2d 106 (C.A. 8); *S. Buchsbaum & Co.* v. *Federal Trade Commission,* 153 F. 2d 85 (C.A. 7), judgment vacated, 328 U.S. 818; *United States* v. *Perkins,* 79 F. 2d 533 (C.A. 2); 2 Davis, *Administrative Law Treatise,* § 11.21, p. 129), so here, where no findings were ever made by the boards that heard the live witnesses, the Secretary is not free to fashion "findings" from bits of testimony given by witnesses whom he never saw. See also *United States* v. *Morgan,* 304 U.S. 1; cf. *Board of Pharmacy of District of Columbia* v. *Feldman,* 279 F. 2d 821 (D.C. Cir.):

"The key consideration is to prevent the demeanor of witnesses, whenever it may be a substantial element, from getting lost from the case."*

Except for the last case, the cited authorities rest on statutes and considerations of fairness. It is however submitted that, if a statute were to authorize a reviewing officer who heard none of the witnesses to make "findings" after the boards who heard the witnesses made no findings—and that is precisely what the present statute has been construed to authorize—then such a statute would involve a deprivation of due process.

5. *"Findings" first made for the particular case; subpar. (e).* It was alleged in par. 6½ of the Supplemental Complaint (*infra,* p. A22)—on the basis of replies to petitioner's interrogatories—that from June 29, 1948, when the applicable elimination statute first became law, until June 20, 1960, when Assistant Secretary Short acted in peti-

---

* In its opinion, the Court of Appeals specifically approved portions of the opinion below, 160 A. 2d 100, 193 (Mun. App. D.C.), as follows:

"Appellate courts usually lean heavily on findings of administrative boards, as they do on judges' findings and jury verdicts. This is in recognition of the intelligence and understanding of the triers of fact; it is also, as has been said times without number, in recognition of their opportunity to personally hear the witnesses and observe their demeanor in the act of testifying. When that opportunity is lacking and weight and credibility of evidence are involved, there is also lacking an essential ingredient of due process.

"In this case the issues were complicated and highly controversial. The hearings were long and sometimes heated. Petitioner's denials of wrongdoing were emphatic. There were important areas where credibility of witnesses was a vital factor * * *. The circumstances required that the Board exercise a judgment judicial in nature in weighing and appreciating the credibility and persuasiveness of the testimony. This could not fairly be done on a cold record, four years after the hearing and eight years after the alleged offense."

tioner's case, no specific findings as to the grounds for elimination had ever been made by the Secretary or his delegate in any elimination case. It was there further alleged that the "findings" made by Assistant Secretary Short represented a new departure, a deviation from the hitherto settled administrative practice in such proceedings, and that those "findings" were fashioned to meet the exigencies of petitioner's case.

It scarcely needs to be argued that particular action, directed only against a single individual but never against others, involves an unreasonable discrimination that is the very antithesis of due process. Here, as in *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-374, the law has been "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances." See also, *accord, Griffin* v. *Illinois,* 351 U.S. 12, 17.

6. *"Findings" as to new matters not previously alleged; sub-par. (f).* Paragraphs 6*a*(i) and 6*d and* ½ of the Supplemental Complaint allege (*infra,* pp. A19-20, A21) that Assistant Secretary Short made "findings" that purported to find petitioner guilty of acts of misconduct that had never been charged against him during the more than two years that the elimination proceedings were pending against him in the Department of the Army.

Consequently, petitioner is being convicted under authority of the challenged statute of something not charged—which of course is palpably unconstitutional. "Conviction upon a charge not made would be sheer denial of due process." *DeJonge* v. *Oregon,* 299 U.S. 353, 362; see also *Cole* v. *Arkansas,* 333 U.S. 196, 201.

7. *General unfairness; sub-par. (g).* This last allegation (*infra,* p. A24), that "The entire proceedings in their totality fall far below the minimal standards of fairness required by the concept of Due Process of Law," is neither

a mere catch-all nor a summing up of the previously particularized points. Rather, it rests on an additional factor that injected significant—and indeed outrageous—unfairness into the proceedings. (The last adjective is used advisedly.)

Petitioner was accused by the selection board of homosexuality, even though that board had been advised that there was no evidence to establish the allegation. Cmplt., ¶¶8, 9(d), *infra,* pp. A5, A6-A7. Under the Army Regulation quoted and discussed above, the selection board's accusation was transformed into a finding. That issue consumed a major proportion of the time and of the evidence at every stage of the proceedings (Supp. Cmplt., ¶5*e*, *infra,* p. A19). Thereafter, Assistant, Secretary Short purported to disregard that issue (par. 2, *infra,* p. A28).

The Supplemental Complaint alleges (¶ 5*e*, *infra,* p. A19) that the Secretary's disapproval could not cure the prejudice to petitioner that resulted from the injection of that allegation. As this Court once remarked in a somewhat analogous situation (*Shepard* v. *United States,* 290 U.S. 96, 104), "The reverberating clang of those accusatory words would drown all weaker sounds." The harm had been done and was incurable. See *United States* v. *Provoo,* 215 F. 2d 531, 533-537 (C.A. 2). That admittedly unfounded accusation (Cmplt., ¶9(d), *infra,* pp. A6-A7) dominated the proceedings, contaminated them utterly, and made a fair hearing impossible.

Indeed, as Blackstone long ago said (4 Bl. Comm. *215), "it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out; for if false, it deserves a punishment inferior only to that of the crime itself." Once it was injected, as here it was with knowledge that it was not supported by proof, it deprived petitioner of a fair hearing far more clearly than mere newspaper publicity (*Delaney* v. *United States,* 199 F. 2d 107 (C.A. 1)).

That issue produced quite as much of "an irresistible wave of public passion" as a mob milling about around the courthouse (*Moore* v. *Dempsey,* 261 U.S. 86, 91). While the Secretary's brushing aside of the allegation undoubtedly reflected a realization that it had been disproved, at least as nearly as possible in a situation where the accused has the burden of disproof, his action could not cure the prejudice which by then permeated and infected the entire proceedings.

---

It follows, accordingly, that petitioner raised substantial constitutional issues in attacking the validity of the elimination statute.

*Fourth.* Arguing in opposition to petitioner's motion to convene a three-judge court, the defendants below relied on the statement of Holmes, J., in *McAuliffe* v. *Mayor of City of New Bedford,* 155 Mass. 216, 29 N.E. 517, that no one has a constitutional right to be a policeman, and accordingly argued that no one has a constitutional right to be an officer of the Army.

Judge Curran apparently went further, saying (*infra,* p. A37) that "The complaint in alleging that the acts of the defendants amounted to deprivation of property without due process of law is insufficient."

Insofar as Judge Curran is relying on the aphorism about "no constitutional right to be a policeman," there are two conclusive answers, both of them short. First, the substantive right to continue in employment, even of a non-governmental nature, is entitled to constitutional protection. Second, in a proceeding to terminate such employment, the employee is entitled to procedural due process. The mere citation of *Greene* v. *McElroy,* 360 U.S. 474, suffices for both propositions; and of course here, where government employment with tenure is in issue, with valuable retirement rights attached thereto (Cmplt., ¶5; *infra,* p. A3), there is presented an *a fortiori* case.

Defendants' argument below, insofar as it adds up to a contention that petitioner was afforded procedural due process, wholly overlooks both par. 8½ of the Supplemental Complaint (quoted above, pp. 9-10; *infra,* pp. A23-A24), which alleges the precise contrary with particularity and specificity, viz., that the statute as construed and as applied to the plaintiff denied him procedural due process, as well as the prayer (par. 10(a)(2), Supp. Cmplt., above, p. 10; *infra,* p. A25) which accordingly asks that the enforcement of the statute be enjoined in consequence.

Those allegations require a three-judge court—and if Judge Curran's memorandun is somehow to be understood as holding that petitioner has no constitutional right to due process, substantive or procedural, simply because he is an Army officer; if his holding can be construed to mean that the threadbare dictum in *Reaves* v. *Ainsworth,* 219 U.S. 296, 304—"To those in the military or naval service of the United States the military law is due process"—is dispositive of this case without more, then, it is submitted, his ruling in and of itself raises a further constitutional question of substance.

(It hardly needs to be added that, after *Harmon* v. *Brucker,* 355 U.S. 579, there can be no doubt whatever regarding petitioner's right to judicial review. This is mentioned only because Judge Curran's ruling that the allegations were "insufficient" may be directed at that question, which indeed was much argued by the defendants.)

## CONCLUSION

Petitioner therefore prays:

1. That a writ of mandamus issue to the respondent, the Honorable Edward M. Curran, United States District Judge for the District of Columbia, commanding him to proceed to convene a three-judge district court, pursuant to the provisions of 28 U.S.C. §§ 2282 and 2284(1), to hear and determine petitioner's motion for a preliminary injunc-

tion to restrain the enforcement and execution of 10 U.S.C. §§ 3781-3786, on the ground that, as construed and applied, those provisions are unconstitutional, which said motion is now pending in that certain cause in the United States District Court for the District of Columbia, entitled LEE B. LEDFORD, JR. v. WILBER M. BRUCKER, Secretary of the Army, *et als.*, and numbered Civil Action No. 3583-59;

2. That this Court grant such other and further relief as may seem proper.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,

*Counsel for the Petitioner.*

JANUARY 1961.

# APPENDIX

# APPENDIX A

## ALLEGATIONS AND PRAYER BELOW

### (1) Complaint as Amended

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COUMBIA

Civil Action No. 3583-59

LEE B. LEDFORD, JR., 123 North Wayne Street, Arlington 1, Virginia, *Plaintiff*,

v.

1. WILBER M. BRUCKER, Secretary of the Army, Washington 25, D. C.,
2. DEWEY SHORT, Assistant Secretary of the Army, Washington 25, D. C.,
3. MAJOR GENERAL ROBERT V. LEE, U.S. Army, The Adjutant General, United States Army, Washington 25, D. C., *Defendants.*

COMPLAINT [AS AMENDED]

(For temporary restraining order and injunction)

(Filed December 18, 1959)

Plaintiff, LEE B. LEDFORD, JR., for cause of action against the defendants, respectfully shows:

1. The plaintiff, Lee B. Ledford, Jr., is a citizen of the United States and of the Commonwealth of Kentucky, temporarily residing at 123 North Wayne Street, Arlington 1, Virginia. He is and ever since his graduation from the United States Military Academy on June 11, 1941, has been an officer in the Regular Army, and is now a Major in permanent rank by appointment by the President by and with the advice and consent of the Senate, and a

Lieutenant Colonel in temporary rank by appointment by the President alone. Since September 1955, plaintiff has been on duty in the Office of The Judge Advocate General, Department of the Army, Washington 25, D. C., where he is presently assigned to the Fiscal Branch of the Procurement Division of that Office.

2. Defendant No. 1, Wilber M. Brucker, here sued in his official capacity, is the duly qualified and acting Secretary of the Army of the United States, having his official place of business at the seat of government in Washington, and authorized by statute to take final action in all cases of separation of commissioned officers from the Regular Army for failure to meet standards under Sections 3781 to 3786, inclusive, of Title 10, U. S. Code. All references to the U. S. Code in this complaint are, unless otherwise specified, to the 1958 edition thereof.

3. Defendant No. 2, Dewey Short, here sued in his official capacity, is a duly qualified and acting Assistant Secretary of the Army of the United States, having his official place of business at the seat of government in Washington, and authorized by Defendant No. 1 to take final action in the latter's name in all cases of separation of commissioned officers from the Regular Army for failure to meet standards under Sections 3781 to 3786, inclusive, of Title 10, U. S. Code.

4. Defendant No. 3, Major General Robert V. Lee, United States Army, here sued in his official capacity, is the duly qualified and acting The Adjutant General, United States Army, having his official place of business at the seat of government in Washington. Defendant No. 3, under the direction of Defendant No. 1 and Defendant No. 2, and pursuant to regulations promulgated by Defendant No. 1, effectuates all separations of commissioned officers from the Regular Army for failure to meet standards under Sections 3781 to 3786, inclusive, of Title 10, U. S. Code.

5. The present action involves the interpretation of Sections 3781 to 3786, inclusive, of Title 10, U. S. Code; involves plaintiff's deprivation, without due process of law, of the right to active duty pay and allowances and to retirement annuities having a value of more than $10,000; and is otherwise within the general equity jurisdiction of this Court.

6. Plaintiff brings this action because the defendants are about to separate him, without any retirement privileges, from the active list of the Regular Army, in excess of any authority granted them by statute, and in violation of Acts of Congress and of Army Regulations having the force of law.

7. Sections 3781 to 3786, inclusive, of Title 10, U. S. Code, restate without substantive change Title I of the Army and Air Force Vitalization and Retirement Equalization Act of June 29, 1948, c. 708, 60 Stat. 1081, 10 U. S. Code (1952 ed.) Sections 580 to 586, inclusive (hereinafter referred to simply as "Title I"). The foregoing provisions of law authorize removal of officers from the active list of the Regular Army only for "failure to achieve the standards of performance to be prescribed by the Secretary by regulation" and did not and do not authorize such removal for specific acts of misconduct punishable by dismissal with or without confinement following trial by court-martial under the old Articles of War or under the present Uniform Code of Military Justice. The foregoing limitation on the removal power under the cited statutes clearly appears from the following:

(a) In the temporary war-time provision, Section 2 of the Act of July 29, 1941, c. 326, 55 Stat. 606, it was provided that the Secretary of War might exercise the power of removal "from among officers whose performance of duty, or general efficiency, compared with other officers of the same grade and length of service, is such as to warrant such action, or whose retention on the active list

is not justified for other good and sufficient reasons appearing to the satisfaction of the Secretary of War." In H. R. 2744, 80th Congress, the bill that became Title I, Section 102 originally read, "Selection of any officer to show cause for retention shall be based upon his failure to achieve such standards of performance as the Secretary of War shall by regulation prescribe, or on other good and sufficient reasons appearing to the satisfaction of the Secretary of War and of which the selection board is advised." The concluding clause, "or on other good and sufficient reasons appearing to the satisfaction of the Secretary of War and of which the selection board is advised," was stricken from the bill when it was reported to the House of Representatives, and was not thereafter added when Section 102 was enacted, or when it was reenacted as Section 3781 of Title 10, U. S. Code, where it now appears.

(b) Administrative removal from the active list for specific acts of misconduct punishable with dismissal with or without confinement following trial by court-martial is inappropriate on its face in view of the automatic provision in Section 3786 of Title 10, U. S. Code, for an honorable discharge together with severance pay in the event that the officer whose removal from the active list is effected does not qualify for retirement, and with full retirement pay and privileges in the event that the officer does so qualify.

(c) Administrative removal from the active list for specific acts of misconduct punishable with dismissal with or without confinement following trial by court-martial is further inappropriate on its face because the boards provided for by Sections 3781 to 3786, inclusive, of Title 10, U. S. Code, have no power to compel testimony, with the consequence that an officer being eliminated thereunder for specific acts of misconduct is unable to defend himself effectively against allegations made by individuals who are not available for confrontation or cross-examination.

(d) Administrative removal from the active list for specific acts of misconduct punishable by dismissal with or without confinement following trial by court-martial is further inappropriate on its face, because, in elimination proceedings under Sections 3781 to 3786, inclusive, of Title 10, U. S. Code, the officer who appears as respondent does not have safeguards of confrontation or of cross-examination or the protection of the rules of evidence that are accorded an officer being tried by a court-martial, nor does he have ultimate judicial review of the proceedings by the United States Court of Military Appeals such as is available to an officer convicted by court-martial. Moreover, as is more particularly set out below in paragraph 11(a) of this complaint, in an elimination proceeding under the cited provisions, the burden of proof is explicitly shifted from the Government to the officer who appears as respondent therein.

(e) Army Regulations 635-105A, dated 2 January 1957, provided in par. 4*a* that "Elimination will not be used in lieu of disciplinary action under the Uniform Code of Military Justice."

8. Notwithstanding the limited statutory authority thus granted by Congress, and in the face of the Army Regulations just cited, a selection board of general officers convened under Section 3781 of Title 10, U. S. Code, on April 29, 1958, called on the plaintiff to show cause why he should not be removed from the active list of the Army for the following reasons:

"1. Acts of personal misconduct.

"2. Conduct of such a nature as to bring discredit upon himself and to limit his usefulness to the service.

"3. Existence of homosexual tendencies.

"4. Intentional misrepresentation of fact in an official statement."

Plaintiff was not given a hearing by the selection board, and did not and could not appear before that board.

9. The foregoing action by the Selection Board was unlawful in each of the following respects.

(a) Allegations 1, 2, and 4, are not grounds for elimination by administrative action, inasmuch as each constitutes a military offense punishable by dismissal with or without confinement. No less than fifty-five articles of the Uniform Code of Military Justice (Arts. 79-134, inclusive; 10 U.S.C. §§ 879-934) denounce various acts of personal misconduct. Conduct of a nature to bring discredit upon the armed forces constitutes a violation of Art. 134 of the Uniform Code of Military Justice (10 U.S.C. § 934). Making a false official statement constitutes a violation of Art. 107 of the Uniform Code of Military Justice (10 U.S.C. § 907). Conviction of offenses denounced in the cited articles in the case of commissioned officers warrants a sentence of dismissal and, depending on the offense, confinement for a term of years in addition.

(b) The "acts of personal misconduct" alleged by the selection board were not specified by that board when plaintiff was called on to show cause why he should not be removed from the active list of the Regular Army, nor have they since been specified in any of the further proceedings set forth below in paragraphs 10 to 17, inclusive, of this complaint. None of the three boards that considered plaintiff's case in the entire course of the elimination proceedings brought against him has ever made findings defining, or has otherwise indicated the nature of, the particular acts of misconduct that allegedly warrant plaintiff's administrative removal from the active list of the Regular Army.

(c) There was no competent evidence whatever before the selection board to substantiate allegation 3.

(d) The summary submitted to the selection board, upon which that board acted when it called upon plaintiff

to show cause why he should be retained on the active list of the Regular Army, specifically and frankly stated that "There appears to be a strong probability that Lt. Col. Ledford is possessed of homosexual tendencies and may have committed homosexual acts, but there is no such positive evidence available as will satisfactorily establish such as facts."

(e) The file submitted to the selection board contained an anonymous letter making allegations against the plaintiff, in violation of par. 6, Army Regulations 640-98, dated 14 November 1955, which provides that "No anonymous communications will be made a part of an individual's record." [As amended December 23, 1959.]

(f) Despite the command of 10 U.S.C. § 3781 that the selection board review "the record" of the plaintiff, the file on which its order to show cause was based contained only investigatory reports derogatory to the plaintiff, and omitted every favorable report concerning him that had been made to investigatory agencies in the course of several investigations of allegations against him over a period of several years.

(g) The selection board was never advised of the existence of, and the file before it did not include, an indorsement by Major General Eugene M. Caffey, then The Judge Advocate General of the Army, which under date of October 29, 1956 made the following comment on a recommendation that plaintiff be eliminated from the active list:

> "1. I have read and considered the material in this file. I am of the opinion that neither a trial by court-martial nor a board proceeding is warranted by the state of the evidence, gathered through years of investigation.
>
> "2. There is a complete absence of any evidence to show guilty knowledge on the part of the officer concerned. The worst that can be said about him is that

his mode of life is unusual and has given rise to all sorts of gossip—pure gossip which rests on ignorance when it is not founded on conjecture or plain malice."

"3. I recommend no further action in this matter."

(h) The file submitted to the selection board contained matter adverse to the plaintiff, which under the provisions of paragraphs 4 and 7(*b*) of Army Regulations 640-98, dated 14 November 1955, should have been destroyed not later than October 29, 1957, viz., one year after the date of the comment made by General Caffey that is quoted in the preceding subparagraph, and six months prior to the action of the selection board in plaintiff's case. [As added by amendment, December 23, 1959.]

10. On November 18 and 19 and December 2, 3, 4, 5, 6, 8, and 9, 1958, plaintiff had a hearing before a board of inquiry convened pursuant to 10 U.S.C. § 3782. Following this hearing, the board of inquiry found that "Cause for retention has not been shown," and recommended plaintiff's elimination from the Regular Army.

11. The foregoing hearing before the board of inquiry was neither "fair" nor "impartial" as required by the cited statute in the following particulars, all of which, separately and in the aggregate, rendered the hearing unfair and partial.

(a) The hearing was unfair because conducted under regulations that shifted the burden of proof to the respondent officer, the plaintiff here, and gave conclusive effect to the *ex parte* allegations made by the selection board from a file the summary of which, set forth in paragraph 9(d) above, frankly stated that "there is no such positive evidence available as will satisfactorily establish such as facts."

(i) Army Regulations 635-105A, dated 2 January 1957, provide in paragraph 7 thereof, "This board [of inquiry]

evaluates matters presented by the respondent on his behalf to determine if they constitute a basis for further service sufficiently strong to overcome the established reasons for elimination already found to exist by a selection board."

(ii) Army Regulations 635-105B, dated 2 January 1957, provide in paragraph 8 thereof, as follows:

> "The impression that it is the responsibility of the Government to establish its case before this board [of inquiry] in much the same manner as is done in a court-martial is erroneous. The merits of the Government's case have been determined by the selection board prior to the convening of board of inquiry. The board of inquiry does not sit in judgment of this earlier determination, which has concluded that the respondent does not meet prescribed standards. The burden of proof, therefore, rests with the respondent to produce convincing evidence that he should be retained. In the absence of such a showing by the respondent, the board must find for elimination."

(iii) The placing of the burden of proof on the respondent in elimination proceedings is further emphasized in paragraphs 14*b*, 18*b*(1), and 25*c* of Army Regulations 635-105B, dated 2 January 1957.

(b) The hearing was unfair because there was presented to the board of inquiry evidence of an alleged incident of misconduct on the part of the plaintiff which had not been considered by the selection board. The incident in question was alleged to have occurred in 1946 or 1947, eleven or twelve years previously, and it was first mentioned in a statement dated 14 June 1958, whereas the selection board's call on the plaintiff to show cause was dated 29 April 1958.

(c) The hearing was unfair because the board of inquiry of three general officers, who had been sworn as

required by pertinent Army Regulations, made virtually all of their rulings as instructed by an unsworn legal adviser of lower rank. The record of the hearing before the board of inquiry discloses that, in eighteen instances, the legal adviser recommended a ruling contrary to plaintiff's position, and that in all eighteen instances the board of inquiry thereupon ruled against the plaintiff. In none of those instances did the legal adviser state any reasons for his recommendations.

(d) The hearing was unfair because the board of inquiry refused to call for examination and cross-examination under oath numerous individuals whose *ex parte* statements damaging and prejudicial to the plaintiff had been considered both by the selection board and by the board of inquiry.

(e) The hearing was unfair because conducted in violation of par. 10, Army Regulations 15-6, dated 25 July 1955, which directs "a general observance" of the rules of evidence, including specifically the hearsay rule and the rules relating to privileged communication. Thus—

(i) Hearsay and multiple hearsay were regularly admitted, and the entire record is devoid of any evidence admissible under an observance of the rules of evidence that would prove any of the allegations made against the plaintiff.

(ii) A violation of the attorney-client privilege by a lawyer who had represented plaintiff was admitted over objection.

(f) The hearing was unfair because, under Army Regulations 635-105B, dated 2 January 1957, respondent was limited by paragraph 18*b*(2)(d) in bringing witnesses to the hearing while simultaneously in paragraph 16*a*(7) the weight of favorable statements that he might obtain from absent witnesses was specifically minimized.

(g) The hearing was unfair because conducted under regulations that placed an affirmative burden on the board of inquiry in the event that it desired to find in the respondent's favor. Army Regulations 635-105B, dated 2 January 1957, provide in paragraph 26*a*(1): "The board will find whether cause for retention has or has not been shown. If the board finds that the respondent has shown cause for retention, a summary of data leading to this finding will be included."

(h) The hearing was unfair because plaintiff was never specifically advised of the particular "acts of personal misconduct" found by the selection board to warrant his removal and which he had to defend before the board of inquiry, and because the regulations under which the proceedings were conducted did not permit him to require particularization of the charges he was called upon to meet.

12. The proceedings of the board of inquiry were, on or about April 13, 1959, approved by the Commanding General, Military District of Washington, and were forwarded to the Department of the Army.

13. On November 24 and December 17 and 18, 1959, the case against the plaintiff was heard by a board of review convened pursuant to 10 U.S.C. § 3783. Following the hearing, the board of review recommended that the plaintiff be removed from the active list of the Regular Army.

14. The hearing before the board of review was contrary to law because Sections 3781 to 3786, inclusive, of Title 10, U. S. Code, do not authorize the administrative removal of an officer from the active list of the Regular Army for specific acts of misconduct that are triable by court-martial and punishment by dismissal and confinement. Plaintiff repeats at this juncture the allegations of paragraph 7 of this complaint, which are here incorporated by reference.

15. The hearing before the board of review was contrary to law, because the proceeding heard by that board was unlawfully set in motion by the selection board. Plaintiff repeats at this juncture the allegations of paragraph 9 of this complaint, which are here incorporated by reference.

16. The hearing before the board of review was contrary to law because conducted under regulations that improperly shifted the burden of proof to the plaintiff, because infected with evidence made inadmissible by pertinent Army Regulations, and because the record before the board of inquiry that was made available to the board of review was irrevocably and irretrievably tainted with the errors committed by the board of inquiry. Plaintiff repeats at this juncture the allegations of paragraph 11 of this complaint, which are here incorporated by reference.

17. The hearing before the board of review was further contrary to law in that there was no substantial evidence tending to show the commission by the plaintiff of any of the acts alleged against him but that, to the contrary, the overwhelming weight of all the evidence wholly disproved, on the whole record, every allegation with which he was faced.

18. The elimination proceedings particularized above were not only undertaken without authority of law but were commenced in defiance of law, and in their denial to the plaintiff of the traditional safeguards of confrontation and cross-examination fell so far below minimal standards of fairness as to amount to taking away plaintiff's office and the pay, allowances, and retirement rights thereunto appertaining without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

19. Nevertheless, on the basis of said elimination proceedings, the defendants threaten to, and unless restrained

and enjoined by this Court will, imminently, immediately and irrevocably separate plaintiff from the active list of the Regular Army, to his irreparable injury. Plaintiff lacks sufficient years of service to be entitled to retirement benefits, and, if once removed from the active list of the Regular Army, cannot be restored thereto under existing law, nor by executive action, but could be restored only if a special Act of Congress authorizing his reappointment were enacted.

20. Notwithstanding the pendency of the elimination proceedings hereinbefore set forth, plaintiff has not been relieved or suspended from duty, but has at all times since the initiation of those proceedings on April 29, 1958, more than a year and a half previously, continued on duty in the Office of The Judge Advocate General, Department of the Army, with the full approval and approbation of his duly constituted military superiors, and is still performing duty there.

21. Plaintiff has exhausted all of his administrative remedies and now has no adequate relief save through this suit, and the balance of convenience requires that the *status quo* be maintained during its pendency.

22. Therefore, because all other administrative and legal remedies are inadequate, plaintiff prays for temporary and permanent relief as follows:

(a) For an order temporarily restraining the defendants, and each of them, from removing plaintiff from the active list of the Regular Army pursuant to the proceedings as aforesaid commenced under Sections 3781 to 3786, inclusive, of Title 10, U. S. Code, until such time as this Court can hear the motion for a temporary injunction herein contained;

(b) For an order enjoining the defendants, and each of them, from removing plaintiff from the active list of the

Regular Army pursuant to or by reason of the elimination proceedings as aforesaid;

(c) For an order commanding Defendant No. 1 and Defendant No. 2 to disapprove the said elimination proceedings herein before set forth;

(d) For an order enjoining the defendants, and each of them, from removing plaintiff from the active list of the Regular Army by reason of anything appearing or alleged against him in the elimination proceedings hereinbefore set forth in this complaint, or from taking any other action against him or to his prejudice by reason of anything appearing or alleged against him in the said proceedings, except such action as is or may be authorized under the provisions of the Uniform Code of Military Justice;

(e) For an order enjoining the defendants, and each of them, from taking any personnel action whatever to the plaintiff's detriment by reason of anything appearing or alleged against him in the said proceedings; [As added by amendment, December 23, 1959.]

(f) For an order commanding the defendants, and each of them, to implement paragraphs 4 and 7(*b*) of Army Regulations 640-98, dated 14 November 1955, by causing to be destroyed all of the matter adverse to the plaintiff contained in said proceedings which antedates October 29, 1956. [As added by amendment, December 23, 1959.]

(g) For such further relief as may seem proper. [As renumbered, December 23, 1959.]

The plaintiff moves that there be issued an injunction *pendente lite* restraining the acts set forth in paragraphs

(b) and (d); and prays that said motion be set down for hearing at the earliest possible date.

/s/ LEE B. LEDFORD, JR.
Lee B. Ledford, Jr.

/s/ FREDERICK BERNAYS WIENER
Frederick Bernays Wiener,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N.W.,
Washington 6, D. C.
(DIstrict 7-2163)
*Attorney for the Plaintiff.*

[Jurat Omitted]

---

**(2) Supplemental Complaint as Amended**

[CAPTION OMITTED]

SUPPLEMENTAL COMPLAINT [AS AMENDED]

(For preliminary and permanent injunction)

(Tendered August 18, 1960; leave to file granted, September 23, 1960; amendments allowed, October 12, 1960.)

Plaintiff files this Supplemental Complaint, pursuant to leave granted, in order to show the following occurrences and events that have happened since the date of the original complaint and the amendment thereto, and which are material to the controversy between the parties.

1. The verbatim transcript of so much of the elimination proceedings as took place before the board of review, as to which see paragraphs 13-17, inclusive, of the original complaint, was transcribed on or about January 15, 1960; was submitted to plaintiff's counsel for correction on January 16, 1960; and on January 20, 1960, was returned, with corrections, to the recorder of the board of review.

2. Plaintiff's motion for preliminary injunction and defendants' motion to dismiss or in the alternative for sum-

mary judgment came on for hearing on February 15, 1960. Following such hearing, the parties to this cause on February 26, 1960, withdrew those motions without prejudice, and stipulated that the defendants would have 120 days from that date to consider and take action on the proceedings involving the plaintiff, and that the effective date of any such action would be stayed for a period of 30 days following receipt by plaintiff's attorney of written notification of any such action.

3. On June 20, 1960, Defendant No. 2 acted on the proceeding in plaintiff's case, and, after purporting to make findings of fact, approved the recommendation of the board of review that the plaintiff be eliminated from the Army. A copy of the action of Defendant No. 2, marked Exhibit A, is attached hereto and made a part hereof. A copy of Exhibit A was delivered to the office of plaintiff's attorney on June 23, 1960.

4. Between December 18, 1959, the day when the board of review recommended that plaintiff be eliminated from the Army, and June 20, 1960, when Defendant No. 2 approved that recommendation, plaintiff was continued on duty in the Office of The Judge Advocate General, Department of the Army. During that interval, plaintiff was, with the full approval and approbation of his military superiors, promoted to be Chief of the Fiscal Branch of the Procurement Division of that Office. During that interval, plaintiff was sent, pursuant to competent military orders, on no less than 8 trips to various parts of the country on official business, in the course of which he represented the Army and the United States Government in conferences and negotiations with State officials. On June 22, 1960, plaintiff was designated as Army representative on, and Chairman of, the Tax Subcommittee of the Department of Defense's Armed Services Procurement Regulations Committee.

5. The action of Defendant No. 2 set forth in Exhibit A attached hereto is invalid and illegal in numerous respects, as follows:

*a.* None of the reasons set forth in Exhibit A falls within the grounds for elimination authorized by the governing statutes, 10 U.S.C. §§ 3781-3786, inclusive, viz., "failure to achieve the standards of performance to be prescribed by the Secretary by regulation", as all of such reasons relate to standards of conduct that are punishable under and only under the Uniform Code of Military Justice (10 U.S.C. §§ 801-934).

*b.* The action taken by Defendant No. 2 that is reflected in Exhibit A cannot and does not cure the illegality with which the elimination proceedings against the plaintiff were infused and infected before the selection board in the following respects, viz.,

(i) failure to specify the alleged "Acts of personal misconduct" charged against the plaintiff;

(ii) withholding of the full facts in the case from the selection board;

(iii) reliance in violation of applicable Army Regulations on an anonymous communication and on documents required to have been destroyed; and

(iv) all of the other instances of illegality set forth in paragraph 9 of the original complaint herein as heretofore amended, the allegations of which are at this juncture incorporated by reference.

*c.* The action taken by Defendant No. 2 that is reflected in Exhibit A cannot and does not cure the illegality with which the elimination proceedings against the plaintiff were infused and infected before the board of inquiry in the following respects, viz.,

(i) shifting the burden of proof against the plaintiff in violation of the statutory requirement for a "fair and impartial hearing";

(ii) consistent overruling by the board of inquiry of all of plaintiff's objections on the say-so of an unsworn legal adviser;

(iii) refusal to call for confrontation and cross-examination witnesses who had submitted statements adverse to the plaintiff;

(iv) violation of vital rules of evidence contrary to the provisions of Army Regulations; and

(v) all of the other instances of illegality set forth in paragraph 11 of the original complaint herein, the allegations of which are at this juncture incorporated by reference.

*d.* The action taken by Defendant No. 2 that is reflected in Exhibit A cannot and does not cure the illegality with which the elimination proceedings against the plaintiff were infused and infected before the board of review in the following respects, viz.,

(i) the underlying illegality of the proceedings before the selection board and the board of inquiry;

(ii) the circumstances that there was no substantial evidence tending to show the commission by the plaintiff of any of the acts alleged against him and that, to the contrary, the overwhelming weight of all the evidence wholly disproved, on the whole record, every allegation with which he was faced; and

(iii) all of the other instances of illegality set forth in paragraph 14 to 17, inclusive, of the original complaint, the allegations of which are at this juncture incorporated by reference.

*e.* The action taken by Defendant No. 2 that is reflected in Exhibit A, insofar as in paragraph 2 thereof it purports to disregard the allegations of homosexual tendencies on the part of the plaintiff, cannot cure the prejudice that resulted to plaintiff from the injection of these allegations, which were pressed at every stage of the proceedings, which consumed a major portion of the time and of the evidence at every stage of the proceedings, and which were admittedly without foundation from the very outset of the proceedings. The allegations of 9(d) of the original complaint herein are at this juncture incorporated by reference.

*f.* The findings purportedly made by Defendant No. 2 that are reflected in Exhibit A are invalid and illegal, essentially because they are retroactive, inasmuch as the matters charged against the plaintiff were never specified or particularized before the selection board, the board of inquiry, or the board of review, and inasmuch as none of those boards ever made any findings of fact at any stage of the proceedings. There is accordingly no showing that either the board of inquiry or the board of review recommended plaintiff's elimination from the Army on the grounds on which Defendant No. 2 rested his approval of those recommendations. The record of the elimination proceedings is entirely consistent with the rejection by either or both of the said boards of the grounds for elimination relied on by Defendant No. 2 for his approval of their recommendations.

6. The findings purportedly made by Defendant No. 2 that are reflected in Exhibit A are severally invalid and illegal as follows, in addition to the grounds of invalidity and illegality heretofore specified, as follows:

*a.* Purported finding 1a(1) of Exhibit A is invalid and illegal because

(i) it makes a new allegation against the plaintiff which was never made, considered or contested at

any prior stage of the elimination proceedings, thus purporting to eliminate him on a charge on which he was never tried, with a consequent denial of due process of law;

(ii) it is wholly without the support of record evidence; and

(iii) it disregards the fact that Virgil Blain McBride was permitted by the plaintiff's military superiors to occupy quarters assigned to such superiors, and that such permission was not rested on any representation by the plaintiff concerning his relationship to the said McBride.

*b.* Purported finding 1a(2) of Exhibit A is invalid and illegal because

(i) it purports to particularize as an act of misconduct something never before specified in the proceedings against the plaintiff;

(ii) it purports, more than two years after the event, to punish plaintiff in respect of an incident for which neither his military superiors nor the civil authorities ever sought to bring him to account at any previous time;

(iii) it is without support of any substantial evidence, inasmuch as Virgil McBride Ledford was tried and acquitted by the Municipal Court for the District of Columbia in March 1958 on a criminal charge growing out of this identical transaction.

*c.* Purported finding 1b of Exhibit A is invalid and illegal in its entirety because utterly unsupported by evidence, inasmuch as it is the irrefutable fact that plaintiff's usefulness to the service increased between 1956 and 1960. Plaintiff was continuously on duty in the Office of The Judge Advocate General of the Army during this entire period. In addition to the activities and the appointment

set forth in paragraph 4 of this Supplemental Complaint, plaintiff in the year 1959 made no less than 8 other trips on official business, pursuant to competent military orders, in each of which he represented the United States Army and the United States Government in conferences and negotiations with State officials.

*d.* Purported finding 1b(1) of Exhibit A is invalid and illegal because utterly without the support of competent evidence, in that

(i) plaintiff lived with Virgil McBride Ledford after 1956 with the full knowledge and consent of his military superiors; and

(ii) all of the competent evidence in the record establishes without contradiction that Virgil McBride Ledford neither is, nor among persons who know him, has the reputation of being, a homosexual.

*d and ½.* Purported finding 1b(1) of Exhibit A is further invalid because it materially changes the accusation considered at all stages of the proceeding, from living with a known homosexual to living with a person with a reputation as a homosexual. [As added by amendment, October 12, 1960.]

*e.* Purported finding 1b(2) of Exhibit A is invalid and illegal for the reasons set forth in subparagraphs 6*b* and 6*c* of this Supplemental Complaint, the allegations of which are incorporated by reference at this juncture.

*f.* Purported finding 1c of Exhibit A is illegal and invalid because unsupported by evidence, inasmuch as

(i) the overwhelming evidence of record establishes that the official statement in question did not contain any misrepresentation;

(ii) the overwhelming evidence of record establishes that the representation in the official statement in question was utterly immaterial; and

(iii) In 1956, long before the statute of limitations had run, The Judge Advocate General of the Army determined that this incident did not warrant disciplinary action. The allegations of paragraph 9(g) of the original complaint are incorporated by reference at this juncture.

6½. From June 29, 1948, the effective date of Title I of the Army and Air Force Vitalization and Retirement Equalization Act, through its codification as Sections 3781 to 3786, inclusive, of Title 10, United States Code, on August 10, 1956, and until June 20, 1960, no specific findings as to the grounds for elimination had ever been made in elimination proceedings under the cited statutes either by the Secretary of the Army or by any Assistant Secretary of the Army acting as his delegate. The purported findings by the defendant Short in Exhibit A represent a new departure in elimination cases and a deviation from what had formerly been the settled administrative practice in such cases. Those purported findings were fashioned to meet the exigencies of this plaintiff's case more than six months after the present action was brought. [As added by amendment, October 12, 1960.]

7. The elimination proceedings particularized in the original complaint as amended, were not only undertaken without authority of law, but were commenced and continued in defiance of law, and the action of Defendant No. 2 as reflected in Exhibit A hereto, which purports to approve them, was similarly taken without authority of law and in defiance of law. The elimination proceedings here in question, in their denial to the plaintiff throughout their course of any particularization of the matters with which he was charged, and in their denial to the plaintiff of the traditional standards of confrontation and cross-examination and of fact finding by the tribunal that heard conflicting evidence, so far fell below minimal standards of fairness as to amount to taking away plaintiff's office



84154 O—62——44

and the pay, allowances, and retirement rights thereunto appertaining without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

8. Nevertheless, on the basis of said elimination proceedings, and particularly on the basis of the approval thereof by Defendant No. 2 as reflected in the action attached hereto as Exhibit A, the defendants threaten to, and unless restrained and enjoined by this Court will, imminently, immediately and irrevocably separate plaintiff from the active list of the Regular Army, to his irreparable injury. Only the terms of the stipulations herein between the parties dated February 26, 1960, and July 15, 1960, have prevented the defendants from an earlier effectuation of such separation. Plaintiff lacks sufficient years of service to be entitled to retirement benefits, and, if once removed from the active list of the Regular Army, cannot be restored thereto under existing law, nor by executive action, but could be so restored only if a special Act of Congress authorizing his reappointment were enacted, and he were nominated and confirmed pursuant to such an Act.

8½. As construed and applied to the plaintiff in the circumstances of the present case, Sections 3781 to 3786, inclusive, of Title 10, U.S. Code, 1956 edition, are unconstitutional, because depriving plaintiff of his office and of the pay, allowances, and retirement rights thereunto appertaining without due process of law, in violation of the Fifth Amendment in that

(a) Plaintiff was not given adequate notice of the accusations against him;

(b) The burden of proof was shifted to the plaintiff to prove his innocence of the *ex parte* determination earlier made against him;

(c) Plaintiff was denied the right to be confronted by and to cross-examine witnesses who had submitted state-

ments against him that were considered at all levels of the proceeding;

(d) Although no findings were ever made by either of the boards that heard witnesses, the defendant Short proceeded, without hearing witnesses, to make findings adverse to the plaintiff on conflicting evidence which involved credibility;

(e) Such findings were made after the present litigation commenced and represented the first instance in the twelve years since the statute in question was first enacted that the Secretary of the Army or his delegate had ever made specific findings of fact in any elimination case;

(f) Such findings in material particulars pertained to matters which had never been charged or even intimated against plaintiff during any prior phase of the proceedings over more than two years; and

(g) The entire proceedings in their totality fall far below the minimal standards of fairness required by the concept of Due Process of Law. [As added by amendment, October 12, 1960.]

9. Plaintiff has exhausted all of his administrative remedies and now has no adequate relief save through this suit, and the balance of convenience requires that the status quo be maintained until its final termination. Plaintiff refrains from praying for a temporary restraining order only because the terms of the stipulation dated July 15, 1960, render such relief unnecessary.

10. Therefore, because all other administrative and legal remedies are inadequate, plaintiff prays for temporary and permanent relief as follows:

(a)(1) For an order enjoining the defendants, and each of them, and their officers, agents and subordinates, from removing plaintiff from the active list of the Regular Army pursuant to or by reason of the elimination proceedings commenced under 10 U.S.C. §§ 3781-3786, as more partic-

ularly described herein and in the original complaint as amended [as renumbered, October 12, 1960];

(a) (2) For an order enjoining the defendants, and each of them, and their officers, agents and subordinates, from enforcing or executing the provisions of 10 U.S.C. §§ 3781 to 3786, inclusive, against the plaintiff [As added by amendment, October 12, 1960];

(b) For an order commanding Defendant No. 2 to revoke and annul the action previously taken by him as set forth in Exhibit A hereto;

(c) For an order commanding Defendant No. 1 and Defendant No. 2 to disapprove the said elimination proceedings which are more particularly described herein and in the original complaint as amended;

(d) For an order enjoining the defendants, and each of them, and their officers, agents and subordinates, from removing plaintiff from the active list of the Regular Army by reason of anything appearing or alleged against him in the elimination proceedings more particularly described herein and in the original complaint as amended, or from taking any other action against him or to his prejudice by reason of anything appearing or alleged against him in the said proceedings, except such action as is or may be authorized under the provisions of the Uniform Code of Military Justice;

(e) For an order enjoining the defendants, and each of them, and their officers, agents and subordinates, from taking any personnel action whatever to the plaintiff's detriment by reason of anything appearing or alleged against him in the said proceedings;

(f) For an order commanding the defendants, and each of them, to implement paragraphs 4 and 7(b) of Army Regulations 640-98, dated 14 November 1955, by causing to be destroyed all of the matter adverse to the plaintiff

that is contained in said proceedings and which antedates October 29, 1956; and

(g) For such other and further relief as may seem proper.

/s/ LEE B. LEDFORD, JR.
Lee B. Ledford, Jr.

(Signed) FREDERICK BERNAYS WIENER
Frederick Bernays Wiener,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N.W.,
Washington 6, D. C.,
(DIstrict 7-2163),
*Attorney for the Plaintiff.*

[Jurat Omitted]

EXHIBIT A

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
Washington, D. C.

June 20, 1960

MEMORANDUM FOR: CHIEF OF STAFF, UNITED STATES ARMY
Subject: Elimination—Lieutenant Colonel Lee B. Ledford, Jr., 023775, Judge Advocate General Corps

1. Having examined the record in the case of Lieutenant Colonel Lee B. Ledford, Jr., 023775 Judge Advocate General Corps, I find that it establishes:

a. That the respondent committed acts of personal misconduct in that:

(1) The respondent, Colonel Ledford, continuously falsely represented his legal relationship to Virgil Blain McBride, later known as Virgil McBride Ledford, to be that of brother, one result of which was the furnishing of public living quarters to the said Virgil Blain McBride at Fort Bragg, North Carolina, without charge, when

Colonel Ledford knew that Virgil Blain McBride, since he was not his brother, did not qualify for entitlement to such quarters without charge under the then existing Army regulations.

(2) At approximately midnight, 12 March 1958, Colonel Ledford was the driver of an automobile in which Virgil McBride Ledford was a passenger. Colonel Ledford circled Lafayette Square, Washington, D. C., three times and then stopped alongside a young man standing on the sidewalk who was later identified as Private Robert D. Arscott, a plainclothes member of the Washington Police Department Vice Squad. Virgil McBride Ledford engaged Private Arscott in a conversation which quickly led to a solicitation by Virgil McBride Ledford for Private Arscott to commit a homosexual act. Specifically, Virgil McBride Ledford first asked Arscott if he wanted "some sex", and then, after consulting with Colonel Ledford, asked Private Arscott if he wanted a "blow job". Colonel Ledford was present during this conversation, was consulted by Virgil McBride Ledford during the latter's conversation with Private Arscott, and Colonel Ledford engaged in the conversation to the extent of stating to Private Arscott, "Well, are you going to get in the car, the light has changed three times."

b. That the respondent's conduct was such as to bring discredit upon himself and to limit his usefulness to the service in that:

(1) The respondent, Colonel Ledford, continued to live openly with Virgil McBride Ledford after he had been informed in 1956 of Virgil McBride Ledford's reputation as a homosexual;

(2) At approximately midnight, 12 March 1958, Colonel Ledford was the driver of an automobile in which Virgil McBride Ledford was a passenger. Colonel Ledford circled Lafayette Square, Washington, D. C., three times and then stopped alongside a young man standing on the side-

walk who was later identified as Private Robert D. Arscott, a plainclothes member of the Washington Police Department Vice Squad. Virgil McBride Ledford engaged Private Arscott in a conversation which quickly led to a solicitation by Virgil McBride Ledford for Private Arscott to commit a homosexual act. Specifically, Virgil McBride Ledford first asked Arscott if he wanted "some sex", and then, after consulting with Colonel Ledford, asked Private Arscott if he wanted a "blow job". Colonel Ledford was present during this conversation with Private Arscott, and Colonel Ledford engaged in the conversation to the extent of stating to Private Arscott, "Well, are you going to get in the car, the light has changed three times."

c. That the respondent intentionally made a misrepresentation of a material fact in an official statement; to wit, in an application for a curtailment of his Korean tour of duty and as a basis therefor, he stated that he wanted to return to the United States with his brother and thereby misrepresented Virgil McBride Ledford to be his brother.

2. The further finding and the action, set out in paragraphs 3 and 4, below, are not predicated upon that evidence in the record tending to show the existence of homosexual tendencies in the respondent, Colonel Ledford, and I have placed no reliance thereon in arriving at such finding and action.

3. Finally, based upon the findings set out in paragraph 1, above, I find that the respondent has failed to show cause why he should not be eliminated from the Army.

4. Accordingly, the recommendation of the Board of Review for Eliminations, that Lieutenant Colonel Lee B. Ledford, Jr., be eliminated from the Army, is approved.

/s/ DEWEY SHORT
Assistant Secretary of the Army
(Manpower, Personnel and Reserve Forces)

### (3) Petitioner's Motion for Preliminary Injunction

[Caption Omitted]

## MOTION FOR PRELIMINARY INJUNCTION

The plaintiff, by his attorney, moves the Court for an order granting a preliminary writ of injunction against the defendants, their officers, agents and subordinates, pending this suit, and until further order of the Court, upon the grounds set forth in the amended complaint and supplemental complaint herein, limited however to prayers (a), (d), (e), and (g) of paragraph 10 of said supplemental complaint.

Dated: August 18, 1960.

(Signed) FREDERICK BERNAYS WIENER
Frederick Bernays Wiener,
1025 Connecticut Avenue, N.W.
Washington 6, D. C.
*Attorney for the Plaintiff.*

## APPENDIX B

### STATUTES INVOLVED

1. The applicable three-judge court provision is as follows:

**"§ 2282. Injunction against enforcement of Federal statute; three-judge court required**

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

2. The Act of Congress whose enforcement is sought to be enjoined is the former Title I of the Army and Air Force Vitalization and Retirement Equalization Act of June 29, 1948, c. 708, 60 Stat. 1081, 10 U.S. Code (1952 ed.) §§ 580-586, which was restated without substantive change in 1956 as 10 U.S.C. §§ 3781-3786, 1956 revision. As has been noted above, p. 5, the 1960 amendments do not govern this case. The provisions applicable here were those of 1956, as follows:

**"§ 3781. Selection boards: composition, duties**

"The Secretary of the Army shall convene annually a selection board composed of five general officers. The selection board shall review the record of each commissioned officer on the active list of the Regular Army to determine whether he shall be required, because of failure to achieve the standards of performance to be prescribed by the Secretary by regulation, to show cause for his retention on the active list.

**"§ 3782. Boards of inquiry: composition; duties**

"(a) Boards of inquiry, each composed of three or more general officers, shall be convened, at such places

as the Secretary of the Army may prescribe, to receive evidence and make findings and recommendations as to the fitness of officers to be retained on the active list of the Regular Army.

"(b) A fair and impartial hearing before a board of inquiry shall be given to each officer required to show cause for retention under section 3781 of this title.

"(c) If a board of inquiry recommends the retention of an officer, his case is closed. However, at any future time he may be again required to show cause for retention under section 3781 of this title.

"(d) If a board of inquiry recommends the removal of an officer from the active list of the Regular Army, it shall send the record of its proceedings to a board of review.

**"§ 3783. Boards of review: composition; duties**

"(a) Boards of review, each composed of five or more general officers, shall be convened by the Secretary of the Army, at such times as he may prescribe, to review the cases of officers recommended by boards of inquiry for removal from the active list of the Regular Army, and to make recommendations as to the retention of those officers.

"(b) If a board of review recommends the retention of an officer, his case is closed. However, at any future time he may be again required to show cause for retention under section 3781 of this title.

"(c) If a board of review recommends the removal of an officer from the active list of the Regular Army, it shall send its recommendations to the Secretary for his action.

**"§ 3784. Removal of officer: action by Secretary of the Army upon recommendation**

"The Secretary of the Army may remove an officer from the active list of the Regular Army for any cause that he considers sufficient, if removal for that cause is recommended by a board of review under this chapter. The Secretary's action in such a case is final and conclusive.

**"§ 3785. Rights and procedures**

"(a) Each officer under consideration for removal from the active list of the Regular Army under this chapter shall be—

"(1) notified in writing of the pendency of any proceeding for his removal;

"(2) allowed reasonable time to prepare his defense;

"(3) allowed to appear in person and by counsel at proceedings before a board of inquiry and a board of review; and

"(4) allowed full access to, and furnished copies of, records relevant to his case at all stages of the proceeding.

"(b) No person may be a member of more than one board convened under this chapter for the same officer.

**"§ 3786. Officer considered for removal: voluntary retirement or honorable discharge; severance benefits**

"(a) At any time during proceedings under this chapter and before the removal of an officer from the active list of the Regular Army, the Secretary of the Army may grant his request—

"(1) for voluntary retirement, if he is otherwise qualified therefor; or

"(2) for honorable discharge with severance benefits under sub-section (b).

"(b) Each officer removed from the active list of the Regular Army under this chapter shall—

"(1) if on the date of removal he is eligible for voluntary retirement under any law, be retired in the grade and with the pay to which he would be entitled if retired at his request; or

"(2) if on that date he is ineligible for voluntary retirement, be honorably discharged in the grade then held with severance pay equal to one month's basic pay at the rate to which he was entitled on the date of discharge, multiplied by the number of years of his active commissioned service, but not more than 12.

"(c) For the purpose of subsection (b) (2), a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded."

## APPENDIX C

### APPLICATION BELOW FOR A THREE-JUDGE COURT

#### (1) Petitioner's Motion to Convene a Three-Judge Court

[Caption Omitted]

### MOTION TO CONVENE A THREE-JUDGE COURT AND TO CERTIFY CAUSE TO ATTORNEY GENERAL

Now comes the plaintiff, by his attorney, and moves the Court to convene a District Court of three judges, pursuant to 28 U.S.C. §2284, inasmuch as both the prayer contained in paragraph 10(a)(2) of the proposed amendment to the Supplemental Complaint herein and the Motion for Preliminary Injunction herein seeks an interlocutory injunction to restrain the enforcement and execution of 10 U.S.C. (1946 edition) §§3781 to 3786, inclusive, on the ground of their repugnance to the Constitution of the United States, relief which under 28 U.S.C. §2282 can only be heard and determined by a District Court of three judges.

Plaintiff further moves that, as required by 28 U.S.C. §§2284(2) and §2403, the pendency of this action be certified to the Attorney General of the United States. Informal notice has already been given that officer, as evidenced by copy of notice attached hereto.

Dated: September 29, 1960.

(Signed) Frederick Bernays Wiener
FREDERICK BERNAYS WIENER
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.
*Attorney for the Plaintiff.*

[Caption Omitted]

To the Honorable William P. Rogers, Attorney General of the United States:

YOU ARE HEREBY NOTIFIED, pursuant to the provisions of Section 2282, 2284, and 2403 of Title 28 of the United States Code, that there has been filed an application for an interlocutory injunction in the above-entitled action, to enjoin the enforcement of Sections 3781 to 3786, inclusive, of Title 10 of the United States Code, 1956 editions, by restraining the defendant Wilber M. Brucker, Secretary of the Army, the defendant Dewey Short, Assistant Secretary of the Army, and the defendant Major General Robert V. Lee, The Adjutant General of the Army, from removing the plaintiff, Lieutenant Colonel Lee B. Ledford, Jr., from the active list of the United States Army, on the ground that said statutes as construed and applied in the present case violate the Due Process clause of the Fifth Amendment to the Constitution of the United States in that

"(a) Plaintiff was not given adequate notice of the accusations against him;

"(b) The burden of proof was shifted to the plaintiff to prove his innocence of the *ex parte* determination earlier made against him;

"(c) Plaintiff was denied the right to be confronted by and to cross-examine witnesses who had submitted statements against him that were considered at all levels of the proceeding;

"(d) Although no findings were ever made by either of the boards that heard witnesses, the defendant Short proceeded, without hearing witnesses, to make findings adverse to the plaintiff on conflicting evidence which involved credibility;

"(e) Such findings were made after the present litigation commenced and represented the first instance in the twelve

years since the statute in question was first enacted that the Secretary of the Army or his delegate had ever made specific findings of fact in any elimination case;

"(f) Such findings in material particulars pertained to matters which had never been charged or even intimated against the plaintiff during any prior phase of the proceedings over more than two years; and

"(g) The entire proceedings in their totality fall far below the minimal standards of fairness required by the concept of Due Process of Law."

Dated: September 29, 1960

(Signed) Frederick Bernays Wiener
FREDERICK BERNAYS WIENER
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.
*Attorney for the Plaintiff.*

[Certificate of Service on Attorney General Omitted]

---

**(2) Respondent's Memorandum Denying Motion to Convene a Three-Judge Court**

MEMORANDUM

Before convening a three-judge court the nature of the challenge concerning the constitutionality of an Act of Congress should be closely scrutinized to determine whether the challenge goes to the statute itself, or the application of the statute, or to the method of enforcing the statute. To justify the interposition of a three-judge court the challenge must go to the constitutionality of the statute itself.

The complaint alleges that as construed and applied to the plaintiff in the circumstances of the present case the statute is unconstitutional because the plaintiff was deprived of his office, his pay allowances, and retirement

rights without due process of law. A suit challenging the validity of the regulations and administrative action under the statute raises no substantial questions on constitutional validity as to the statute itself.

The complaint in alleging that the acts of the defendants amounted to deprivation of property without due process of law is insufficient. Plaintiff's application to convene a three-judge court is thereby denied. Counsel for the defendants will prepare the appropriate order.

/s/ EDWARD M. CURRAN
*Judge*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

---

## No. 752, Misc.

---

LEE B. LEDFORD, JR., *Petitioner*,

v.

The Honorable EDWARD M. CURRAN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA

---

**On Motion for Leave to File Petition for a Writ of Mandamus**

---

## PETITIONER'S REPLY MEMORANDUM

---

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N.W.,
Washington 6, D. C.,
*Counsel for the Petitioner.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



84154 O—62——45

## INDEX

Page

I. Mandamus in This Court Has Always Been Recognized as the Only Available Remedy When a District Judge Refuses to Convene a Three-Judge Court in an Appropriate Case .......... 2

II. Since Judge Curran in This Case Neither Dismissed the Complaint Nor Evaluated the Substantiality of the Constitutional Issues, No Appeal Lies to the Court of Appeals .......... 3

III. The Statute Here, Unlike Others Previously Considered, on Its Face Effectively Deprives the Individual Concerned of the Safeguards of Confrontation and Cross-Examination .......... 5

IV. The Attack on the Statute in Other Respects on the Footing That It Is Unconstitutional as Construed and Applied Requires a Three-Judge Court 7

Conclusion .......... 8

## AUTHORITIES

CASES:

*Ex parte Atlantic Coast R. Co.*, 279 U.S. 822 ...... 2
*Ex parte Bransford*, 310 U.S. 354 .......... 2
*California Water Service Co.* v. *Redding*, 304 U.S. 252 3
*Ex parte Collett*, 335 U.S. 897 .......... 8
*Ex parte Collins*, 277 U.S. 565 .......... 2
*Creary* v. *Weeks*, 259 U. S. 336 .......... 5, 7
*Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282 ..... 8
*Eastern States Petroleum Corp.* v. *Rogers*, 177 F. Supp. 944 .......... 3
*Ex parte Fahey*, 332 U.S. 258 .......... 2
*F.H.A.* v. *The Darlington*, 352 U.S. 977 .......... 5
*Fiske* v. *Kansas*, 274 U.S. 380 .......... 8
*Fleming* v. *Rhodes*, 331 U.S. 100 .......... 8
*Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73 .... 4
*French* v. *Weeks*, 259 U.S. 326 .......... 7
*Greene* v. *McElroy*, 360 U.S. 474 .......... 7
*Ex parte Hobbs*, 280 U.S. 168 .......... 2

Page

*Ex parte James*, 287 U.S. 572 .................... 2
*Ex parte Madden Bros. Inc.*, 283 U.S. 807 .......... 2
*Ex parte Metropolitan Water Co.*, 220 U.S. 539 .... 2
*Ex parte Northern P. R. Co.*, 280 U.S. 142, 280 U.S. 530, 281 U.S. 690 .............................. 2, 5
*Ex parte Peru*, 318 U.S. 578 .....................2, 3, 8
*Ex parte Poresky*, 290 U.S. 30 .................... 3
*Ex parte Public National Bank*, 278 U.S. 101 ....... 2
*Query* v. *United States*, 316 U.S. 486 ............. 8
*Rogers* v. *United States*, 270 U.S. 154 ............ 7
*Stratton* v. *St. Louis S.W.R. Co.*, 282 U.S. 10 ....... 2
*Two Guys from Harrison-Allentown* v. *McGinley*, 266 F. 2d 427 .................................. 4
*Ex parte United States*, 287 U.S. 241 .............. 3
*Wicks* v. *Southern Pac. Co.*, 231 F. 2d 130 .......... 4
*Ex parte Williams*, 277 U.S. 267 ................... 2

STATUTES:

Article of War 22 of 1916-1948 (10 U.S.C. [1926-1946 eds.] § 1493) ............................ 6

Article of War 101 of 1916-1948 (10 U.S.C. [1926-1946 eds.] § 1573) ............................ 5

Section 24b, National Defense Act (10 U.S.C. [1926-1940 eds.] § 571) ............................ 5, 6

28 U.S.C. § 1253 ................................. 3

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

---

No. 752, MISC.

---

LEE B. LEDFORD, JR., *Petitioner,*

v.

The Honorable EDWARD M. CURRAN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA

---

**On Motion for Leave to File Petition for a Writ of Mandamus**

---

## PETITIONER'S REPLY MEMORANDUM

---

The direction of the Solicitor General's arguments in opposition suggests that a few words by way of emphasis and further particularization will serve to clarify the issues.

Petitioner will show, first, that for fifty years mandamus in this Court has been recognized as the only remedy for refusal to convene a three-judge court; next, that although

a single judge may dismiss a complaint that raises no substantial federal question or that is otherwise outside the jurisdiction of the district court, here Judge Curran did not dismiss the complaint nor did he evaluate the constitutional challenge; third, the statute here, unlike others previously considered, on its face effectively deprives the individual concerned of the safeguards of confrontation and cross-examination; and, finally, the attack on the statute in other respects, on the footing that it is unconstitutional as construed and applied, requires a three-judge court.

**I. Mandamus in This Court Has Always Been Recognized as the Only Available Remedy When a District Judge Refuses to Convene a Three-Judge Court in an Appropriate Case.**

Turning first to the question of the proper remedy, apart from its availability in a particular case, it is the fact that, beginning just fifty years ago (*Ex parte Metropolitan Water Co.*, 220 U.S. 539), this Court has consistently held that the proper remedy to review the refusal of a District Judge to convene a three-judge court is by application for a writ of mandamus filed here. *Ex parte Collins,* 277 U.S. 565; *Ex parte Williams,* 277 U.S. 267; *Ex parte Public National Bank,* 278 U.S. 101; *Ex parte Atlantic Coast R. Co.,* 279 U.S. 822; *Ex parte Northern P. R. Co.,* 280 U.S. 142, 280 U.S. 530, 281 U.S. 690; *Ex parte Hobbs,* 280 U.S. 168; *Stratton* v. *St. Louis S.W.R. Co.*, 282 U.S. 10; *Ex parte Madden Bros. Inc.*, 283 U.S. 807; *Ex parte James,* 287 U.S. 572; *Ex parte Bransford,* 310 U.S. 354.

The doctrine that mandamus is a discretionary and extraordinary remedy, available only in extraordinary cases (e.g., *Ex parte Fahey,* 332 U.S. 258), a doctrine invoked here by the Solicitor General (Br. Op. 8-9), has never been applied to the foregoing situation. For even the strongest anti-mandamus view, so forcefully set forth in the dissenting opinion in *Ex parte Peru,* 318 U.S. 578, 590, 597, recog-

nizes that the writ lies in a case such as this one. There it was said,

> "Cases like *Ex parte Northern P. R. Co.,* 280 U.S. 142, ordering a district judge to summon three judges to hear a suit under § 266 of the Judicial Code [now 28 U.S.C. § 2284], must be put to one side. This is one of the excepted classes under the Act of 1925 in which direct review lies from a district court to the Supreme Court, and it is therefore an orthodox utilization of an ancillary writ within the rule of *Re Massachusetts,* 197 U.S. 482, *supra.*"

It is wholly wrong to speak (Br. Op. 8, 9) of any alternative remedy in the Court of Appeals, such as was admittedly available in *Ex parte Peru,* 318 U.S. 578, or, possibly, in *Ex parte United States,* 287 U.S. 241. For here 28 U.S.C. § 1253 provides for a direct appeal to this Court, so that the Court of Appeals has simply no power in the premises.

**II. Since Judge Curran in This Case Neither Dismissed the Complaint Nor Evaluated the Substantiality of the Constitutional Issues, No Appeal Lies to the Court of Appeals.**

Petitioner recognizes that, where the constitutional question presented is lacking in substance, a single judge may dismiss the complaint by himself. *Ex parte Poresky,* 290 U.S. 30; cf. *California Water Service Co.* v. *Redding,* 304 U.S. 252. Consequently, where the single district judge has dismissed a complaint because the constitutional question presented was insubstantial, or where on the face of the complaint federal jurisdiction in other respects is also lacking, then appeal lies to the Court of Appeals. That was the situation in *Eastern States Petroleum Corp.* v. *Rogers,* 177 F. Supp. 944 (D.D.C.), discussed at Br. Op. 7-8.

Here, however, Judge Curran did not dismiss the complaint either on the merits or for lack of jurisdiction; he only denied petitioner's motion to convene a three-judge court. Even on the Solicitor General's view (Br. Op. 9-13)

that the constitutional issues are indeed unsubstantial, it is the fact that numerous non-constitutional issues remain to be tried. Cf. *Florida Lime Growers* v. *Jacobsen,* 362 U.S. 73, and discussion at Pet. 14.

But the short answer is that, however much Judge Curran may have misconceived the gravamen of petitioner's pleadings, there is nothing in his memorandum (Pet. App. A36-A37) that purports in any way to evaluate the substantiality of the constitutional attack made upon the statute (Supp. Cmplt., ¶8½, Pet. App. A23-A24). Consequently in petitioner's view, this case is governed by *Wicks* v. *Southern Pac. Co.,* 231 F. 2d 130 (C.A. 9), cited at Br. Op. 7, note 3, where the Ninth Circuit said (p. 134):

> "It is only where a single district judge decides that a complaint raises a substantial constitutional issue and proceeds to decide that issue on its merits, that he acts without jurisdiction. *The remedy for such action is to seek mandamus from the Supreme Court to compel the convening of a three-judge court to hear and decide the substantial constitutional issue in the case on its merits.*" [Italics added.]

*Accord: Two Guys from Harrison-Allentown* v. *McGinley,* 266 F. 2d 427, 432 (C.A. 3).

Insofar as Judge Curran's comment (Pet. App. A37), to the effect that "The complaint in alleging that the acts of the defendants amounted to deprivation of property without due process of law is insufficient," may be read to import a lack of standing to sue and hence a determination on the merits unrelated to the substantiality of the constitutional issues, the short answer is that, as long as the allegations of the constitutionality of the statute as construed and applied and the prayer for a preliminary injunction remained in the case (Supp. Cmplt., ¶8½, Pet. App. A23-A24; Supp. Cmplt., ¶10(a)(2), Pet. App. A25; Motion for Preliminary Injunction, Pet. App. A29), Judge Curran had no jurisdiction to pass on the merits.

As this Court said in *Ex parte Northern P. R. Co.*, 280 U.S. 142, 144,

> "In the presence of the application for an interlocutory injunction—which was at no time withdrawn but constantly pressed—a single judge, whether Judge Pray or Judge Bourquin, was as much without authority to dismiss the bill on the merits as he would be to grant either an interlocutory or a permanent injunction. Our decisions leave no doubt on these points."

Nor, in such a situation, would Judge Curran have had authority to grant the present petitioner full relief. *F.H.A.* v. *The Darlington*, 352 U.S. 977.

**III. The Statute Here, Unlike Others Previously Considered, on Its Face Effectively Deprives the Individual Concerned of the Safeguards of Confrontation and Cross-Examination.**

Petitioner has not attacked the substantive validity of an elimination statute, but has confined himself to particularized allegations of a denial of procedural due process. That being so, the Solicitor General is demonstrably in error when he says (Br. Op. 11-12) that, in *Creary* v. *Weeks*, 259 U.S. 336, "this Court approved a statutory scheme which was, in all essential respects, identical to that in issue here."

There is a vital difference between the two statutes.

Section 24b of the National Defense Act (10 U.S.C. [1926-1940 eds.] §571), which was considered in *Creary*, afforded an officer tentatively placed in Class B an opportunity to appear before a court of inquiry—and a court of inquiry was a tribunal that had power to compel testimony. See Article of War 101 of 1916 through 1948 (10 U.S.C. [1926-1946 eds.] §1573):

> "A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses

> as is given to courts-martial and the trial judge advocate thereof.[1] * * * The party whose conduct is being inquired into or his counsel, if any, shall be permitted to examine and cross-examine witnesses so as fully to investigate the circumstances in question."

Here, on the other hand, the boards provided for in the statute now being assailed had no power to compel testimony, and the complaint specifically alleges (Cmplt., ¶9(d), Pet. App. A10) that "the board of inquiry refused to call for examination and cross-examination under oath numerous individuals whose *ex parte* statements damaging and prejudicial to the plaintiff had been considered both by the selection board and by the board of inquiry." That allegation, on which is rested one of the specifications of unconstitutionality (Supp. Cmplt., ¶8½(c), Pet. App. A23-A24; see also Pet. 16-17), sharply differentiates the present legislation from Section 24b of the National Defense Act. The result is that, under the present statute, petitioner was effectively denied the safeguards of confrontation and of cross-examination in a proceeding under which he stands to be stripped of his office and of the pay and retirement benefits thereunto appertaining.

[1] See Article of War 22 of 1916 through 1948 (10 U.S.C. [1926-1946 eds.] § 1493:

> "ART. 22. PROCESS TO OBTAIN WITNESSES.—Every trial judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions."

Accordingly, in view of *Greene* v. *McElroy,* 360 U.S. 474, petitioner's allegation that the statute is repugnant to the Constitution is, to put it mildly, highly substantial.[2]

**IV. The Attack on the Statute in Other Respects on the Footing That It Is Unconstitutional as Construed and Applied Requires a Three-Judge Court.**

Moreover, all of the other allegations that the statute is unconstitutional as construed and applied also raise substantial questions, as the citations to and discussion of decisions of this Court at Pet. 14-16, 17-21, amply demonstrate. These decisions foreclose the issues presented only in the sense that petitioner's remaining contentions are similarly shown to be well founded. It is appropriate to note that nothing in the cases here arising under Section 24b of the National Defense Act cited at Br. Op. 11, 12 (*French* v. *Weeks,* 259 U.S. 326; *Creary* v. *Weeks,* 259 U.S. 336; *Rogers* v. *United States,* 270 U.S. 154) even remotely involved the substantial and indeed shocking unfairness complained of here.

Here the statute is specifically and explicitly alleged to be unconstitutional as construed and applied to this

---

[2] In view of the quoted allegations of the complaint, which after well over a year still stand uncontradicted, no answer ever having been filed by the defendants below, it is not open to the Solicitor General to assert the contrary, as he does at Br. Op. 10, note 4.

In any event, his assertion there that "Petitioner was given the opportunity to call a number of others who had furnished statements against him, but he declined to do so, insisting that they should be called by the Board," is wrong both in law and in fact. It is wrong in law, because adverse witnesses, least of all those at a distance, do not respond on mere request. And it is wrong in fact, because at least one witness requested by petitioner, who had not previously submitted a statement, would not appear voluntarily, and although the Board of Inquiry was so advised, it still refused to call him. See pp. 241-242, 933-934, of the transcript before the Board of Inquiry, an exhibit submitted in support of the defendants' motion for summary judgment below.

petitioner in the circumstances of the present case: ¶8½ of the Supplemental Complaint, set forth at Pet. 9-10 and again at Br. Op. 4-5. Such allegations have been consistently held to constitute sufficient challenges of unconstitutionality. *Fleming* v. *Rhodes,* 331 U.S. 100 (Federal statute); *Query* v. *United States,* 316 U.S. 486 (State statute); *Fiske* v. *Kansas,* 274 U.S. 380 (State statute); *Dahnke-Walker Co.* v. *Bondurant,* 257 U.S. 282 (State statute).

To the extent that the Solicitor General now asserts that the allegations herein are insufficient (Br. Op. 12-13), he may be seeking to revive the view, forcibly expressed in the *Fleming* and *Dahnke-Walker* dissents, that it is necessary to attack the statute as a whole or to allege that it is bad on its face. Up to now, however, that has not been the view of this Court, nor has Congress seen fit to amend the basic jurisdictional acts.

If, therefore, the rule is now to be changed, the matter should be spelled out for all to see, and not left to rest on conjecture or on such inferences as may be drawn from the mere notation of a denial of leave to file.

## CONCLUSION

For the foregoing additional reasons, the present motion for leave to file should be granted; or, in the alternative, be set down for oral argument. *Ex parte Peru,* J. Sup. Ct., Oct. T. 1942, p. 131; *Ex parte Collett* and related cases, 335 U.S. 897.

Respectfully submitted.

Frederick Bernays Wiener,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N.W.,
Washington 6, D. C.,
*Counsel for the Petitioner.*

April 1961.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

---

**No. 752, Misc.**

---

LEE B. LEDFORD, JR., *Petitioner,*

v.

The Honorable EDWARD M. CURRAN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA

---

**On Motion for Leave to File Petition for a Writ of Mandamus**

---

## APPENDIX C(3) TO PETITION FOR A WRIT OF MANDAMUS

---

The order effectuating Judge Curran's memorandum has now been signed and entered, and is here set forth.

---

### (c) Respondent's Order Denying Motion to Convene a Three-Judge Court

[Caption Omitted]

ORDER

This cause having come on for hearing upon the motion of the plaintiff, Lee B. Ledford, Jr., to convene a three

judge court and upon consideration of said motion and the opposition thereto, and the oral arguments of counsel made in open court, and the court having filed a memorandum opinion herein, it is by the court this 27th day of January, 1961,

ORDERED that the motion of the plaintiff to convene a three judge court be and the same hereby is denied.

/s/ EDWARD M. CURRAN
*Judge*

---

Respectfully submitted.

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.
*Counsel for the Petitioner.*

FEBRUARY 1961.

No. 752 Misc.

# In the Supreme Court of the United States

OCTOBER TERM, 1960

LEE B. LEDFORD, JR., PETITIONER

*v.*

THE HONORABLE EDWARD M. CURRAN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA

*ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS AND ON PETITION FOR A WRIT OF MANDAMUS*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**


**ARCHIBALD COX,**
*Solicitor General,*
**WILLIAM H. ORRICK, JR.,**
*Assistant Attorney General,*
**ALAN S. ROSENTHAL,**
**MARK R. JOELSON,**
*Attorneys,*
*Department of Justice, Washington 25, D.C.*

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statutes involved | 2 |
| Statement | 2 |
| Argument | 6 |
| Conclusion | 13 |
| Appendix | 14 |


## CITATIONS


Cases:

| | |
|---|---|
| *Aaron* v. *Cooper*, 261 F. 2d 97 | 7 |
| *Atlantic City R.R., In re*, 164 U.S. 633 | 9 |
| *Bell* v. *Waterfront Commission of New York Harbor*, 279 F. 2d 853 | 7 |
| *Bransford, Ex parte*, 310 U.S. 354 | 6, 12 |
| *Collins, Ex parte*, 277 U.S. 565 | 12 |
| *California Water Service Co.* v. *City of Redding*, 304 U.S. 252 | 9 |
| *Carrigan* v. *Sunland-Tujunga Telephone Co.*, 263 F. 2d 568, certiorari denied, 359 U.S. 975 | 7 |
| *Creary* v. *Weeks*, 259 U.S. 336 | 11, 12 |
| *Eastern States Petroleum Corporation* v. *Rogers*, 177 F. Supp. 944 (D.C.D.C.), appeal dismissed, 361 U.S. 7 | 7 |

Cases—Continued

| | Page |
|---|---|
| *Eastern States Petroleum Corporation* v. *Rogers*, 265 F. 2d 593, motion to file petition for mandamus denied *sub nom. Eastern States Petroleum Corp.* v. *Prettyman*, 361 U.S. 805 | 7, 8 |
| *Eastern States Petroleum Corporation* v. *Rogers*, 280 F. 2d 611, certiorari denied, 364 U.S. 891 | 8 |
| *Fahey, Ex parte*, 332 U.S. 258 | 9 |
| *French* v. *Weeks*, 259 U.S. 326 | 12 |
| *Haines* v. *Castle*, 226 F. 2d 591, certiorari denied, 350 U.S. 1014 | 7 |
| *Jacobs* v. *Tawes*, 250 F. 2d 611 | 7 |
| *Payson* v. *Franke*, 282 F. 2d 851, certiorari denied, February 20, 1961, No. 615, this Term | 12 |
| *Peru, Ex parte*, 318 U.S. 578 | 9 |
| *Reaves* v. *Ainsworth*, 219 U.S. 296 | 12 |
| *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21 | 9 |
| *Rogers* v. *United States*, 270 U.S. 154 | 12 |
| *Schneider* v. *Herter*, 283 F. 2d 368 | 7 |
| *Sealy* v. *Department of Public Instruction*, 252 F. 2d 898 | 12 |
| *Stratton* v. *St. Louis S. W. Ry.*, 282 U.S. 10 | 6 |
| *White* v. *Gates*, 253 F. 2d 868, certiorari denied, 356 U.S. 973 | 7 |
| *Wicks* v. *Southern Pacific Co.*, 231 F. 2d 130, certiorari and motion to file petition for mandamus denied *sub nom. Wicks* v. *Brotherhood of Maintenance of Way Employees*, 351 U.S. 946 | 7 |
| *William Jameson & Co.* v. *Morgenthau*, 307 U.S. 171 | 9, 12 |
| *Williams, Ex parte*, 277 U.S. 267 | 6 |



84154 O—62——46

Constitution and Statutes:

Constitution of the United States: Page
Fifth Amendment ---------- 10, 11
National Defense Act of 1920, 41 Stat. 759, 773, Section 24b ---------- 11
Title 10 U.S.C., Chapter 359:
10 U.S.C. 3781–3786 ---------- 2, 3, 6, 9, 11, 12, 13, 14
10 U.S.C. 3781 ---------- 2, 3, 10, 14
10 U.S.C. 3782 ---------- 3, 10, 14
10 U.S.C. 3783 ---------- 3, 15
10 U.S.C. 3784 ---------- 15
10 U.S.C. 3785 ---------- 16
10 U.S.C. 3786 ---------- 10, 16
28 U.S.C. 2282 ---------- 2, 6, 8, 9, 12, 13, 14
28 U.S.C. 2284 ---------- 6, 7

# In the Supreme Court of the United States

OCTOBER TERM, 1960

---

No. 752 Misc.

LEE B. LEDFORD, JR., PETITIONER

*v.*

THE HONORABLE EDWARD M. CURRAN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA

---

*ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS AND ON PETITION FOR A WRIT OF MANDAMUS*

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

---

### OPINIONS BELOW

The memorandum opinion of respondent, denying petitioner's motion to convene a three-judge court (Pet. A36), is not reported.

### JURISDICTION

The memorandum opinion of respondent, denying petitioner's motion to convene a three-judge court, was entered on January 13, 1961. An order to that effect was entered on January 27, 1961. Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. 1651(a).

## QUESTIONS PRESENTED

1. Whether the extraordinary writ of mandamus is available in this Court to review the action of a single judge denying petitioner's application to convene a three-judge court, pursuant to the provisions of 28 U.S.C. 2282.

2. Whether, assuming that his action is reviewable by writ of mandamus here, the single judge below correctly determined that the convening of a three-judge court was not warranted because petitioner had failed to present a substantial challenge to the constitutionality of 10 U.S.C. 3781–3786, which prescribe the procedure for separation of officers from the Regular Army "for failure to meet standards."

## STATUTES INVOLVED

The relevant statutes are set forth in the Appendix, *infra*, pp. 14–17.

## STATEMENT

Petitioner is a commissioned officer in the Regular Army who is serving in the Judge Advocate General Corps. In 1958, administrative proceedings, pursuant to the provisions of Title 10 of the United States Code, Chapter 359 (10 U.S.C. 3781–3786, App., *infra*, pp. 14–17) were commenced to separate him from the service for failure to achieve the prescribed standards of performance. A Selection Board, convened under 10 U.S.C. 3781, determined that petitioner should be required to show cause for his retention on the active

list of the Regular Army.[1] A Board of Inquiry was then convened for the purpose of according petitioner a "fair and impartial hearing" on the "show cause" order, pursuant to 10 U.S.C. 3782. A lengthy hearing was held before the Board of Inquiry during which both the petitioner, who was represented by counsel, and the government presented witnesses. Subsequently, the Board ruled that petitioner had failed to show cause for his retention. A Board of Review, convened pursuant to 10 U.S.C. 3783, conducted another hearing in which petitioner presented witnesses. At the termination of the hearing, the Board recommended petitioner's removal from the Army. On June 20, 1960, Assistant Secretary of the Army Dewey Short, acting for the Secretary, approved the removal of petitioner from the service.[2]

On December 18, 1959, the date on which the Board of Review rendered its decision, petitioner filed suit in the United States District Court for the District of Columbia to enjoin the Secretary of the Army, Assistant Secretary Short, and the Adjutant General of the Army, from removing petitioner from the Army (Pet. A1–A15). In substance, petitioner alleged (1) that the statute did not authorize administrative removal

[1] The Selection Board's report set out four allegations of misconduct on the part of petitioner. Petitioner was subsequently given access to the material which had been considered by the Board in making these allegations.

[2] The Assistant Secretary's memorandum noted that he found certain acts of misconduct on the part of petitioner established by the record (Pet. A–26).

for specific acts of misconduct which were triable by court-martial, and (2) that the administrative proceedings conducted against petitioner had been procedurally unfair in various respects. The invalidity of the statute was not asserted.

The defendants in the action filed a motion for summary judgment on the ground that, by filing suit before action had been taken by the Secretary, petitioner had failed to exhaust his administrative remedies. A stipulation was then agreed upon, and approved by the court, whereby the suit would be stayed temporarily until the Secretary acted. After Assistant Secretary Short had approved the removal of petitioner on behalf of the Secretary, petitioner filed a supplemental complaint and new motions for preliminary and permanent injunctions enjoining his removal. A further stipulation was filed by the parties providing that the Army would retain petitioner in his position until the district court had disposed of the motion for a preliminary injunction.

Petitioner's supplemental complaint asserted that the Secretary's action had been illegal, and once more alleged that the administrative proceedings had been so unfair as to deny petitioner due process of law. Subsequently, petitioner amended the supplemental complaint to add the following allegations (Pet. A23–A24):

> As construed and applied to the plaintiff in the circumstances of the present case, Sections 3781 to 3786, inclusive, of Title 10, U.S. Code, 1956 edition, are unconstitutional, because depriving plaintiff of his office and of the pay,

allowances, and retirement rights thereunto appertaining without due process of law, in violation of the Fifth Amendment in that—

(a) Plaintiff was not given adequate notice of the accusations against him;

(b) The burden of proof was shifted to the plaintiff to prove his innocence of the *ex parte* determination earlier made against him;

(c) Plaintiff was denied the right to be confronted by and to cross-examine witnesses who had submitted statements against him that were considered at all levels of the proceeding;

(d) Although no findings were ever made by either of the boards that heard witnesses, the defendant Short proceeded, without hearing witnesses, to make findings adverse to the plaintiff on conflicting evidence which involved credibility;

(e) Such findings were made after the present litigation commenced and represented the first instance in the twelve years since the statute in question was first enacted that the Secretary of the Army or his delegate had ever made specific findings of fact in any elimination case;

(f) Such findings in material particulars pertained to matters which had never been charged or even intimated against plaintiff during any prior phase of the proceedings over more than two years; and

(g) The entire proceedings in their totality fall far below the minimal standards of fairness required by the concept of Due Process of Law.

On the basis of these allegations, petitioner sought "an order enjoining the defendants, and each of them, and their officers, agents and subordinates, from en-

forcing or executing the provisions of 10 U.S.C. §§ 3781 to 3786, inclusive, against the plaintiff" (Pet. A25). Asserting that his suit was one to restrain the enforcement and execution of an Act of Congress on the ground of its unconstitutionality, within the meaning of 28 U.S.C. 2282, App., *infra*, p. 14, petitioner filed a motion requesting that a three-judge court be convened pursuant to the latter provision and 28 U.S.C. 2284 (Pet. A34). This motion was denied by respondent, Judge Edward M. Curran of the United States District Court for the District of Columbia (Pet. A36–A37).

## ARGUMENT

1. Petitioner seeks a writ of mandamus directing the District Judge to convene a three-judge court for the purpose of hearing his claims as to the unconstitutionality of 10 U.S.C. 3781–3786. There is no justification for resort to the extraordinary writ of mandamus, however, since petitioner's remedy is by appeal, at the proper time, to the Court of Appeals for the District of Columbia Circuit.

(*a*). Although it is true, as petitioner maintains (Pet. 11), that this Court has held that mandamus is a proper remedy when a district judge fails or refuses to convene a three-judge court (*e.g., Ex parte Bransford,* 310 U.S. 354, 355; *Stratton* v. *St. Louis S.W. Ry.,* 282 U.S. 10, 16; *Ex parte Williams,* 277 U.S. 267, 269), in recent years the federal courts have consistently upheld the alternative rule that, if a "single District Judge in dismissing the case for lack of jurisdiction commits error, the error can be corrected by appeal to the Court of Appeals without

burdening the Supreme Court * * *" (*Jacobs* v. *Tawes*, 250 F. 2d 611, 615 (C.A. 4)).[3]

Petitioner, however, cites *Eastern States Petroleum Corp.* v. *Rogers*, 265 F. 2d 593 (C.A. D.C.), and *Schneider* v. *Herter*, 283 F. 2d 368 (C.A. D.C.), for the proposition "that the Court of Appeals lacks power to act in the premises" (Pet. 11), *i.e.*, to review a district judge's refusal to notify the chief judge of a circuit to convene a three-judge district court, pursuant to 28 U.S.C. 2284. But those cases merely decide that a motion for leave to file an application for an order to convene a three-judge district court cannot be addressed to the chief judge of the court of appeals; they do not hold that a remedy may not be had by way of appeal to the court of appeals, at the appropriate time, from the decision of the single judge. Indeed, the history of the *Eastern States Petroleum* litigation is proof not only that the refusal of the district judge to convene a three-judge court may be reviewed by direct appeal to the court of appeals, but also that this Court is no longer ready to invoke mandamus as the only remedy to review a single district judge's order: (1) this Court, refusing to re-

[3] Accord, *e.g.*, *Bell* v. *Waterfront Commission of New York Harbor*, 279 F. 2d 853, 858 (C.A. 2); *Carrigan* v. *Sunland-Tujunga Telephone Co.*, 263 F. 2d 568, 573 (C.A. 9), certiorari denied, 359 U.S. 975; *Aaron* v. *Cooper*, 261 F. 2d 97, 105–106 (C.A. 8); *White* v. *Gates*, 253 F. 2d 868, 869 (C.A. D.C.), certiorari denied, 356 U.S. 973; *Wicks* v. *Southern Pacific Co.*, 231 F. 2d 130, 135 (C.A. 9), certiorari and motion to file petition for mandamus denied *sub nom.* *Wicks* v. *Brotherhood of Maintenance of Way Employees*, 351 U.S. 946; *Haines* v. *Castle*, 226 F. 2d 591, 594 (C.A. 7), certiorari denied, 350 U.S. 1014.

view the district judge's order (177 F. Supp. 944 (D. D.C.)), dismissed a direct appeal (361 U.S. 7); (2) the chief judge of the circuit refused to convene a three-judge court on direct motion to him (265 F. 2d 593 (C.A. D.C.)); (3) this Court, refusing to review the action of the chief judge and of the district judge in refusing to convene the three-judge court, denied a motion for leave to file a petition for writ of mandamus (*sub nom. Eastern States Petroleum Corp.* v. *Prettyman,* 361 U.S. 805); (4) the appellant thereupon prosecuted an appeal to the court of appeals, which upheld its power to review the order of the district court by affirming the dismissal of the action (280 F. 2d 611, 613, fn. 7, 615–616 (C.A. D.C.)); and (5) this Court denied certiorari (364 U.S. 891).

(*b*). Even if a mandamus proceeding in this Court were an appropriate alternative to an appeal to the court of appeals, petitioner has not made a sufficient showing to invoke the Court's discretion. He has not asserted a case of unusual importance or urgency, but claims the right to review by way of mandamus in this Court solely by virtue of his allegation that respondent erred in denying the application for a three-judge court. Such a view would place on this Court the unnecessary burden of reviewing every claim that a district judge has erred in refusing to refer a case to a three-judge court, pursuant to 28 U.S.C. 2282, no matter how frivolous or unsubstantial. Since an extraordinary remedy such as mandamus should only be "reserved for really extraordinary causes," resort to mandamus should

not be allowed as a "substitute * * * for appeal," especially when, as here, appeal to the courts of appeals is not "a clearly inadequate remedy." *Ex parte Fahey,* 332 U.S. 258, 260; accord, *e.g., Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21, 27–28; *Ex parte Peru,* 318 U.S. 578, 584; *In re Atlantic City R.R.,* 164 U.S. 633, 635.

2. Even if mandamus were properly available here at this stage, the motion for leave to file a petition for a writ of mandamus should nonetheless be denied because petitioner failed to present a sufficiently substantial challenge to the constitutionality of 10 U.S.C. 3781–3786 to warrant the convening of a three-judge district court.

(*a*). Under 28 U.S.C. 2282, a three-judge court is required to be convened only if petitioner raises a substantial constitutional question as to the validity of an act of Congress. See *William Jameson & Co.* v. *Morgenthau,* 307 U.S. 171; *California Water Service Co.* v. *City of Redding,* 304 U.S. 252. "The lack of substantiality * * * may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." *Id.* at 255.

In the present case, petitioner's attack on the military separation statute (10 U.S.C. 3781–3786) lacks substantiality both because it is "obviously without merit" and also because its unsoundness "results from the previous decisions of this Court." The separation statute provides an administrative procedure for removing Regular Army officers who have failed to meet certain standards of performance

prescribed by the Secretary of the Army. This procedure was fashioned so as to provide the Army with a general scheme for eliminating from its ranks substandard and unsuitable officers, and was not intended to embody all of the incidents of a judicial proceeding. The procedures on their face are fair and reasonable for this type of proceeding, and even allow the officer to receive an honorable discharge in his present grade and severance pay after his removal (10 U.S.C. 3786(b)(2), App., *infra,* pp. 16–17). Under the statute, after a Selection Board has reviewed an officer's record and has recommended that the officer be required to show cause for his retention in the service, the officer must go forward to show, in a "fair and impartial hearing" before a Board of Inquiry, that he should not be removed (see 10 U.S.C. 3781, 3782). But this imposition of the burden of going forward, after the initial board has determined that there is sufficient ground to proceed, is neither unfair nor unusual and accords with procedures followed in comparable circumstances.

Although petitioner contends that the imposition of a "burden of proof" on the officer and the "denial of confrontation"[4] violate his rights under the Fifth Amendment (Pet. 15–17), previous decisions of this Court have also made it clear that these separation

[4] The Boards did not have the power of compulsory process. At petitioner's hearing, the Board of Inquiry produced several of the witnesses against him. Petitioner was given the opportunity to call a number of others who had furnished statements against him, but he declined to do so, insisting that they should be called by the Board.

procedures are valid. *Creary* v. *Weeks,* 259 U.S. 336, involved Section 24b of the National Defense Act of 1920 (41 Stat. 773), a predecessor of 10 U.S.C. 3781–3786. The section provided for the classification in "Class B" of Army officers who, in the opinion of a selection board, should not be retained in the service. An officer so classified could appear before a court of inquiry, where he would "be furnished with a full copy of the official records upon which the proposed classification [was] based and * * * be given an opportunity to present testimony in [his] own behalf." 41 Stat. 773. Two other boards were then to consider the matter, the latter board to determine whether or not the officer had been placed in Class B because of his neglect, misconduct, or avoidable habits. If he had, he was to be discharged from the Army. Creary, who had been discharged pursuant to this procedure, claimed that, since he had not been accorded a hearing before the final board, he had been deprived of his rights under the Due Process Clause of the Fifth Amendment. This Court rejected Creary's contention, concluding that, since the boards had acted pursuant to the terms of the statute, the discharge had been valid. The Court emphasized the plenary nature of the power given to Congress by the Constitution to regulate the armies and referred to the need for "expeditious procedure" in military affairs. 259 U.S. at 343.

In the *Creary* case, this Court approved a statutory scheme which was, in all essential respects, identical to

that in issue here. In other instances as well, the Court has pointed out that the military, itself, is the best judge as to which officers are fit to serve, and that, accordingly, military separation proceedings need not embody "the safeguards of a trial in court." *Reaves* v. *Ainsworth,* 219 U.S. 296, 306; see, *e.g., French* v. *Weeks,* 259 U.S. 326; *Rogers* v. *United States,* 270 U.S. 154. See also *Payson* v. *Franke,* 282 F. 2d 851 (C.A.D.C.), certiorari denied, February 20, 1961, No. 615, this Term. In view of these decisions, petitioner's attack on 10 U.S.C. 3781–3786 presented no substantial constitutional question.

(*b*). Under 28 U.S.C. 2282, a three-judge district court is required to be convened only if "[a]n * * * injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States * * *" is sought. Allegations which merely attack administrative action, or the method of enforcement of a statute or of regulations issued thereunder, are insufficient to justify the convening of a three-judge court. *William Jameson & Co.* v. *Morgenthau,* 307 U.S. 171; *Sealy* v. *Department of Public Instruction,* 252 F. 2d 898 (C.A. 3). Nor may a three-judge court be convened merely because a federal statute is claimed to have enabled an unconstitutional result to be achieved; rather, the action complained of must be shown to have been directly attributable to the provisions of the statute. See *Ex parte Bransford,* 310 U.S. 354, 361; *Ex parte Collins,* 277 U.S. 565, 569.

In the present case, many of petitioner's arguments are directed at the particular administrative proceedings, rather than at the statutory scheme itself. Thus, petitioner's charges that the allegations formulated against him were insufficient (Pet. 15), that Assistant Secretary Short improperly made findings in his case (Pet. 17–19), and that, under the circumstances, the entire administrative proceedings fell below "minimal standards of fairness" (Pet. 19–21) are in no true sense an attack on the provisions of 10 U.S.C. 3781–3786, but are simply a challenge to the propriety of the administrative action, and, as such, do not furnish a basis for the invocation of 28 U.S.C. 2282.

---

Since petitioner did not present a substantial challenge to the constitutionality of 10 U.S.C. 3781–3786, the respondent District Judge correctly refused to convene a three-judge court.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the motion for leave to file a petition for a writ of mandamus be denied.

ARCHIBALD COX,
*Solicitor General.*

WILLIAM H. ORRICK, JR.,
*Assistant Attorney General.*

ALAN S. ROSENTHAL,
MARK R. JOELSON,
*Attorneys.*

APRIL 1961.

## APPENDIX

28 U.S.C. 2282 provides:

§ 2282. *Injunction against enforcement of Federal statute; three-judge court required.*

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Chapter 359 of 10 U.S.C. (10 U.S.C. 3781–3786), entitled SEPARATION FROM REGULAR ARMY FOR FAILURE TO MEET STANDARDS, provides:

§ 3781. *Selection boards: composition; duties.*

The Secretary of the Army shall convene annually a selection board composed of five general officers. The selection board shall review the record of each commissioned officer on the active list of the Regular Army to determine whether he shall be required, because of failure to achieve the standards of performance to be prescribed by the Secretary by regulation, to show cause for his retention on the active list.

§ 3782. *Boards of inquiry: composition; duties.*

(a) Boards of inquiry, each composed of three or more general officers, shall be convened, at such places as the Secretary of the Army may prescribe, to receive evidence and make findings and recommendations as to the

fitness of officers to be retained on the active list of the Regular Army.

(b) A fair and impartial hearing before a board of inquiry shall be given to each officer required to show cause for retention under section 3781 of this title.

(c) If a board of inquiry recommends the retention of an officer, his case is closed. However, at any future time he may be again required to show cause for retention under section 3781 of this title.

(d) If a board of inquiry recommends the removal of an officer from the active list of the Regular Army, it shall send the record of its proceedings to a board of review.

§ 3783. *Boards of review: composition; duties.*

(a) Boards of review, each composed of five or more general officers, shall be convened by the Secretary of the Army, at such times as he may prescribe, to review the cases of officers recommended by boards of inquiry for removal from the active list of the Regular Army, and to make recommendations as to the retention of those officers.

(b) If a board of review recommends the retention of an officer, his case is closed. However, at any future time he may be again required to show cause for retention under section 3781 of this title.

(c) If a board of review recommends the removal of an officer from the active list of the Regular Army, it shall send its recommendations to the Secretary for his action.

§ 3784. *Removal of officer: action by Secretary of the Army upon recommendation.*

The Secretary of the Army may remove an officer from the active list of the Regular Army for any cause that he considers sufficient, if removal for that cause is recommended by a board of review under this chapter. The

Secretary's action in such a case is final and conclusive.

§ 3785. *Rights and procedures.*

(a) Each officer under consideration for removal from the active list of the Regular Army under this chapter shall be—

(1) notified in writing of the pendency of any proceeding for his removal;

(2) allowed reasonable time to prepare his defense;

(3) allowed to appear in person and by counsel at proceedings before a board of inquiry and a board of review; and

(4) allowed full access to, and furnished copies of, records relevant to his case at all stages of the proceeding.

(b) No person may be a member of more than one board convened under this chapter for the same officer.

§ 3786. *Officer considered for removal: voluntary retirement or honorable discharge; severance benefits.*

(a) At any time during proceedings under this chapter and before the removal of an officer from the active list of the Regular Army, the Secretary of the Army may grant his request—

(1) for voluntary retirement, if he is otherwise qualified therefor; or

(2) for honorable discharge with severance benefits under subsection (b).

(b) Each officer removed from the active list of the Regular Army under this chapter shall—

(1) if on the date of removal he is eligible for voluntary retirement under any law, be retired in the grade and with the pay to which he would be entitled if retired at his request; or

(2) if on that date he is ineligible for voluntary retirement, be honorably dis-

charged in the grade then held with severance pay equal to one month's basic pay at the rate to which he was entitled on the date his discharge, multiplied by the number of years of his active commissioned service, but not more than 12.

(c) For the purposes of subsection (b)(2), a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded.

MARCH 27, 1959.

## REVIEW OF CURRENT ELIMINATION PROCEDURES—REPORT TO DEPUTY CHIEF OF STAFF FOR PERSONNEL

(Prepared by Col. Frederick Bernays Wiener, JAGC, USAR)


I. The problem.
II. Facts bearing on the problem.
III. Discussion:
  A. Analysis of the 28 retention cases:
    1. RA efficiency cases.
    2. RA misconduct cases.
    3. EAD efficiency cases.
    4. EAD misconduct cases.
  B. Other possible causes of high retention rate:
    1. Work of the boards of inquiry.
    2. No requirement for findings where elimination recommended.
    3. Personnel factors in composition of boards.
  C. Assumptions underlying the elimination process.
  D. Considerations of legality:
    1. Elimination for specific acts of serious misconduct.
    2. Shifting the burden of proof.
    3. Failure to require findings.
    4. Risk involved in the present system.
    5. OASA directive to Board of Review.
IV. Conclusions.
V. Recommendations.
VI. Coordination.
Annex A. Details of 28 recent retentions by Board of Review.
Annex B. Illegality of parts of present process.
Annex C. Recent cases retained by boards of inquiry.


Memorandum for: Deputy Chief of Staff for Personnel.
Subject: Review of current elimination procedures.

### I. THE PROBLEM

1. The problem is to analyze the effectiveness of elimination procedures under 10 U.S.C. Secs. 3781-3786 (old Title I, Public Law 810, 80th Congress), and under AR 635–105 A & B, 2 Jan 1957, with a view to determining the reason why such a large percentage of cases initiated under those provisions result in retention, and to recommend action to decrease that percentage.

### II. FACTS BEARING ON THE PROBLEM

2. Despite numerous revisions of the Army Regulations implementing the cited statutory provisions, which date from 1948, and despite numerous careful studies of the operation of the elimination process—the most recent being the 1955–1956 DCSPER Staff Study (Officer Elimination System) and the report made on 30 April 1956 by Brig Gen Theodore W. Parker, OCSA (Review of the Officer Elimination System)—there is still widespread dissatisfaction with its operation. The Army Staff, by and large, believes that too many cases which are processed for elimination result in retention, while many officers connected with the final Review Board stage of the proceedings, either as board members, recorder, or counsel for respondents, feel that many of the cases should never have been processed.

#### RETENTION FIGURES

3. For the years 1948 through 1957, inclusive, a total of 796 RA officers were selected to show cause why they should not be separated from the Active List. Out of these, 339, or 42.5%, were retained (tab 1). In 1958, out of 35 completed cases involving all components, 16, or 45.7%, were finally retained (tab 2). Thus the retention percentage has remained constant, notwithstanding the 1957 revision of the ARs, which tipped the scales perceptibly against officers required to show cause.

4. For some years now, all officers selected to show cause, whether RA or EAD, have had their cases heard, with right to personal appearance, by the Army Board of Review for Eliminations. This board is composed of five general officers, three being permanently assigned, the other two being selected from a roster of MGs and BGs on duty at Hq D/A. When a non-RA officer appears, one or more non-RA general officers sit on the board. Of the last 100 cases heard by that board, 47 resulted in recommendations for retention: 29 RA retained, 16 RA eliminated; 18 EAD retained, 37 EAD eliminated. (Figures supplied by Col. Sams, Recorder.) Retentions through exercise of clemency by USA or ASA (M&RF) are not considered.

SCOPE OF STUDY

5. With a view to ascertaining the reasons for the high retention rate, 28 of the latest cases in which the Review Board recommended retention were examined and analyzed. The details of all of these cases are set forth in annex A.

6. In a recent retention case, civilian counsel for the respondent reexamined the scope of the basic statutory authority for elimination, and of the current ARs governing the process, with a view to resorting to the civil courts for relief in the event of an adverse decision by the Review Board. Pertinent portions of the brief prepared in support of the contemplated court proceeding are set forth in annex B. As is shown in greater detail below, the phases of the process that are attacked in the annex B brief on legal grounds are also shown to be administratively undesirable on grounds of policy. See pars. 47–55, below.

## III. Discussion

### A. ANALYSIS OF THE 28 RETENTION CASES

7. The cases that are separately analyzed in annex A will first be divided into RA and EAD categories, and within each group there will first be discussed the cases involving efficiency and then those predicated on alleged acts of misconduct.

*1. RA efficiency cases*

8. Sixteen of the 19 RA cases examined involved RA officers required to show cause for elimination on grounds of inefficiency. All but one of these 16 cases was initiated by OAD or by the Career Management Branch of the Technical Service concerned. The remaining case was field initiated following relief of the officer by reason of unsatisfactory performance but before any attempt at reevaluation following reassignment.

9. All of the fifteen D/A initiated cases under this heading were based on a low OEI. Three involved the lowest officer of grade and branch concerned, one more the second lowest. Six additional cases were reported as being in the lowest 1% of OEI score; three more in the lowest 2%; and one in the lowest 6%. The single field initiated case concerned an officer in the lowest 12%.

10. Of the sixteen RA inefficiency cases, perhaps only two (cases 7 and 12) appear on examination to have been fairly on the borderline; Case 7 involved an officer who won the Silver Star in WW II, Case 12 a TC officer who appears to have made a forceful impression on the review board.

11. In all of the other 14 RA inefficiency cases, the numerical OEI rating did not accurately reflect the adjectival evaluation placed on the respondent by the officers rating him. These cases accordingly document and substantiate the conclusion reached in the DCSPER Staff Study (28 Mar 1958), Officer Evaluation System, par. 3*d*(3)(a), that one of the weaknesses of the present system is the "Failure of the numerical score to reflect the rater's intended appraisal of the rated officer." The pattern that emerges is this, that if a rating officer uses the terms on the present ER in their literal dictionary meaning, then a report that evaluates an officer as average will, if followed by an unfavorable report, result in placing that officer in the lowest percentile levels.

12. Analysis of the RA inefficiency cases in which retention ultimately resulted shows that, in most of them, a request by the Removal Selection Board (10 U.S.C. Sec. 3781; more familiarly referred to as the 810 Screening Board) directed to the prospective respondent's current field commander for a special ER, for an evaluation of the officer's potential, and for a recommendation whether he should be required to show cause, would have prevented the case from ever beginning and would thus have saved the time of 8 general officers as well as substantial sums in travel and clerk hire.

13. On occasion, the danger signals were flying and should have been apparent to a perceptive, alert, and objective examiner. For instance (Case 2), the low OEI of a Colonel DC was based on ERs by line officers and was presented by an MC officer. The ERs reflected professional competence. In those circumstances an evaluation by one of the general officers in the DC seems fairly called for. Or, another instance (Case 3), an Ordnance officer's low OEI resulted from adverse reports on two tours as a comptroller. This was, on its face, either a malassignment or else the result of the impact of a new and directed procedure on reluctant users. If the latter, technical evaluation by OCA was indicated. In either event, the case on its face was not one for elimination.

14. In fairness to the Removal Selection Board, it must be pointed out that the Board has not been well served in initiated cases by OAD. All too often, the "Evaluation and Analysis" of the prospective officer's record is less an evaluation than a brief written against him. The unfavorable entries are emphasized, failures in minor misconduct more than ten years in the past is exhumed, and the favorable entries and comments are minimized. This attitude reflects the specific directions contained in Policy Implementation Instructions Nr 30–43, OAD, TAGO, 15 Dec 1958, Personnel Actions: Elimination and Relief from Active Duty (tab 3). Analysis of the cases enumerated in annex A leaves the distinct impression that, just as the wolves pounce on the unprotected sheep at the edge of the flock, so the action officers in OAD descend on the low men on the OEI totem pole. On occasion, as in Case 8, where the officer had already successfully defended two earlier show cause proceedings, and has a rising AEI, the recommendation that he be required to show cause a third time constitutes harrassment, and may well reflect an unhealthy emotional attitude on the part of the initiators. Otherwise stated, the OAD summaries that initiated fifteen of the cases analyzed in detail in annex A are far from objective, and belie the assertions and assumptions contained in so many documents that the order to show cause is a "determination" based on "careful screening."

15. With respect to the single field-initiated RA inefficiency case (Case 15), the recommendation for elimination was coincidental with reassignment, and before the respondent's performance in his new position could be evaluated. The same was true of the field-initiated EAD inefficiency cases (Nos. 26 and 28) discussed below, par. 26*c*. A great deal of time, money and paperwork could be saved if the D/A established a policy of not considering a field-initiated inefficiency case for elimination until the field commander had first made an effort to employ the officer concerned elsewhere in the command, and then given him a fair trial in the new assignment.

2. *RA misconduct cases*

16. Three of the RA cases examined were predicated on misconduct; and not a single one of the three should ever have been processed.

(*a*) Case 4 involved an officer of outstanding efficiency, charged by his estranged wife with adultery and indecent assaults on her teen-age daughter. If true, these are offenses deserving of dismissal and confinement, appropriate only for trial by court-martial. By proceeding under the elimination provisions, the Army rewards the officer guilty of such action either with retirement or with an honorable discharge and substantial severance pay. Apart from the questionable legality of such a course (as to which see pars. 48, 49, and annex B), this form of separation is utterly inappropriate for the conduct charged. True, the statute of limitations had run on court-martial charges—a plain indication that, as the Review Board necessarily found, the accusations were trumped-up and false. If the acts charged had in fact taken place, there would have been an immediate outcry from the victims.

(*b*) Case 16 involved an illeged concealment on applications for commissions, of three trials by Summary CM while an EM; case sparked by ACSI, and initiated by CMB of Tech Service; officer with good OEI. The fact is that trivial and immaterial misrepresentations cannot successfully be made the basis for elimination; Review Board voted to retain officer after only 13 minutes.

(*c*) Case 19 concerned a Negro CWO, married and with 7 children, alleged to have concealed two arrests and an instance of VD. One of the arrests occurred after the alleged concealment, which is to say, the accusation that respondent made a false official statement in that regard was itself a false official statement by the officer initiating the elimination proceedings made with reckless disregard of its truth or falsity. Moreover, married personnel should not be quizzed as to early VD misconduct.

17. As matter of policy, the elimination procedure with its rewards—full retirement privileges if eligible therefor, separation with honorable discharge and substantial severance pay (about $10,000 for a colonel with 18 years' service)—is appropriately only for the inept, and is wholly unsuited for the vicious. The ARs should return to the original policy set forth in the first implementation of P.L. 810, viz., "The provisions herein will not be used in lieu of court-martial action or action under the provisions of AW 104." Par. 3*d*, AR 605–200, 19 May 1949.

18. With respect to minor and immaterial concealments, it should be borne *in mind that, in fact, boards will not eliminate on that ground.* Consequently, adoption of a tacit policy not to initiate elimination cases based thereon will not lead to any differences in result. Nor would such a policy mean a lowering of the Army's moral standards. Truth is relative, not absolute. Minor shadings do not imply moral corrosion. The DCSPER Staff Study on the Officer Evaluation System states (par. 3*d*(3)(b)), what everyone knows, that ERs today are being consciously inflated to avoid hurting subordinates. Tested by the ordinary dictionary meaning of words, every senior officer joining in this practice is just as guilty of making a false official statement as the lieutenant who "forgets" about the summary court he had while a GI.

19. From time to time it has been proposed to revise the officer evaluation system by requiring every ER to be shown to the rated officer prior to forwarding. Invariably this proposal is met with the (successful) objection that with such a requirement in force there would be few honest ERs. If the officer corps as a whole lacks the courage and the candor to make truthful evaluations if those are required to be shown to the officers being evaluated, then it is high time to stop pursuing junior officers who, with the natural human reaction of forgetting the unpleasant, fail to record early punishments for minor offenses.

20. It is time, also, to establish a period of limitations after which punishments may be forgotten. An accused convicted by court-martial is not chargeable with prior convictions more than three years old. MCM, 1951, par 75*b*(2). Why then should an officer, each time he is called upon for a personal history statement, be required to list convictions going back in some instances ten and fifteen years? A sensible cut-off would be to provide that, if a conviction by military or civil court more than five years old has been duly brought to the attention of the D/A in circumstances where it was relevant, and has then been waived, it need no longer be mentioned by the officer, nor will it be set forth in any evaluation or other personnel action.

21. Similarly, it is time to consider old VD as a matter of health and not as a point going to current worth, and to regard it only in its purely medical aspects. Probably most EM contracted VD at some time; in the old Army, it was that event that marked the transformation from recruit to soldier. But to inquire of officers and married warrant officers, years after the event, whether they met with misfortune in their youthful escapades, asks an immaterial question which is essentially degrading, and serves no purpose other than the inadmissible one of prurient curiosity. Denials of VD other than in connection with current medical treatment should therefore not be made the predicate of any allegation of false official statements.

*3. EAD efficiency cases*

22. Only 5 of the cases examined involved attempted elimination of EAD officers on grounds of inefficiency and two of those (Cases 21 and 25) included misconduct as well. Of these 5 cases, only 2 were initiated in the field. The discussion that follows immediately below will deal only with the efficiency features.

23. The impression left by the EAD inefficiency cases is that the screening by the Elimination Selection Board, composed of colonels, is substantially inferior to that effected as to RA officers by the Removal Selection Board, which is composed of general officers; and that this difference is due to a lack of discrimination in evaluating evidence, with the result that the EAD cases reflect a shotgun approach. Here are some examples:

(*a*) Case No. 21 involved, in its more serious aspects, allegations of false official statements made by an officer in the lower 30% of OEI. That is surely not an unacceptable standing, yet the respondent was called on to defend an allegation of failure to discharge assignments properly—which he was in fact able to disprove to the hilt.

(*b*) Case No. 24 concerned a paratrooper with a Silver Star and 2 BSMs. Upon his relief, following an adverse report by an officer who later became an NP patient, he was reported as being in the lower 33% of OEI, and required to show cause on four allegations of inefficiency. On his readjusted OEI, at the time of the Review Board hearing, he was in the upper 43%. But even on the earlier figure, he was still too high to warrant initiating an elimination proceeding against him for inefficiency.

(*c*) Case No. 26, field-initiated without opportunity for evaluation on reassignment, lower 22%, yet ordered to show cause for inefficiency. This was actually an amazing instance of improper and unjust action; see details in annex A.

24. Here again, the reports submitted by OAD are partial, and do not reflect objective evaluations. One difficulty may be that the Elimination Selection Board is composed of Colonels, and that the combat arms branches of OAD are headed by BOs. This factor may well preclude independent Board evaluation of the show cause eliminations at the screening level. All of the EAD cases analyzed in annex A, and all but one of the 11 EAD cases recommended for retention by a Board of Inquiry (par. 31, below), concerned combat arms officers. See also annex C.

*4. EAD Misconduct Cases*

25. Of the 6 EAD cases involving misconduct, two (Cases 21 and 25) involve the minor concealments already discussed in pars. 18–21, above. Two more (Case 20 and 22) involve reliance on Art 15 punishments; and one (Case 23) was predicated on withdrawal of a security clearance; and the last one (Case 27), while involving alleged minor concealments, in fact was susceptible of a perfectly proper explanation. The last three categories will now be discussed in order.

26. Art. 15, UCMJ, like its predecessor, AW 104, authorizes nonjudicial punishment only for "minor offenses." Whether a particular dereliction is a minor offense, or reflects dishonesty or serious misconduct, is essentially a matter of command judgment. If the former, Art 15 action is indicated; if the latter, then charges should be preferred with a view to trial. Consequently, when a CO acts under Art 15, he determines that the offense is a minor one, and hence he should not be permitted to initiate elimination proceedings on the basis of two Art 15 actions. Cases like Nos. 20 and 22, where this was done, should be routinely bounced back. It would help if the ARs were made more explicit, and explained that two Art 15 proceedings do not add up to "recurrent misconduct."

27. In Case 23, elimination was recommended by the field automatically upon withdrawal of a security clearance by ACSI. Analysis of the case reveals that the CIC summary in the case, which charged false official statements, contained erroneous conclusions as to the legal effect of the matters allegedly concealed. Some of the concealments were minor at best (pars. 18–20, above), but as to some of the items there was in fact no falsehood. If the officer concerned had been called on for a reply, and JAG had been requested to check the legal conclusions of the CIC agents, this case would never have needed the attention of 5 general officers on the Review Board.

28. Finally, Case 27 involved allegations of falsely claiming decorations, and falsely concealing VD. As to the latter, apart from the considerations already canvassed in par 21, above, this officer had good reason for believing that his ailment was not within the category. The other charge broke down when it was established that the clerks made the entry, not the respondent; that he inquired of TAG whether he was entitled to what had been written down; and that he never wore the badge and decorations in question. A direction to reply by indorsement, or, at the most, an IG investigation at the local level, would have avoided inflating this incident to the level of an elimination case.

B. OTHER POSSIBLE CAUSES OF HIGH RETENTION RATES

29. There will now be discussed, in order, three other possible causes of the existing high retention rate, namely, the work of the Boards of Inquiry, generally referred to as the field boards; possible personnel factors in the composition of all the boards; and, finally, a review of the assumptions, expressed and tacit both, that currently underly the elimination process.

*1. Work of the boards of inquiry*

30. Where the respondent is an RA officer of more than three years' commissioned service in the RA, the law (10 U.S.C. Sec. 3782(a)) requires that the Board of Inquiry be composed of three general officers. In all other cases, it is composed of field grade officers senior to the respondent in both permanent and temporary rank.

31. TAGO (Maj. Averett, Off Br, Separations Sec) furnished a list of the 12 most recent elimination cases where retention had been recommended by the B/I. All but one of these concerned EAD officers, and the one exception was a recently integrated RA officer, so that none involved recommendations for retention made by general officers. See annex C.

32. Similarly, in each of the 17 cases analyzed in the annex A that concerned RA commissioned officers, the B/I of general officers recommended elimination. Some of those cases reflect striking differences between the attitudes of the B/I and the B/R, each one of which is composed of general officers. E.g., Case No. 2, B/I out 15 minutes and recommended elimination, B/R out 15 minutes and recommended retention. E.g., Case No. 13, B/I out 3 minutes and recommended elimination, B/R out 7 minutes and recommended retention. E.g., Case No. 16, B/I out 11 minutes and recommended elimination, B/R out 13 minutes and recommended retention.

33. The explanation of these striking instances is found in the provisions of current ARs, specifically, par. 8, AR 635–105B, 2 Jan 1957:

"The impression that it is the responsibility of the Government to establish its case before this B/I in much the same manner as is done in a court-martial is erroneous. The merits of the Government's case have been determined by the selection board prior to the convening of B/I. The B/I does not sit in judgment of this earlier determination, which has concluded that the respondent does not meet prescribed standards. The burden of proof, therefore, rests with the respondent to produce convincing evidence that he should be retained. In the absence of such a showing by the respondent, the board must find for elimination."

In quite a number of the cases analyzed in annex A, the Recorder of the B/I emphasized the foregoing concept, and in Case No. 10 the convening authority sent the B/I, prior to the hearing, a letter to that effect.

34. Apart from the circumstance, discussed below, par. 50, and in annex B, that the quoted provision is illegal because in conflict with the statutory direction in 10 U.S.C. Sec. 3782(b) that the respondent be given "a fair and impartial hearing," the fact is that the paragraph in question is demonstrably inaccurate. By no stretch of language or imagination can an order to show cause be transformed into a determination. Moreover, both the analysis of actual cases made in annex A as well as the consistently high retention rate demonstrate that, in actual fact, the merits of the Government's case have not been determined by the selection board.

35. The result of par. 8, AR 635–105B, therefore, is to transform three general officers into rubber-stamps, and to preclude their exercising any independent judgment. This is undesirable, not only because it deprives the Army of the board members' experience and utterly wastes their time, but also because it requires cases which could and should have been disposed of in the field to be sent to the D/A—where they will require the attention, not of 3 generals, but of 5. Thus the current approach is self-defeating.

36. Apparently field grade officers on B/I's seem less cowed by the ARs and exercise some modicum of independent judgment. See annex C, part II, the case of a recently integrated RA officer heard by such a board; and note (par. 31, above), that the last 12 cases where retention was recommended by a B/I, none involved a B/I composed of general officers.

*2. No requirement for findings where elimination recommended*

37. Par. 26*a*(1), AR 635–105B, requires the B/I to make findings if it recommends retention, but not if it recommends elimination. This makes the proceeding just a little harder for the respondent, in that it throws the factor of lethargy into the scales against him, and thus may well be illegal in depriving him of the "fair and impartial hearing" that the law requires; see par. 52, below, and annex B. The point made here is that the provision is administratively self-defeating. In mixed efficiency and misconduct cases (e.g., Nos. 5, 15, 21, 24, and 25 in annex A), an overall requirement for findings would, by narrowing the issues, greatly ease the task of the Review Board.

*3. Personnel factors in composition of boards*

38. As has been pointed out (par. 4 above), nearly 65% of all RA officers appearing before the B/R are retained. This figure is the more striking when it is remembered that the membership of both the Removal Selection Board and the Board of Review for Eliminations are drawn from the same source, viz., BGs and MGs on duty at Hq D/A. Except for the happenstance of not being stationed in Washington, the statutory B/Is are similarly staffed. All of these officers have essentially similar background, training, experience, and outlook. There is probably more continuity in membership on the Review Board, which has 3 permanent members, but this is a factor which normally would count against rather than for respondents; as the old adage has it, permanent jurors are convicting jurors.

39. In the face of the essential identity of personnel from which the three boards are drawn, it is plain that the high retention rate reflects, not weak heads or weak sisters at the B/R level, but weak cases passed by the screening board, and a shackling of judgment at the B/I level. These factors combine to shift all responsibility to a higher level, with the result that, in fact, the real screening and analysis of the cases is primarily done by the B/R. Moreover the impression from the fact that the R/A retention rate exceeds the non-RA retention rate at the B/R level, and from the further fact that all but one of the last 12 cases in which a B/I recommended retention involved non-RA officers, is that the discrepancy noted reflects, not any discrimination against non-RA officers by the B/R, but rather the fact that the non-RA cases have been more carefully sifted before they got to the B/R. In the absence of more complete study of the figures, however, this impression must necessarily be regarded as tentative only.

C. ASSUMPTIONS UNDERLYING THE ELIMINATION PROCESS

40. Throughout the studies, regulations, case records, and correspondence that deal with various aspects of the elimination process, there appear stock phrases that, for all the eminence of the persons using them, reflect extremely muddy and unclear thinking.

41. "The Army has no room for any but efficient and effective officers." If this means that the obvious deadwood should be eliminated from the officer corps, no one can quarrel with the idea; but the U.S. Army, like every other organization in every other field of human activity, will be composed of some people who are less efficient and less effective than others, and, like other organizations, it must learn to make do with a certain number of weaker members whose capabilities are limited. It is too often forgotten that promotion passovers effect a good deal of elimination of those who on the basis of current standards of evaluation have been found to be under par.

42. It is generally recognized at this time that elimination proceedings are not an appropriate method for a kind of RIF of RA officers. The purpose of Title I of Public Law 810, as the committee reports and hearings disclose, was not to consider comparative efficiency but rather to eliminate the dregs—the inefficient, the inept, and the substandard. It is undoubtedly true that the last RIF of EAD officers in late 1957 separated from AD a number of reserve officers whose overall efficiency was higher than that of some RA officers. But it is not feasible to treat both categories on the same footing, essentially because any attempt to do so would seriously impair the value of an RA commission. If all are going to be thrown into the same pot when the Army is reduced in strength, why bother with a Regular Army commission at all? No single step, it is believed, would do as much to destroy career motivation.

43. The underlying philosophy of the 1955–1956 studies, now reflected in the 1957 ARs, is that there is a pressing need to eliminate officers. It was for this reason that the "expansible Army" concept of the 1951 regulations (par. 4a, AR 605–200, 26 Jan 1951),[1] to the effect that a larger Army can utilize less efficient officers than a smaller one, was so indignantly rejected. But, however unpalatable the fact may be, there are only limited numbers of outstanding people in any field, and if the Army ever again mobilizes, it will necessarily have to utilize the services of many thousands of officers who do not now and never will measure up to the standards of the active Army of today.

44. Consequently there should be far more emphasis on the utilization of personnel, on the improvement of performance on the part of the lower half on the efficiency scale, on the constant exhortation of subordinates, and on warning officers when their efficiency appears to be declining, than on the need or even the desirability of expanding the elimination program. And, as the analysis of cases in the present study has disclosed, the basic reason for the high retention percentage in elimination cases is not that too many cases are "beaten," but rather that too many weak cases are initiated. The weakness of the 1955–1956 studies was that they completely failed to examine the screening process; the fallacy of those studies lay in their assumptions that (1) the screening process was dependable, that (2) every case selected to show cause therefore warranted elimination, and that (3) any case resulting in retention in consequence resulted from defects in the procedure subsequent to screening.

45. Thus, these studies complained that, too often, a respondent was able to secure letters from former commanders attesting to his worth with the result

[1] Continued through 18 June 1945 revision; dropped in 1957.

that he was retained. The new regulations, see par. 16a(7), AR 635-105B, accordingly minimize the weight to be given such letters. But, as the case analysis in Annex A shows, testimonials from recent commanders are frequently more accurate guides to an officer's worth than his OEI score and the generally slanted estimate submitted by the branches to the screening board.

46. Those studies, and considerable official correspondence thereafter, stress that elimination proceedings are "not punitive." In the sense that elimination does not have the same effect as a conviction for felony by a civil court, or a conviction by court-martial followed by dismissal with or without confinement, the statement is true. But, in fact, to eliminate an officer of over 15 years' service is to deprive him of valuable retirement rights, and thus it is punitive in fact. Such a deprivation in proper cases may be reviewed in the civil courts. Accordingly, it seems appropriate to examine the legal aspects of certain features of the present elimination process.

D. CONSIDERATIONS OF LEGALITY

47. Attached as Annex B is a brief, prepared for submission to the U. S. District Court for the District of Columbia in the event that it became necessary to challenge the legality of an elimination proceeding. Grounds of alleged illegality will be set forth very summarily here; interestingly enough, in each instance the feature said to be illegal is also administratively undesirable.

*1. Elimination for specific acts of serious misconduct*

48. When Title I of Public Law 810 was first introduced, it provided that the selection of any officer to show cause for retention "shall be based upon his failure to achieve such standards of performance as the Secretary of War shall by regulations prescribe, *or on other good and sufficient reasons appearing to the satisfaction of the Secretary of War and of which the selection board is advised.* The italicized clause having been stricken by the Committee, which then reported Title I as "a means of eliminating from the RA inefficient, inept, and substandard officers," it follows that Congress did not intend elimination proceedings to be used to rid the service of officers guilty of offenses punishable under the Articles of War (and, later, under the UCMJ). "Standards of performance" to remove the inefficient and inept does not include acts of misconduct, as the committee revision of the bill plainly shows. There is therefore a grave question whether "conduct unbecoming an officer," which has been traditionally punishable by court-martial (old AW 95, now Art 133, UCMJ), should be a ground for elimination, as now provided by par. 5b(13), AR 635-105A, as added by C4, 30 Dec 1958.

49. Moreover, since the eliminated officer is entitled either to all retirement privileges or, if not eligible for retirement, to an honorable discharge plus generous severance pay, it is likewise plain that Congress did not intend such benefits to be accorded officers guilty of misconduct. On this issue, legal argument and administrative policy are in accord.

*2. Shifting the burden of proof*

50. The shift in the burden of proof affected by Par. 8, AR 635-105B (quoted above, par 33), is not in accord with the statutory mandate for "a fair and impartial hearing," 10 U.S.C. 3782(b), particularly in view of the evidence before the Congressional Committees that the Army contemplated a B/I proceeding that "corresponds to a regular trial in a civil court, where a vital right is affected," "in the traditions of American justice." To urge that the elimination procedure is administrative rather than legal, or that the B/I does not operate in a judicial light, begs the question; the statute requires "a fair and impartial hearing;" all administrative hearings are required to conform to minimum standards of fairness; and to shift the burden of proof (as distinguished from the burden of going forward), simply on the basis of the one-sided and inadequate action of the screening board does not meet these requirements. This is even clearer where the convening authority has in effect directed the B/I to find against the respondent, as in Case 10 of annex A.

51. Here also, the legal and administrative considerations coincide; shifting the burden of proof has in fact crippled the effectiveness of the B/I, has wasted the time of its members, and has simply shifted the burden of decision to the B/R at the D/A level.

*3. Failure to require findings*

52. The provision in par. 26a(1), AR 635–105B, which requires the B/I to make findings when it recommends retention but not when it recommends elimination, is unfair to the respondent by making it easier for the board to hold against him, and hence in violation of the law's requirement for "a fair and impartial hearing;" and, as shown in par. 37, above, it is undesirable administratively because, in a mixed case, it fails to narrow the issues and thus places a greater burden on the B/R.

*4. Risk involved in the present system*

53. In view of 10 U.S.C. Secs. 1162 and 1163, there is no legal obstacle to the elimination of non-RA officers because of misconduct, but in view of numerous provisions for equality of treatment as between RA and non-RA, and in view of the normal inclination of civil courts to review administrative proceedings for essential fairness, it is believed that the considerations outlined in pars. 48–50 apply to all eliminations.

54. It is understood that the issues discussed in annex B and briefly summarized in pars. 46–51 are presently under consideration by TJAG, and that no conclusion has yet been reached there. There is no need at this juncture to pursue the discussion further. The important point for DCSPER is that a JAG opinion contrary to the opinions expressed in annex B will not in any sense guarantee that a U.S. District Court will uphold the present procedures, and that if a Federal court holds those procedures to be illegal because in violation of the statute, the result will be that every officer heretofore separated thereunder will be free to bring suit in the Court of Claims for back pay on the basis that his elimination was improper.

55. Whether or not it is desirable to run such a risk is essentially a command decision. But inasmuch as each of the features of doubtful legality is also of questionable desirability as a matter of policy, there appears to be no compelling reason for taking any risk whatever in this area.

*5. OASA directive to Board of Review*

56. A letter from the former ASA(M&RF) to the B/R, subject: Finding of Moral or Professional Dereliction in Certain Elimination Cases, 23 May 1957 (tab 4), reads in pertinent part as follows:

"As guidance:

"a. Elimination involving reasons stated in subparagraph 5b(1) through (5), AR 635–105A, will be regarded as conclusively indicating moral or professional dereliction.

"b. Elimination involving reasons stated in subparagraph 5b(1) through (5), AR 635–105A, may be regarded as moral or professional dereliction when correction of the particular deficiencies is within the control of the individual."

57. Reasons (1) through (5) involve efficiency; the remainder are as follows:

(6) Repeated failure to meet personal financial obligations.

(7) Mismanagement of personal affairs detrimentally affecting performance of duty.

(8) Same, to the discredit of the service.

(9) Intentional omission or misrepresentation of facts in official statements.

(10) Acts of intemperance and/or personal misconduct.

(11) Homosexuality.

(12) Apathy, defective attitudes, or other character or behavior orders.

58. The letter in question has at least two doubtful features.

(a) First, it would be very hard to establish that causes (10), (11), and (12) listed just above represent situations where, in fact, "correction of the particular deficiencies is within the control of the individual." Certainly alcoholism and a good deal of homosexuality are essentially health disorders that are as little under the control of the individual as cancer, arthritis, heart disease, TB, or insanity. Similarly, when does an officer's "mismanagement of personal affairs" really establish dereliction? Compare Case 5 in annex A, and the domestic trouble there involved.

(b) Second, an intimation by higher authority that certain factors are to be regarded as "conclusive" does not lose its force by being labelled "guidance." Similar directives in court-martial cases have regularly resulted in reversals by the Court of Military Appeals on the ground that they represented improper exercises of "command influence."

59. It is not to be expected that a civilian court will take a more charitable view of the letter in question, which accordingly renders potentially vulnerable virtually every non-RA case in which the B/R has made or will make a finding that "moral or professional dereliction" is present.

60. If the letter were withdrawn, this very real danger would be averted. It should either be withdrawn, or else rewritten in the light of the foregoing comments, with, in any event, the word "conclusively" omitted. Indeed, it would seem that a board of five general officers, all of more than twenty, and some of over thirty years commissioned service, are fully competent, by reason of intelligence, integrity, and experience, to determine without guidelines or outside assistance whether particular conduct does or does not constitute "moral or professional dereliction" on the part of the individual concerned.

## IV. Conclusions

### A. BASIC CAUSES OF HIGH RETENTION RATE

1. The present high retention rate in elimination proceedings is the result of two factors:

(*a*) Inadequate screening before respondent is ordered to show cause.

(*b*) Inadequate consideration at B/I level.

2. The present high retention rate in elimination proceedings is not the result of a different class of personnel or of a different outlook at the B/R level.

### B. BASIC CAUSES OF INADEQUATE SCREENING

3. Inadequate screening before respondent is ordered to show cause results from a combination of factors, as follows:

(*a*) Questionable approach in these respects:

(1) Undue reliance on low OEI scores.

(2) Reliance on presentations made to screening boards by OAD and CMBs of Tech Services, which in fact are generally non-objective and often heavily slanted against prospective respondents.

(*b*) Lack of professional assistants to help screening boards to scrutinize OAD and CMB presentations.

(*c*) Failure to require cross-checks on recommendations, viz:

(1) Failure to ask for evaluation from field when OAD or CMB initiates elimination because of low OEI.

(2) Failure to require field to reevaluate relieved officer after fair trial in reassignment when field initiates action.

(3) Failure to ask for legal analysis of ACSI reports alleging misrepresentation or concealment of court proceedings.

(*d*) Application of unsound disciplinary standards in elimination cases, viz:

(1) Using elimination as substitute for trial by court-martial.

(2) Using elimination where CO by acting under Art 15 has determined offense or offenses to be minor.

(*e*) Application of unrealistic standards in case of:

(1) Omission to disclose old punishments for minor offenses.

(2) Omission to disclose old VD cases.

(*f*) Elimination Selection Board, which initiates show cause orders in cases of probationary RA and non-RA officers, seems additionally handicapped in exercise of objective judgment because its members are outranked by heads of Combat Arms Branches in OAD who initiate recommendations.

### C. BASIC CAUSE OF INADEQUATE CONSIDERATION AT B/I LEVEL

4. Inadequate consideration at B/I level, particularly in RA cases, is result of shackling B/I's judgment by directives in current ARs, which sometimes are supplemented by specific directions by convening authority.

### D. LEGAL CONSIDERATIONS

5. There exists a substantial question regarding legality of these features of present elimination process:

(*a*) Resort to elimination in case of RA officers charged with specific, serious acts of misconduct that are triable by court-martial.

(*b*) Shifting burden of proof to respondent at B/I level.

(*c*) Requiring findings by B/I only in cases where retention is recommended.

6. Foregoing legally doubtful features are also in each instance administratively undesirable:

(*a*) RA officer guilty of serious misconduct should not receive retirement or honorable discharge with severance pay, which are only alternatives in elimination cases.

(*b*) Shifting burden of proof shackles judgment of B/I members, turns them into rubber stamps, and shifts responsibility for case to, and takes up time of, five general officers on the B/R.

(*c*) Failure to require findings by B/I that recommends elimination results in burdening B/R with issues and evidence that B/I may have resolved in respondent's favor.

7. Present OASA directive to B/R in non-RA cases contains expressions susceptible of being construed as direction to convict, and hence might well make such cases vulnerable if challenged in civil courts.

E. LESSENING OF EMPHASIS ON ELIMINATION

8. Energy now expended on elimination cases would be more profitably employed in career management, supervision, and corrective improvement of officers in lower efficiency brackets.

## V. Recommendations

*1. Administrative*

(*a*) Retention Selection Board should be assigned experienced and knowledgeable officer, preferably with legal training, to act as Executive Officer, and to scrutinize presentations made by OAD and career branches of Tech Services.

(*b*) Elimination Selection Board should be given similar professional assistance.

(*c*) General officer should be detailed as permanent president of Elimination Selection Board.

*2. Policy directives*

(*a*) Every recommendation for elimination initiated by OAD or career branches of Tech Services should, before consideration by screening board, be routinely referred to officer's current commanders for (1) special ER, (2) evaluation of potential, and (3) recommendation as to whether show cause order should be issued.

(*b*) No recommendation for elimination initiated in the field should be considered by the screening board in the absence of officer's reassignment and reevaluation after fair trial in such reassignment.

(*c*) No recommendation for elimination of RA officer on basis of specific acts of serious misconduct punishable by court-martial should be processed by the screening board.

(*d*) No recommendation for elimination based on two Art 15 punishments should be processed where CO acting under Art 15 had option of preferring charges and recommending trial.

(e) Every recommendation for elimination based on report by ACSI operatives concerning alleged acts in, or punishments by, civil courts should be routinely referred to TJAG for analysis.

(*f*) No recommendation for elimination based on alleged concealment of punishment, civil or military, for minor offenses more than five years previously should be processed.

(*g*) No recommendation for elimination based on alleged concealment of VD should be processed.

(*h*) OAD Policy Implementing Instructions NR 30–43, Personnel Actions—Elimination and Relief from Active Duty, 15 Dec 1958, should be revised, not only to reflect the foregoing views, but also to eliminate present emphasis on every item of stale misconduct.

(*i*) OASA Guidance Letter to B/R should either be withdrawn or else revised to eliminate word "conclusive," and to emphasize that ultimate determinations rest in the sound but uncontrolled discretion of the B/R.

*3. Revision of regulations*

(*a*) AR 635–105 A & B should be extensively revised, with particular reference to the following:

(1) Delete all references to burden of proof shifting to respondent.

(2) Require boards of inquiry to make findings as to proof or disproof of each allegation.
(3) Delete all references to show cause order as a "determination" of the allegations made.
(4) Restate principle that elimination will not be used as a substitute for disciplinary action.
(5) Emphasize that two Art 15 actions do not constitute recurrent misconduct.

(*b*) Establish five year statute of limitations for minor punishments, after which they need not be referred to by officer concerned, and will not be made basis of personnel actions.

(*c*) Establish policy that no personnel actions will be predicated on inquiries regarding VD.

(*d*) Revise promotion regulations to provide that, when officer in zone of consideration is ordered to show cause, action on promotion will be suspended to await final outcome of elimination proceeding, and such period of suspension will not be considered a passover.

*4. Basic policy reorientations*

(*a*) Shift emphasis in personnel field from elimination to utilization, improvement, and career management of officers in lower efficiency groups.

(*b*) Continue efforts to modify present efficiency reporting system, with particular reference to:
(1) Providing a system which does not require double-talk and inflation of reports to protest subordinates who though competent are not outstanding.
(2) If numerical scoring system must be retained (and apparently it must be), then modify so that numerical score will reflect only observable performance of assigned duties.

## VI. Coordination

1. Subject-matter of study was discussed with Senior Member and Recorder of Army Board of Review for Eliminations; Asst JAG, Military Affairs; Recorder, Retention Selection Board; members of PAD, P&RD, C&SD in DCSPER; and Gens Mather, Bond, and Stoughton.

2. In view of limited time available, further coordination could not be effected. If this study is to be further staffed, coordination should be sought in the following areas: TAGO; TJAGO; OAD; Pres, RSB; Pres, ESB; Pres, ACRB.

3. As a matter of completeness, USAF experience with elimination system should probably be examined; 10 U.S.C. Secs. 8781–8786 are same as corresponding Army provisions, and derive from same source, viz., Title I of P.L. 810, 80th Congress.

Frederick Bernays Wiener,
*Colonel, JAGS, USAR.*

Attachments:

Annex A: Analysis of 28 recent elimination cases in which the Army Review Board recommended elimination.

Annex B: Illegality of (1) employing administrative elimination procedure in cases of RA officers charged with misconduct and of (2) present regulations shifting the burden of proof to respondent after he has been directed to show cause.

Annex C: Last 12 cases in which a Board of Inquiry has recommended retention; analysis of the single RA case therein included.

Tab 1: Separation of RA officers under elimination procedures, 1948–1957.

Tab 2: Separation of officers under elimination procedures, 1958.

Tab 3: OAD, Policy Implementation Instructions 30–43, Elimination and Relief from AD, 15 Dec 58. [Omitted from this copy.]

Tab 4: Ltr, OASA, 23 May 1957, Finding of Moral or Professional Dereliction in Certain Elimination Cases.

---

## Annex A

## Analysis of 28 Recent Elimination Cases in Which the Army Review Board Recommended Retention

1. Request was made to the Army Review Board for Eliminations for a list of the last 25 cases in which that Board had recommended retention, and the

proceedings in those cases, insofar as available from TAG, were examined. Thereaafter 10 additional RA cases were requested, and the files (except for those of 4 CWOs) were also examined.

2. The cases that were examined are here divided into RA and non-RA; within each group they are arranged in order of rank; and within each grade they are arranged alphabetically by branch.

3. A key to the individuals' names and service numbers is available, but for obvious reasons is not made a part hereof.

PART I. REGULAR ARMY OFFICERS

*Case No. 1: Colonel, Artillery*

*Prior service.*—16 years active commissioned service. Commissioned, NGUS, 1936–1941; EAD 1941–1946; integrated RA 1946. WW II, ASF and OPD, WDGS. LM and OLC. Graduate C&GSS and AFSC.

*Initiator of proceedings.*—Arty Branch, OAD.

*Grounds.*—Lower 1% of OEI; mediocre service; defective attitude.

*Summary of evidence.*—Nervous perfectionist; allegations of being anti-social proved to be allergy to tobacco smoke; many indications of competent service; adverse remarks covered short periods, expecially service as Deputy of US mission to Soviet Zone of Germany, where conflicting directives from several sources were common; at time proceedings were instituted was doing excellent job as SAA to North Dakota NG; numerous favorable comments by general officers, including Generals W. B. Palmer and C. K. Gailey; B/I out 6 minutes, B/R out 25 minutes.

*Comment.*—OEI figure did not present accurate estimate of officer's worth to service.

*Evaluation.*—If field report had been required on receipt of OAD recommendation, case would in all probability not have been processed further.

*Case No. 2: Colonel, Dental Corps*

*Prior service.*—16 years active commissioned service. Early Inf-Res commission on graduation from college, then Dental-Reserve commission after dental school; EAD in WW II, short interruption, integrated RA in 1947.

*Initiator of proceedings.*—CMB, SGO.

*Grounds.*—Lower 1% of OEI; reached zenith of potential; failure to exercise necessary leadership.

*Summary of evidence.*—ER comments were "uncooperative social attitude," "negative personality;" "lacks force." Comments also were "professionally competent" and "dental service superior." Adverse comments were by lay officers (CGs and Dep CGs of isolated post); elimination recommended by MC officer in SGO. Respondent received no indication of inefficiency. Had in fact made professional contribution to dentistry, and had in dutch-uncle fashion brought drafted dentists in line so that they performed properly. B/I out 15 minutes, B/R out 15 minutes.

*Comment.*—OEI figure misleading, particularly because it did not reflect comment of adverse raters that respondent provided superior professional service. Also, expression in AR that "officer has reached his zenith of potential" is particularly misleading as applied to dentists; as of 28 February 1959, there were 98 RA Colonels DC, permanent and temporary, and 4 dental generals (3 after FY 1959); on the face of the figures, therefore, most dentists reach their zenith when they are promoted to colonel.

*Evaluation.*—This case had its danger signals flying: Low OEI due to ratings by laymen, ERs showed respondent was professionally competent, recommendation for elimination was made by a doctor, not a dentist. If screening board had requested an evaluation by the DC generals, case undoubtedly would have been stopped then and there.

*Case No. 3: Colonel, Ordnance Corps*

*Prior service.*—26 years commissioned service; USMA 1932; SS and BSM in WW II.

*Initiator of proceedings.*—Ord Br, OAD.

*Grounds.*—Lower 1% of OEI; failure to keep pace; failure to discharge assignments.

*Summary of evidence.*—Ordnance officer since 1941, Division Ordnance Officer in WW II, later graduate of Comptrollership course at Syracuse U. Then

assigned as Comptroller at Redstone Arsenal; relieved; sent overseas; assigned as Comptroller KMAG, to teach Koreans cost accounting. In respondent's words, "I find that my entire problem is the result of statistically low rating scores received while I was in the specially directed assignments as a comptroller." Did not examine own ERs, never advised regarding adverse reports. One of adverse raters submitted favorable statement, saying, "If Colonel X is unacceptable for active duty now, he has been unacceptable for active duty for 25 years." Impression that this is case of Ordnance Officer malassigned to comptrollership assignments is dispelled by testimony and statements in file indicating respondent was a top-flight comptroller, but had difficulty introducing new financial concepts into installation primarily interested in production, and into foreign army knowing nothing of costs and caring even less. B/I out for 3½ hours (including lunch), B/R out 30 minutes.

*Comment.*—Striking instance of OEI failure to reflect either officer's capabilities, or result of possible malassignment consequent on change of MOS, or clash that results when dedicated perfectionist undertakes to impose an unsettling D/A directive on officers of higher rank accustomed to a simpler and less burdensome system.

*Evaluation.*—If screening board had called on respondent's last few field commanders for special reports, or had asked OCA to appraise respondent's comptrollership efficiency from the comptroller's point of view, extremely unlikely whether this proceeding would have been instituted. Present case also one that was flying danger signals.

*Case No. 4: Colonel, Quartermaster Corps*

*Prior service.*—18 years commissioned service; USMA 1940; permanent Major; temporary Colonel.

*Initiator of proceedings.*—CMB, OQMG.

*Grounds.*—"Acts of personal misconduct," based on voluminous and verbose accusations made by respondents estranged wife and her two daughters. Accusations covered every spat and tiff in 8 years of married life, but most serious charges were adultery and two alleged indecent assaults on 17 year old daughter.

*Summary of evidence.*—Couple married in 1958, wife had three children by prior marriage, respondent adopted them. In later years, fairly stormy home sessions: these were alleviated by wife receiving psychiatric care. Early in 1956, wife announced intention of leaving (for religious reasons), which she did with all children in June. Respondent made arrangements for ample support, but in 1957 negotiations for property settlement broke down. Wife and daughters then made accusations. Respondent denied them. Enlisted polygraph operator tested one daughter, asking "Did X (surname only) do this?", and determined daughter was truthful. Respondent refused to submit to polygraph test on advice of counsel, case then submitted, and respondent required to show cause. Some indication this was done because statute of limitations had run on court-martial charges.

Long B/I hearing, which developed accusers' self-contradictions,, and inherent improbability of accusations; Polygraph experts also challenged enlisted operative's interpretation. Respondent had high OEI, was in vital QM job, and strongly supported by his CG, who knew both respondent and wife. B/I nearly hours.

At B/R, three general officers appeared as character witnesses for respondent; latter also testified; summing-up by counsel analyzed evidence and exposed inconsistencies and contradictions. B/R, out 9 minutes.

*Comment.*—If respondent had in fact made indecent assaults on his teenage daughter, he should have been tried and sentenced to dismissal and confinement, not eliminated with honorable discharge and $10,000 severance pay. Brief in Annex B was prepared to challenge this case in civil courts if necessary, on grounds elimination not authorized for specific acts of misconduct.

At present (see par. 9*a*(3), AR 15–6, added by C2, 15 Jan 1959), polygraph material would be inadmissible at any stage. Quite apart from legal question, as a matter of sound policy, allegations such as were made here should either be tried by court-martial or dismissed.

*Evaluation.*—Fact that statute of limitations had run, because accusations not previously brought to attention of military authorities, should have warned screening board that case was suspect. If incidents had actually occurred, victims undoubtedly would have complained immediately.

84154—62——48

*Case No. 5: Lieutenant Colonel, Corps of Engineers*

*Prior service.*—18 years active commissioned service. ROTC commission 1940; Thomason Act, 1940–1941; RA since 1941. With OSS behind lines in China, WW II, LM with V, BSM with V.

*Initiator of proceedings*—CMB, OCE.

*Grounds.*—Lowest 6% of OEI, seven years downward trend, 2 passovers for temporary colonel; (1) unacceptable standard, (2) failure to exercise leadership, (3) mismanagement of personal affairs.

*Summary of evidence.*—While on ROTC duty, clash with PMS&T on grounds involving veracity; respondent's wife interfered; later reported "turbulent marital life, subsequent acceptance of wife's abuse, dominated by wife." Couple then had 4 children, harmony apparently restored thereafter, now have 5. Prior to B/I hearing, respondent asked for polygraph test; administered by same EM as in Case No. 4, who, in questions, referred to PMS&T, a full colonel, simply by surname, and concluded respondent was truthful. While at TEC, Fort Belvoir, respondent became interested in rocketry, and participated in this activity to greater extent than immediate superior liked. Considerable disparity between rater's numerical evaluations and extremely complimentary adjectival comments by MG Tulley, CG, B/I out 19 minutes. Gen Tulley appeared as witness for respondent at B/R, B/R out 30 minutes.

*Comment.*—If AR had required B/I to make findings, it might have eliminated "mismanagement of personal affairs," an allegation based on old and hence necessarily stale incident, from further consideration by B/R. Apart from that, plain that OEI did not correctly reflect officer's value.

*Evaluation.*—If CG, TEC, where respondent was serving when proceedings were initiated, had been called on for evaluation, there would have been no proceedings. Fact that OEI was said to be lowest 6%, instead of the usual lowest 1% or 2% of these cases, should at least have raised someone's eyebrow, and fact that elimination recommendation spoke of "7 years downward trend" should have raised a doubt: why wait 7 years? Substantial disparity between case as presented by OCE, and adjectival comments of CG, TEC on the ERs on which case rested. Case also suggest undesirability, not to say futility, of delving into officers' husband-wife relationships.

*Case No. 6: Lieutenant Colonel, Finance Corps*

*Prior service.*—15 years active commissioned service. 6 years NGUS enlisted, then NGUS commissioned, EAD 1942, integrated 1947; 24 years total commissioned service, active and inactive.

*Initiator of proceedings.*—CMB, OCFin.

*Grounds.*—Consistently low OEI since 1951; now lower 2%, actually next to last in grade, branch and component; one passover for colonel; allegations, (1) unacceptable record of efficiency, zenith of potential; (2) failure to keep pace.

*Summary of evidence.*—Finance officer of mild disposition, said to be anti-social, "quiet." At B/I, a Major General, former CG, Finance Center, Indianapolis, testified at length regarding respondent's value to service, and expressed opinion he had not reached zenith. B/I out 40 minutes, B/R out 10 minutes.

*Comment.*—A typical instance of the shortcomings of the OEI as an index of an officer's value to the service, and also a typical instance of a career branch jumping on those at the tag end of the procession. As to officer's personal attributes, the obvious question posed is, just how much of a personality does a Finance Officer need?

*Evaluation.*—Possibly the fact that OEI had long been low should have raised a question: Why wait so long? Field report might have helped.

*Case No. 7: Lieutenant Colonel, Infantry*

*Prior service.*—Over 17 years active commissioned service: SS, 2 BSMs, and PH in WW II; failed to complete C&GSS; 1 passover for temporary Colonel.

*Initiator of proceedings.*—Infantry Br, OAD.

*Grounds.*—Lower 1% of OEI, warning in March 1956; zenith of potential; failure to keep pace.

*Summary of evidence.*—ER's state, "diamond in the rough—good troop man;" "reached his peak some years back;" "probably longer on talk than on performance." "Quality of performance picked up after proceedings instituted; major general presented letter, respondent was fine combat soldier. Glowing report by colonel who had been in same WW II unit: "I would be happy to have him serve under me in combat, and I would be happy to serve under him in combat."

*Comment.*—Probably a borderline case, but fact that respondent picked up after show cause order issued shows, had not in fact reached zenith. Possibly a field report would have made proceedings unnecessary.

*Evaluation.*—An officer who won a Silver Star in combat cannot, as a practical matter, be eliminated for inefficiency unless he is utterly and demonstrably hopeless, which this respondent was not.

*Case No. 8: Lieutenant Colonel, Military Police Corps*

*Prior service.*—15 years active commissioned service. OCS, 1943, RA 1947. Actually, highest grade on EAD was 1st Lt; Captain on terminal leave; integrated February 1947 as Captain, permanent lieutenant colonel January 1949 on basis of then policy of promoting on basis of age.

*Initiator of proceedings.*—CMB, OPMG

*Grounds.*—Low OEI, actually low man in grade, branch and component. Passover, Colonel AUS, 1950. 3 passovers, Colonel RA, in 1954, 1955, and 1956. (1) Zenith of potential, (2) failure to keep pace.

*Summary of evidence.*—Faced show cause boards in 1952 and again in 1954, retained by action of B/I in each instance. Immediate superior, G1 of KMAG, testified in his favor and against elimination, before B/I. B/I out 36 minutes. At B/R, respondent not present, but counsel showed, AEI had been steadily increasing since last show cause proceeding. B/R out 10 minutes.

*Comment.*—Promotion from permanent captain to permanent lieutenant colonel in 13 months is less than fair to officer concerned, particularly when highest previous grade on AD was 1st lieutenant. In view of two prior elimination proceedings, this was simply case of harassing the low man on the totem pole.

*Evaluation.*—Harassment should have been evident, and should have, but did not, suggest request for report from field regarding performance in current assignment. Case seems instance where elimination proceedings improperly used to amend OPA, namely, to eliminate on basis of repeated passovers to permanent colonel when law still does not recognize that fact as ground for separation from AD.

*Case No. 9: Lieutenant Colonel, Military Police Corps*

*Prior service.*—Over 17 years commissioned service; awarded 8 battle stars and an arrowhead in WW II.

*Initiator of proceedings.*—CMB, OPMG

*Grounds.*—Lower 3% of OEI; "manner of performance generally unacceptable since 1951"; (1) zenith of potential, (2) failure to keep pace.

*Summary of evidence.*—Remarks on ERs: "Operates rather than plans," "impetuous," "rubs people the wrong way," "mistakes from the head, not from the heart," "lacks good judgment." One period when comments were adverse involved conflict of loyalties between theater PM and Hq of which respondent was PM. One indorser noted, "with division in combat, and eligible to return to ZI, chose latter." CMB, OPMG erred in stating respondent had no combat service. B/I out 1 hour 8 minutes after sitting very late; B/R out 10 minutes.

*Comment.*—Examination of ERs shows considerable divergence between adjectival and numerical ratings; recommendation for elimination did not fairly present officer's record. Also, greatest difficulty seemed to stem from failure to instruct officer that his loyalty ran to immediate commander and not to chief of service at Theater Hq. Fact B/R was out only 10 minutes indicates case was not really on borderline.

*Evaluation.*—In part, OEI breakdown, although 1958 recommendation for elimination on basis of "manner of performance generally unacceptable since 1951" should have signalled a warning. If so, why such a long delay?

*Case No. 10: Lieutenant Colonel, Ordnance Corps*

*Prior service.*—17 years active commissioned service. ORC 1930; EAD 1941–1946, six months' gap; integrated 1947; poor record, C&GSS.

*Initiator of proceedings.*—Or Br, OAD

*Grounds.*—Declining OEI since 1952; (1) zenith of potential, (2) failure to keep pace. Lower 1% of OEI.

*Summary of evidence.*—Conflicting comments on ERs; e.g., "making progress in his work, making great effort to rectify his weaknesses;" "works hard—inclined to be easy going" (both these remarks in a single comment); in 1952–1953, "high potential." Several rating officers testified for respondent, recommending retention, and one that his overall performance of duty was excellent. B/I

was virtually directed by convening authority to eliminate, in letter reading: "It is particularly important to bear in mind that, under present directives governing eliminations, a case is finally forwarded to a board of inquiry only after the D/A has determined by a careful screening of the individual's record that he does not meet prescribed standards and therefore should be eliminated from the service." B/I out 29 minutes. B/R had later ERs before it, also charts showing adjectival ratings on all ERs as opposed to OEI numbers. B/R out 15 minutes.

*Comment.*—This is virtually a laboratory example of how a rating officer who uses language in its dictionary meaning, and attempts to say that the rated officer's performance is excellent, and that he should be retained is, by conversion to OEI numbers, made to lay the foundation for that officer's elimination. Otherwise stated, there is no correlation between an honest use of adjectival ratings and the resultant OEI. Convening authority's letter to B/I, apart from questionable legality, turns B/I into mere rubber stamp. Moreover, the statement in that letter that the respondent's record has been subjected to "a careful screening" is, as the cases considered in this survey show, not true in fact.

*Evaluation.*—Possibly the statement that respondent's OEI had been declining for 6 years should have alerted the screening board. If field reports from recent commanders had been requested, case might not have been submitted. As the case stands, it offers a stark demonstration of how the imperfections of the OEI, the apparent reluctance to look beyond those figures, and the finality that is read into the original adverse impression as it moves along, result in waste motion involving the time of 8 general officers and in harassment of and consequent injustice to the individual, in what is not in any sense a doubtful case. When the B/R recommends retention after only 15 minutes, it is proof that the proceedings should never even have been started.

*Case No. 11: Lieutenant Colonel, Quartermaster Corps*

*Prior service.*—Seventeen years commissioned service. USMA 1941, preceded by 2 yrs as EM, one of these at the West Point Preparatory School.

*Initiator of proceedings.*—CMB, OQMG.

*Grounds.*—Lower 1% of OEI; (1) failure to keep pace; (2) low efficiency, zenith of potential; (3) apathy and defective attitude.

*Summary of evidence.*—Allegation (3) above, based on respondent's failure to come to Washington at suggestion of OQMG to review his records. At B/R hearing, respondent showed, these communications pointed out no deficiencies, he thought suggestion routine, and as agency was busy, his CO advised postponing visit. ERs in case consistently and repeatedly characterize respondent as "quiet." While on duty in First Army Area, respondent studied law at night; some superiors remarked he was spending too much time on legal studies, others noted that such studies represented commendable effort in QM officer engaged in procurement activities to improve himself professionally. Several rating officers testified that respondent was "average" officer. B/I out 56 minutes, B/R out 20 minutes.

*Comment.*—Another laboratory example demonstrating that if an officer is honestly rated as "average," he winds up in the lower 1% of OEI. As respondent's defense counsel said, "The OEI system should be called on to show cause why it should not be eliminated from the Army."

*Evaluation.*—This is probably a case where there was little if anything to warn the screening board that the OEI was completely untrustworthy in giving an "average" officer a score that was very far below average. Possibly a perceptive and open-minded reviewer would have required respondent to explain why he did not come down to examine his records before charging him with "apathy and defective attitudes." But this may be only the wisdom of hindsight.

*Case No. 12: Lieutenant Colonel, Transportation Corps*

*Prior service.*—16 years commissioned service. 1 year NGUS, EAD 1942–1946, six months' gap, integrated RA 1947. Squeaked by C&GSS, with recommendation against further schooling.

*Initiator of proceedings.*—CMG, OCT

*Grounds.*—Lower 2% of OEI, passed over for Colonel, RA, low standing at C&GSS; (1) zenith of potential, (2) failure to keep pace with contemporaries.

*Summary of evidence.*—Repeatedly and consistently characterized as "quiet" on ERs; other comments, "deceptively mild:" "easily swayed by subordinates, but division ran well," Frequently ill; testimony showed he was victim of sinusitis, and generally assigned to areas where climate particularly hard on sinus suf-

ferers. When proceedings started, was on USAR duty; superiors and trainees (including a BG, USAR) testified he was doing good job. B/I out 38 minutes. B/R record suggests, respondent made a good appearance and forceful impression while testifying on his own behalf. B/R out 20 minutes.

*Comment.*—Case of OEI failure, i.e., where numerical ratings failed to reflect either the officer's worth or the fact that one of his great difficulties was a sinus condition at a New England station.

*Evaluation.*—Probably a borderline case, but for the favorable personal impression respondent appears to have made on the B/R. But if screening board had called on field for report and evaluation, proceedings might never have been commenced.

*Case No. 13: Major, Quartermaster Corps*

*Prior service.*—15 years commissioned service. 6 years EM, NGUS; commissioned 1943, integrated into RA 1949 following competitive tour.

*Initiator of proceedings.*—CMB, OQMG

*Grounds.*—Zenith of potential; declining OEI, bottom of branch.

*Summary of evidence.*—Respondent had a few poor reports, which lowered his OEI very substantially. OQMG prepared a summary that emphasized every unfavorable feature, including his failure to complete the enlisted course at the QM School, some 16 years earlier. Summary stated, "His moral character is *apparently* beyond reproach" (italic not in original). B/I out 3 minutes. At B/R level, pointed out respondent was only 22 months from retirement. B/R out 7 minutes.

*Comment.*—Another instance of an average officer, rated honestly, and then hit by some unfavorable report, with a resultant sub-basement OEI. Also, striking example of an unfair summary by the career branch of the officer's service. Possibly a sympathy case, but in borderline cases B/R generally stays out longer than 7 minutes.

*Evaluation.*—Only way screening board could have avoided being impaled on the inaccuracies of OEI evaluation would have been (*a*) to call for special report from the field to evaluate respondent and (*b*) to have its own staff review the OQMG evaluation for accuracy and fairness.

*Case No. 14: Major, Signal Corps*

*Prior service.*—16 years active commissioned service. EM, NGUS, 1940–1941; 2d Lt, ORC, EAD, 1941; integrated RA 1947.

*Initiator of proceedings.*—CMB, OCSigO

*Grounds.*—Lowest OEI of grade branch and component; twice passed over for temporary Lt Colonel; therefore in accordance with D/A policy, brought before screening board.

*Summary of evidence.*—Good electronics technician, not much interested in administration; received Art. 15 punishment for failure to report a theft of switchboard by indigenous personnel. (Respondent recovered the property, but did not report the incident.) Considerable testimony by high-ranking civilian technicians favorable to respondent's professional competence, and ERs showed that while assigned to USAF units, USAF thought highly of his capabilities. B/I out 15 minutes. B/R out 20 minutes.

*Comment.*—Another instance of pursuing the low man on the OEI totem pole, where OEI generates a vicious circle: Officer gets a low OEI, then is passed over for promotion, then is recommended for elimination because he is passed over.

*Evaluation.*—Not much in here to warn a screening board that still has faith in OEI scores. Worst feature of this case is that the D/A policy which requires officer twice passed over for temporary promotion to be sent to screening board is varying the statute by adding a new ground for elimination. OPA directs separation and/or retirement for officer twice passed over for permanent promotion. Policy in question in effect amends the statute by adding two passovers for temporary promotion as additional grounds for separation of RA officers. If White Charger amendments to OPA are desirable, Congress should make them.

*Case No. 15: Captain, Infantry*

*Prior service.*—8 years commissioned service. ROTC commission. BSM with V and PH in Korea, thereafter integrated into RA. Negro officer.

*Initiator of proceedings.*—Field initiated, vis., by PMS&T at institution where respondent was serving; approved by Army Commander; concurred in by Inf Br, OAD.

*Grounds.*—Lower 12% of OEI; (1) downward trend in OEI; (2) failure to discharge assignments properly; (3) Acts of intemperance and/or personal misconduct; (4) apathy and defective attitude.

*Summary of evidence.*—Low score at Inf School; Art. 15 reprimand and forfeiture for drunken driving incident in Germany; complaint by PMS&T of all-Negro faculty re laziness, tardiness, sloppiness. After reassignment to present station, respondent picked up, and was doing good job. B/I out 21 minutes, B/R out 15 minutes.

*Comment.*—Factors favorable to respondent were his combat record in Korea, fact that his OEI even with adverse reports was not at rock bottom, and undoubtedly, fact he was performing well at new station. Some indication of personality conflict in ROTC unit. Possibly circumstance respondent was a Negro inclined B/R to leniency, although short period of deliberation may indicate that case was not sufficiently close to make this factor significant.

*Evaluation.*—A single poor performance at one station should not be a sufficient basis of show cause proceedings, in the absence of warning to the relieved officer, and a fair period of probation in an entirely different environment. Also case of shotgun approach; allegation (3) probably unsupportable and likely to have been struck out of case if ARs had required B/I to make findings.

*Case No. 16: Captain, MSC*

*Prior service.*—Seven years active commissioned service. 4 years as EM in WW II, enlisting in 1941 at age of 15; Combat Infantryman and Combat Medical Badges, Helicopter Pilot.

*Initiator of proceedings.*—CMB, SGO, sparked by a report from AGSI.

*Grounds.*—False official statements, in failing to disclose, in applications for ORC and RA commissions, 1950, 1952, 1953, three summary courts-martial in 1943 and 1944 while an EM. This officer's OEI ranged from a high of 124 to a low of 104; apparently high for grade and branch, but percentage position not shown.

*Summary of evidence.*—Respondent assumed, question re court-martial applied to convictions in commissioned status. B/I out 11 minutes, B/R out 13 minutes.

*Comment.*—Court-martial action on all of these alleged falsehoods had been barred for years by limitations. Law has always required that, to constitute perjury, misstatement must be "material." MCM, US, 1951, par. 210. Plainly, if respondent had disclosed these very minor convictions while an enlisted man (one for breach of restriction, one for drunk in uniform, one for 1 day AWOL), he would have been commissioned just the same, hence misrepresentations were immaterial and essentially trivial.

Lest this be thought to urge a lowered standard of veracity and integrity for the officer corps, it seems appropriate to quote from ODCSPER Staff Study, 28 Mar 1958, subject: Officer Evaluation System, par 3*d* (3) (b), and the reference there to "Reports being progressively inflated as rating officers in their desire to avoid hurting their subordinates attempt to beat the system by purposely rendering a report which they believe will result in a high score."

As long as the Army overlooks the inherent misrepresentation involved in a colonel's characterizing a subordinate as "One of the most outstanding officers I know" when in fact the rated officer is simply what under earlier scoring systems would have been called a run-of-the-mill Excellent, it cannot fairly pounce upon the concealment by a prospective lieutenant of minor punishments imposed upon him while a GI.

*Evaluation.*—Minor and immaterial discrepancies by officers with otherwise good records cannot in fact be made the basis of elimination. It would no doubt be undesirable to say so in regulations, but as a matter of policy cases like the present one are better forgotten.

*Case No. 17: First Lieutenant, Ordnance Corps*

*Prior service.*—4½ years commissioned service. Direct commission in Ord C, first two years' service in Armor.

*Initiator of proceedings.*—Ord Br, OAD.

*Grounds.*—Lower 1% of OEI. Failure to keep pace, no reason to think any improvement.

*Summary of evidence.*—ERs: "quiet," "lacks force," "lack of command of English." In fact, a college graduate. Apparently something of a goof-off, until he got married, at which time his manner of performance picked up perceptibly, and his ERs subsequent to the order to show cause showed progressive improvement. B/I out 35 minutes, B/R out 15 minutes.

*Comment.*—Young, immature officer, who needed a jolt; but what need was there to take the time of 8 general officers to administer it?

*Evaluation.*—Request for special evaluation from current commanders might have stopped this case. Fact that officer was only a lieutenant was at least indication that future improvement could not be ruled out.

*Case No. 18: CWO, W-2*

*Prior service.*—CWO with TC; 8 years as a warrant officer, 6 years of commissioned service before then.

*Initiator of proceedings.*—CMB, OCT.

*Grounds.*—Substandard service since 1950; lower 2% of OEI.

*Summary of evidence.*—Respondent RIF'd in 1950 because of low efficiency, and as a WOJG was before a show-cause B/I in early 1954. That B/I, composed of 3 BGs (one of whom is presently Ch of T), recommended retention. Present B/I, of field grade officers, was out 12 minutes; B/R out 25 minutes.

*Comment.*—Plainly, this respondent was not the best in the business, but the great advantage of the warrant officer category is that it is designed to take care of the useful individual who lacks educational advantages, who therefore has reached his ceiling, and who is consequently not promoted except insofar as longevity gives him higher pay and more perquisites. Appointment of a warrant officer, therefore, presupposes a static level of ability.

Real vice here was that, after one B/I had said respondent's record was acceptable from 1950–1953, OCT and second B/I undertook to evaluate period from 1950 through 1957, thus going over first period a second time. This is harassment of the individual, and waste motion for the service.

*Evaluation.*—Proper screening of OCT recommendation would have directed elimination of everything prior to first B/I, and would have called for field evaluation of respondent's current performance of duty. Screening here was by ESB, composed of field grade officers.

*Case No. 19: CWO, W-3*

*Prior service.*—Ten years as WO in RA, 18 years service in all. Combat infantryman with BSM. Negro.

*Initiator of proceedings.*—CMB, TAGO.

*Grounds.*—False official statements, denial of arrests, and denial of VD ten years privously. OEI in lower 29%.

*Summary of evidence.*—Highly efficient Personnel WO; married, seven children; also one allegedly concealed arrest took place *after* the date of the official statement in question. B/I out 1 hour, 15 minutes, B/R out 10 minutes.

*Comment.*—These were minor misrepresentations. Moreover, since one arrest took place after the date of its alleged concealment, this was not a misrepresentation made by respondent; rather, the allegation of falsity was a misrepresentation by the officer who signed the recommendation for elimination. Also, it is inappropriate to ask married warrant officers whether they had VD as young recruits.

*Evaluation.*—The lower the grade, the more difficult it is to eliminate for minor misrepresentations, particularly when one of the allegations can be shown to be demonstrably false as a matter of chronology. As indicated in the Evaluation of Case 16, such minor matters are better forgotten. Moreover, as a matter of policy, concealment of old VD should never be made a basis of any kind of official action. Such inquiries serve no purpose (except medical, not here in issue), and only require the individual to degrade himself, in violation of at least the spirit of Art. 31.

Here was an efficient CWO, of long service, with a combat record, now a married man with 7 children. What difference did it make to anyone at this juncture whether, years back, he had VD?

## PART II. NONREGULAR OFFICERS

*Case No. 20—Major, Artillery, USAR*

*Prior service.*—12 years active commissioned service. 1 year as EM; OCS, 1943: EAD, 1943–1947, 1947–1948, 1950 to date.

*Initiator of proceedings.*—CG of Inf Div.

*Grounds.*—(1) Zenith of potential, based on OEI, lowest 2%; (2) two Art. 15 punishments.

*Summary of evidence.*—First Art. 15 involved a delayed payment of trust funds, second, by same CG who initiated elimination, an allegation of salvaging property for personal gain. Considerable evidence to show, property had been abandoned. B/I out one hour, 3 minutes, B/R out 15 minutes.

*Comment.*—Art. 15, like its predecessor AW 104, authorizes non-judicial punishment only for "minor offenses." When a commander proceeds under Art. 15 in preference to preferring charges or directing trial by court-martial, that amounts to a command determination, in this instance by a major general with GCM jurisdiction, that the offense is a minor one and does not warrant dismissal or other serious punishment. Therefore, such a commander should not be permitted to initiate elimination proceedings on the basis of one or even two Art. 15 actions. If he thinks the offenses are serious, he should try the officer, not send the case to the D/A for elimination to clean up his own disciplinary problems.

*Evaluation.*—There is no legal impediment to elimination of a non-regular by board action because of specific acts of misconduct—the discussion in Annex B pertains only to RA officers—but as a matter of policy field commanders should be reminded that (a) if the offenses are serious, trial is indicated, and (b) the DA will not eliminate for "minor offenses."

*Case No. 21: Major, Infantry, USAR*

*Prior service.*—13 years active commissioned service, 19 years total commissioned service.

*Initiator of proceedings.*—Inf Br, OAD.

*Grounds.*—(1) Failure to discharge assignments, (2) False official statements, viz., (a) concealment of 1944 GCM, violation of standing order, AW 96, sentence to forfeit $40 per month for six months; and (b) denial of nervousness when record showed hospitalization for an anxiety state.

*Summary of evidence.*—Allegation (1) above based on fact, lower 30% of OEI. Evidence showed respondent performed outstandingly as PMS&T at a military school of good reputation. Allegation (2)(a) based on denial of GCM 8 years later on personal history statement, and again on application for integration 4 years after that. B/I out 56 minutes. At B/R, respondent showed that TAG accepted his first explanation, and produced general officer as witness in his behalf. B/R out 10 minutes.

*Comment.*—Since officer was "in lower 30%," it was silly to charge him with inefficiency. Also, failure of ARs to require B/I to make findings probably required B/R to consider efficiency, which respondent may well have established to B/I's satisfaction. As to alleged misrepresentation, how long must an officer continue to list all of his early and essentially minor derelictions?

*Evaluation.*—There ought to be some period of limitations after which misdeeds can be forgotten. A court-martial may not consider prior convictions more than three years old. MCM, US, 1951, par. 75*b*(2). There should be a similar wiping the slate clean as to other situations, so that after five or certainly ten years a $240 forfeiture imposed on a lieutenant for violation of a standing order can be forgotten for all purposes.

*Case No. 22: Captain, Artillery, USAR*

*Prior service.*—7½ years active commissioned service. 13 years total commissioned service. EM 1943–1945, OCS 1945, 18 months EAD, then EAD 1951 to date.

*Initiator of proceedings.*—School Commandant.

*Grounds.*—Repeated failure to meet personal financial obligations, based on two Art. 15 punishments for rubber checks.

*Summary of evidence.*—Respondent, with wife and 5 children, was NG adviser living on civilian economy and went badly into debt. After coming to school, two of his checks bounced; in the case of the second, he had telephoned from West Coast to friend in Pa. to make deposit to cover, but this was day of 3 foot blizzard and friend unable to get to bank. Foregoing set forth by way of mitigation in Art. 15 correspondence. OEI rising. B/I out 33 minutes. At B/R, friend whom snow kept from making deposit testified in person. B/R out 15 minutes.

*Comment.*—An officer whose checks bounce is either careless or else dishonest. CO here, by proceeding under Art. 15 determined that he was dealing with "minor offenses." If he considered respondent dishonest, he should have preferred charges with a view to trial.

*Evaluation.*—These Art. 15 cases should be bounced back to their originators; see discussion under Case No. 20.

*Case No. 23: Captain, Infantry, USAR*

*Prior service.*—10 years active commissioned service. EM 1942–1943, OCS 1943, EAD 1943–1946, EAD 1950 to date.

*Originator of proceedings.*—Field, based solely on denial of security clearance.

*Grounds.*—Elimination Selection Board alleged five grounds: (1) Failure to meet financial obligations; (2) false official statements; (3) mismanagement of personal affairs; (4) acts of personal misconduct; (5) Apathy.

*Summary of evidence.*—Respondent's OEI was in upper 25%. In 1945, he had been convicted by GCM of passing worthless check, and sentenced to reprimand and $300 forfeiture; on personal history statement he noted punishment but not conviction. All mismanagement of personal affairs took place in civilian interval, 1946–1950, during which he filed petition in bankruptcy. Also charged with concealing two civil convictions in same period, one for bad check, one for contempt. As to first, he was put on probation for 5 years, and when probation over, records under provisions of state law were changed to "not guilty," and he accordingly did not consider he had been convicted. Contempt was civil (not criminal) contempt in connection with delayed alimony payment to ex-wife. Respondent, Canadian citizen, was finally naturalized in 1956; statute requires showing of good moral character, and he disclosed probation period to naturalization authorities. B/I out 45 minutes, B/R out 5 minutes.

*Comment.*—In view of high OEI, and fact that most of respondent's troubles belonged to his civilian in-between period, it is clear that grounds on which elimination was sought represented improper shotgun approach. Only serious questions were, did respondent conceal convictions? He disclosed the fact that he had been punished by the Army, under state law there was no conviction standing against him once his period of probation was over, and the contempt citation was a civil matter. Small wonder, therefore, that B/R voted to retain after only 5 minutes.

*Evaluation.*—This case demonstrates the danger of recommending elimination automatically upon denial of a security clearance, since here such denial resulted from sloppy and inaccurate CIC report, after which the errors were compounded by a multiplication of unfounded allegations.

*Special note.*—Any denial of security clearance should first be checked by TAG for legal accuracy before any elimination proceeding is predicated thereon. Also, Elimination Selection Board needs professional assistance to shift out and delete allegations that available proof plainly fails to support.

*Case No. 24: Captain, Infantry, USAR*

*Prior service.*—12 years active commissioned service. EM 2 years, OCS 1943, EAD 1943–1945, and 1948 to date. Paratrooper, SS and 2 BzS.

*Initiator of proceedings.*—Inf Br, OAD.

*Grounds.*—(1) Downward efficiency, zenith of potential; (2) failure to exercise necessary leadership; (3) failure to discharge assignments; (4) acts of intemperance and/or personal misconduct; (5) Apathy.

*Summary of evidence.*—Recommendation stated officer was in lower 33% of OEI, that he had contracted veneral disease in 1944 (14 years previously), and that he had received Art. 15 punishment for being drunk and disorderly in 1955. ERs indicated alchoholism. Testimony showed that respondent was a fine officer in combat, and that his work in his new assignment, after relief out of an A/B Div, was outstanding. Also evidence that his eyes were frequently bloodshot without any drinking whatever. B/I out 39 minutes. At B/R, showed that the rating officer who gave him worst report was later patient in the NP clinic, and that by revision of OEI scores, respondent was in top 43%. B/R out 13 minutes.

*Comment.*—Another instance of the shotgun approach, apparently characteristic of the Elimination Screening Board. Fact that respondent was in lower 33% should have proved to board that this officer's efficiency was acceptable, particularly since he was combat hero and had his category renewed only 18 months previously. Moreover, outrageous to seize upon a 14 year old VD infection and one Art. 15 action to establish misconduct. Fact that worst report was rendered by an officer with emotional instability underscores frightening weakness of entire evaluation system.

*Evaluation.*—Apparently respondent's relief from duty in one assignment triggered elimination action. Such "one-strike-is-out" evaluation is unjustified in any except an actual combat situation. Relatively high OEI should have flagged

weakness of case. Impression deepens that ESB not sufficiently mature in judgment, and poorly served by staff.

*Special note.*—Inf Br, OAD, recommendation for elimination dated 14 May 1958. By Par. 12, SO 72, D/A, 9 Apr 1958, respondent announced as promoted to major. What happened? This case bears further investigation.

*Case No. 25: Captain, Infantry, USAR*

*Prior service.*—9 years active commissioned service. EM 1943–1946. 2d Lt ORC, 1949, on basis of subsequent education. Failed to complete branch school, relieved from AD, EM 6 mos, then recommissioned after OCS in 1949. SS, BSM, and PH.

*Initiator of proceedings.*—Inf Br, OAD.

*Grounds.*—Lower 2% of OEI; (1) mediocrity, zenith of potential; (2) failure to keep pace; (3) failure to exercise leadership; (4) failure to discharge assignments properly; (5) false official statements; (5) apathy.

*Summary of evidence.*—False official statements alleged were two, first being concealment of a Summary CM while an EM. On two occasions he marked "No" to question whether ever convicted, but attached fact of conviction on separate sheet. TAG on both occasions waived the conviction and accepted explanation. On third occasion, no longer mentioned it. Second falsehood charged was statement he resigned his first ORC commission when in fact it was terminated for his failure to complete basic course. Respondent said commission was *not* terminated by D/A, that he was simply separated from AD, and that thereafter he in fact resigned; Recorder of B/I admitted those statements correct (B/I record, pp. 24–25). Passed over for Capt AUS once, promoted next time. B/I out 18 minutes. Respondent being RIF'd but fought proceedings to retain commission. B/R out 10 minutes.

*Comment.*—Another instance of ESB shotgun approach, aggravated by fact that one allegation of falsehood was itself false. Also, since Sum CM twice waived and explanation twice accepted, how many times need fact be further repeated? Record bears out comment of defense counsel before B/R, that OAD in preparing an evaluation actually prepared a brief against the respondent.

*Evaluation.*—Fairly shocking example of inaccuracy and unfairness by OAD, and of poor judgment by ESD. Combat hero, yes, but fact B/R only took 10 minutes to retain strongly indicates case should never have been started.

*Case No. 26: First Lieutenant, Artillery, USAR*

*Prior service.*—7 years commissioned service, since completion of ROTC in 1951. Awarded BSM.

*Initiator of proceedings.*—Bn Cdr in Germany.

*Grounds.*—(1) Mediocre service, zenith of potential; (2) failure to keep pace; (3) failure to exercise necessary leadership; (4) failure to assimilate necessary proficiency. Lower 22% of OEI.

*Summary of evidence.*—Only 1185 duty days out of 2178 reflected in ERs; many short unrated tours. Respondent was CO of Hq Btry. Former Bn CO testified in his favor, saying former Bn Ex O, a Major S, was inclined to harass respondent, CO told latter to lay off, and testified, respondent above average. Then Major S succeded to command of Bn, relieved respondent, and initiated elimination proceedings.

Before initiation of proceedings, respondent passed over once for promotion to Capt AUS. Proceedings initiated by Maj. S, Bn CO, on 18 Dec 1957; Inf Br. OAD, recommended elimination 20 Feb 1958; ESB ordered respondent to show cause on 5 Mar 1958. Because of pendency of show cause proceedings, respondent's name taken off list for temporary Capt by promotion board that adjourned 17 June 1958. On 17 July 1958, respondent advised he would be RIF'd, because twice passed over for promotion to Capt AUS.

B/I out 50 minutes. B/R met 14 Oct 1958, out 10 minutes. Respondent relieved from AD 18 Dec 1958, and thereafter promoted to Capt USAR, as of 23 May 1958.

*Comment.*—This is a particularly outrageous case in many respects. First, elimination proceedings were processed without requiring reassignment within the command (USAREUR). Second, these proceedings were initiated by single officer whose previous superior had directed him to cease harassing respondent. Third, lower 22% of OEI should have warned ESB that respondent had a potential. Fourth, nearly half of respondent's service not reflected in ERs. Finally, respondent was RIF'd because passed over for promotion because of pendency of proceedings which he successfully defended, B/R being out only 10 minutes—after which he was promoted in the USAR.

*Evaluation.*—A tragic conglomeration of injustices, improper personnel administration, and self-contradictory personnel actions that reflect scant credit on either the good name or the good sense of the Army.

*Special note.*—Officers in a zone of consideration for promotion against whom show-cause proceedings are instituted should not be removed from the list. Action should be suspended pending final decision, and period of suspension should not be counted as a passover. Case should then be reconsidered by promotion board.

*Case No. 27: First Lieutenant, Infantry, USAR*

*Prior service.*—6 years active commissioned service after OCS, preceded by 5 years as EM.

*Initiator of proceedings.*— Inf Br, OAD.

*Grounds.*—False official statements, viz., (1) claiming decorations to which not entitled, and (2) concealing VD. Respondent in top 39% of OEI.

*Summary of evidence.*—(1) Respondent found entries on 66-1 giving him credit for Combat Infantry Badge, PH, and BSM. Wrote TAG, citing references on 66-1, asking for information. TAG had no record, respondent then ordered to show cause. No evidence respondent made the entries, and in fact respondent never wore any of the decorations. (2) Respondent diagnosed as having chancroid. Not put in VD ward, not segregated, not given red bathrobe worn by other VD patients, did not know chancroid was in VD category, never heard the word used in hygiene lectures. B/I out 43 minutes, B/R out 10 minutes.

*Comment.*—Sad case of shooting first and aiming afterwards.

*Evaluation.*—If respondent had been called on for explanation of questionable entries, or if matter had been reported to Army Commander for an IG investigation, case would never have arisen. Another instance of woefully immature and unsound judgment by both OAD and ESB. Also, why should any non-medicos fuss about old, cured VD cases?

*Case No. 28: Second Lieutenant, Artillery, USAR*

*Prior service.*—Fifteen months active commissioned service, preceded by about a year as EM following induction.

*Initiator of proceedings.*—Field commander.

*Grounds.*—(1) Failure to discharge assignments; (2) zenith of potential; (3) apathy. Lower 2% of OEI.

*Summary of evidence.*—Wealthy Ivy League lad with artistic interests—painting, music—essentially a dilettante who failed in 5 years at college to receive degree. Drafted. Then called to active duty as 2d Lt at same post where he had served as EM—and his first AD assignment was as a Btry CO! Psychiatric evaluation to the effect that lad could do a better job if given a chance. No effort to reassign or to transfer to other post. Respondent not stupid; see, for instance, this excerpt from his testimony: "then a brigadier general arrived, and he generated a great deal of concern." What novelist could paint a better word picture? B/I out 30 minutes, B/R out 12 minutes.

*Comment.*—B/R may well have been impressed by fact that a 2d Lt would fight all the way up, but, as one B/R member said later, this case was "a comedy of errors." Whether it was comical may well be a matter of opinion, but it plainly illustrates four glaring and obvious errors in personnel management: First, except where there has been a battlefield promotion, a newly commissioned officer should never serve on the same post where he was an EM. Second, a newly commissioned 2d Lt should never be made a Btry CO as his first assignment. Third, elimination proceedings are premature until some effort at reassignment within the command has been made. Fourth, to attempt to eliminate a 2d Lt of only 15 months service who is obviously intelligent reflects a bankruptcy of personnel utilization.

*Evaluation.*—Here is another case that shows woefully bad judgment on the part of OAD and the ESB.

---

## ANNEX B

ILLEGALITY OF (1) EMPLOYING ADMINISTRATIVE ELIMINATION PROCEDURE IN CASES OF RA OFFICERS CHARGED WITH MISCONDUCT AND OF (2) PRESENT REGULATIONS SHIFTING THE BURDEN OF PROOF TO RESPONDENT AFTER HE HAS BEEN DIRECTED TO SHOW CAUSE

(The passages that follow are excerpts from a legal brief that was prepared in support of a suit proposed to be filed in the U.S. District Court on behalf

of an RA officer of more than 18 years' service in the event that the Review Board recommended elimination in his case.

(He had been charged with "acts of personal misconduct," the most serious of which, if conviction by court-martial had resulted, would have sustained a sentence of dismissal, total forfeitures and eleven years' confinement.

(Inasmuch as the Review Board recommended retention, there was no occasion to test the matter in the courts. However, all the papers had been drawn.

(The language used is that of advocacy. But the legal principles discussed were considered amply sufficient to support a successful outcome.)

*I. An officer of the Regular Army who commits specific acts of misconduct punishable by dismissal and confinement can be separated from the service only by court-martial, the grounds for administrative removal from the active list under 10 U.S.C. (1956 revision) secs. 3781–3786 being limited to inefficiency.*

Very briefly, it is the position of the plaintiff—a Regular Army officer—that for the commission of specific acts of misconduct punishable by dismissal and confinement he can be seperated from the Army only by court-martial action pursuant to the Uniform Code of Military Justice, and that the statutory provisions for administrative removal, cited in the heading, extend only to instances of substandard performance of duty and general inefficiency.

The foregoing contention rests on the textual and legislative history of the statute; on the most nearly contemporaneous administrative construction of its scope; on current Army Regulations; and on the circumstance that the statute; on the most nearly contemporaneous administrative construction of appropriate for grave misconduct, but for an honorable discharge and severance pay or retirement benefits, steps wholly fitting for the incompetent or inefficient but utterly inappropriate for the vicious.

A. *The textual and legislative history of 10 U.S.C. (1956 revision) Secs 3781–3786plainly show that these provisions were only intended to reach inefficiency and to rid the Army of "deadwood."*

In order to ascertain the Congressional intent underlying the statutes in question in their present revision—all citations to Title 10 of the U.S. Code in this memorandum are, unless otherwise indicated, to the 1956 revision (Act of Aug. 10, 1956; Public Law 1028, 84th Cong., vol. 70A Stat.)—the statutory development will first be traced.

This development insofar as pertinent here covers three stages; First, the Joint Resolution of 1941, which temporarily suspended Section 24b of the National Defense Act during the then emergency and World War II; second, Title I of the Army and Air Force Vitalization Act of 1948, which was the permanent legislation; and third, the codification of the 1948 provisions in the 1956 revision of Title 10, U.S.C.

First. Prior to the 1920 Amendments to the National Defense Act (Act of June 4, 1920, c. 227, 41 Stat. 759) the only provisions for removing an officer from the Regular Army in time of peace, other than in connection with a reduction of the establishment were by dismissal pursuant to court-martial under the Articles of War, and by dropping him from the rolls under Article of War 118 because of long-continued absence of conviction in a civil court.

In 1920, Congress added Section 24b to the National Defense Act (10 U.S.C. (1926–1940 eds) Sec. 571), which provided an elaborate procedure for the classification of officers "who should not be retained in the service." See *French* v. *Weeks*, 259 U.S. 326; *Creary* v. *Weeks*, 259 U.S. 336. After the first few years of its operation, this provision proved ineffective, and when the Army was mobilized just prior to World War II, the need for speedier elimination of substandard officers became acute. See "Vitalization of the Active List of the Army, Hearings before the Senate Committee on Military Affairs" on S.J. Res. 88, 77th Cong., 1st sess.

Congress accordingly, by the Joint Resolution of July 29, 1941, c. 326, 55 Stat. 606, suspended the operation of Section 24b, and in Section 2 of the Joint Resolution provided for administrative removals from the active list, with honorable discharge for officers so removed who had less than seven years commissioned service, and retirement with pay for removed officers with more than seven years such service. The portions of Sec. 3 pertinent here read as follows:

"That during the time of the national emergency announced by the President on May 27, 1941, the Secretary of War, for such causes and under such regulations as he may prescribe, may remove any officer from the active list of the Regular Army: *Provided*, that such removal be made from among officers whose performance of duty, or general efficiency, compared with other officers of the

same grade and length of service, is such as to warrant such action, or whose retention on the active list is not justified for other good and sufficient reasons appearing to the satisfaction of the Secretary of War; * * *."

Second. When World War II ended, the foregoing provision was about to expire, and accordingly the Army sought—and obtained—permanent legislation for the elimination of inefficient officers, in what became Title I of the Army and Air Forces Vitalization and Retirement Equalization Act of (June 29) 1948, c. 708, 62 Stat. 1081. As originally introduced in 1947—before there was a separate Air Force—the measure was H.R. 2744, 80th Congress, and in its Section 102 provided as follows in its last sentence: "Selection of any officer to show cause for retention shall be based upon his failure to achieve such standards of performance as the Secretary of War shall by regulation prescribe, or on other good and sufficient reasons appearing to the satisfaction of the Secretary of War and of which the selection board is advised."

When the bill was reported out of committee on July 9, 1947, the final clause—"or on other good and sufficient reasons appearing to the satisfaction of the Secretary of War and of which the selection board is advised"—was deleted. In its report (H.R. Rep. 816, 80th Cong., 1st sess.), the House Committee said in pertinent part (p. 5):

"The provisions of title I represent the culmination of a long struggle to provide a means of eliminating from the Regular Army inefficient, inept, and substandard officers.

* * * * * * *

"The Secretary of War will, by regulations, provide that such officers as fall below a prescribed standard will be selected to appear before the Selection Board. Generally speaking, they would be officers whose records show that they are substandard, either by virtue of the inefficiency of their work, because of personal habits, or perhaps because of ineptitude. Some reasonable measure of determining the efficiency and the aptitude of the officer will be used as a yardstick."

In the following session, the Senate Committee did not restore the deletion made by the House Committee, nor did it make any changes other than those necessary to reflect the creation of the Air Force as a separate armed service in the interim. The Senate Committee said (S. Rep. 1543, 80th Cong., 2d sess., p. 3).

"Title I provides that there will be an annual review of the Regular officers in these two services (Army and Air Force) and that in the event they are found in fact to be substandard, they may be removed from the services."

The hearings on H.R. 2744 similarly negative the notion that any removals which the measure contemplated were to be for grounds traditionally dealt with by a court-marital. See 2 Hearings before the Committee on Armed Services of the House of Representatives on Sundry Legislation Affecting the Naval and Military Establishments, 1947, 80th Cong., 1st sess.; No. 169 Subcommittee Hearings on H.R. 2744 * * * before Subcommittee No. 7, Retirement, pp. 3293 et seq.:

"Lt. Col. E. J. LATOSZEWSKI (Personnel and Administration Div., General Staff, U.S. Army). * * * our proposals as embraced in title I of H.R. 2744 are specifically designed to remove from the active list those officers who fall below desired standards of efficiency.

"In short, the primary objective of the title is to provide a satisfactory point system for the removal of substandard and undesirable Regular Army officers.

* * * * * * *

"It should be borne in mind that in asking for the enactment of title I we are asking for a means of vitalizing the active list.

* * * * * * *

"Mr. JOHNSON of California. Well, is it your opinion, from studying these personnel problems, that after, say 10 or 12 years, you could eliminate all those whose aptitudes and temperament are not fitted, that is, do not fit them to be officers?

"Colonel LATOSZEWSKI. That is the purpose of title I; yes, sir.

"Mr. JOHNSON of California. That is the general objective.

"Colonel LATOSZEWSKI. Yes, sir (p. 3410).

* * * * * * *

"Colonel LATOSZEWSKI. * * * the procedure for courts-martial is distinctly different from what we propose here."

Accordingly, when H.R. 2744 came before the full committee (No. 196, pp. 4865 et seq.), Mr. Johnson spoke as follows (p. 4890):

"The rules of the game that they (the Regular Army) apply are promulgated by the Secretary of War. He lays down the rules under which elimination shall occur. I presume from time to time he will alter those to fit changing conditions. In that way we feel we have a system whereby poor officers who do the Army no good and who don't justify their original selection will finally be removed."

In this connection, it is significant that when Gen. W. S. Paul, then Director of Personnel and Administration, War Department General Staff, was outlining to the Subcommittee the shortcomings of the procedures under Section 24b of the National Defense Act, he was concerned only with inefficiency. See No. 169, supra, at p. 3348:

"I was recorder in Washington here for this class-B board, as we call it, for over 4 years. I can recall one particularly outstanding case of an officer who had 11 consecutive years of unsatisfactory ratings. He was placed in class B three times and restored by different Presidents—Republicans or Democratic, it didn't matter what the political complexion was—to class A. That is the sort of dead wood that we want to get out."

Third. We come now to the 1956 revision, in which the provision reads (10 U. S. C. Sec 3781): "The selection board shall review the record of each commissioned officer on the active list of the Regular Army to determine whether he shall be required, because of failure to achieve the standards of performance to be prescribed by the Secretary by regulation, to show cause for his retention on the active list."

This provision has precisely the same substantive content as when it was originally enacted in 1948. For Section 49 (a) of the Act of August 10, 1956 (70A Stat. 640) specifically provides that "In sections 1–48 of this Act, it is the legislative purpose to restate, without substantive change, the law replaced by those sections on the effective date of this Act." And the Committee reports had said, "The object of the new titles has been to restate existing law, not to make new laws. * * * Adherence to the substance of existing law, however, has not always meant adherence to the letter of the statute." H. R. Rep. 970, 84th Cong., 1st sess., p.8; Sen. Rep 2484, 84th Cong., 2d sess., p.19.

Consequently, since between 1948 and 1956, the Secretary of the Army was not authorized to remove an officer of the Regular Army from the Active list for specific acts of misconduct punishable by dismissal and confinement, under administrative provisions that deprived such an officer of the protection of the rules of evidence and the appellate procedures of the laws governing trials by court-martial, the Secretary was not authorized to do so after 1956. The proceeding now sought to be enjoined, which was brought against plaintiff for "acts of personal misconduct" under 10 U. S. C. Secs 3781–3786, was in consequence outside the authority conferred on the Secretary by the Congress.

B. *The most nearly contemporaneous administrative interpretation of Title I of the Vitalization Act supports the view that those provisions could not be utilized to separate an officer because of misconduct; and current Army Regulations still prohibit the use of the elimination procedure in lieu of trial by court-martial.*

The Army and Air Force Vitalization and Retirement Act, 62 Stat. 1081, was signed and went into effect on June 29, 1948. We are concerned here only with the "Vitalization" provisions, Title I, now 10 U. S. C. (1956 revision) secs. 3781–3786, and will refer to those provisions either as "Title I" or on occasion, simply as the "Vitalization Act."

The first Army regulations implementing that measure were published on May 19, 1949, effective July 1, 1949; they were numbered AR 605–200, and entitled "Officers—Demotion and Elimination." Par. 3d thereof was as follows:

"The provisions herein will not be used in lieu of court-martial action or action under the provisions of Article of War 104. However, recurrent convictions by court-martial for minor offenses or recurrent punishment under Article of War 104 may be cause for taking action under these regulations."

Article of War 104 as amended in 1958 (10 U. S. C. (Suppl.II to 1946 ed.) Sec. 1576), entitled "Disciplinary powers of commanding officers," provided for disciplinary punishments without the intervention of a court-martial "for minor offenses."

(Under MCM, 1949, the major acts of personal misconduct charged against the present plaintiff were punishable by dismissal, total forfeitures, and eleven years' confinement.)

Plainly, therefore, when AR 605–200 was promulgated in 1949, administrative separation for officers accused of what plaintiff here stands accused of having done was never in contemplation. See also MCM, 1949, par. 118, p.114: "An offense for which the Articles of War * * * authorize * * * penitentiary confinement is not a minor offense."

In the 1951 version of the regulations, it was made even more plain that any misconduct must first be evidenced by an actual conviction. Here is par.3*d* of AR 605–200, dated January 26, 1951, and effective March 1, 1951:

"The provisions herein will not be used in lieu of court-martial action or action under the provisions of AW 104. However, recurrent misconduct or other offenses, evidenced either by court-martial conviction or action under AW 104, may be cause for taking action under these regulations."

In this connection, it is to be noted that disciplinary action under AW 104 was only authorized "unless the accused demands trial by court-martial" (10 U. S. C. (Supp. II to 1946 ed.) Sec. 1576 (see also MCM, 1949, Par. 120, p. 146.

After the Uniform Code of Military Justice became effective, on May 31, 1951, the provision last quoted was changed to reflect the passing of the Articles of War Changes 1 to AR 605–200, dated July 26, 1951, reworded par 3*d* as follows:

"The provisions herein will not be used in lieu of court-martial action or action under the provisions of the Uniform Code of Military Justice, Article 15. However, recurrent misconduct or other offenses, evidenced either by court-martial action, action under AW 104 (MCM, 1949,) or under the Uniform Code of Military Justice, Article 15, may be cause for taking action under these regulations."

Art. 15, UCMJ (50 U. S. C. (1952 ed.) Sec 571), entitled "Commanding officer's non-judicial punishment," was in substance the same as AW 104, with the sole exception that it was left to the Secretary of the military department concerned to determine whether its provisions were applicable to an accused who demanded trial by court-martial. The rule for the Army remained the same; such a demand was a bar to trial. *Manual for Courts-Martial, U. S., 1951*, par. 132.

Not until 1954, six years after the effective date of the Vitalization Act, was any attempt made to broaden the scope of elimination by administrative means. AR 605–200, dated June 18, 1954, provided in par.3*c*: "These regulations will not be used in lieu of disciplinary action under the Uniform Code of Military Justice. However, recurrent misconduct or other offenses, whether or not evidenced by punishment under the Uniform Code of Military Justice or under Article of War 104 (MCM, 1949), may be cause for taking action under these regulations."

The present provision is AR 635–105A, "Personal Separations, Elimination," dated January 2, 1957, par. 4*a*, which is as follows:

"Elimination will not be used in lieu of disciplinary action under the Uniform Code of Military Justice. However, recurrent misconduct, whether or not evidenced by judicial or nonjudicial punishment, is cause for elimination."

In view of the narrowly delineated scope of the basic statute, we think it plain that, beginning with 1954, the regulations insofar as they purport to permit elimination for recurrent misconduct not evidenced by judicial or nonjudicial punishment under the Uniform Code of Military Justice, are not authorized by law, and are to that extent invalid.

In any event, at the time plaintiff was ordered to show cause, the regulation specifically stated that "Elimination will not be used in lieu of disciplinary action under the Uniform Code of Military Justice." (Among the allegations buried in the mass of statements on which the show cause order was based were three serious charges.) Those acts, if proved under the Code, carried a maximum punishment of dismissal, total forfeitures, and eleven years' confinement. (Applicable citations to MCM, 1951.)

Consequently, the basic directive of the existing regulation, forbidding the use of elimination procedures as a substitute for disciplinary action under the Uniform Code, coincides with the basic limitation written into the statute, and both together join in demonstrating that the proceeding against which plaintiff seeks relief in this Court is illegal and unauthorized.

C. *The honorable separation and retirement features provided by the elimination provisions are inconsistent with the view that those provisions may be resorted to when specific acts of misconduct punishable by dismissal and confinement are in question.*

The inappropriateness of the administrative elimination procedure to rid the Army of officers charged with specific acts of misconduct involving moral turpitude is emphasized and indeed conclusively established by the provisions Congress has made for separation in such cases.

Section 106(b) of Title I provided that, in the event of removal, an officer not entitled to voluntary retirement would be honorably discharged with severance pay. Section 106(a) provided that, if eligible for voluntary retirement, the removed officer would be retired in the grade and with the retired pay to which he would be entitled if he had been retired upon his own application. And Sec. 104 provided that, at any time prior to removal from the active list after the initiation of removal procedures, the officer concerned might apply for similar separation.

The foregoing provisions are now assembled 10 U.S.C. Sec. 3786.

If an officer is removed for inefficiency or for ineptitude, it is entirely appropriate to give him an honorable discharge with severance pay, or to place him on the retired list; the poor fellow did as well as he could, but he was unable to do much, and even his best did not measure up to the necessary standards. His removal will vitalize the active list and yet he is not to be subjected to any stigma by reason of what after all were inadequacies without moral fault.

If an officer is tried by court-martial and convicted of an offense involving moral turpitude, he is dismissed from the service, his pay and allowances due and to become due are forfeited, and he may be sentenced to confinement at hard labor. Such a separation takes place under other than honorable conditions, he receives no severance pay, and he is not entitled to retirement; indeed, many benefits available to other veterans are lost to him because of his separation under other than honorable conditions.

Yet in the present case, where the recommendation made by two boards is that plaintiff be eliminated from the Army because of "acts of personal misconduct," he receives an honorable discharge and, because he lacks 18 months' service of being eligible for voluntary retirement—there being no such retirement for an officer with less than 20 years' service—he will be given severance pay in addition to his honorable discharge. Plainly, Congress could never for a moment have intended that kind of exit from the service for one found to have committed the acts with which plaintiff's accusers have charged him.

The heart of the matter is that, by its very terms, the administrative elimination procedure is inherently inappropriate for the removal of officers for specific acts of misconduct punishable by dismissal and confinement, and hence underscores in still another context the Congressional intent that this administrative procedure should be resorted to only in cases of ineptitude and inefficiency.

On the very face of the statute, Congress indicated its unwillingness to separate the vicious, as distinguished from the inept or inefficient, other than by court-martial.

D. *Nothing in 10 U.S.C. Sec. 3784 militates against the foregoing analysis of the scope of the administrative elimination procedures.*

The text of 10 U. S. C. sec. 3784 is as follows:

"The Secretary of the Army may remove an officer from the active list of the Regular Army for any cause that he considers sufficient, if removal for that cause is recommended by a board of review under this chapter. The Secretary's action in such a case is final and conclusive."

Despite its apparent breadth, the quoted provision is not in any sense inconsistent with what has already been said.

The words, "if removal for that cause is recommended by a board of review under this chapter"—"chapter" being Chapter 359 of Title 10, "Separation from Regular Army for Failure to Meet Standards," which comprises Secs. 3781 to 3786—those words necessarily limit the generality of the earlier clause, "for any cause that he considers sufficient." Read together, as they must be, the two clauses show that, if any officer is recommended for removal for any of the grounds to which the chapter is applicable, i.e., for inefficiency or ineptitude, then the Secretary is the sole judge of the sufficiency of such inefficiency. And the finality of the Secretary's action, first introduced into the administrative removal process in the 1941 Joint Resolution, was a response to the fact that Class B proceedings under Section 24b of the National Defense Act broke down at the White House.

The conclusion that 10 U.S.C. Sec. 3784 does not erase the limitations heretofore discussed at length is fortified by a glance at its derivation.

The comparable provision in the Vitalization Act was Sec. 101, as follows (10 U.S.C. (1952 ed.) Sec. 580.)

"Notwithstanding any other provision of law, the Secretary of the Army and the Secretary of the Air Force, for their respective services, are hereby authorized, for such causes as each may deem satisfactory, to remove any commissioned officer from the active list of the Regular Army or the Regular Air Force, as the case may be, in the manner hereinafter prescribed."

In the Vitalization Act, the next section, Sec. 102 (10 U.S.C. (1952 ed.) Sec. 581), provided that "Selection of any officer to show cause for retention shall be based upon his failure to achieve such standards of performance as the cognizant Secretary shall by regulation prescribe"—and we have seen how the House Committee struck from the bill that became the Vitalization Act the clause following the quotation, which had read, "or on other good and sufficient reasons appearing to the satisfaction of the Secretary of War and of which the selection board is advised."

Very plainly, Congress by limiting the grounds for selection set forth in Sec. 102 necessarily limited the grounds for removal vested in the Secretary by Sec. 101, and those limitations continued in force when, in the 1956 codification, Sec. 102 became Sec. 3781 and Sec. 101 reappeared as Sec. 3784.

Apart from the general purpose of Congress already adverted to above, they make no substantive changes, the revisers' notes show specifically that any alteration in the substance in the present connection was farthest from their minds, both when they changed the language and when they juxtaposed the earlier provisions. See H. Rep. 970, 84th Cong., 1st sess., p. 251; S. Rep. 2484, 84th Cong., 2d sess., p. 261.

II. *The hearing accorded plaintiff by the board of inquiry was not "fair and impartial" as required by the statute.*

Section 3782(b) of Title 10 provides that "A fair and impartial hearing before a board of inquiry shall be given to each officer required to show cause for retention under section 3781 of this title."

The same provision had been in Sec. 103 of the Vitalization Act (10 U.S.C. (1952 ed.) Sec 581), when it read, "Any officer selected to show cause for retention shall be accorded a fair and impartial hearing before a Board of Inquiry * * *."

Quite apart from any question as to the scope of the elimination proceedings instituted against plaintiff, the fact is that, in several important particulars, those proceedings were neither fair not impartial as the statute requires.

A. *The elimination proceedings instituted against the plaintiff were neither fair nor impartial because conducted under regulations that frankly and deliberately shifted the burden of proof from the Government to him and required him to establish his innocence.*

Notwithstanding the statutory mandate that the board of inquiry hearing be "fair and impartial," the hearing which plaintiff had was neither. The regulations under which that hearing was conducted proceeded on the footing that plaintiff had already been determined to be guilty, frankly shifted the burden of proof to him, and made it incumbent on him to establish his innocence. Here are the pertinent provisions:

(i) AR 635–105A, 2 January 1957, par. 7: "This board (of inquiry) evaluates matters presented by the respondent on his behalf to determine if they constitute a basis for further service sufficiently strong to overcome the established reasons for elimination already found to exist by a selection board."

(ii) AR 635–105B, 2 January 1957, paragraph 8: "The impression that it is the responsibility of the Government to establish its case before this board (of inquiry) in much the same manner as is done in a court-martial is erroneous. The merits of the Government's case have been determined by the selection board prior to the convening of board of inquiry. The board of inquiry does not sit in judgment of this earlier determination, which has concluded that the respondent does not meet prescribed standards. The burden of proof, therefore, rests with the respondent to produce convincing evidence that he should be retained. In the absence of such a showing by the respondent, the board must find for elimination."

(iii) AR 635–105B, 2 January 1957, further provides as follows:

(*a*) Paragraph 14:

"These instructions will be given by the appointing authority, his designated representative, the president, or recorded of the board, or may be formalized in a specific letter of instructions to the board of inquiry. * * *

"*b*. Emphasizing that the burden of proof rests with the respondent to show why he should retain his present status."

(*b*) Paragraph 18*b*(1): The president will explain to the respondent his rights and privleges.

(1) *Responsibility of respondent.* The respondent is responsible for presenting reasons for his retention in the Army. He must come forward with evidence which shows that, despite determination by the selection board that he has not met standards prescribed, he is worthy of continued active duty. Such evidence must refute or rebut records prescribed by the Government or constitute affirmation of the officer's contention that he should retain his current status."

(*c*) Par. 25*c*:

"Before the board (of inquiry) determines its finding and recommendation, it should review the mission for which it was constituted, its guidance, and the evidence presented before it in the light of the following:

"(1) The board of inquiry convened after a selection board determined that the respondent failed to meet required standards.

"(2) The purpose of the board was to afford the respondent an opportunity to state the reasons why he should be permitted further service as an officer.

"(3) Responsibility rested with the respondent to refute or rebut the Government's evidence and to present evidence affirming his contention that he is qualified to retain his current status."

It is crystal clear from the foregoing that, under the regulations in force when plaintiff had his hearing before the board of inquiry, the basic determination was considered as having already been made by the selection board, and that before the board of inquiry the burden of proof was placed on the plaintiff to show, if he could, that the determination reached by the selection board was wrong.

Yet the selection board proceeded ex parte. Plaintiff as respondent had no right to appear before it, there is no provision in the regulations for any such appearance, and he did not in fact appear before it. Yet the regulations as now written regard the selection board's ex parte determination as a formal adjudication.

It is plain that, under these regulations, the Congressional purpose is wholly perverted. When Congress wrote the requirement of a "fair and impartial hearing" before the board of inquiry into the law, it intended that the facts should be established by that board, just as they would be in a trial. Here are excerpts from the hearings already cited (2 Hearings before Committee on Armed Services, H.R., 80th Cong., 1st sess.; No. 169, Subcommittee Hearings on H.R. 2744):

"Mr. BROOKS. General, may I ask you this: the original trial whereby these officers are selected from service corresponds to a regular trial in a civil court, where a vital right is affected; isn't that right?

"General PAUL (Director of Personnel & Administration, War Dep't General Staff). That is correct.

"Mr. BROOKS. And, above that, on any complaints arising from the trial of these officers by the board, there is an appeal?

"General PAUL. That is correct (p. 3344).

* * * * * * *

"Congressman ELLSWORTH of Oregon. In setting up permanent legislation for the selection for elimination and retirement of officers of the Regular Army, the utmost care should be used that highly efficient officers, even if called before such a board, may have an opportunity in the traditions of American justice to defend their cases on actual merit."

It does not require extended argument to demonstrate that the ex parte action of a selection board hardly "corresponds to a regular trial in a civil court, where a vital right is affected," nor that a review of the selection board's ex parte action under rules where the burden of proof is frankly shifted to the respondent is not "in the traditions of American justice." After all, in no regular trial are the allegations of the complaint or the indictment taken as established, and yet that is precisely the weight that the current regulations give the determination of the selection board.

Here is what happened in this case: Accusations were made. The plaintiff denied these accusations under oath. One of the accusers took a polygraph test, which was interpreted by an enlisted polygraph operator as showing that

this individual's accusations were truthful. Plaintiff refused to take a similar test on the advice of counsel. With those papers before them, the Selection Board called on plaintiff to show cause why he should not be eliminated from the service for "acts of personal misconduct." Thereafter, the regulations turned that Selection Board action into a determination that plaintiff had in fact committed "acts of personal misconduct," and the burden of proof was placed on him to disprove this "determination" before the Board of Inquiry.

How can such a proceeding possibly be defended?

The short of the matter is that the statutory requirement of "a fair and impartial hearing" before the board of inquiry is impossible of attainment under the regulations in force when plaintiff's case was heard, viz., AR 635–105A and AR 635–105B, both dated 2 January 1957.

Only a few months ago, the Court of Appeals for the District of Columbia Circuit held that an alien who was continuously residing and physically present in the United States could be deported only in proceedings in which the Immigration and Naturalization Service bore the burden of proof. *Kwong Hai Chew* v. *Rogers*, 257 F. 2d 606 (D.C. Cir.).

If that is the measure of justice due an alien, then surely a citizen commissioned in the Army by the President with the advice and consent of the Senate is at least entitled to the same rule, under which the burden of proof rests with those making the accusation.

B. *Plaintiff's board of inquiry hearing was additionally neither fair nor impartial as required by the statute because the regulations limited his right to obtain live witnesses while simultaneously minimizing the weight to be accorded favorable testimony from absent witnesses.*

The regulations governing plaintiff's board of review hearings were additionally unfair; they limited him in bringing live witnesses to the hearing while minimizing the weight to be accorded favorable statements from absent witnesses. Here are the pertinent paragraphs from AR 635–105B, 2 January 1957:

(i) Par. 18*b*(2)(d):

"He (the respondent) may request appearance before a board of inquiry of any witness whose testimony he believes to be pertinent to the case. Such request will be honored by the board if such witness is considered by it to be reasonably available and his testimony can add materially to the case. However, he will not be reimbursed for expenses incident to the appearance or assistance of civilian witnesses. Wherever practicable, depositions and interrogatories will be used in order to expedite the hearing and to conserve travel funds."

(ii) Par. 16*a*(7):

"Letters of commendation, appreciation, or expression of value of the officer to the service are often solicited by the respondent. Value of such letters with respect to the case at hand and weight to be given such letters is of considerable question. In many cases the reason for solicitation is not given and period of service or acquaintanceship covered is in the remote past. With this in mind, such letters may well be of little weight in determining the effectiveness or suitability of the officer today. When solicited letters are introduced into evidence they should be accompanied by a copy of the letter of solicitation."

Or, otherwise stated, heads we win, tails you lose. The respondent's facilities for obtaining live witnesses will be sharply curtailed in the interest of expedition and economy, but statements that the respondent obtains from absent witnesses will be minimized and denigrated in advance.

Plainly, the impact of those provisions does not set the stage for a hearing that can be "fair and impartial" as the statute requires.

C. *Plaintiff's board of inquiry hearing was further unfair because conducted under regulations that made it more difficult for that board to find for him than against him.*

In an ordinary trial, civil, or criminal, or before a court-martial, the trier of facts is put to no additional burden when he finds for one side or the other. The jury finds for the plaintiff or the defendant; in a criminal case, it returns a verdict of Guilty or Not Guilty; and court-martial procedures as to findings parallel those of civilian criminal courts. See MCM, US, 1951, par. 74. But when an officer appears before a board of inquiry under elimination procedures, then current regulations make it far easier for that board to find against him than to find in his favor.

Par. 26*a*(1) of AR 635–105B, 2 January 1957, provides as follows:

"The board will find whether cause for retention has or has not been shown. If the board finds that the respondent has shown cause for retention, a summary of data leading to this finding will be included."

In other words, if the board wants to find in respondent's favor, it encounters an affirmative burden; it must explain why it found for him, and must summarize the evidence in support of that explanation. If however the board wishes to find against the respondent, it is faced with no additional labor.

A hearing conducted under rules that place the natural instincts of lethargy into the scales against the person whose rights are in question, and cast an additional burden on his potential defenders can, plainly enough, be neither fair nor impartial.

(Sub-points D and E dealt with the use made of polygraph readings by both the Screening Board and the Board of Inquiry. Following numerous rulings by TJAG to the effect that polygraph evidence is inadmissible in board proceedings (e.g., JAGA 1957/2627), the regulations were changed to incorporate that principle. Par. 9a3, AR 15–6, added by C2, 15 Jan 1959.)

F. *Apart from everything else, the lack of findings vitiates the entire elimination proceeding.*

The selection board charged plaintiff with "acts of personal misconduct." What those acts were was never specified. Certain allegations loomed larger than others, but, in their statements the accusers raked up everything over an eight-year period capable of occurring to minds fired with a desire to pervert.

There was no procedure in the regulations already cited for the plaintiff to obtain any particularization of the charges against him, and even now, when his removal from the active list has been recommended both by the board of inquiry and by the board of review, there has never been anything more specific charged against him than "acts of personal misconduct."

As has been shown, the only requirement approaching findings is that the board of inquiry must summarize data in the event that it votes to retain respondent—the plaintiff here—in the service.

Consequently, plaintiff is on the verge of being eliminated from the Army, to which he has given over 22 years of his life, on nothing more specific than "acts of personal misconduct."

We do not think that anything in the statute warrants such a result. And, as the Court of Appeals has recently intimated, findings require something more than conclusory statements. See *Coleman* v. *Brucker*, 257 F. 2d 661 (D.C. Cir.).

The totality of the unfairness visited upon plaintiff reaches, we think, constitutional proportions. For he is about to be stripped of his office, without findings: under a procedure that, while charging him with acts that constitute court-martial offenses carrying dismissal and eleven years of confinement at hard labor, deprive him of the protection of the rules of evidence; deprive him of the procedural guarantees and the appellate review that Congress has written into the Uniform Code of Military Justice; find him guilty on the basis of an ex parte determination by a selection board before whom he did not and could not appear; and thereafter placed the burden of proof on him to establish his innocence under a procedure heavily weighted against him.

In *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, the Supreme Court held that the Government could not deny a hearing to an alien who was held for exclusion on the ground that his admission would be prejudicial to the public interest. The court said (pp. 602–603), "We do not reach the issue as to what will be the authority of the Attorney General to order the deportation of petitioner after giving him reasonable notice of the charges against him and allowing him a hearing sufficient to meet the requirements of procedural due process."

When, following remand of that case, the alien was given a hearing on the issue of his deportation, at which the burden of proving his admissibility was placed on him, the resultant order of deportation was set aside for that reason. *Kwong Hai Chew* v. *Rogers*, 257 F. 2d 606 (D.C. Cir.).

Plaintiff submits that an American citizen holding a commission in the Regular Army is entitled to no less procedural due process than was the alien Chinese sailor in that case.

We are aware of the much-quoted dictum from *Reaves* v. *Ainsworth*, 219 U.S. 296, 304, to the effect that "To those in the military or naval service of the United States the military law is due process." Plaintiff's answer to that generalization—assuming it to be valid at all—is that the proceedings against him were not in accordance with but rather in violation of the military law, in two major respects:

(1) The matters charged against him were cognizable only before a court-martial under the Uniform Code of Military Justice, and could not lawfully be made the subject of administrative elimination proceedings.

(2) The hearing before the board of inquiry was neither fair nor impartial and hence did not comply with the statute in any event.

ANNEX C

LAST 12 CASES IN WHICH A BOARD OF INQUIRY HAS RECOMMENDED RETENTION; AND ANALYSIS OF THE SINGLE RA CASE THEREIN INVOLVED

I. Last 12 cases in which a B/I has recommended retention (list furnished by Maj Averett, Off Br, Sep Sec, Personnel Division TAGO) involve officers of grade, branch, and component as follows:

1. Lt. Col. Inf. USAR
2. 1st Lt, Inf, USAR
3. Capt, Armor, USAR
4. Capt, Inf, USAR
5. 1st Lt, Inf, USAR
6. 1st Lt, Inf, USAR
7. Maj, Arty, USAR
8. 1st Lt, Inf, NSAR
9. Maj, Arty, RA
10. Capt, Inf, USAR
11. Capt, SigC, USAR
12. Lt Col, Inf, USAR

II. In the time available, only the single RA case, No. 9, could be examined, and this turned out to be a probationary officer. Hence, in none of last 12 cases where B/I recommended retention was B/I composed of general officers. Analysis of case follows, presented in some manner as cases in ANNEX A.

*Case No. 29: Major, Artillery, RA*

*Prior service.*—OCS, 1942; EAD 1942–1946. EAD again, 1951 to date. Integrated RA 1 July 1958.

*Initiator of proceedings.*—Arty Br, OAD, sparked by ACSI

*Grounds.*—Intentional omission of material fact; conduct unbecoming, etc. Officer in upper 14% of OEI.

*Summary of evidence.*—Charge was that respondent answered "No" to "Have you ever been arrested and convicted?" When in fact, during civilian interval, 1946–1951, he had been arrested on a charge of driving under the influence of alcohol, and that he had forfeited $210 collateral. ASCI report also stated some creditors considered respondent "slow pay." Facts were that forfeiture of bail in state where charge was made does not constitute a conviction, and that respondent had forfeited bail by reason of his lawyer's advice; if tried, then cop-versus-motorist might have resulted in conviction, this way nothing on record. Question on application was "arrested and convicted," not "arrested or convicted." Two RA colonels testified they would believe respondent under oath, certificates from MG to same effect. B/I out 19 minutes, found "misunderstanding, no intent to falsify," and recommended retention. Army Commander signed letter to the effect, watch this officer hereafter.

*Comment.*—Officer had in fact not been convicted, hence no falsehood.

*Evaluation.*—Another instance of what happens when unquestioning reliance is placed on CIC evaluation of a court proceeding; reference to TJAG would have kept this case from starting. Army Commander's comment consequently seems unjustified. Probably no harm done, respondent thereafter promoted to Lt Col AUS.

---

**TAB 1**

REGULAR ARMY OFFICERS

*I. Separation of substandard RA officers under Public Law 810 (ch. 359, title 10)*

| Calendar year | Selected for "show cause" | Losses because of "show cause" action | Retired instead | Resigned instead | Other losses instead | Retained— By BI | Retained— Or RB |
|---|---|---|---|---|---|---|---|
| 1948 | 54 | 36 | 25 | 10 | 1 | 18 | 0 |
| 1949 | 88 | 58 | 18 | 7 | 33 | 30 | 0 |
| 1950 | 119 | 62 | 16 | 13 | 33 | 57 | 0 |
| 1951 | 33 | 21 | 4 | 8 | 9 | 12 | 0 |
| 1952 | 117 | 69 | 7 | 30 | 32 | 48 | 0 |
| 1953 | 61 | 32 | 6 | 19 | 7 | 29 | 0 |
| 1954 | 126 | 70 | 11 | 40 | 19 | 56 | 0 |
| 1955 | 57 | 34 | 5 | 22 | 7 | 23 | 0 |
| 1956 | 100 | | 3 | 31 | 19 | 47 | 32 |
| 1957 | [1] 71 | 32 | 2 | 7 | 12 | 19 | 13 |
| 1958 (May 31) | 9 | | | | | | |
| Total | 835 | 457 | 97 | 187 | 173 | 339 | 45 |

[1] 20 pending—all from special RIF screening.

*II. RA officer losses as a result of 2-time passover for permanent promotion, 1948 through 1957*

| | Discharged | Retired |
|---|---|---|
| Major | 2 | 119 |
| Captain | 46 | |
| 1st lieutenant | 35 | |

NOTE.—These data are unavoidably incomplete because records are not available on those officers who resigned after 1 passover and those who received a physical disability retirement instead of discharge.

*III. Regular Army officer losses (punitive)*

| Calendar year— | Court-martial dismissals | Resignations in lieu of trial |
|---|---|---|
| 1954 | 4 | 16 |
| 1955 | 2 | 18 |
| 1956 | 0 | 14 |
| 1957 | 4 | 16 |
| 1958 | 1 | 5 |

TAB 2

STATISTICS OF CASES REQUIRED TO SHOW CAUSE BY THE 1958 REMOVAL SELECTION BOARD

| | |
|---|---|
| Number of cases required to show cause by Board | 51 |
| Completed cases: | |
| Resigned [1] | 2 |
| Retired [1] | 7 |
| Discharged [1] | 7 |
| Discharged by Board action | 1 |
| Placed on temporary disability retired list | 1 |
| Died | 1 |
| Retained by Board of Inquiry | 5 |
| Retained by Board of Review | 10 |
| Retained by Secretary of the Army | 1 |
| Retained by Under Secretary of the Army | 0 |
| Subtotal | 35 |
| Pending Cases: | |
| Referred to Separation Branch, TAGO | 0 |
| Individual and/or field notified | 2 |
| Being processed for separation/discharge | 2 |
| Being processed for retirement | 0 |
| Being processed for Board of Inquiry | 11 |
| Being processed for Board of Review | 1 |
| Pending decision of Under Secretary of the Army | 0 |
| Subtotal | 16 |
| Total | 51 |

[1] These actions were elected by the individuals concerned in lieu of appearing before a field board of inquiry.

30 MARCH 1959.

Memorandum for the Deputy Chief of Staff for Personnel.
Subject: Review of Current Elimination Procedures (March 27, 1959).

SUPPLEMENT

In view of the extremely short time available, the following additions to and modifications of the basic paper, which normally would and should have been

incorporated therein, are necessarily submitted separately. Each item is keyed to the basic paper by page and paragraph.

1. Page 8, following par. 20, add the following:

"20A. A simple way of effecting the foregoing policy would be to revise the question to read. 'Have you ever within the five years preceding the date of this document been convicted, by either a civil or military court, of other than minor offenses?'

"20B. 'Minor offenses,' for this purpose may be defined as follows:

"a. Within the military system, any action under Art. 15; any conviction by Summary Court-Martial; any trial by Special Court-Martial of an officer or warrant officers; and any trial by Special Court-Martial of an EM resulting in an approved sentence, whether suspended or executed, not involving more than 30 days' confinement (the Summary Court-Martial maximum). Trials of officers by General Court-Martial prior to 1949 (when officers first became, in fact, subject to trial by Special Courts-Martial), where the approved sentence did not include dismissal, whether suspended or executed, and where the approved forfeitures did not exceed the present punishing power of special courts-martial, may also be considered as minor for all purposes.

"b. In the civil courts, any prosecution for a misdemeanor that did not result in a sentence to confinement."

2. Page 9, following par. 24, add the following:

"24A. In the past, also, about one third of the membership of the Elimination Selection Board was drawn from OAD. Since almost all of the non-RA elimination cases are processed by OAD before being considered by the ESB, this factor militates against objective judgment. It seems desirable, therefore, to provide that no member of the ESB will be selected from officers currently on duty in OAD or in the Personnel Divisions of the Tech Services."

3. Page 15, following par 43, add the following:

"43A. In this connection, it appears to have been generally overlooked that, ever since 1947, the need for elimination provisions such as those now being considered, is less than it was previously. Under the National Defense Act of 1920, with its provisions for promotion by seniority (sometimes sarcastically but accurately characterized as the system of promotion by senility), a plan of elimination was a necessity, and Sec. 24b, the Class B proceedings, was thought to meet this need. But after one initial housecleaning in 1920–1921, the Class B system broke down, and in 1941 General Marshall, then Chief of Staff, sought and obtained from Congress the passage of Public Law 190, 77th Congress, to suspend Sec. 24b, and to weed out the deadwood in the mobilization then in progress. It was because Public Law 190 was temporary that the Army in 1947 sought enactment of what became Title I of Public 810, 80th Congress.

"43B. In 1941, the RA officer strength was about 14,000. After the last Congressionally directed reduction of RA officer strength in 1922, the number had been at 12,000 for many years. Therefore, in 1941, the Army was dealing with the accumulation of some 19 years mal-functioning of Class B. Yet the total number of officers called on to show cause under Public Law 190 was only 203 (tab. 5; provided by Mr. Lynch, Historical and Precedent Sec, TAGO). This comes to about 1 elimination per 1000 officers per year.

"43C. After 1947, the Officer Personnel Act substituted promotion by selection, with its provision for elimination from the active list for two promotion passovers. At present, almost 150 officers are thus separated each year (figure from Lt Col Waddell, P&RD), and that number will increase as more promotions are made to depend on "best qualified" rather than "fully qualified." At 150 per year, with the present commissioned RA strength, this comes to about 5 or 6 eliminations per 1000 officers per year. If the Tamed White Charter Bill becomes law, the figure may be expected to rise still further in the future as Lt Colonels are retired for failure to be promoted to Colonel.

"43D. Accordingly, the condition at which Public 190 was aimed in 1941 no longer exists—but in 1948, when Title I of Public 810 became law, apparently the effect of the preceeding year's Officer Personnel Act was not considered anywhere. No doubt there is room for both systems of removal, the OPA for promotion passovers, and Title I for the periods between promotion consideration and for the utter dregs. But with promotion passovers eliminating many of the less effective officers, it would seem more realistic not to be unduly perturbed at the failure of the Title I elimination process to separate more officers than it does (see Tabs 1 & 2 for the figures). The real value of the elimination process to the Army lies, not in the number of separations it effects, but in the

vastly greater numbers whom it goads and frightens into turning in a better professional performance."

4. Page 23, rewrite Conclusion 3*f* and add new subparagraph *g* as follows:

"*f*. Elimination Selection Board, which initiates show cause orders in cases of probationary RA and non-RA officers, seems additionally handicapped in exercise of objective judgment because its members are outranked by heads of Combat Arms Branches in OAD who initiate recommendations, and because some of its members are on duty in OAD.

"*g*. Even under optimum conditions, a screening board sees a partial picture, drawn from paper; the review board has the benefit of full presentation by both sides, of later evaluations, and of seeing and hearing the respondent in person."

5. Page 24, add Recommendation 1*d*, as follows:

"*d*. No officer on duty in OAD or in the personnel division of a Tech Service should be detailed as a member of the Elimination Selection Board."

6. Page 26, add Recommendation 4*c*, as follows:

"*c*. Reevaluate the significance of the elimination process in the light of the statutory provisions, enacted and to be enacted, that require separation from the active list for promotion passovers."

7. Page 27, add par. 4 just above signature, as follows:

"4. Present status of coordination (30 Mar 59) is as follows:

"*a*. C&SD, ODCSPER (Col Hale)—concurs in recommendations and conclusions bearing on OEI.

"*b*. P&RD—has paper under study.

"*c*. PAD—has seen, no comments at this time.

"*d*. ACRB (BG Hardenbergh, Director)—says study is excellent review and analysis, but will make no further comments until formally submitted."

8. Page 27, add the following item under Attachments: "Tab 5. Reclassification of Officers in FY 1942."

9. Page 27, add the following:

"MEMO FOR RECORD:

"During its preparation, this study was discussed with many individuals connected with the elimination process, not only in ODCSPER, but also in TAGO, OAD, ACRB, and OASA. In general, the conclusions and recommendations set forth above won the concurrence of the individuals actively concerned in the mechanics of elimination procedures at the actual axe-wielding level, while the same conclusions and recommendations were most strongly resisted at the levels where current polices are formulated, and where eliminations are initiated.

"It is believed that these divergencies reflect essentially a difference between individuals who are acquainted with the full records in elimination cases, and those not so acquainted. Otherwise stated, the differences of opinion grow out of different observed facts.

"Accordingly, it is suggested that annex A, the analysis of 28 retention cases, should be read first.[1]

"Had time permitted, 100 or more such cases would have been examined. Inasmuch as 28[1] are probably a fair sample, such further study in all probability would not have varied substantially the conclusions reached, although additional instances would undoubtedly have resulted in some sharpening of detailed recommendations.

FREDERICK BERNAYS WIENER,
*Colonel, JAGC, USAR.*

---

SUPPLEMENT TO ANNEX A

*Case No. 30: CWO-W2, RA*

*Prior service.*—7 years as WO, 10 years as EM before then.

*Initiator of proceedings.*—Career Br, OQMG. Screening by ESB.

*Grounds.*—Decline in efficiency, substandard service, failure to exercise leadership, failure to meet financial obligations. Lower 2% of OEI.

*Summary of evidence.*—ERs said, "lack of initiative," "works best under pressure and supervision." Considerable evidence of personality clashes, but strongly favorable testimony from many officers, respondent was competent and doing good job. Late AEI quite high. "Failure to meet financial obligations" boiled down to two Art 15 cases, involving negligent failure to maintain sufficient balances; checks promptly paid after protest. At B/I, defense counsel urged

[1] 29th case attached.

that current ARs did not meet basic standards of fairness required of administrative proceedings by the civil courts. B/I out 58 minutes, B/R out 10 minutes.

*Commentary.*—Reference of recommendation for elimination to field, and application of proper disciplinary standards could have kept this case from starting. Fact B/R was out only 10 minutes shows case was not even borderline.

*Evaluation.*—Nothing in this additional case to vary conclusions or recommendations previously submitted.

Mr. WIENER. Interestingly enough, when I presented that report, I found wide concurrence among the "Indians" in the Pentagon, and "Indian" means an action officer—the "Indians" as against the "Chiefs"—the people who were in the actual elimination process, who saw these cases, who knew the facts, they agreed with me, whereas the people on the screening board, and those who rendered staff supervision and saw only the retention rate were against me and then, as I say, in December 1959, I brought this case in court, alleging a violation of the statute in two respects: First, that the statute didn't cover misconduct; second, that the shift in the burden of proof was contrary to the statutory direction for fair and impartial hearings.

Without going into the details, I was able to keep that litigation alive for a year and a half until my man had got his retirement and then he was permitted to walk out under his own steam. I did try to get it to the Supreme Court on a mandamus to convene a three-judge court and that after some cogitation was denied, and I don't really quarrel with it, because the way the statute was written, I think, was probably all right. It was the regulations which were bad, and the application of the regulation and while that case was pending, Congress revised the act.

In that revision Public Law 86–616, the 1960 amendment, Congress divided the misconduct and the inefficiency, but Congress specifically and it is shown in the report, in the committee report, shifted the burden of proof against the accused and didn't provide for confrontation.

I think it is fair to say the hearings were very inadequate on the House side and there weren't any hearings on the Senate side and after the House passed this bill, I wrote to the chairman of the Subcommittee on Military Affairs asking him for a hearing and after the bill had been passed by the Senate and was becoming law I got in reply a letter that some Air Force general had written in reply to my objections admitting that the effect was to change the burden of proof.

As I say, these issues are pending now.

I should add two additional features of the pending case. Not only is there no confrontation, not only was confrontation by the accuser denied in that case but the regulations specifically provide for the minimization of favorable letters.

In other words, if I am the respondent, I can't be faced by my accuser, I can't cross-examine him, and if I get a letter from General Schmaltz that I am a fine fellow and ought to be retained, that is waved to one side and the regulation says you minimize that.

Furthermore, under the new procedure there is not only no de novo hearing before the Board of Review, but there is no representation for the respondent before the Board of Review and in this particular case they had the hearing before the Board of Review, the recorder was there, he summarized all the adverse matter in the record, ad-

verse to the respondent. He mentioned none of the favorable factors and the respondent himself could not appear.

It is as though when I take an appeal to the court of appeals, I am the appellant but I can't be there.

Well, now, it seems to me that regardless of outcome this is the sort of mess that Congress should clean up after adequate hearings and not pass the buck to the courts to point out unconstitutionality because there is a lot of fairness that isn't unconstitutional which should be cleaned up.

There is no hope, no reasonable hope of getting the services to clean it up, because when I had this mandamus pending, I went to the Solicitor General then newly appointed and said, "I would like you to take a look at it," and the Solicitor General said, "I will let you go talk to the Army."

After all the New Frontiersmen had just come in, and so I wrote a letter to the new Secretary and I had a reply from the new Under Secretary and I think this may be of interest for the committee, I have a photostatic copy of the correspondence here, and Mr. Ailes said this:

> If, as you allege, the Army regulations which prescribe procedures for elimination of substandard officers are inconsistent with the statutes which they are designed to implement, and if, as you also allege, these statutes are unconstitutional as construed and applied to your client, considerable revision of Army elimination procedures will be required. On the basis of the information available to me, and my examination of the briefs filed in the pending litigation, I do not believe that such a revision is necessary or desirable at this time."

So that unless there is some impetus emanating from this committee or unless the Supreme Court agrees to hear the appeal and strikes down the statute this mess will never be cleaned up.

(The letters referred to follow:)

WASHINGTON, D.C., *February 21, 1961.*

Re *Ledford* v. *Curran*, Supreme Court of the United States, No. 752, Misc.

HON. ELVIS J. STAHR, JR.,
*Secretary of the Army,*
*Department of the Army,*
*Washington, D.C.*

MY DEAR MR. SECRETARY: With the written consent of the Solicitor General, dated February 20, 1961, who has advised me that he is arranging for a 30-day delay in replying in the above-entitled matter to permit me to make the present request, I urge that you examine for yourself the underlying controversy, namely, the elimination proceedings against my client, Lt. Col. Lee B. Ledford, Jr., 023775, JAGC.

Reexamination of your predecessor's actions it the more appropriate since they were advised in this matter by the very officers in The Judge Advocate General's Office who had originally instituted the elimination proceedings, and who thus, unconsciously or otherwise, were defending their earlier determination rather than objectively appraising a proposal originally put forward by a different office.

It is submitted that the prior approval by former Assistant Secretary Short in this case should be rescinded, and the proceedings disapproved, primarily for the reasons set forth below. There were other grave irregularities, but those about to be enumerated are the most serious.

1. Absence of substantial evidence to sustain the vague allegations made.
2. Injection into the proceedings of a particularly revolting allegation, known to be without evidentiary support when it was initiated and now admitted to be unsupported by proof, but which took up the major portion of the transcript and hence irreparably prejudiced the respondent's defense against the other allegations.

3. Refusal to call for confrontation and cross-examination individuals whose statements adverse to the respondent were considered at all stages, even though one of these was actually in the same building in which the hearing was being held.

4. Shifting the burden of proof against the respondent by giving conclusive weight to the ex parte charges made against him, pursuant to paragraph 8. AR 635–105B, January 2, 1957, in violation of the statutory command, see 10 U.S.C. (1956 revision) section 3782(b), for "a fair and impartial hearing."

5. Absence of findings by the two boards that heard witnesses, followed by "findings" on sharply conflicting evidence by former Assistant Secretary Short, who had heard no witnesses. One consequence of this irregular procedure was that the respondent stands convicted of matters never charged or even intimated against him at any earlier stage of the proceedings.

Now that the Army has a new Secretary as well as a new Judge Advocate General, an opportunity to seek reconsideration of the unjust and, in my judgment illegal action heretofore taken against Lieutenant Colonel Ledford is finally at hand; and the Solicitor General, who represents in the Supreme Court the officials who were defendants in the injunctive proceeding below (*Ledford* v. *Brucker, Secretary of the Army, et al.*, U.S. District Court for the District of Columbia. C.A. No. 3583–59), has indicated his willingness that I now submit the matter to you for reexamination.

It is my earnest hope that you will undertake such a reappraisal. It is my considered opinion, based on intimate knowledge of the record, that the present proceedings reflect no credit on the administrative processes of the U.S. Army. I urge, therefore, that you disapprove them.

I stand ready, at short notice and under time limitations comparable to those imposed in appellate courts, to present this case to you or to your delegate, and to supply whatever additional information may then be desired, supplementary to this necessarily brief communication.

Inasmuch as a copy of the Solicitor General's letter to me was sent The Judge Advocate General, I am sending a copy of this letter to General Decker with a view to avoiding unnecessary delay.

Respectfully,

FREDERICK BERNAYS WIENER,
*Counsel for Lieutenant Colonel Ledford.*

---

DEPARTMENT OF THE ARMY,
OFFICE OF THE UNDER SECRETARY,
*Washington, D.C., April 4, 1961.*

FREDERICK B. WIENER, Esq.,
*Washington, D.C.*

DEAR MR. WIENER: Pursuant to the instructions of the Secretary of the Army, I have made an independent examination of the decision to effect the elimination of your client, Lt. Col. Lee B. Ledford, Jr., from the Army. The allegations raised in your letter to the Secretary dated February 21, 1961, have been carefully considered in the course of my inspection of the records pertaining to this case.

As a result of my examination, I am satisfied that the position of the Army in this case is both fair and reasonable and that there has been compliance with the applicable Army regulations. Moreover, I note that your allegations are substantially the same as the issues awaiting resolution in the courts. If, as you allege, the Army regulations which prescribe procedures for elimination of substandard officers are inconsistent with the statutes which they are designed to implement, and if, as you also allege, these statutes are unconstitutional as construed and applied to your client, considerable revision of Army elimination procedures will be required. On the basis of the information available to me, and my examination of the briefs filed in the pending litigation, I do not believe that such a revision is necessary or desirable at this time.

In view of the foregoing, I have informed the Solicitor General that I see no justification for reversing the previous decision to effect the elimination of Lieutenant Colonel Ledford from the Army, and have urged that he proceed with the litigation.

Sincerely yours,

STEPHEN AILES,
*Under Secretary of the Army.*

Mr. WIENER. Now, I think that when the committee delves deeply into this elimination matter it will find that you don't even need it for inefficiency, because while the 1948 legislation was pending Congress passed the OPA which provides for passovers, so that the inefficient are automatically eliminated. They are not just promoted if the fellow ahead of them dies or retires and they keep away from a court-martial.

I think the committee will also find that chapter 360 is resorted to for misconduct only whenever the evidence is insufficient to justify conviction by court-martial or when the offense has been barred by the statute of limitations or when the accusers won't stand up to confrontation and cross-examination, and I strongly urge this committee to initiate some kind of reconsideration to clean up this mess because quite apart from the outcome of the pending litigation, I don't think that the kind of proceedings which take place particularly under the misconduct provisions of chapter 360, I don't consider that those proceedings are consonant with American notions of fair play.

That is the end of my statement on the eliminations, Mr. Chairman.

Senator ERVIN. Mr. Creech?

Mr. CREECH. Colonel Wiener, the subcommittee has received testimony to the effect that the uniform code is unwieldy, that it is burdensome, and that it would not work effectively during wartime.

It has also received testimony to the effect that the Court of Military Appeals should be abolished and that a more effective type of military justice could be administered by reverting to the previous administration under the Elston Act.

I wonder, sir, what your views are with regard to these allegations?

Mr. WIENER. Mr. Creech, in the thought that since this committee has evidenced its interest in military justice, I have arranged my thoughts on that subject so that I won't be just talking off the cuff and at large.

I will address myself to that subject and in the course of my presentation I will answer your questions specifically.

The matter of military justice is a dilemma. I think we ought to face it. It is a dilemma that arises out of the need for reconciling essentially irreconcilable concepts.

On the one hand we have the hard and unpalatable fact that a military organization is and must be an authoritarian organization because its job is to send men obediently to death if need be.

Gen. William T. Sherman—and I don't think anyone will question his military prowess although in the past there have been southern friends who suggested that in the past he was a little careless with fire—General Sherman, as is not generally known——

Senator ERVIN. I might add, Colonel, that we have very substantial evidence of that. [Laughter.]

Mr. WIENER. I do not wish to fan flames, Mr. Chairman.

What is not generally known, perhaps, is that Sherman was a practicing lawyer before the Civil War, or, out of deference to the chairman, before the War Between the States.

Senator ERVIN. My geology professor used to call it the un-Civil War. He said it was the most uncivil thing that ever happened.

Mr. WIENER. I think that the official records, as you are doubtless aware, refer to it as the War of the Rebellion but now in an effort,

a manful effort, to calm things down in this centennial celebration, I think it's being called a Confederate war as a euphemism that does not arouse tensions on either side of the Mason-Dixon line.

He wrote a frequently quoted piece about the difference between the military and civil communities. He said, in substance:

the object of the civil law is to create the greatest benefit of all in a peaceful community. The object of military law is to govern armies composed of strong men. An army is an organization of armed men obligated to obey one man.

Well, that gives rise to the longhairs' favorite dichotomy about whether the military law is designed to administer justice or to enforce discipline and the answer is, "Both"; because you can't have discipline if injustice is rampant.

The difference is in the application, in the speed, and in the purpose of punishment, and punishment in a military organization is primarily deterrent. Punishment in the civil courts is, of course, primarily reformatory. And, of course, an army is not a deliberative body.

That is the one side of the coin.

On the other the need for military discipline enforced by prompt and certain sanctions does not meet what are publicly acceptable standards of criminal justice. I don't think the American people are prepared for summary criminal justice.

In fact, in the discussions in 1948 and 1949, it got to the point where persons—and this was right after we had won the greatest war in history—persons were unwilling to trust to the commanders who had planned and ordered the invasion and at whose behest 300,000 fine Americans were killed in action, they were unwilling to trust those commanders with the power to appoint courts-martial even though such powers went back to colonial days.

I was engaged in a debate with a New York lawyer about this time, and when this was brought out he said—and I can prove it with the recording of that TV debate—"General Eisenhower is only interested in the prerequisites of the brass."

That is how emotional they got about it. And as for death sentences, I think, I don't know whether it is your committee, sir, or the District of Columbia Committee which now has pending this question of the mandatory death penalty in the District of Columbia.

I will say here and now I am not squeamish about the death penalty, I have seen too many cemeteries of decent citizens on the Pacific Islands and certainly there are some humans who ought to be destroyed as though they were mad dogs, but I don't think it can be denied that the death penalty fouls up the machinery of justice in the country under present conditions.

If Caryl Chessman had been sentenced to life imprisonment his case would never have attained the proportions it had. If we didn't have a mandatory death sentence in the District of Columbia I am sure it would be easier to get convictions for first degree murder.

Mr. CREECH. For your information, Colonel, that bill was reported by the District Committee and is now currently under consideration in the Senate.

Mr. WIENER. In World War II or more accurately, between the close of the Civil War and the close of World War II, only one American soldier was executed for a purely military offense.

Now, that was for repeated desertion in the face of the enemy.

I studied that once. That caused an awful lot of screaming yet he certainly wasn't the only one who deserved punishment, and yet if the death penalty is to be a deterrent, you can't execute it as death sentences for murder have been executed under the code and under the Elston Act 6 years after the offense when the war is over.

Now, you have got to attempt, and it is the task of statesmanship to attempt, a workable compromise between these two apparently conflicting concepts, and that workable compromise seems to me to require two bases.

First, the recognition that a military community differs from a civilian community, that drafting a military code is very different from drafting a code of criminal procedure for the State of East Oversham.

Definition of offenses, no, but the application and the procedure and the entire approach itself are a different problem, because it is a different breed of cat.

And second, again arising out of this conflict, military justice should, therefore, be limited to situations where the standards and techniques and procedures of military justice are necessary, and it shouldn't attempt to parallel civilian justice and say, "Well, they have got a jury and we have a court-martial."

The test, I think, was laid down by Mr. Justice William Johnson, of South Carolina, in the old case of *Anderson* v. *Dunn*, in the 6th on Wheaton, page 204 at 231, "The least possible power adequate to the end proposed." That would be a good standard.

Now, the basic difficulty with the Uniform Code is that it disregards both those reconciling factors, and that in its 11 years of operation it has proved it is unable to stamp out abuses at the source.

Far from limiting military jurisdiction, it had extended it.

Through 1951 the capital offenses of murder and rape could not be tried within the limits of the continental United States in time of peace, and that limitation was last defended by General Crowder, the Judge Advocate General of the Army from 1911 to 1923, a very able man, a very profound lawyer—last of the giants, I think—and he said, "It is not right, a military court shouldn't try capital offenses in time of peace in the United States."

That was incorporated, that was set out in old Article of War 92 from 1916 on.

His code also had Article of War 74; namely, that in time of peace the civil courts had primary jurisdiction over offenses against the civilian population committed by members of the military.

Why the drafters of the uniform code refused to carry on those limitations, I can only surmise. I am reasonably familiar with the legislative history. I can only surmise that they thought they were setting up a judicial framework so perfect that the limitations weren't necessary.

Now, there has been some attempt to curtail the military jurisdiction by an agreement between the Department of Defense and the Department of Justice made in 1955, but it is still possible for the military to try a case of murder occurring on a military reservation. That wasn't so before. I remember back in 1939 there was some officer at Fort Benning who needed money and the only source of

funds he saw immediately available was the insurance he had on his wife and he banged her head in pretty thoroughly with a golf club. He was tried in a U.S. district court in Columbus, Ga.

I don't think, and I say this dispassionately, objectively, and after a great deal of reflection, I don't think that the military are qualified to exercise a general criminal jurisdiction and I rest that primarily on what they did in the *Smith* and *Covert* cases. I am not talking now about the jurisdiction.

Mrs. Smith, General Krueger's daughter, had been under continuous psychiatric care for 5 years, and then the doctors said to her husband if she turns in here once more she goes home, so she didn't turn in. Then, in an incident when she had been drinking and when she was full of drugs which had been prescribed by the doctor she stabbed her husband and he died. She was found guilty of premeditated murder despite substantial evidence of her mental instability, and she received a life sentence. I don't think that any civilian court, any civilian court in the United States—there was no triangle, I mean there was none of this poor girl stuff or anything like that—I don't think any civilian court in the country would have given her more than 3 years for manslaughter if indeed they convicted her at all.

Senator CARROLL. What year was that, Colonel?

Mr. WIENER. The trial was in 1953, it is one of the cases in *Reid* v. *Covert*, 354 U.S. 1.

Senator ERVIN. That is the case where they say you couldn't try an American civilian who accompanied the Armed Forces abroad for a crime committed by them abroad?

Mr. WIENER. Yes, sir. I am now talking, addressing myself only to the merits which, of course, when I handled those cases in the civil courts weren't in issue at all. Then there was the case of Mrs. Covert. Mrs. Covert, again no triangle, had, according to the majority opinion of the psychiatrists, a psychotic episode. She thought her husband was her father who had deserted her as a child—after she had axed her husband she took all the sleeping pills she could find and climbed into bed with the corpse and when during the trial it was found she was with child and that child was born in prison, then, after the trial two of the Government psychiatrists retracted their testimony, and what did the Air Force do? They found her guilty of premeditated murder and said any punishment other than life imprisonment would be unwarranted and inappropriate. I say, you look at—she would have been acquitted, I think anywhere, if she had been tried by the English courts as under the NATO agreement she would now be. They hadn't taken effect then. I think there where they have the strict McNaghten rule she would have been acquitted and yet she was sentenced to serve life imprisonment and even after she had a baby born in prison no one could see any mitigating circumstances to modify that life sentence; so I say these people are just not equipped to carry on a general criminal jurisdiction.

Now, second, where the jurisdiction is, even where the jurisdiction is within the former limits, the code introduces what I think are unsuitable civil concepts, civilian concepts.

Before the code a trial by court-martial was adverse in form but not entirely, because laymen could prosecute and defend, and the rule was that waiver by a layman was not given a great deal of effect,

because they figured this fellow didn't know any better. He was just a captain of infantry, a lieutenant of artillery, he wasn't a lawyer. We won't consider waiver.

Well, now, the cases are tried mostly by aggressive lieutenants on both sides, who get their notion of trial practice from Perry Mason and Mr. District Attorney, and you have a hammer and tongs contest, and waiver is given very serious effect even though it may have been some kid 3 months out of law school. Even more significant to me is that the uniform code divorces the administration of military justice from the consciousness of the services. Instead of the services disciplining themselves and taking a precise interest in seeing that the guilty are convicted and the innocent go free, the whole thing is turned over to the cops and the lawyers, and when a decision comes down saying that this or that was unfair, nobody sees that because this is in a verbose opinion which only the lawyers need bother with. It is no longer a part of the consciousness of the service.

In the old days, your well trained officer who had been in the peacetime army knew military law, and he had a working grasp of the rules of evidence. Whenever I sat as law member under the 1920 Articles of War and I had one of these experienced lay officers next to me, I would close the court and I would say, "Joe, what do you think?" because he had been through it more than I had, and I wanted the benefit of his doubt.

The third difficulty is that it is impossible to expect the services without the supervision of the Court of Military Appeals to stamp out the endemic existence of command influence, and I have here a list of the horribles. I don't want to go into them in detail, Mr. Chairman, perhaps if I either submit the citations to the reporter or submit them separately. These are shocking cases that weren't caught by the Board of Review.

There is the *Deain* case (5 U.S.C.M.A. 44), a Navy case. They had a permanent general-court. I think the Navy has now got away from that. The admiral who was president of the general court was challenged and on challenge admitted that when "I see him come in there, I know he is generally guilty otherwise he wouldn't be here," and then he made out the fitness reports on the members of the court.

Well, you can imagine how much dissent you were going to get from the members of the court in that situation. Passed by a board of review, reversed by the Court of Military Appeals.

*Whitley* (5 U.S.C.M.A. 786): The president of a special court was ruling in favor of the defense. At a recess he was relieved and another officer was substituted in his place. Passed by the Board of Review, reversed by the Court of Military Appeals.

*Sears* (6 U.S.C.M.A. 661): There was an Air Force special court-martial in England. The accused hired an English solicitor who, of course, has the right of audience. The convening authority put two lawyers on the court on the special court, who advised the president to overrule every one of the solicitor's objections. Passed by the Air Force Board of Review, reversed by the Court of Military Appeals.

*Parker* (6 U.S.C.M.A. 75): A soldier put on trial for a capital case, death sentence adjudged, 1 day to prepare for trial. Passed by the Board of Review, reversed by the court.

*McMahan* (6 U.S.C.M.A. 708): A soldier on trial for a capital offense. His counsel, a major, J.A., made no closing argument although it was a very thin case on premeditation, said nothing in mitigation when the question before the court was whether it should be a death sentence or a life sentence. Death sentence was adjudged, passed by the Board, reversed by the court.

*Kennedy* (8 U.S.C.M.A. 251): A cooked-up scheme, I don't think any other characterization would be accurate, between trial counsel, the law officer and the staff judge advocate to get a conviction. Passed by the Board, reversed by the court, and finally *Kitchins* (12 U.S.C.MA. 589), when an Army lieutenant made a spirited defense his superior, the staff judge advocate, gave him a low efficiency report. Passed by the Board, reversed by the court.

So, I am convinced you need a court not only to take you gentlemen and the Congress out of the court-martial business so you don't have to go see the Secretary on behalf of constituents but also to look over the shoulders of these people who just can't be relied upon to do a completely decent job by themselves.

And more than that, some of the current remedies which they propose would make the situation even worse.

There has been pending a bill sponsored by the American Legion, to restore the limitation on capital offenses existing before 1950. It is bitterly opposed by the Army in the Brucker report.

The Brucker report has a court packing provision. I would have supposed that after Senator Joe Robinson died in the summer of 1937, the court packing was just one of the things that wasn't done.

In the committee draft of the Brucker bill which is their proposal for amending article 67 (a) (1) there is this provision:

> Two judges shall be appointed for a term of four years from among the retired commissioned officers of the Armed Forces who have completed at least 15 consecutive years service on active duty as a Judge Advocate of the Air Force or as a legal specialist of the Navy within two years of their appointment.

That is just a court-packing plan, to put two judge advocates on the Court of Military Appeal in order to limit the number of reversals.

Then they had a perfectly fantastic definition of harmless error. I don't have to tell this subcommittee that judges and lawyers differ on what was and what was not harmless error. If it is a 9-man court you will get 5 to 4 decisions, if it is a 7-man court, you will get 4 to 3 decisions. It is frequently a very close matter.

Here is the Army's, the new Brucker report's definition of harmless error in their proposal for article 59.

> An error of law * * * will not be considered to materially prejudice the substantial rights of an accused unless after consideration of the entire record it is affirmatively determined that a rehearing would probably produce a materially more favorable result for the accused.

In other words, if someone is guilty of murder, first-degree murder, and plainly is such a beast in human form that he would be sentenced to death after a fair trial, well then, it makes no difference that he was sentenced to death after a greviously grossly unfair trial. I submit that is a fantastic definition of harmless error.

Finally, the Brucker report objects to the greater independence which the American Legion bill would give to Boards Review by putting them in the Office of the Secretary of Defense where they

84154—62——50

wouldn't be subject to and right under the nose of the Judge Advocate General and I understand your subcommittee has heard that the members of Army Boards of Review are rated for efficiency by the Chairman of the Board—again hardly a factor calculated to produce independence of judgment.

Now, on the basis of an experience with no less than three military codes, extending over 25 years, I venture to make these suggestions for improvement of the present rather unhappy and unsatisfactory situation:

First, I would reenact the limitations of old articles of war 74 and 92.

Secondly, I would either put the boards of review into the Secretary of Defense's office with tenure, in other words, they are there for a 3-year term and you don't transfer them when they write an opinion you don't like. Or better still abolish them altogether and shorten the process.

There is really no need for a double appellate review in the military system. It grew out of a historical accident. In the Elston bill, they superimposed a judicial council on the Board of Review, I think the purpose of the judicial council originally was sentence equalization and disciplinary aspects.

In other words, not so much did this man commit larceny or murder or was he quilty of embezzlement but assuming he was guilty of conduct unbecoming an officer, what would be a proper punishment from a disciplinary point of view. Now that was continued by the code, and I think there is no need for it.

I will say this, the existence of the Board of Review does not help an accused substantially, and I feel so strongly about that that I no longer take retainers before Boards of Review because it is a waste of my time and of my client's money. Any case that a Board of Review sets aside would be set aside in the examination branch. You get only built-in delay, and built-in expense.

What I would provide is that all cases should be examined in the Judge Advocate General's office as the minor ones are now examined under article 69, and from an adverse decision there, the Judge Advocate General can certify or the accused can petition.

Then I would give the Court of Military Appeals the same jurisdiction over facts and sentences that the Boards of Review now have. I would enact the Army's law officer program by law, with corresponding changes in the manual to make it clear that the law officer presides, and that would reduce the present president of the board to a mere foreman of the jury.

The Army has a very successful law officer system. The Navy has adopted it certainly on a pilot basis, I don't know how far it has gone.

The Air Force has resolutely held out against it, as far as I can see, because they put the NIH stamp on it, "Not Invented Here," and so they want no part of it.

I think the permanent law officer program is the greatest improvement in trials since the code, and that it should be mandatorily required.

I would also consider a return to the Elston bill's provisions as to lawyers. Now the Elston bill said, "If you have a lawyer for the

prosecution you have got to have one for the defense. If you have a layman prosecuting, you don't need a lawyer for the defense."

Well, I know that the bar association pontificators say, well, you have got to have lawyers to try cases. I have seen it done the other way. There was an old farmer back home who was asked whether he believed in baptism. He said, "Good Lord, yes, sir, I have seen it done." I have seen cases adequately tried by layman prosecuting and defending and in the British Colonies, lay police officers prosecute all except the really difficult cases.

Senator ERVIN. Colonel, as a matter of fact, courts-martial apply to a small field—law violations—isn't that true?

Mr. WIENER. Yes, I would say so. Certainly, if you would restrict the jurisdiction, you don't need a lawyer to try an a.w.o.l. case.

Senator ERVIN. Of course, those of us in civilian courts, not only have all of the field of criminal law but we have all these other fields of law. Criminal law occupies a comparatively small area of the total field of the law?

Mr. WIENER. Yes, sir, and the court-martial, of course, has only criminal jurisdiction. I wouldn't dream if I were staff judge advocate of assigning a layman to prosecute a murder case or a tricky case of embezzlement or anything that was really serious.

But the a.w.o.l.'s and the desertions and the disrespect to superior officers, you don't need lawyers to try those cases, and that would, I think, again bring the system of military justice back into the consciousness of command.

Then I would see if I couldn't get some impetus toward further education. I made a study of this, again on duty at the Pentagon. What kind of education does an Army officer get, and I am talking about the full-time professionals, what kind of education does he get in military law. Well, he gets 1 year at the Military Academy and that is it. When he gets to Leavenworth he will learn something about military government and martial law but he never again from West Point on through the War College studies the problems of sanctions. He never studies the problem of punishment. He repeats a few legends that he has heard from older officers but no one has ever applied their very considerable talents to looking at the question of sanctions.

Now, one of the reasons military justice took such a beating in World War II was lack of training, particularly among commanders.

When the Army took an officer and made him a brigadier general and gave him command of a newly organized division, and there was a man who had probably been only a major a year previously, they didn't immediately say, "OK., boy, take your division and train it and take it out to the field and beat the enemy."

No, they sent him to Fort Leavenworth for a very stiff refresher course. Sure, he was qualified, he wouldn't have been detailed, he wouldn't have been given that assignment if he hadn't been a superior officer. But, "Before you take your division you are going to have a refresher course."

But nobody ever took these people who had general court-martial jurisdiction for the first time in their lives and gave them a 5-day sitdown with a wise dutch uncle J.A. who knew all the mistakes because he had seen them, to sit down and guide them.

And finally, there must be some way, which there isn't now, of communicating to commanders the basic principles of the Court of Military Appeals decisions on questions of basic fairness. I don't mean that you have to instruct a division or corps or Army commander in the intricacies of embezzlement or what is or what is not premeditation, but I mean, "Look, these are things that aren't done and this is why."

In other words, don't let military justice be a thing apart as now.

Then, finally, I think you have got to do something by legislation to make the legal career in the service more attractive. Under the provisions of the Officer Personnel Act any officer, any legal judge advocate who isn't appointed a brigadier general must retire, is retired between the ages of 51 and 55, depending on how or when he entered the service.

Now, if a lawyer is any good at all, and that may be a big "if" sometimes; but, assuming he is a good, competent lawyer, 51 to 55 is when he reaches his prime. Now, it is true that at 55 he isn't going to be a combat-ready battle leader. But you don't need him for that. You want him to keep his commanders out of difficulty and give sound advice to the staff and to the secretary.

I think the law school rider should be repealed. The services have demonstrated that they can't recruit the lawyer they need from the law schools because, after all, if a lad goes to law school he goes because he wants to be a lawyer. If a lad wants to be an Army officer, he goes to the Military Academy or he stays on after his obligated ROTC training, and sometime after he has decided he wants to stay in that is the time to send him to law school.

Now, the reasoning behind the law school rider is you can get all reserve JA's you need. They can't, they have tried it. You can't.

I don't know whether a separate corps is the answer. Some of these cases arise in the Army and Air Force, and the Army has had a separate corps of judge advocates since 1862. Also I doubt very much whether it is a question of pay. I know that the Judge Advocates Association some time back came out very strongly for more pay for the lawyer sitting in the rear on his rear than for the fellow in the front line being shot at by the enemy, I was then president of the Judge Advocates Association, and felt very strongly about that, felt that it was a matter of civic morality that if I ever supported such a proposal I couldn't look any soldier in the eye, let alone look myself in the eye shaving in the morning. Then when the board of directors overruled me on that the only thing I could do is resign.

Those are my suggestions and I am ready for more questions, Mr. Chairman.

Mr. Creech. Colonel Wiener, you have quoted General Crowder as saying that it is not right for the military to try by court-martial an individual for a capital offense in time of peace. You haven't indicated, sir, that it is your feeling they are not qualified in some instances to do so.

The subcommittee has been told by one witness that there is a serious question of constitutionality as to whether, indeed, the Constitution permits the military to try by court-martial in time of peace a serviceman accused of an offense within the United States where the nature of the crime is exclusively civil, in the sense that it is not com-

mitted on a military installation against military property or military personnel, and does not involve any matter affecting the maintainance of military discipline.

I wonder, sir, if you could care to comment on this statement with regard to the constitutionality?

Mr. WIENER. Well, I don't—I am aware of the argument but I must say I can't see it as a constitutional question. It is true, of course, that if you look at the early codes there was a limitation, they were limited to military offenses, anything else must be turned over to the civilian authorities.

Back in 1833, there was a soldier on the pier of West Point convicted of larceny from a carpet bag—this was before there were carpetbaggers but they had carpet bags.

Senator ERVIN. That was the day I guess when they carried their own property in carpet bags.

Mr. WIENER. Instead of somebody else's property. [Laughter.]

General Alexander Macomb who was then commanding general and who had written a book on military law, disapproved the sentence because it had nothing to do with military discipline.

The Army wasn't given jurisdiction over civil offenses except in time of war until 1863 and not over civil offenses as such until 1916 although they were charged, most civil offenses were charged as conduct to the prejudice of good order and military discipline, and the *Grafton* case (206 U.S. 333), was one where a soldier was tried for manslaughter under the general article.

There was another case whose name I can't recall—I find that is one of the burdens of seniority, it is hard to remember the names of cases—I think it is 105 U.S.

The man who shot President Garfield was kept under military guard, and the sentry, I think, was not a Chester Arthur man and he got so mad that he fired at the assassin and wounded him and he was tried under the general article and that was sustained. I think the case is *Ex parte Mason* (105 U.S. 696).

So it is very difficult for me, regardless of the fact that the jurisdiction has been legislatively expanded, to find a constitutional curtailment in the general power in article I, section 8, clause 14, "to make rules for the Government and regulation of the land and naval forces."

That clause seems to me all-inclusive and so it is a question of legislative judgment rather than of constitutional limitation.

Mr. CREECH. Sir, do you feel there is any problem posed with regard to differentiating between those crimes which are strictly civil and those which might be within the purview of the military, particularly in light of article 135 of the code?

Mr. WIENER. You mean the general article?

Mr. CREECH. Yes.

Mr. WIENER. 134?

Mr. CREECH. 134.

Mr. WIENER. No, I think with the *Grafton* case and this other one in 105 U.S., it's been sustained so frequently that there is no constitutional limitation. I mean, people had been tried for civil offenses under the general article for a long time. I see it as a matter of legislative judgment. I think it is the part of wisdom to restrict the

military jurisdiction to occasions that affect military discipline. But I don't think it is a constitutional limitation.

Senator CARROLL. May I ask a question here, Mr. Wiener?

Mr. WIENER. Yes, sir.

Senator CARROLL. It's been years since I have been in this field. Isn't the general practice or used to be the general practice that if a member of the military personnel committed a crime, I am speaking within the United States, against a civilian the civilian authorities could prosecute?

Mr. WIENER. Yes. That was article of war 74 of 1916 through 1948. I can give you the present reference. Article 14 of the Uniform Code changed that. I think that the civil courts should have primary jurisdiction over civilian offenses committed by military personnel off the post.

In other words, if the soldier, if the marine from Quantico robs somebody in the District he ought to be tried in the District court. If he robs somebody on the reservation, he should be tried by court-martial.

Senator CARROLL. It seemed to me during that period of time prior to the adoption of the code that under that old procedure there was the civilian authority who could waive and let the military prosecute.

Mr. WIENER. That is correct, yes. But the civilian jurisdiction was primary in time of peace. It was not exclusive even in time of war. There is the case of Caldwell against Parker somewhere in 251 or 2 U.S. (252 U.S. 376). There was a soldier tried for murder by the civil authorities in time of war, and he said that the military had exclusive jurisdiction and the Supreme Court said no, they have primary jurisdiction but not exclusive.

In other words, either side can waive and as a matter of fact, sir, that was always the basis of, made the basis of local agreements.

If you had an Army post next to a town which, of course, had gin mills and gin mills on payday and soldiers mean trouble, the post commander through his judge advocate or provost marshal would work out a modus vivendi with the police chief as to who would be tried by whom. But the civil authorities had precedence, primary jurisdiction under article of war 74.

They don't have it today.

Senator CARROLL. Then as I recall if a crime were committed on an Army post, a capital crime in that period of time he would be tried in the U.S. district court.

Mr. WIENER. Yes, sir, that was article of war 92.

Senator CARROLL. Has that been changed?

Mr. WIENER. Yes, sir, that was changed and now that the American Legion wants to get it back, the Army is screaming bloody murder against the change. They seem to feel it somehow impugns their honor to take away any jurisdiction from them. It is very difficult for me to understand why a jurisdiction that General Crowder, with his background and learning and wisdom deliberately avoided, should now become a matter of honor and be vigorously attacked by the Brucker report.

Senator CARROLL. From your long experience, is there a difference in procedure, substantial difference in procedure if as I understand the military individual, military personnel committed a capital crime now on a military post would be tried by court-martial?

Mr. WIENER. Yes, sir.

Senator CARROLL. From your long experience is he denied any constitutional rights that he would have by the civilian authorities?

Mr. WIENER. Well, I wouldn't say that he is denied constitutional rights, because under the code the trial itself is pretty good, and with the law officer program it is very good. But by and large, a Federal judge is better qualified.

Senator CARROLL. Does he have the right to subpena witnesses?

Mr. WIENER. Yes, he does. Yes, he does.

Senator CARROLL. Subpena a document, records?

Mr. WIENER. Yes, sir.

Senator CARROLL. Any right that he would have as a defendant in a civil court?

Mr. WIENER. He gets the same kind of trial except for the quality of the officer making the rulings and except for the differences between a jury and a court-martial that the defendant in the U.S. district court would have.

Senator CARROLL. One more question, Mr. Chairman, coming back to this prosecution of a member of the military establishments.

Mr. WIENER. As a matter of fact, sir, if I may continue my answer, with respect to pretrial discovery, the military accused gets more rights than the defendant in the U.S. district court.

Senator CARROLL. I was thinking of crimes committed off the reservation by a member of the military. He cannot be prosecuted now by the civilian authorities?

Mr. WIENER. No, he can be prosecuted but the civilian authorities no longer have primary jurisdiction.

Senator CARROLL. I see.

They can still work out a conflict between the two?

Mr. WIENER. Yes, except they are not negotiating from strength now, and the agreement that I spoke of, which is the agreement between the Department of Defense and Department of Justice, applies, of course, only to Federal offenses.

Senator CARROLL. Let us assume that there is a wide conspiracy among members of the military personnel, do you know in your experience—in the commission of a crime, do you know in your experience whether or not there, they are permitted any wiretapping evidence to come in in military hearings?

Mr. WIENER. There is a decision of the Court of Military Appeals which I can't name at the moment which holds, I believe, that the Communications Act, the wire-tapping prohibition in section 605 does not apply to the communications system on an Army reservation.

Senator CARROLL. That does not apply?

Mr. WIENER. Yes, sir.

Senator CARROLL. Do you know what that citation is?

Mr. WIENER. No, but I will make a point of looking it up, and submitting it to counsel.

Senator CARROLL. Would you do that? I would appreciate it.

Senator ERVIN. Proceed.

Senator CARROLL. Do you remember the reasons given in that case briefly?

Mr. WIENER. It's been so long since I read it, I would just be guessing and I don't want to do that.

Senator CARROLL. All right.

(The information referred to follows:)

In *United States* v. *Noce*, (5 USCMA 715), the Court of Military Appeals held by a divided vote that section 605 of the Communications Act did not apply to a communication limited to a military telephone system. This was followed, likewise by a divided court, in *United States* v. *DeLeon*, (7 USCMA 747), as well as by a unanimous court in *United States* v. *Gopaulsingh*, (7 USCMA 722), where the military communication system was located in Korea.

Mr. CREECH. Sir, at the present time the code provides military jurisdiction over military personnel who are not on active duty.

In your opinion, sir, is this constitutional and if so, is it desirable?

Mr. WIENER. Well, I don't thing there is much of that. Let me just go through that briefly in article 2. Article 2(1), there is no problem, that is the usual provision. There is no problem there, cadets, aviation cadets, midshipmen.

Mr. CREECH. Excuse me, apparently what I was saying, I omitted to say retired personnel.

Mr. WIENER. Retired personnel?

Mr. CREECH. Yes.

Mr. WIENER. Retired personnel, I am aware of the, of a recent law review article which says it is unconstitutional and, of course, if you are going to interpret the constitution entirely on the basis of what the Fathers had in mind, and Chief Justice Hughes in Home Insurance against Blaisdell says that is not a proper approach. (See *Home Bldg. & Loan Assn.* v. *Blaisdell*, (290 U.S. 398, 442–443).) They couldn't have had retired personnel in mind because there were no retired personnel at that time.

I don't think there is a constitutional problem. They are a part of the Army. They also serve who only stand and wait.

It has this interesting history. In 1916, when General Crowder, after over a decade of effort, finally persuaded Congress to adopt the revision of the 1806 Articles of War, in other words, there hadn't been a real revision in 110 years, and he got that adopted, the Senate added it as a rider to the Army appropriation bill in 1916, and you gentlemen will recall that that was at the height of the preparedness movement when it was fairly clear that sooner or later we would get into the First World War, the Senate amended it to eliminate jurisdiction over retired personnel.

Woodrow Wilson vetoed the entire bill, appropriations and all. He said, these people must be subject to military law and I think what he had basically in mind was some retired general popping off and saying he didn't like the President, the Commander in Chief's policies. So it went back.

About the middle of the 1930's, there was a great deal of reluctance to exercise that jurisdiction, and one such case of a retired officer being tried by court-martial was disapproved, I think when General MacArthur was Chief of Staff.

The corps area commander where the case arose was Gen. Malin Craig, and a very few months after General Craig became Chief of Staff a retired lieutenant down in Atlanta who had been papering the neighborhood with rubber checks was tried and dismissed, and I don't think there have been many trials since.

Of course, there are a great many offenses by retired officers that shouldn't be brought before courts-martial.

Take this admiral who smuggled something in from China. Well, that is a customs offense. Court-martial isn't well adapted to trying that kind of an offense. Sure, he was turned over to the civil authorities but I don't think there is any constitutional question, and my own view, for what it is worth, is that this gives the Commander in Chief a certain control over retired officers.

I know there is one retired BG who always pops off, the committee knows about him. He will never be tried because there is some question as to whether he has got all his marbles, I don't mean he is commitable, but he is a crackpot, so why bother with him?

Senator CARROLL. May I ask a question along this line again?

Mr. WIENER. Yes, sir.

Senator CARROLL. Coming back to this difference between the civilian authorities and military authorities: The civilians no longer have any primary jurisdiction. In some instances, many instances military personnel live off the post. Supposing a military person commits a crime and there is a search, a seizure, and an arrest on the part of civilians. The military decide to try it, under your experience is he permitted to raise the constitutional questions before a military court-martial that he would raise in a civilian court, for example no probable cause for arrest, probable cause for the issue of a search warrant, illegal detention, could he raise those questions?

Mr. WIENER. He could raise them. Whether he could succeed is something else. As I recall, sir, there is a very equivocal provision in the manual for courts-martial on that. (See par. 152, "U.S. Manual for Courts-Martial," 1951.) I think part of it arises out of the fact that they want the full power of search on the military post. There used to be units during the war, wherein knife play and stabbing were endemic and the experienced commanders found out the only way to wipe out knifing, in some of the units we had during the war, was to wake them up at 2 in the morning and have a complete check of their footlockers, and after a while they got tired of being awakened out of dreams of home at 2 a.m. and there weren't any more knives in the outfit.

I don't know whether it was strictly according to the books but it certainly kept down the court-martial business.

Senator CARROLL. That is different. That is on the military reservation itself.

Mr. WIENER. That is on the post.

I see no reason why under present decisions *Elkins* and *Mapp* (*Elkins* v. *United States*, 364 U.S. 206; *Mapp* v. *Ohio*, 367 U.S. 643)—why if there were an illegal search, let us say, in an officer's house in Arlington and he were being tried at Fort Belvoir, why he couldn't make the objection; I don't think there are many rulings on it. Or at least none that I know of.

Senator CARROLL. In other words, have there been any rulings by this highest appellate court?

Mr. WIENER. All I can say, sir, is I don't recall any. I don't mean to suggest for a moment I am prepared to recite on all 12 volumes on what they have decided because frequently these haven't been too clear.

Senator CARROLL. Your testimony has stimulated my thinking along these lines.

Mr. WIENER. Yes, sir.

Senator CARROLL. I can understand that on a military reservation they perhaps would have to have a different rule there.

Mr. WIENER. Yes. (In *United States* v. *De Leo*, 5 USCMA 148, the Court of Military Appeals by a dividend vote held admissible the fruits of a search made by French authorities. Since then, however, the Supreme Court in *Elkins* v. *United States*, 364 U.S. 206, has disapproved the "silver platter" doctrine, so that today the result should be different if the French search would have been illegal by American standards.)

Senator CARROLL. There would be a difference under the fourth amendment.

Mr. WIENER. I would think an officer off the post should have the same protection against authority, whether it is the CID or the MP's, that he has against the county police or the FBI.

Senator CARROLL. What about military personnel on the post, the commission of a crime on the post, what about long confinement and a confession, has that issue arisen?

Mr. WIENER. That issue has arisen and they have been pretty good on confession. Any kind of a coerced confession is bad, and as a matter of fact, it has been my impression that they are rather more favorable to the accused in the book than most civil courts.

As I recall, and this was a case I defended 7 or 8 years ago, there is a provision in the manual—and I am speaking from recollection only—there is a provision in the manual that once charges are preferred the accused's silence may not be made the subject of comment. I think that goes there rather farther than the Federal district courts do. (See par. 140*a*, "U.S. Manual for Courts-Martial," 1951, at p. 251.)

Senator CARROLL. All right.

Mr. CREECH. Colonel, the statement has been made with regard to giving the civilian courts primary or exclusive jurisdiction over civil-type offenses by servicemen, that, because of the delay in both the State and Federal courts, there might be a denial of a speedy trial to the accused.

What is your view on that, sir?

Mr. WIENER. I don't think there is anything in that. I have in mind the case of *Burns* v. *Wilson* in 346 U.S., that was a rape-murder on Guam. The men were tried in 1948, I think they were finally executed in 1954. I think that is a delay that stacks up favorably with anything we can cook up in the civil courts. I don't think there is a great deal of delay. There may be situations where you can start the trial faster, but with the present built-in delays, with Boards of Review, Court of Military Appeals—and there is an even worse case, the case of poor General Grow. He was the general officer who was accused of having left his diary lying around loose in a hotel room in Germany where the Russian spies got hold of it. He was tried by court-martial and went all through the trial, the Board of Review, Court of Military Appeals, and over to the White House and the case sat there for about 2 or 3 years. The GCMO, the general court-martial order was published several years, I think, after the Court of Military Appeals acted. So there is no way that you will completely reduce delay.

I think if you get rid of Boards of Review you will considerably speed up the process, and you are not taking away anything from the accused by way of protection because I feel very strongly that if a case is bad enough for a Board of Review to bust, the examination branch will bust also and they will do it much more quickly.

Mr. CREECH. In your supplemental statement and your colloquy with the chairman, you mentioned the *Covert* and *Smith* cases and inasmuch as Congress has never enacted legislation to cover situations which have arisen as a result of those cases as well as the *Toth* case, I wonder, sir, if you feel it is desirable to have legislation and if so what you suggest.

Mr. WIENER. I think, of course, it is desirable to have legislation. I think it is a very undesirable situation where a crime can be committed with impunity so that there is nobody to try the person.

Now, we have the NATO agreements. Under the NATO agreement the receiving state, that is the country where our forces are stationed, has primary jurisdiction over dependents and now must necessarily have it over civilian employees—I think it is very undesirable to have a gap in the law where crime can be committed with impunity without any tribunal where an offender must account.

I think by and large with offenses committed by our civilians, be they employees or dependents, against members of our forces or other persons accompanying them, that the receiving state doesn't want, really want, the jurisdiction.

In other words, if we have the wife of a lieutenant colonel who drives too soon after a cocktail party, and runs down an American civilian, soldier, or dependent, I don't think the foreign courts, except possibly in some countries where they have great nationalist fervor, would be particularly interested in trying that. It is not their business. They would be interested only if such a person ran down and killed one of their nationals.

So there ought to be some way of dealing with that.

Now Congress, I think, in the last session, the last Congress amended at long last the espionage provision, so that there would be a civilian employee at an Army headquarters who violates the Espionage Act he would be subject to trial.

But you still have a gap. Let us suppose that there is a dispute at an American Embassy abroad between two undiplomatic diplomats and one of them is pushed backwards and strikes his head and is killed. Who tries him? We can't. We have no law to cover it, and in the *Tyler Kent* case where our code clerk at the Embassy in England violated the Espionage Act the British were able to step in because we waived immunity. (See *Tyler Gatewood Kent*, 28 Cr. App. R. 23; *Ex parte Kent*, 323 U.S. 672; *A Report on the Case of Tyler Kent*, 11 Dept. of State Bull. 243.)

Now, the British have a statute which I think might fill the bill. They have it only for serious offenses because I think that for the ordinary offenses, let them be tried over there.

As a matter of fact, it is a wonderful deterrent, as we found out when we had troops in the Philippines before the war.

The American civilian personnel, the wives and the daughters, knew that if they had an accident and killed somebody downtown in Manila they would be tried in a Philippine court.

Of course, they had a theoretical right to appeal to the Supreme Court, but they were subject to being tried in the Philippine Court and that kept them in line.

The British, since 1828, have had a law which makes homicide by a British subject anywhere in the world, murder or manslaughter, triable in a British court. This doesn't mean that they send diplomatic representations to bail out the Britisher and have him brought home for trial. It simply means if no one else tries him, is able to or nobody else wants to try him, they have jurisdiction. That legislation is based on the old civil law notion of personal jurisdiction, jurisdiction based on allegiance. (See *Regina* v. *Azzopardi*, 1 Car. & K. 203, a case arising under the 1828 statute. The present law, to the same effect, is St. 24 & 25 Vict., c. 100, sec. 9.)

I think that would cover it, and then you combine that with the provision that we have had on our books since the beginning, providing for trial in the district in which the person is first found or brought (now 18 U.S.C. 3238) and all that means is if you have something like the *Covert* case today arising in England where the British are not really interested—and in a year and a half in Trinidad I had a great deal of experience with British feelings about jurisdiction and sovereignty, and "sovereignty" to an English lawyer is a fighting word. Nonetheless they really weren't interested unless their own people were involved.

In a case like that with such legislation, Mrs. Covert could be flown home. If the plane landed in Westover Field she could be tried in the District of Massachusetts. If she landed at Andrews she would be tried in Bolling. That would be the forum.

The statute would make it possible. We don't have the trouble about witnesses. A jet can bring a person from anywhere in Europe in 8 hours. We don't have any transportation problem. As to the subpena power, no, we don't have a subpena power but you tell some English witnesses, "Look, we will give you a trip to the States and we will pay you a witness fee and we will pay your subsistence," you won't have any difficulty.

A free junket gets witnesses just as I am told it induces others to leave home on occasions. [Laughter.]

Mr. CREECH. Colonel, you have addressed yourself to the boards of review at some length. I wonder, sir, if you would comment on a proposal which the subcommittee has received that the Discharge Review Board and the Correction Board might be combined and, furthermore, have one combined board for all services, and that membership on the board might provide for civilian participation.

Would you care to comment on that suggestion?

Mr. WIENER. Did you say the Correction Board and the Discharge Review Board?

Mr. CREECH. Yes, sir.

Mr. WIENER. I think it would be a very good idea to combine them because frequently you do not know which one it goes to.

I have presented a case before the Discharge Review Board and got a turndown from the Correction Board.

I think it would be a good idea to have everything in one board because they all do the same kind of business. The Correction Board,

now that the wartime cases cannot be brought up any more, the 3-year limitation is in effect, would be well qualified to handle it.

I would have it in the Department of Defense, and I would draw the civilian members from the service other than the applicant.

In other words, if you have an Army discharge case, take your civilians from the Navy and Air Force.

The one difficulty with the Correction Board that I have sensed is this: that they have had a very conscientious permanent chairman. He has been there ever since it was set up, which is 15 years.

As you know, those boards can award back pay, and I just have the uncomfortable feeling that somehow he has the unconscious notion of putting the dollar sign on every case before going into the merits.

I think it would be well not to have a permanent chairman. I think it would be well to have rotating boards, and also if you have, as in the case I supposed, an Army case, by putting Navy and Air Force civilians on it, you will do away with any unconscious tendency to protect their own department, and you go into the merits.

So I think that would be an excellent idea.

Mr. CREECH. I believe Mr. Everett has some questions for you, sir.

Mr. EVERETT. Colonel Wiener, do you anticipate that there would be any constitutional objections to any extension of Federal district court jurisdiction to include routine type criminal offenses committed overseas, such as larceny?

Mr. WIENER. No, because, as I think it is the *Blackmer* case, in 284 U.S., Chief Justice Hughes said that the question of how far a statute extends is not a constitutional question but simply a matter of legislative intention.

There is the *Bowman* case in 260 U.S., conspiracy on a ship in Rio de Janeiro Harbor.

Blackmer was the reluctant witness. He did not want to appear before a committee of the Senate. He preferred the soothing air of the south of France. Well, he was held properly convicted.

Mr. EVERETT. Might there be any distinction between that type of situation which would involve in some way the obstruction of a governmental function, on the one hand, and a case, say, involving a larceny or homicide, on the other?

Mr. WIENER. I would say if you have a homicide by—well, if you have a *Covert* case where the poor woman, in her psychotic episode kills a member of the Armed Forces, and reduces the strength, I would say she is interfering with the Government function.

Mr. EVERETT. Colonel, with respect to benefits of a civilian court of review, a review by the Court of Military Appeals specifically, do you think that such review might be helpful for administrative discharges in cases where such discharges are given under other than honorable conditions?

Mr. WIENER. Well, it might be. But I think if you civilianize your discharge review boards and compose the membership from the other services, I think you would get that.

Mr. EVERETT. You feel this would provide the same type of review that——

Mr. WIENER. I would think so, as a practical matter.

I would hate to saddle the Court of Military Appeals, which certainly is working hard and has a heavy docket, I would hate to saddle

them with the requirement for cleaning up every other administrative mess in the Pentagon.

Mr. EVERETT. Do you think there would be workload problems for that court in being granted a factfinding and sentencing jurisdiction?

Mr. WIENER. No, not really, because any appellate court is going to look at facts regardless of what the book says on what their jurisdiction is. Facts influence them.

Now, of course, I think there will be very few cases where they will say that the evidence is so insubstantial that "If we had no factfinding powers we would have to sustain it," there would be very few cases. But I would give them—they certainly have got the same qualifications for passing on the facts that the boards of review have.

I think also the trend in American law generally is toward widening appellate review. In other words, we do not have the old-fashioned common law notion of error apparent in the record. There has been a gradual drift toward the equity standard of review.

Mr. EVERETT. Might it not, though, require additions to the membership of the court?

Mr. WIENER. Perhaps so. But I certainly would not recommend taking the new member from among retired Judge Advocates General.

Mr. EVERETT. Would you consider it desirable to utilize, as an alternative, a new type of board of review, let us say a consolidated all-civilian board of review, between the convening authority and the Court of Military Appeals?

Mr. WIENER. Well, I would say, as I have said, if you are going to have boards of review at all, they ought to be in the office of the Secretary of Defense, and they ought to be given tenure.

I question whether they do any good. I know they use an awful lot of time and energy. I think that it would be better to go direct from the Judge Advocate General's Office to the court.

As to whether such a change would—of course, the court can protect itself by denying review. As to whether such a change would affect their workload to the extent of requiring additional personnel, I think is up to them to say. I cannot presume to look over their shoulders and tell them how much help they do or do not need.

Mr. EVERETT. You suggested as one of your recommendations that the Congress might consider the elimination of lawyers from the simpler type of court-martial cases such as AWOL, desertion——

Mr. WIENER. Yes, sir.

Mr. EVERETT (continuing). Disobedience to orders and the like. Isn't it possible that even in this type of case, which generally is routine, there might be unique issues such as mental responsibility, incapacity to obey an order, which might not be recognized by the layman but would be recognized by the lawyer?

Mr. WIENER. Certainly, and under the Elston bill that was left to the discretion of the convening authority.

If his staff judge advocate is any good at all and he sees there is that kind of a problem, he will say that is a case for lawyers on both sides.

But when you have a simple morning report AWOL or an open and shut desertion, where the fellow is found in civilian clothing 500 miles away, I do not think that needs lawyers.

In other words, the staff judge advocate looking at the papers submitted to him has got to make that decision.

The only thing that is necessary, I think, is that when the prosecutor is a lawyer, the defender ought to be a lawyer.

Mr. EVERETT. Isn't it quite possible, though, that the lawyer, talking to the accused as defense counsel, might find out possible defenses that would not occur to the staff judge advocate from reading the files of the case?

Mr. WIENER. I do not think so. I had a case once in the Pacific where some soldier was stealing. He was detailed as an orderly to clean up the officers' quarters. He never took any money but he took girls' pictures.

It was perfectly obvious to me that he was an art lover and he was probably cracked, and the surgeon agreed with me. I mean, the staff judge advocate has got to catch that sort of thing.

Mr. EVERETT. Now, with respect to the field judiciary system devised by the Army, in addition to the desirability of enacting this into law as you recommended, would it be desirable to extend this system at the trial level to cases now tried by special court-martial and to administrative discharge proceedings?

Mr. WIENER. No, I do not think it is necessary for special court cases really. I mean, 6 months, those are the misdemeanor cases, I do not think you need it there.

An administrative discharge, what you ought to do is to clean up the procedure.

Now, take this elimination procedure on which I started. The law provides, the regulations provide, for a legal adviser.

Well, one of these cases I took to court the legal adviser was called on 18 times for advice.

He never gave any reasons, but the result was always unfavorable to the respondent's objection. I do not think he does any good at all.

Mr. EVERETT. Well, has it been your experience in the field judiciary system that the law officer does occasionally rule with the defense, and might that not be——

Mr. WIENER. Oh, yes. In the field judiciary system you have a really independent judiciary. There are two advances.

Advance No. 1 you have an officer who does nothing else but rule on questions arising in the course of the trial. He is not someone in addition to other duties who rules off the cuff and then hopes he will somehow be sustained.

Secondly, he has independence. He is not subject to the thumb of the staff judge advocate who has decided to refer the case for trial, and who is going to review it.

He is not even subject to the command of the Army commander in whose area he acts. He is directly under the Judge Advocate General.

Those two features combined to give you a very perceptively higher level of Army trials, and of Navy trials, where they are trying the new system.

Mr. EVERETT. If that be the case then, Colonel, might not the results of the proceeding to which you referred, the elimination proceeding, have been different if the legal adviser had had the independent status?

Mr. WIENER. No, because the legal adviser would have been bound by the fact that the burden of proof by regulations is shifted to the

respondent. I remember in one of these cases somebody raised the objection that the burden of proof was shifted against him, and when I got into the case I did not raise that objection before the next board either. How can I say to five general officers on the board, "Look, this regulation issued by order of the Secretary of the Army is illegal." They cannot review that; and neither can a law officer.

The viciousness in the elimination is in the statute and in the implementing regulations, and you cannot expect, even if the law officer believes that those provisions are unfair, he cannot overrule the Secretary.

Mr. EVERETT. Now, in the case you mentioned, the situation you mentioned, the discharge will normally be under honorable conditions, in the elimination procedure?

Mr. WIENER. Oh, no; not under 360. Under 359 it has to be an honorable discharge, and that was the factor that underscored the impropriety of eliminating for misconduct because no matter what you charged him with, acts of personal misconduct, he still got an honorable discharge and a lot of severance pay; whereas under 360 he gets severance pay, but the quality of discharge is generally less than honorable, and the law so provides, and the committee report shows that this was deliberate.

Mr. EVERETT. In the undesirable discharge case at the enlisted level which, of course, generates the much larger volume of business than the officer cases, would you consider that some type of law officer or, independent legal, advisor might be helpful?

Mr. WIENER. Well, it might well be. It is a question really of deciding how far you are going to go.

Now, when we had the old section 8 discharges, the goof-offs, I do not know how much of a trial type hearing you ought to have for that kind of a thing. If the fellow is clumsy and he is just no good, get rid of him.

On the other hand, when the administrative discharges are resorted to for misconduct because they do not think they have enough evidence to make it stick before a court-martial, then it is vicious.

Mr. EVERETT. The subcommittee has had some testimony to the effect, that this occurs at the enlisted level as well as the officer level. Would your remarks be equally applicable to that?

Mr. WIENER. Yes.

I remember hearing—this was 3½ years ago—I remember hearing General Harmon, who was then Judge Advocate General of the Air Force, point out that because of what he considered to be the complications of court-martial procedure there was a greater and ever growing resort to administrative discharges, and he seemed quite proud of the fact.

Mr. EVERETT. Colonel Wiener, do you consider, as has been suggested in some quarters, that articles 133 and 134 of the Uniform Code, as they are currently interpreted and applied, are unconstitutional?

Mr. WIENER. No, not until you get a decision saying you cannot charge somebody downtown with disorderly conduct.

Of course, what is conduct unbecoming an officer and a gentleman is a subjective standard, and you are going to get variations. You are going to get variations from time to time.

I suppose that 50 or 75 years ago anybody who said "goddamn" in front of the lady was no gentleman. Now the ladies say it in front of men, and I mean ladies. Col. James K. Gaynor wrote a doctoral thesis on conduct unbecoming an officer and gentleman, seeing if he could not make some kind of sense out of the ruling. His answer was you cannot. It is what somebody feels is improper at some time.

Now, there are certain categories that are fairly simple. I think it was a mistake when they abolished mandatory dismissal for conviction for conduct unbecoming. I think what they should have done was added possibility of confinement.

There was a case in New Caledonia I remember reviewing. This officer sold liquor to enlisted men at a profit. This was a Navy theater, and in a Navy theater during the late war no enlisted man could have hard liquor.

Well, he had a large allotment home, and he wanted to get it to his wife, and he got chummy with a French girl, and he wanted to get her an engagement ring, and the only way he could raise the money over and above his allotment was to peddle this liquor at vastly inflated prices to the GIs.

He was found guilty of conduct unbecoming an officer and gentleman, and all you could do was dismiss him, and if the article had been written differently I think he should have served time.

Now dismissal is not mandatory, and people have said, and I think properly so, that this is a relaxation of moral standards, and so it is. But the difficulty is if you look in the Board of Review opinions of the postwar period you will find that a great many cases of conduct unbecoming and sentences of dismissal were commuted to reprimand and forfeiture and relief from active duty on the recommendation of the Judge Advocate General which, I think, makes the complaint a theoretical one.

The decline in moral standard occurred then.

Mr. EVERETT. With respect to the field judiciary system, about which you wrote recently in the American Bar Journal, do you think it would be more effective, equally, or less effective, if a civilian law officer were substituted for the present military officer?

Mr. WIENER. I do not think so. I mean, of course, the British in their general courts have a barrister in wig and gown.

No, I do not think it makes any difference really. I would just as soon have an officer there if he is a good one.

Mr. EVERETT. Would it be a fair assumption that you would not draw any constitutional distinctions insofar as military jurisdiction is concerned over civil offenses, with respect to whether it is a capital offense or a noncapital offense?

Mr. WIENER. I certainly would not. As a matter of fact, when I argued the case of *Kinsella* v. *Singleton*, 361 U.S. 234, I had five separate reasons why the distinction did not hold water, and looking at the author of the capital versus noncapital distinction while I argued them. The practical difficulties in the distinction are fantastic. For instance, by some quirk of draftsmanship, homicide committed in the course of a burglary is felony murder and, therefore, capital. But homicide committed in the course of a housebreaking is not, and the manual says that a tent cannot be the subject of burglary although structures can. (See: par. 208, M.C.M.)

So your question of military jurisdiction would depend on whether or not the tent had been so far reinforced as to amount to a structure, and I say that is silly.

Mr. EVERETT. With respect to the Uniform Code and your criticisms thereof, have you during the 11 years that it has been in effect discerned what you consider to be any significant improvement in the administration of military justice?

Mr. WIENER. I would say that the quality of trials is better, there is no question about that. But there are still a lot of messy areas and, of course, one of the worst is on execution of sentences.

Take the case of an officer sentenced to dismissal and confinement. Under the articles of war he would be generally confined, he could wear his uniform. The only labor he would have to perform would be to police his quarters.

When the general court-martial order issued, it said, "Lt. Oscar Glotz ceases to be an officer of the Army on midnight, the 12th of March." Then his uniform would be taken away and he would be shipped to a disciplinary barracks.

What they have been doing under the Uniform Code is they ship him right away to the disciplinary barracks and treat him as a general prisoner, and in so doing, I think they violate article 13, but I never had a client who was prepared to finance a habeas corpus proceeding on that.

They give him a number. The only time he can wear his uniform is on visitors' day, if he has visitors, and what they are trying to do in the Brucker report amendment, and also the DOD amendment, is to continue that and legalize it and say that it is perfectly proper.

Well, the difficulty is that frequently you get the conviction reversed, and what good is that chap as an officer after he has been policing up a prison, wearing a prisoner's suit with a number, and has had his name and picture sent, broadcast through FBI channels, and so forth as a convict?

Mr. EVERETT. In your opinion, Colonel Wiener, should the authority of the commanding officer to administer nonjudicial punishment be increased, and if so, under what limitations or conditions?

Mr. WIENER. Well, I am not close enough to company administration to have any view on it.

I think company punishment, wisely used and in some areas, is a great deterrent.

I think it should be more frequently used. Whether company commanders under present-day circumstances are too young may be a question. Maybe the regimental commander or the battle group commander or the battalion commander should be the one, because I have in mind also that the company commanders nowadays are youngsters.

Back before the war you could still be a captain at 40. Well, if you were a company commander at age 40, you knew a lot more about discipline than if you are a company commander at age 26 or 27.

Mr. EVERETT. Colonel, would you think it appropriate to have an express statutory differentiation as to military justice between wartime and peacetime conditions?

Would you have one set of procedures for one time and one for the other?

Mr. WIENER. Well, you have higher punishments. I think if you get rid of the boards of review you are not going to have the delay factor. But I do not—here again I do not think the public is going to go for a bobtailed kind of criminal procedure at, let us say, Fort Bragg simply because there has been a declaration of war. I am assuming, of course, that the declaration of war is in effect for some weeks and that there is still a Fort Bragg at that time, which may be a violent assumption.

Mr. EVERETT. Colonel, you were kind enough to furnish the subcommittee with a reprint of your very significant article in the Harvard Law Review dealing with constitutional rights of military personnel.

Could you very briefly summarize your conclusions on that topic?

Mr. WIENER. Well, the conclusion, summarizing very briefly, the conclusion is that the framers of the Bill of Rights did not consider that its provisions applied to any except civil trials, and the most dramatic instance of that was the case of the court-martial of General Hull. He was the old dodo who surrendered Detroit without firing a shot, and he was tried by court-martial and sentenced to death.

At the trial he asked to have his lawyer speak for him, and the court said, "Oh, no, if the lawyers have anything to say to the court, the communication will be made through the accused," because the rule then was that a lawyer may sit there, but he is not to open his mouth in court.

This being the case of a general officer and a death sentence, that came before the President, none other than James Madison, the father and the draftsman of the Bill of Rights, and he was the man who read court-martial records carefully, as his surviving letters show, and he approved the proceedings.

Mr. EVERETT. My last question, Colonel, at the present time would you consider there was any need for legislation broadening the scope of review by Federal district courts of court-martial decisions? I am thinking of the habeas corpus procedure.

Mr. WIENER. No. I think the review is all right. Of course, there is a question sub judice which has never been decided.

In other words, take the famous case of *Johnson* v. *Zerbst*, (304 U.S. 458), where any deprivation of constitutional rights in the course of a trial is reviewable on habeas corpus, and that has been congressionally ratified by the present habeas corpus provision in title 28.

It is still unclear whether the same scope of review applies to courts-martial. I suppose it would save considerable litigation if that were set forth.

However, it would still leave open—well, if the statute provided that you have the same kind of collateral review on the court-martial as you do of a Federal district court conviction, then there is no problem. But if you try to cut it down, then there will be a constitutional problem whether you can do so.

So I suppose the wisest thing would be to leave it for the time being and see what happens.

Mr. EVERETT. Thank you.

Senator ERVIN. Colonel, you have distinguished yourself very much in this particular field, and the subcommittee is deeply grateful to

you for appearing before the committee and giving us the benefit of your experience and your observations. We are deeply grateful to you.

Mr. WIENER. Thank you very much, Mr. Chairman, for your generous comment.

(The prepared statement of Mr. Wiener follows:)

OUTLINE OF STATEMENT OF FREDERICK BERNAYS WIENER, MEMBER OF THE DISTRICT OF COLUMBIA BAR AND COLONEL, U.S. ARMY RESERVE, RETIRED, ON THE ARMY-AIR FORCE ELIMINATION PROCEDURE

1. Prior to 1920, promotion in the Army was by senility, viz, officers were promoted when more senior officers died, retired, were dropped from the rolls pursuant to article of war 118 (10 U.S.C. (1926–46 eds.) § 1590); see *McMullen* v. *United States* (100 C. Cls. 323, certiorari denied, 321 U.S. 790), or were dismissed pursuant to sentence or court-martial. Power of the President to dismiss summarily in time of peace was taken away shortly after the Civil War; there has been only one war-time dismissal since then, which was considered and upheld in *Wallace* v. *United States*, (257 U.S. 541, 258 U.S. 296).

2. First provision for elimination for inefficiency was introduced in 1920 by section 24b of the National Defense Act (10 U.S.C. (1926–46 eds.) § 571), which provided for a class B of "officers who should not be retained in the service."

Preliminary classification was by a board of officers; final classification was made only by a court of inquiry, which had nationwide powers of subpena under articles of war 22, 23, and 101 (10 U.S.C. (1926–46 eds.) §§ 1493, 1494, 1573).

An officer finally placed in class B then had his case reviewed by another board, "to determine whether such classification is due to his neglect, misconduct, or avoidable habits." If this body, the so-called "honest and faithful" board, answered the question affirmatively, the officer was discharged; if in the negative, he was retired.

3. Class B proceedings cleaned out a lot of deadwood in the first year or so, and were sustained when challenged in the courts. *French* v. *Weeks* (259 U.S. 326); *Creary* v. *Weeks* (259 U.S. 336); *Rogers* v. *United States* (270 U.S. 154). Thereafter, the system broke down, largely at the White House, where Members of Congress too often successfully interceded on behalf of affected constituents. By 1940, class B was essentially brutum fulem.

4. With the mobilization then starting, the Army needed desperately to clear out accumulated deadwood, and General Marshall obtained passage of joint resolution of July 29, 1941 (c. 326, 55 Stat. 606). See Vitalization of the Active List of the Army, hearings, Senate Committee on Military Affairs on Senate Joint Resolution 88, 77th Congress, 1st session.

This joint resolution provided for removal from active list "from among officers whose performance of duty, or general efficiency, compared with other officers of the same grade and length of service, is such to warrant such action, or whose retention on the active list is not justified for other good and sufficient reasons appearing to the satisfaction of the Secretary of War."

Joint resolution provided one board only, with action by the Secretary to be final; removed officers with less than 7 years' service were to be honorably discharged, others retired with pay.

About 200 officers out of a total Regular Army officer strength of 14,000 were called on to show cause under this provision, which was temporary, and which suspended section 24b of the National Defense Act during the then unlimited emergency.

5. In 1947, with the end of that emergency, the War Department sought legislation that would permanently replace section 24b, and a bill, H.R. 2744, 80th Congress, was introduced at its request.

Section 102 of that bill originally read: "Selection of any officer to show cause for retention shall be based upon his failure to achieve such standards of performance as the Secretary of War shall by regulation prescribe, *or on other good and sufficient reasons appearing to the satisfaction of the Secretary of War and of which the selection board is advised.*

The italicized words were deleted when the bill was reported out of committee (H. Rept. 816, 80th Cong., 1st sess.), and never reappeared. In 1948, the entire measure became title I of the Army and Air Force Vitalization Act of 1948, (c. 708, 60 Stat. 1081, 10 U.S.C. (1952 and 1958 eds.) § 580–586); and in 1956

it was reenacted without substantive change as 10 U.S.C. § 3781–3786 (Army) and 10 U.S.C. § § 8781–8786 (Air Force). This law provided for three stages; an ex parte selection board that ordered an officer to show cause; a board of inquiry that heard witnesses; and a board of review that reviewed the prior record and also heard testimony de novo. The statute gave mandatory honorable discharges with severance pay to all officers not entitled to retirement, and provided for retirement for those so entitled.

Significantly enough, section 107 of the 1948 law provided for review of all cases of elimination that had been effected under the 1941 joint resolution.

6. The hearings on H.R. 2744, which became the elimination law in force from 1948 to 1960, negative the notion that any removals which that measure contemplated were to be for grounds of misconduct that had traditionally been dealt with by a court-martial. See pt. 2 hearings, Committee on Armed Services, House of Representatives on sundry legislation, 1947, 80th Congress, 1st session, No. 169.

The first Army regulations implementing the 1948 legislation provided that the new statute would not be used in lieu of disciplinary action, but that recurrent convictions by court-martial or recurrent nonjudicial punishment under AW 104 or article 15, UCMJ, might be cause for action thereunder. See AR 605–200, 19 May 1949, par. 3*d*; AR 605–200, 26 Jan. 1951, par. 3*d*.

Not until AR 606–200, June 18, 1954, par. 3c, promulgated 6 years after the 1948 legislation, was misconduct not evidenced by court-martial or nonjudicial punishment made a ground for elimination. This provision was continued in AR. 636–105A, January 2, 1957, par. 4*a*.

Of course the mandatory statutory provision for an honorable discharge made elimination for misconduct a contradiction in terms.

7. Finally, in 1960, during the pendency of a suit for injunction challenging the power of the Army to eliminate for misconduct—*Ledford* v. *Brucker et als.*, Civil Action 3583–59, in the U.S. District Court for the District of Columbia—Congress amended the law to provide specifically for elimination for misconduct, the character of the discharge to be determined by the Secretary. See §§ 3 and 8 of the act of July 12, 1960, Public Law 86–816, adding 10 U.S.C. §§ 3791–3797 and §§ 8791–8797. The board of review was not to allow a second hearing at which the respondent or his witnesses could be heard. This is the present law. Interestingly enough, neither the hearings nor the committee report referred to the then pending case.

8. The 1948 legislation, reenacted in 1956, required that each officer appearing before a board of inquiry be given "A fair and impartial hearing." 10 U.S.C. §§ 3782(b), 8782(b).

But the 1957 regulations transformed the selection board's allegations—the order calling on the respondent officer to show cause—into determinations that were presumptively correct, and shifted to the officer the burden of disproof. AR 635–105A, January 2, 1957, par. 7; AR 635–105B, January 2, 1957, par. 8. Other provisions of the last-cited regulation further weighted the scales against the respondent. See pars. 14, 18*b*.(1), (25c 26*a*(1). These provisions, collectively, made a fair and impartial hearing impossible, and sometimes, as in *Ledford* v. *Brucker*, *supra*, rendered virtually conclusive allegations known and frankly stated to be unsupported by evidence when made.

9. The 1960 legislation gave statutory sanction to the foregoing shifting of the burden of disproof. See H. Rept. 1406, 86th Congress, 2d session, pages 12–14. Hearings before Subcommittee No. 1, House of Representatives Committee on Armed Services, on S. 1795, 86th Congress, 1st session, p. 3802.

Thus at present, there are four stages, three of which are ex parte—and at the *only one* where the respondent can be heard, he has the burden of disproving the ex parte allegations previously made against him. Consequently the accusation does service for proof.

10. The boards of inquiry provided in 1948 and 1960, unlike the courts of inquiry employed in 1920, have no power to compel testimony, and hence effectively deny the respondent officer any effective opportunity for confrontation and cross-examination.

11. The constitutionality of the 1960 elimination procedure in an Army case involving charges of misconduct is currently sub judice. *Beard* v. *Stahr et als.*, (U.S. Sup. Ct., Oct. Term 1961, No. 648).

12. There is a serious question whether any elimination procedure is now necessary. It was in 1941, when the system of promotion by senility was in effect, and early in 1947 when H.R. 2744, 80th Congress, was introduced.

But, by the time the 2d session of the 80th Congress convened, Congress had, in title V of the Officer Personnel Act approved August 7, 1947 (10 U.S.C. (1946 and 1952 eds.) §§ 559a et seq.), substituted a system of promotion by selection, which made provision for the discharge or retirement of substandard officers. Yet the Army continued to press for elimination legislation as though this drastic change in its promotion system had never been made.

13. The shift in the burden of proof introduced by the 1957 regulations was the result of a study by Brig. Gen. (now Maj. Gen.) Theodore W. Parker, which concluded that too many elimination cases resulted in retention.

The percentage of retention was indeed high, being over 40 percent. In March 1959, the present witness was directed to make another study of the elimination system while on a tour of duty as a mobilization designee in the Office of the Deputy Chief of Staff for Personnel, Department of the Army.

The conclusion reached in the latter study, on the basis of an examination of the complete hearing records in over 25 cases in which the board of review had found for retention, was that the high retention rate was a consequence of slanted ex parte presentations, insufficient screening by the selection board, and the shackling of the board of inquiry's judgment by the Army regulations that shifted the burden of proof.

14. Since the present witness is counsel in the pending case cited in paragraph 11, above, he does not feel free to discuss before this subcommittee the constitutional issues therein presented.

Mr. CREECH. Mr. Kabatchnick, the chairman has instructed me to say that this committee will be happy to receive your additional statement at this time, or if you would prefer, at 2 o'clock.

Unfortunately, he has a meeting now and will have to be leaving, but if you care to proceed at this time, the subcommittee will continue in session to hear your statement now, or you can do so at 2 when he will return.

Mr. KABATCHNICK. I will leave it to your discretion.

Senator ERVIN. We will leave it up to your discretion. Counsel can either take your statement or you can give me the option of coming back at 2 and taking it then. I would rather you make it at 2 because I would like to hear it.

Mr. KABATCHNICK. I will yield to the Chair and I will come at 2 o'clock.

Senator ERVIN. The committee stands in recess until 2 o'clock.

(Whereupon, at 12:30 p.m., the committee recessed, to reconvene at 2 p.m., the same day.)

AFTERNOON SESSION

Senator ERVIN. The committee will come to order.

Call the first witness.

Mr. CREECH. Mr. Chairman, the first witness this afternoon is Mr. Neil Kabatchnick, who is returning to the stand to make a supplemental statement.

Senator ERVIN. I am very sorry that we delayed you all again, but it seems like there are not enough hours in a day to get around to doing what we are supposed to do.

## STATEMENT OF NEIL KABATCHNICK—Resumed

Mr. KABATCHNICK. Mr. Chairman, I wish to thank the committee for extending to me this opportunity to address myself to certain areas of consideration which I feel are of extreme concern to this committee and which, because of the late hour on the day on which I first testified, I was not able to cover at that time.

The first matter which I feel should be brought to the attention of the committee for its consideration is the matter of the composition of the various boards for correction of military records.

At the present time, the membership of the boards for correction of military records consists of civilian officers and employees of the various departments appointed under the authority extended in the organic statute as it now exists.

However, it appears to the membership of our military law committee that there may be a very serious area in which an individual applicant's constitutional rights may be deprived in view of the brevity of time that is allotted for consideration of a particular case before the various correction boards.

Under existing practices, the correction boards usually convene once a week. They sit throughout an entire calendar year, which means there are ordinarily 52 sessions. On an average, I believe that they consider about 2,000 cases a year, which means that there are approximately 40 cases which are adjudicated on 1 calendar day of each week. We think that fact in itself, Mr. Chairman, raises a very serious question of the adequacy of consideration given to a particular case, and we submit that no matter how dedicated, no matter how experienced the membership of the board may be, that it is humanly impossible to begin with, that a full, fair, and impartial consideration at the hearing level can be determined.

Now, in addition to that fact, I think it is significant for the committee to take into consideration the fact that of those 40 cases that are adjudicated, on an average, I would say, from the information available to our committee, that an average of 5 cases per day are heard by a correction board.

In other words, the man has an opportunity to come in and present his case, bring in witnesses, have counsel to present argument and, I submit, that in view of the very serious nature of many of these cases and the complexity of these cases, the majority being either court-martial cases or disability retirement cases, and particularly in disability retirement cases where complex medical questions are involved that, by the very number of cases considered alone, there is a very serious question of the adequacy of the consideration given to these cases.

Therefore, it appears that second only to the matter of amending the organic act governing the existing correction board, second only to the provision that the act be amended to provide for an automatic right to a hearing and for subpena power and discovery procedure, it appears that it might be appropriate that the organic act be amended to provide for a standing membership to consider these cases.

A second aspect to a consideration of composition of the correction boards on the basis of a full-time staff of board members, is that the correction boards could then hear cases on a continuing daily basis.

In this regard, it should be noted that the discharge review boards are continuously in session 52 weeks a year. They have permanent staff members who are military personnel and they do hear cases continuously throughout a calendar year.

The caseload, I believe, of the correction boards is much more substantial than the discharge review boards, and in the vast majority of the cases the issues are much more complex. Hence the need

for a standing or permanent membership and provision for more frequent sessions.

Senator ERVIN. Do the correction boards review these cases where the person claims that he was disabled or ill while in the service and is discharged. Do they have jurisdiction of that type of case?

Mr. KABATCHNICK. Yes, sir. The correction boards, however, do not act as a de novo board. The cases are first considered, prior to separation of the man, by a physical evaluation board, and then the recommendations of the physical evaluation board are considered by a physical review council, before which the man has no right to appear nor have counsel, and then if there is a conflict in the recommendations between the physical evaluation board and the physical review council, the case then goes to a physical disability appeal board before which the man cannot appear nor have counsel. This is prior to separation.

Once the man is separated from the service he can go to the disability review boards which are like the discharge review boards; in fact, the same men who sit as members of the discharge review boards, when a physical disability case comes to their attention, they just put on another hat and they act as a member of a disability review board.

There a man has the right to be heard. However, if there is an adverse decision he can then go to the boards for correction of military records. So that they do have jurisdiction, and I would say that a substantial percentage of the work of the correction boards is in the area of the disability retirement type of case.

As I alluded to the other day, however, we feel that in connection with the constitutional rights of the individual serviceman that there are many instances where the disability or an indicated disability will be used as a vehicle for the elimination of the man, and that his constitutional rights in that process will be violated just as seriously as if he appeared before an administrative separation board.

This, as I indicated, is a very serious area to be considered in the issue of constitutional rights of the individual serviceman.

The third point which we feel is an area in which there is a very grave need for substantial procedural changes which, under existing practices, infringe upon the constitutional rights of the individual serviceman before the various correction boards, is in the area of those decisions of the correction boards which are adverse to the applicant.

By that I mean this: Under the existing procedures before the various correction boards, the administrative regulations which have implemented the organic statute have authorized the correction boards to make it a discretionary matter with the correction board as to whether or not a hearing will be granted.

Hence, when a man files an application with the correction boards in which he asks for a change in the character of his discharge, an internal review of the case is made by the staff of the various correction boards, and the case is then considered in executive session by the correction board, at which time a determination is made as to whether or not the man not only will be granted a hearing on his application, but whether or not the application should be denied without the man having the opportunity to be heard.

As I indicated the other day, the burden is upon the applicant under the existing regulations to furnish the board with an "indication of probable material error and/or injustice," in order not only to be granted relief but to have an opportunity to be heard.

Conservatively we would estimate from the information available to us that in approximately 75 to 80 percent of the applications submitted to the correction boards the man is denied relief.

Now, under existing practice——

Senator ERVIN. What percentage?

Mr. KABATCHNICK. We would estimate between 75 and 80 percent of the cases That means that 75 percent or 80 percent of the cases are cases where there is no hearing.

The application is denied without the applicant even having the right to argue his case or to present live witnesses, to have the opportunity to cross-examine witnesses or anything along that line.

Now, we feel that that practice in itself is bad.

Senator ERVIN. I infer that in cases of this character, the only thing considered are the records of documents?

Mr. KABATCHNICK. The regulations provide that the man can submit evidence to the board. But as to the type of evidence which he should submit, the quantity or the quality of the evidence, that is left to the individual applicant's own ingenuity.

In theory it is supposed to be enough evidence to "indicate material error, probable material error."

But, as I indicated the other day, we feel this is an extremely nebulous criteria. It is a worthless criteria. In actual practice, the average applicant who comes in there I would say, as indicated in my statement, resorts to the gratuitous services provided by the veterans organizations, or in many cases will be in pro se, and it is left to the man to present whatever evidence he can assemble to meet this vague and ambiguous criteria.

As I say, without subpena power, without depositions or formal discovery procedures, it is just almost a human impossibility to accomplish the assembly of legal evidence which would satisfy any criteria in any adjudicatory body.

But what is even more serious, or just as serious, is that when the application is denied by a correction board, the board does not make or establish or create a record of its findings, its conclusions and its recommendations.

Well, the recommendation is that the relief be denied. So that when the man's application is turned down all he gets is a piece of paper, a letter, indicating that "Your application has been denied," that the case has been considered by a quorum of the board members and that they found there was no sufficient evidence either by way of quantity or quality "to merit your application being granted."

So that the applicant is left in doubt, without any evidence of how the case was resolved by the board.

Now, in the cases where an applicant is granted a hearing, the boards do make findings, conclusions, and recommendations. So that the applicant has before him at least some kind of a record to evaluate whether the action of the correction board was arbitrary and capricious. In those cases where the applicant is denied his application, it

is very difficult, as far as judicial review is concerned, to specifically point to the rationale of the action of the correction boards.

So that we feel, in order to protect the rights of the average individual applicant, that the procedure should be corrected to provide that the boards must make findings, conclusions, and recommendations in those cases where the application is denied.

Senator ERVIN. To what extent, if any, are the evaluations made by the Veterans' Administration an adequate substitute for lack of more extensive procedures in the board for the correction of military records?

In other words, the Veterans' Administration does give applicants an opportunity to present pretty thorough evidence about disabilities where a claim is filed for compensation, and I just wondered to what extent that could be regarded as a sufficient substitute for the lack of procedure that you describe in disability cases.

Mr. KABATCHNICK. In the disability cases, the Veterans' Administration is not bound by the determinations of the respective military departments as to whether or not a disability was service-incurred or aggravated by service to warrant the granting of disability compensation by the Veterans' Administration.

This is an area which warrants very serious study also for this reason: A man may be put out of the service for psychoneuroses which the military department concerned will say existed prior to his coming into the service, and which was not aggravated by service. The man will then go—incidentally, in making that decision, the department utilizes the Veterans' Administration own schedule of disabilities in determining whether or not it warrants over 30 percent disability, which is the criteria for disability retirement. They will use the same schedule disabilities as the VA does, but that man can go to the VA and get disability compensation on the theory that his condition was service-incurred or aggravated by service.

The U.S. Court of Claims has ruled on this very proposition by saying that where you have an inconsistency between the military department and the Veterans' Administration that each governmental agency, the Army or the Navy or the Air Force, they have their own doctors, they can make their own decisions, and the VA can have their own medical staff and make their own medical determinations.

There does exist today a duality of standards between the military services and the Veterans' Administration as to whether or not a condition is service-incurred or is not service-incurred or is aggravated by service or is not aggravated by service.

We feel, generally speaking, those who are involved in this area in the practice of law, that the military departments, especially where they are using the VA schedule disabilities should have an equal criteria or the same criteria in the adjudication of these cases.

So that there is some relief that can be obtained from the Veterans' Administration, but the quantity of the relief and the quality of the relief is quite different between the military disability retirement and compensation from the VA.

Many times the man will appeal his discharge for physical disqualification after he has received an award of compensation from the Veterans' Administration; and I have in mind the case of an applicant who was in the military service, who was a commissioned officer from

1933 until 1939, and came back into the service in January 1941. He remained on active duty until February 1944 at which time he appeared before an Army retiring board and it was determined that his condition was psychoneuroses and that it existed prior to his coming into active duty in 1933. He was discharged in February of 1944, given an honorable discharge by reason of a physical disqualification. They said the psychoneuroses was disabling, but that it existed prior to his coming into the service in 1933. The man went to the Veterans' Administration and was awarded disability compensation for the psychoneuroses, same condition, and then he appealed, once that determination was made appealed, to the Army to review his case and to award him retirement, disability retirement, on the basis of the VA determination.

This application for retirement was denied even though the Veterans' Administration said that he had psychoneuroses which was service-incurred, and made a determination along that line.

So that this is an area which certainly merits further consideration and study.

I believe I indicated to you the other day that one of the things we feel should be a matter of immediate concern to this committee is the amendment of article 31 of the Uniform Code of Military Justice to provide for at least if not the right to counsel, the privilege of counsel at a time that a serviceman is being interrogated as to possible criminal offense being committed.

We feel that this is a matter which warrants immediate attention of this subcommittee. We feel this is extremely important.

As to the effects of discharge, the administrative discharge, on an individual, we have found it not only affects the individual's opportunity for employment, but even in those cases where he does succeed in getting employment, he is always concerned with whether or not some day his employer will tap his shoulder and say, "We are having a corporate reorganization," or something along that line, and "We are going into the background of people," especially where they might take over a Government contract, and although he might have been a very fine employee for 5 or 10 years subsequent to discharge, he will certainly be eliminated from his position once the background investigation is made.

So that there is that threat, a continuous threat, which persists day in and day out, even when he is successful in securing employment. I have one case in mind where the man has done very well from an employment point of view.

He has been out of the service well over 15 years, and yet he is continuously concerned with whether or not some day the nature of the discharge will come to the attention of his employer, and he will be eliminated from his position.

Also, of course, an other than honorable discharge has a tremendous disruptive effect on the homelife of the individual. I have seen this time and time again where, because of the allegations that are made against the individual, particularly in the sex offense cases and specifically the homosexual case, where you have an individual who is married and might have a family and is accused of indulging in that type of activity; this has a tremendous impact on the family life of the individual even though he may exonerate himself or resign from the

service to avoid publicity so far as his family are concerned, and there is always the doubt that is created by the accusation.

I might also note that in my statement that I made to the subcommittee, it has been our experience that the military services—we feel that there is almost no provision for rehabilitation, for adequate counseling or provision for therapy of the suspected sex offender in the military services.

I have in mind one case where an individual was accused of participating in homosexual activity. There was an indication that he had indulged in this type of behavior. He was aware that he was in need of psychiatric care and counseling, but because he was also aware that the military services had administrative regulations which would precipitate his elimination from the service if he went to a military doctor and said, "I feel that I need help, I want help," he did not seek medical or psychiatric assistance. He also felt, "if I go to the doctor I know that I will be eliminated from the service."

A military medical record is created once he goes to the psychiatrist. That record follows him throughout his military career, so that there is no privilege necessarily attached to his consulting a military psychiatrist. This is an area in which many very fine individuals who could contribute to our national defense, if they could otherwise seek counseling therapy and guidance, could be saved from the stigma attached in their elimination from the service because of their sexual offenses or their sexual propensities.

The final point that I would like to bring to the attention of the committee is the matter of the counseling of an individual serviceman prior to his appearance before a board of officers.

All of the services have administrative regulations which require that a commanding officer prior to his initiating the preliminary action to have a man put before a board of officers, must use the resources of what they call the character guidance programs for counseling the individual man as to how he should correct his behavior and his conduct before they initiate a board action.

In almost every case where a man appears before a board of officers the commanding officer is called in, and one of the standard questions that is almost invariably asked is, "What counseling have you done as far as trying to rehabilitate this man?" and invariably the commanding officer will say that "I have counseled."

But when specifics are asked as to when he last counseled the man or the type of counseling that was extended to the man, you inevitably will get all kinds of vague answers.

One of the military services has instituted a program of what is called a control roster by which a man is put on for 60 or 90 days.

He is put on notice that he is getting close to the time when he may be put before a board of officers.

I think that this is a fine measure, but I think that the regulation should be improved to set out specific factors or guides for the nature and extent of counseling required of a commanding officer before he initiates the board action.

These are the points, Mr. Chairman, which we feel warrant the consideration of this committee, and I wish to thank you for extending us this additional time in presenting this information.

Senator ERVIN. Well, I wish to commend you for your real interest in this subject which has prompted you to ask for additional time, and to thank you again for the very fine contribution you have made to these hearings.

Mr. KABATCHNICK. If the committee has any questions, I will be glad to try to answer them.

Mr. CREECH. I just have one. I would be interested in having Mr. Kabatchnick make a statement on the recommendation which has been made to the subcommittee, among others, that the discharge review board and the correction board should be combined as one board for all services.

Mr. KABATCHNICK. As I believe I indicated the other day, Mr. Creech, until such time as the organic act governing the boards for correction of military records is amended to provide for the absolute right to a hearing, I believe that the discharge review boards should be preserved; the existence of the discharge review boards should be preserved, because they serve an extremely important function in providing the man at least one opportunity to have his case reviewed and to have his day in court.

You do not have that right, as I indicated the other day, not only in the discharge cases but in these other various instrumentalities now utilized for the elimination of a man, such as the selection boards, the active duty boards, and the disability boards which can eliminate a man from the service. Until such time as you have the automatic right to be heard, I think that the boards, the discharge review boards, should be preserved.

If it were deemed that the organic act of the correction boards would be amended to provide for an automatic hearing with the procedural safeguards we have attempted to outline here, until such time as that occurs, I think the discharge review board should be preserved.

Mr. CREECH. Thank you.

Mr. EVERETT. In connection with the hearing granted by the discharge review board, isn't the record of that hearing before the board for the correction of military records?

Mr. KABATCHNICK. Yes, sir.

Mr. EVERETT. And at the discharge review board level, the ex-serviceman does have the opportunity to present new evidence and to confront witnesses and to present live witnesses, as a matter of right, does he not?

Mr. KABATCHNICK. There is no absolute right of confrontation. The discharge review boards do not have subpena power, as they exist today. They have no formal discovery procedures. So you do not have the right of confrontation, you do not have the right of cross-examination, you do not have the right of production of documents, and things along that line.

I am not saying that the existing procedures of the discharge review boards are satisfactory. As I indicated in my statement, there is an immediate, imperative need for authorizing the discharge review boards to have the right of subpena power, and provision for discovery procedures, and also of equal importance, the promulgation of a code of procedure similar to the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure, which is nonexistent today.

The standards, the procedural standards of the discharge review

boards, the correction boards, and the boards of officers at the hearing level prior to discharge are in grave need of improvement in that area.

The regulations are extremely vague. Hearsay evidence, that type of evidence, is invariably considered by these boards.

Mr. EVERETT. Well, is the denial of a hearing by the Board for Correction of Military Records after the hearing by the discharge review board, somewhat analogous to a denial of certiorari by the U.S. Supreme Court after a hearing before the court of appeals, or denial of review by the Court of Military Appeals after a full hearing by the Board of Review?

Mr. KABATCHNICK. I think your analogy is 100 percent accurate.

Mr. EVERETT. Concerning your comments in connection with the right of counsel, isn't it true even today that a serviceman under the decisions of the Court of Military Appeals does have a right to consult counsel during interrogation; that he cannot be informed he has no right of counsel?

Mr. KABATCHNICK. In theory, I would say that every serviceman, as well as every citizen of the United States, has the right to counsel. But you get down to practical considerations of the nature of the warning that is given to the man under article 31, and also of the extreme importance in evaluating the adequacy of that warning, is the psychological factor of the circumstances under which the warning is given.

Now, I think especially where you have a youthful offender, and I think Mr. Pye the other day indicated the concern that he has for the youthful offender, particularly in the sex offense cases, where the average, I think the statistics if they were known would indicate, that the average sexual or individual accused of a sex offense, is not, although I am loath to use the expression, a criminal type of individual, and when an accusation along that line is made, it is extremely traumatic an experience, plus the fact that there is a great fear, I think it would be found if this could be documented, but it has been my experience that there is a tremendous fear of the individual serviceman of the various investigative agencies of the respective services.

So I think that if there were a built-in safeguard in article 31 to indicate to the man, if he does not have the right to counsel, to at least give him a tip that he has the privilege of seeking counsel before he makes any statement, and I think, as Judge Ferguson of the U.S. Court of Military Appeals indicated in his testimony, the time that a man needs the lawyer the most is usually at the time he is arrested, and I think that comment by Judge Ferguson answers the question.

Mr. EVERETT. Let me take it in two parts, then, so that I may be sure there is no misunderstanding.

It is correct, is it not, Mr. Kabatchnick, that under the *Gunnels* case and other cases, it is reversible error to inform a serviceman that he does not have a right to counsel prior to the preferring of charges?

Mr. KABATCHNICK. Right.

Mr. EVERETT. Now, aren't you proposing what would amount to the introduction of the Mallory rule into military law and substituting it for the rule of voluntariness which up to this point has been the rule governing courts-martial?

Mr. KABATCHNICK. I cannot say whether or not it would be substituting the Mallory rule, Mr. Everett.

Mr. EVERETT. I mean the equivalent of it?

Mr. KABATCHNICK. Or the equivalent of it, Mr. Everett. But particularly in the administrative separation case, and I am thinking particularly in my experience or exposure to the homosexual case, invariably the man is under such pressure, not necessarily from his accusers or from the interrogators, but just by virtue of the accusation.

We all have a tendency to confess our misdeeds, and let's face it, the investigators have a job to do, and their job is to get a statement, and invariably they get a statement, and invariably in that statement the man has made all kinds of admissions which, although they may not be provable by the prosecution, they are used as the source or the basis of the administrative elimination. I am thinking particularly of admissions to acts which occurred prior to entry into the military service or acts which are barred by the statute of limitations.

This is where you have heard many of the witnesses come in and say that the Government has not got enough evidence to try the man. This is true. But they have got enough evidence to eliminate him administratively from the service because all they have to do is put in documentary evidence, the man's own statement.

Mr. EVERETT. But it is voluntary. If a statement or admission is made voluntarily, isn't that the highest form of proof, and if it is involuntary, won't it be kept out?

Mr. KABATCHNICK. That in theory is very true, Mr. Everett. But the question comes down to what is voluntary and what is not voluntary.

I have had the privilege of cross-examining investigators who have taken these statements, and invariably in securing these statements, there were no threats. In fact, in the statement it indicates that, "I haven't been threatened; I haven't had any promises of immunity made to me; I haven't been coerced."

But there is no one there to represent the man when he is being interrogated.

Mr. EVERETT. That is true in civilian courts, too, is it not? That the defendant frequently comes in with his attorney and cross-examines the police officers and detectives and says, "I was subjected to the third degree."

Mr. KABATCHNICK. I do not profess myself to be a criminal lawyer. My experience in civil criminal practice is very limited. But on a comparable basis in military practice, based on my experience in the field of military law, it has been my experience that you do not have to go very far to have the results of a third degree inflicted on a man continuously, and too often the statements are made by the client, the respondent, where reference was made to him, "Well, now, if you make a statement or sign a waiver," or something along this line, "Your family won't hear about it. But if you go to a court-martial or go to trial, it is going to be an open hearing, your family is going to know about it; your constituents are going to know about it; your associates are going to know about it, so the best thing for you to do is to tell us what your problem is. We are here to help you."

Invariably the man will make a statement, and I have seen some extremely well-educated individuals make statements which, if they had the advice of counsel or the right of counsel at that moment, they would never have made those statements, particularly in cases where they admit to acts or occurrences which would be barred by

the statute of limitations or which took place before entry into the military service.

Mr. EVERETT. Thank you.

Senator ERVIN. Do you have any questions?

Mr. WATERS. Thank you, Mr. Chairman.

Mr. Kabatchnick, I was wondering: You were talking about counsel and the right to counsel and the privilege to counsel. In talking about counsel, are you referring to counsel as we know it—a licensed attorney at law, licensed before the highest court of a State?

Mr. KABATCHNICK. Well, as I believe I indicated the other day, Mr. Waters, that is an extremely perplexing problem to us of the bar. As I indicated earlier, the ideal situation would be that any serviceman who gets into trouble would have the absolute right to a counsel who is a member of the bar of some jurisdiction, or who is certified by the Judge Advocate General.

However, in many of these administrative proceedings and in the lesser court-martial proceedings, the counsel provided to a man, the "military counsel," is not a member of the bar. And among other things, it creates a very serious question as to whether or not the individual has received the requisite training or adequate training in the evaluation of the evidence that is before him and what steps would be taken as far as the assembly of evidence in defense of the individual.

As I indicated to the committee the other day, this one case came to my attention where a man was placed before a board of officers and was provided "military" counsel.

Mr. WATERS. Was this counsel a licensed attorney at law?

Mr. KABATCHNICK. No, he was not a licensed attorney. He was provided with "military" counsel; fortunately there was a nonvoting legal member on the board, and at the proceeding, the legal member asked respondent's counsel as to whether or not he was familiar with the procedures governing the regulations and procedures governing the board of officers. The respondent's counsel replied, and this case occurred in late 1960 or early 1961—counsel replied, well, "I was a recorder for one of these boards back in 1953 and I don't remember all the procedures." Now, with this evidence before the board, the board proceeded to hear the case, the man was given an undesirable discharge, and fortunately, thank the Good Lord that there is a discharge review board; the discharge review board set aside the undesirable discharge. But that man was put out of the service with an undesirable discharge with this evidence before the board of officers.

This is the type of situation that we feel is causing the violation of the fundamental constitutional rights of the individual serviceman, and until such requisite procedures and requirements are made available to the individual man, his constitutional rights are going to continue to be prejudiced and jeopardized.

Mr. WATERS. Mr. Kabatchnick, you indicated that the military services do not recognize a privilege between physician and patient while in the military services. Is that accurate?

Mr. KABATCHNICK. I believe that there has been a recent case within the last month, handed down by the U.S. Court of Military Appeals, which held that the statements or admissions that an indi-

vidual makes to a physician is not privileged under article 31 of the code, in that he was not a suspect at the time that he made the admissions to the physician.

As I have indicated earlier, when a man in the military service goes to see a doctor and says in theory, let's say, "I have a feeling that I am going to have a nervous breakdown," or "I am suffering from some kind of an illness," a medical record is created and that medical record goes into the man's service jacket and is available to any commander or unit commander, either at the installation where he is stationed at the time the medical record is created, or at any station after he leaves the station where the record is created. So that, to answer your question, it is my understanding under this holding that until such time as an individual is a suspect and it is a serious question as to when an individual becomes a suspect——

Mr. WATERS. Is there a privilege between the individual serviceman and his counsel, whether he happens to be a lawyer or not?

Mr. KABATCHNICK. Certainly as far as any counsel provided who is a member of the Judge Advocate General's Corps, generally speaking, there is a privilege which attaches at the time that the legal counsel is appointed to represent the individual.

However, there is a question that when an individual walks into a staff judge advocate office and says, "I have a legal problem," can the individual staff judge advocate then consider himself as the attorney?

I recently had it come to my attention that an individual went into a staff judge advocate office and made certain statements to a legal officer, and the individual legal officer did not consider, under existing practices, to be the attorney for that individual. Here, no privilege attached.

So that there is a very serious question as to when a military lawyer becomes the attorney for an individual serviceman.

But certainly it has been my experience that the "nonlegal lawyer" or the nonlawyer military counsel, is not as well versed in the principle of attorney-client privilege as might a staff judge advocate or member of the Judge Advocate General's Corps, who is a lawyer. I think that this is a possible source of violation of the attorney-client privilege.

Mr. WATERS. Thank you, Mr. Kabatchnick.

Thank you, Mr. Chairman.

Senator ERVIN. Thank you, Mr. Kabatchnick. We appreciate your coming before us.

Mr. KABATCHNICK. We appreciate the time given us.

Mr. CREECH. Mr. Chairman, the next witness is Mr. Frank E. G. Weil, attorney at law, New York, N.Y., national board member of the American Veterans Committee.

Mr. Weil, we are glad to welcome you to the committee. We appreciate your coming.

## STATEMENT OF FRANK E. G. WEIL, MEMBER OF NATIONAL BOARD OF THE AMERICAN VETERANS COMMITTEE

Mr. WEIL. My name is Frank E. G. Weil. I appear here as a member of the National Board of the American Veterans Committee.

I am an attorney at law, practicing in New York, admitted also to the Supreme Court of the United States.

I graduated from the Yale Law School. I have seen military service in the Army, and I have been a Government employee overseas.

The American Veterans Committee approves, and generally supports the recommendation of the U.S. Court of Military Appeals as set forth in the report of that body for the period ending December 31, 1960, and favors the recommendations for amendment of the Uniform Code of Military Justice which appear on pages 10 through 12 of that report.

We also approve and generally support the recommendations embodied in H.R. 3387, 86th Congress, 1st session, referred to as the Department of Defense omnibus amendments.

Our organization, at its last convention held in New York City, specifically disapproved of the recommendations of the Brucker Committee and in its resolution of disapproval, mentioned the fact that the judges of the court, in their report, had stated that they were "appalled" by the recommendations of the Brucker Committee.

It is our understanding that some of the ideas which originated in the Brucker committee report have survived the objections raised against them and are now before this subcommittee in one form or another. I will now discuss these as we get to them. We generally approve, with a few reservations and suggested amendments:

First, the suggested amendment to article 15, or section 815, which broadens the authority of the commanding officers to impose nonjudicial punishment essentially into the area which has hitherto been within the jurisdiction of the summary court-martial.

We approve of these proposed amendments with the following qualifications:

In the text of the draft bill which we have seen, the suggestion is made that the service Secretaries and the President may prescribe regulations under which the exercise of this nonjudicial punishment may be made.

We feel that whatever the regulations will be they should not diminish the absolute right of the accused to elect trial by court-martial. This absolute right should not be diminished by regulation, even though, of course, the regulations should provide the manner in which it can be exercised and other necessary peripheral matters.

A further provision of article 15 which is also contained in the proposed revision is inherited, I believe, from the Articles of the Government of the Navy, which provide that "A person attached to or embarked on" a vessel may be put on bread and water.

Now, I, myself, do not have enough background and nobody in our organization whom I have contacted has enough background to take a position whether or not bread and water is a suitable punishment for persons on shipboard. It is, of course, likely that the smaller vessels do not have special confinement quarters, and it is a little hard to deprive someone of a pass when he is on a ship at sea and nobody is going ashore, anyway.

However, we feel that bread and water and other similar provisions should not apply to personnel who are merely attached to a vessel and who may be on shore where full court-martial and other punishment may exist.

We therefore recommend the deletion of the words "attached to."

Continuing further in the proposed revision of this article, we approve of the appeals procedure, which applies to somebody who is willing to accept nonjudicial punishment but feels that this punishment is too harsh. We like the fact that such procedure is spelled out.

However, there appears to be a gimmick in the proposed language. The proposed language says that the pendency of such an appeal will not affect the punishment in the meantime. This might cause the situation where, for a very slight infraction which he admits having committed, an individual is placed on restriction for, let us say, 1 week. He thinks 1 week is too much; he appeals; and 2 weeks after he serves his 1-week restriction, the appeal comes down, saying, yes, you are quite right; you should not have been restricted for 1 week.

Therefore, we feel that either the appeal language should be so worded that the appeal must be handled expeditiously——

Senator ERVIN. That puts the man in the same fix as the old story about a fellow who was in jail. The lawyer got down and said "What did they put you in jail for," and then the lawyer says "They can't put you in jail for that," and he says, "Well, I am in anyway."

Mr. WEIL. That is correct.

I presume that a 48-hour period might not be an undue hardship, even if a man were unjustly put to hard labor for this period.

But our committee feels that either the decision on the appeal must be made expeditiously or the pendency of the appeal should delay the punishment until the authorities prescribed have determined that the punishment is in fact just and warranted.

I come now to a further proposal in the revision of article 15. The language that we have seen in the proposed amendment says—

> Unless otherwise prescribed by the Secretary concerned, the imposition and enforcement of disciplinary punishment under this article for any act or omission is not 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 the finding of guilty.

Basically, the American Veterans Committee is opposed to this section altogether. If a man, in attempting to desert, takes with him a Government handkerchief, theoretically he can be given nonjudicial punishment for taking the Government handkerchief and then be brought before a court-martial for the crime of desertion.

It seems to me that if the offense is serious enough to warrant a court-martial, it should carry with it all subsidiary, included and allied offenses. The court-martial should deal with all of them.

However, if this section is maintained, we feel strongly that one part of it at least, should be changed. As the wording I have quoted leaves it to the accused to bring to the attention of the court the fact that he has suffered nonjudicial punishment for a collateral or trivial matter concerned with the same offense, we would suggest that this be changed so that subject to the right of the accused if he wishes to have this information withheld from the court, there are a few instances in which an accused might wish it to be withheld—that subject to that right, it be made mandatory that if nonjudicial punishment has been imposed, this be reported to the court, possibly as an ap-

pendix to the specifications, or in some other formal or official manner and not left to the initiative of the accused to bring before the court.

The proposed revision of article 16 provides for general courts-martial and special courts-martial composed only of a law officer.

In the case of general courts-martial, the proposed revision would make the trial of the accused before a law officer alone dependent upon the approval of the convening authority.

In the case of the special courts-martial, the proposed revision contains an additional limitation in that the Secretaries of the services concerned may bar such trials in the case of persons who elect trial in lieu of nonjudicial punishment under article 15.

These limitations, we submit, are the back door to command influence. If the single law officer court, which we think is a great improvement, is to be made dependent upon the approval of the convening authority, the convening authority may very well refrain from giving the approval in the cases where he intends to read a lecture to the members of the court that offenses of a particular kind are serious and should be harshly dealt with. This is particularly so in the proposed right of the services to bar trials before a single officer special court-martial, where an accused elects court-martial in lieu of nonjudicial punishment.

We feel that the area where the accused elects a court-martial instead of nonjudicial punishment are precisely the areas where differences of opinion, differences of personality, and possible prejudice may exist between a commanding officer and his subordinate, that what the subordinate views as a difference of opinion, the superior will regard as insubordination and the superior will proceed to impose nonjudicial punishment under article 15.

The accused will then wish trial by court-martial. The proposed restriction of article 16, which permits a service Secretary to bar this whole area from the single-officer court brings a very real threat of command influence into this very area.

The American Veterans Committee believes further—this also concerns article 16, that all courts other than the summary court, which it is proposed be abolished, should require the presence of at least one attorney. The present provisions of article 27 provide that in the case of special courts-martial, either both sides be attorneys within the meaning of article 27, or neither side be. We have no quarrel with this provision, but in order to assure the presence of at least one attorney, we recommend that the proposed legislation on the composition of special courts-martial permit either a special court-martial composed of a law officer alone, or a special court-martial composed of a law officer and three members, not the present provision of a president of a special court-martial and two other members without a law officer.

While we see it may be difficult for the services sometimes to provide two or possibly three lawyers for a court-martial, we do not think the burden of requiring one lawyer, who in that case will sit as the law officer of the court-martial, will be too great, because the prosecutor and defense could be nonlawyer counsel in such situations.

Finally, the proposed revision of article 45 provides that the law officer may, if authorized by the Secretary concerned, accept a verdict of guilty and record the same without vote and without the presentation of evidence.

The American Veterans Committee, feeling rather strongly that the position of the accused should be as nearly as possible comparable to a civilian accused, recommends that language be added to the proposed revision of this section which provides that such a plea may be accepted only after the accused has had an opportunity to consult counsel, and in this instance, only after he has had an opportunity to consult counsel who are lawyers within the meaning of article 27.

Let me explain briefly what we mean by this:

Under the proposed revision, an accused may merely plead guilty and no trial follows. Where an accused has had the benefit of consultation with lawyer counsel who can weigh evidence and may suggest to the accused that there is no need to go through the formalities of a trial and that putting into evidence of the details of the offense might inflame the court, if the counsel then recommends to the accused that he plead guilty, so be it.

However, if nonlawyer counsel, who is not that familiar with the quantum of proof which may be required and the other technicalities of a trial, if nonlawyer counsel advise him to plead guilty, we feel that the prosecution should still go forward and present a prima facie case, and that the presentation of evidence should be dispensed with only upon the advice of lawyer counsel.

This completes the formal portion of my testimony.

I have one or two remarks which are occasioned in part by hearing the very excellent testimony of Colonel Wiener this morning.

Much has been said on the part of the services of a shortage of lawyers. To some extent, of course, this shortage is real. To some extent we feel that the shortage is manufactured. The services, when they speak of the shortage of legally trained personnel, they are viewing only the Judge Advocate's Corps. A vast, untapped reservoir exists; for instance, the enlisted lawyer. Many of my school classmates have gone into the Army, have been offered excellent opportunities to go to Cooks' and Bakers' School, Truckdrivers' School, and similar places where their legal knowledge is presumably utilized to the full.

Other avenues could also be used. The New York Law Journal recently carried a front-page announcement that the Air Force had an arrangement in New York whereby such of their Reserve officers on inactive duty who were practicing attorneys in the New York area could put in some of their Reserve time and receive Reserve pay and credit for performing legal services on behalf of the Air Force in that area.

This kind of a system could, I feel, be extended to all of the major cities all over the United States. There are many lawyers on inactive duty with Reserve commissions. If these could be made available as law officers, as prosecutors, as defense counsel and otherwise in the cities in which they practice, this would enable the services to concentrate many of the active duty lawyers in oversea positions.

Furthermore, where a man has long service as an active duty legal officer and the services wish to retain him, I would see no difficulty in permitting him to revert to inactive duty, to hiring the same man as a civilian attorney. The fact that he is an officer, that he still holds a commission, would probably satisfy the statutory provisions. There would be nothing wrong with Mr. Jones, grade GS-11 or GS-12, sign-

ing on some occasions as Major Jones when he comes to records of court-martial.

A full utilization of the enlisted lawyer, the 6-month trainee, the 2-year draftee, the lawyer who has gotten into the Army in some other capacity—even the lawyer who now may be doing a capable job commanding a battery or an infantry company, all these factors added together will, I am sure, provide a sufficient number of lawyers for the armed services in the long run.

Thank you.

(The complete prepared statement of Frank E. G. Weil is as follows:)

STATEMENT OF THE AMERICAN VETERANS COMMITTEE, INC., ON PROPOSALS DEALING WITH THE UNIFORM CODE OF MILITARY JUSTICE

The American Veterans Committee approves and generally supports the recommendations of the U.S. Court of Military Appeals as set out in the report of that body for the period ending December 31, 1960, and favors the recommendations for amendment of the Uniform Code of Military Justice which appear on pages 10 through 12 of that report.

The American Veterans Committee approves and generally supports the recommendations embodied in H.R. 3387, 86th Congress, 1st session, and referred to as the "Department of Defense omnibus amendments." (See annex to Report of the Judge Advocate General of the Army for the period ending December 31, 1960.)

The American Veterans Committee, at its convention held in New York City in May 1961, specifically disapproved of the recommendations of the "Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army" dated January 18, 1960, and appended as annex A to the aforementioned report of the Judge Advocate General of the Army; however, we understand that these recommendations are not before the subcommittee at this time.

Regarding the three draft bills, designated A, B, and D, which appear to embody certain of the provisions originally suggested by the Army committee, the American Veterans Committee takes the following position:

Approves generally of the provisions of draft bill A dated April 11, 1961, with the following comments and suggestions:

(1) The proposed amendments to section 815 (art. 15) enlarge the powers of commanding officers to impose nonjudicial punishment; proposed subsection (A) thereof provides that the applicability of the provisions of article 15 to an accused who demands trial by court-martial and the kinds of court-martial to which the case may be referred upon such a demand may be governed by Presidential regulation, as well as such additional regulations as may be prescribed by the Secretary concerned. The American Veterans Committee feels that it should be made somewhat more clear that the right to elect trial by court-martial in lieu of nonjudicial punishment shall be absolute, and not in any way subject to diminution by regulation (p. 1, lines 6–9, 13–16).

(2) The proposed revision of section 815 (art. 15) retains the provision, with respect to "A person attached to or embarked on" a vessel (sec. (B)(2)(A)), of confinement on bread and water or diminished rations for not more than 3 consecutive days. Although such punishment has been traditional in the Navy, and although shipboard conditions may warrant its imposition on shipboard, the American Veterans Committee considers that there is no justification for retaining this form of punishment concerning persons "attached to" a vessel, who may be serving on shore, and regarding whom the regular procedures of punishment or trial can be made available. The American Veterans Committee accordingly suggests the deletion of the words "attached to" (p. 2, line 18).

(3) The proposed section (D) which provides a mechanism for appeal in cases in which a person punished under section 815 (art. 15) considers the punishment unjust or disproportionate represents a real advance; however, the provision that while the appeal shall be promptly forwarded and decided, the person punished may in the meantime be required to undergo the punishment adjudged, may well serve to nullify the effect of the section in question. The American Veterans Committee considers that this provision be amended so as to make im-

possible the situation where an appeal succeeds, whereas the punishment has been completed during the pendency thereof (p. 4, lines 7–9).

(4) The American Veterans Committee is opposed to the provisions of the proposed section (E). If a matter is sufficiently serious to warrant a trial by court-martial for a "serious crime or offense," it would appear to be too serious to be handled by way of nonjudicial punishment, and deletion of this proposal is therefore recommended. If, however, it should be decided to retain the proposed section (E), the fact that nonjudicial punishment has been imposed should not merely be left to be shown by the accused upon trial but should be brought to the attention of the court or law officer mandatorily, possibly as an annex to the charge sheet, so that the court is certain to have knowledge of such punishment before a sentence is adjudged (p. 5, lines 14–24).

Approves generally of the provisions of draft bill B dated April 11, 1961, with the following comments and suggestions:

(1) The proposed revision of section 816 (art. 16) provides for general courts-martial and special courts-martial composed only of a law officer. In the case of general courts-martial the proposed revision makes the trial of an accused before a law officer alone dependent upon the approval of the convening authority; in the case of special courts-martial the proposed revision contains an additional limitation, in that the Secretaries of the services may bar such trials in the case of persons who elect trial in lieu of nonjudicial punishment under section 815 (art. 15). These limitations may lead to retention of command influence in the very areas from which the single law officer court is designed to remove such influence. Accordingly, the American Veterans Committee recommends deletion of the limitations referred to (p. 1, lines 21–22, and p. 2, lines 7–11).

(2) The American Veterans Committee believes that, considering the recommendation that summary courts be abolished, the two higher grades of court remaining should require the presence of at least one qualified attorney. Present § 827 (art. 27) permits the use of non-lawyer "counsel" in special courts-martial provided the qualifications of the prosecution and defense are equal. Insisting that one attorney be present will do much to raise the standard of justice, and the additional burden on the legally qualified members of the services is one which the services should be prepared to bear; full utilization of the legal skills of many qualified attorneys now serving in nonlawyer positions, both officer and enlisted, should make it possible. Accordingly the American Veterans Committee recommends the deletion from the proposed revision of § 816 (art. 16) that subsection designated (2)(A). Acceptance of this recommendation will require the relettering of the proposed subsections (2)(B) and (2)(C), the deletion from the present text of the Uniform Code of all references to the president of a special court-martial, and from the proposed amendments of all references to the president of a special court-martial and to a special court-martial without a law officer (p. 2, line 2; § 826, p. 4, lines 3–4; § 829, p. 5, lines 18–19; § 839, p. 6, lines 15–16 and 18–20; § 851, p. 7, lines 16–19 and 23–24, and p. 8, lines 9–10).

Approves generally of draft bill "D" (undated) with the following comments and suggestions:

(1) The American Veterans Committee repeats the views regarding the composition of special courts-martial already stated. Acceptance of this view will entail certain consequential amendments to draft bill "D" (§ 838, p. 2, lines 13–14; § 839, p. 3, lines 11–12; § 840, p. 3, lines 22–23; § 845, p. 4, lines 25–26; § 848, p. 6, line 2).

(2) The proposed revision of § 845 (art. 45) provides that the law officer may, if authorized by the Secretary concerned, accept a plea of guilty and record the same without vote, and without the presentation of evidence. The American Veterans Committee feels that the position of the accused should be, as nearly as possible, comparable to a civilian accused. For this reason the American Veterans Committee recommends that language be added to this section which provides that such a plea may be accepted only after the accused has had an opportunity to consult counsel; since special courts-martial may, under present provisions to which no changes are recommended in any of the draft bills, use nonlawyer "counsel" the American Veterans Committee further recommends that the word "counsel" in connection with this article be defined by reference to § 827(b) (art. 27(B), p. 4, line 21 through p. 5, line 5).

Senator ERVIN. I imagine a rather substantial number of reservists are lawyers. For some reason, I think the legal profession has obeyed the prompting to public service, either in political office or in the defense forces of the Nation, such as the National Guard.

I am thinking about the Reserve Forces—National Guard and Reserves.

Mr. WEIL. You are probably quite right, Senator. You probably have more experience in this field.

Senator ERVIN. That may be the basis for the recommendation you make.

Mr. WEIL. Yes, it is; thank you very much.

Senator ERVIN. And certainly a number of your Reserve officers who go into the service as trainees have studied law and go into the service, to get their service behind them. From these men a considerable amount of legal service could be obtained.

Mr. WEIL. I feel sure you are right, sir.

Senator ERVIN. Any questions, Mr. Creech?

Mr. CREECH. Sir, I notice in your statement, the American Veterans Committee deals with the Uniform Code. I wonder, sir, has your committee also studied the administrative discharge procedures of the military in peacetime and if you have studied them, do you have any views which you would care to impart to the subcommittee?

Mr. WEIL. I regret to say that we have not conducted a formal study in this area. I wish, however, to associate myself with the remarks of the last previous witness in that the right to counsel, the right to a fair hearing, the right to the confrontation of witnesses, the right to a record, all of the rights which we are accustomed to treating as self-evident in the processes of civilian justice, should be available in the military, and they should not be restricted except for overriding cases of military necessity.

I do not feel that the process of an administrative review of discharges presents this kind of a military necessity—at least not in peacetime.

Mr. CREECH. Sir, the study which your committee has done undoubtedly has gone into the type of military justice which has been administered through the years and not just under the code.

Is that assumption correct?

Mr. WEIL. To some degree; yes, sir.

Mr. CREECH. I wonder, sir, if you would care to comment upon the assertion which has been made that the Uniform Code is unwieldy, that it is cumbersome, and that it would be more desirable to administer military justice under the previously existing provisions of the Elston Act and at the same time abolish the Court of Military Appeals?

Mr. WEIL. I believe, sir, those that have expressed this view must be largely in favor of what it known to history as the drumhead court-martial. For a brief time following my military service, I worked for War Crimes, and when I reported, I was faced by a young officer who said, "You may think that we are here to hang these people. We are not. We are here to give them a fair trial first and hang them afterward."

I would say this is perhaps an expression of the views you have referred to.

I believe that the Uniform Code, while perhaps a little more cumbersome than some of the earlier procedures, is rightfully so. It is the price we pay for better justice and I think the price is well worth paying. It can be improved, and I think that abolishing the summary court-martial and extending the nonjudicial powers under article 15, subject both to the right to elect a special court-martial and the right to appeal the severity of the punishment may go fairly far toward making it less cumbersome.

Mr. CREECH. Sir, I notice that your committee has associated itself with the recommendation of the Court of Military Appeals. I wonder, sir, if your study has revealed any trends in the quality of the administration of military justice? Do you feel that through the decade or more of its operation the justice dispensed under its aegis has improved?

Mr. WEIL. Yes, sir; we feel it has improved. It has improved significantly, and the technique of the field judiciary, which the Army has adopted rather more broadly and which it proposed to have incorporated in the statute here, I believe has further improved it in that the permanent officials of the field judiciary, being fully advised of every opinion of the Court of Military Appeals, will apply it, and since, with the extension of the system of field judiciary, more and more courts-martial will be handled by members of the field judiciary, this will shorten the trickle-down process from the courts to the actual courts-martial. To that extent, I would disassociate myself from the remarks made by Colonel Wiener this morning, when he said that it was rather difficult for the field to realize what the Court of Military Appeals was saying.

This may be true in a limited extent, but to the extent to which the power to run the court-martial is taken away from the field and placed in the hands of a party of impartial, permanent officials who are aware of these decisions, to that extent will justice be improved.

Mr. CREECH. Your statement has indicated the feeling that this field judiciary system should perhaps be extended to all of the services?

Mr. WEIL. We believe that it should.

Mr. CREECH. I wonder, sir, has your committee gone into the matter of a separate JAG Corps for each of the services?

Mr. WEIL. I do not recall a specific resolution on the matter. But I believe this is part of one of the bills of which we have indicated our general approval. Certainly the skills required to run a military justice system differ somewhat from those needed to run a destroyer.

Mr. CREECH. One of the proposals which you have mentioned on the provisions of the code would have as its purpose, among other things, to avoid command influence. Sir, has your committee studied the issue of command influence, and are there instances which you feel should be brought to the attention of the subcommittee?

Mr. WEIL. We have dealt with that on a rather general basis. I do not have the impressive list of citations from 5 U.S.C.M.A. through 12 U.S.C.M.A. heard this morning. There were such tendencies, but I think under the influence of the court they are being reduced. Two or three of the earlier comments I made are directed toward reducing the possibility of such command influence, which, if the proposed revisions go through unamended, might be built back into the code and should not be built back into the code.

Mr. EVERETT. Mr. Weil, since you have an extraordinary experience in the field of comparative law, I wonder if you have any observations or suggestions based thereon which might be of value to the subcommittee in its present hearings?

Mr. WEIL. One in particular comes to mind, sir, the institution of the new West German Federal Army of a parliamentary commissioner. He is a civilian appointed by and responsible to the German Federal Parliament, who is accessible to all members of the German military, who has something of the functions of—I would say his functions are somewhere between those of a congressional investigating committee or a member of the staff of a congressional investigating committee and those of an inspector-general.

It provides a direct channel to the Parliament for any allegations of abuse, of corruption, undue influence, or anything else of which the Parliament should be aware.

Possibly the representatives of the German Federal Government here in Washington might be able to supply us some further details on how this system works, as would, no doubt, the staff of the headquarters of the U.S. Army in Europe.

It might also be significant to remark that the Military Code of the present German Federal Army, which reflects an attempt to get away from the very valid criticisms made of the predecessor army leaves entirely to the German civil courts the offenses committed by Germans in peacetime. This is perhaps analogous to the provisions of the Articles of War, to which Colonel Wiener alluded this morning.

Mr. EVERETT. With respect to wartime and peacetime, would you draw any distinction between the standards of military justice and procedures of military justice that should exist in peacetime or wartime?

Mr. WEIL. This has come up in a slightly different context this morning. I would say this, sir, that it seems to me that peacetime standards and wartime standards should be the same. One possible exception may be made within an expeditionary force in combat, if shortcuts are required, they might be required in an expeditionary force in combat.

Assuming there has been a declaration of war and Fort Bragg is still in existence, if I can repeat the simile heard this morning. I think that the courts-martial at Fort Bragg should be the same in war or peace, although those in an advanced invasion bridgehead might very well be somewhat foreshortened and speeded up.

Mr. EVERETT. In connection with your proposals for utilization of legal man power, would this include, then, an option for the armed services to use civilian law officers, preferably reservists, in lieu of military law officers, depending on the service?

Mr. WEIL. Yes, I think so.

My suggestion regarding reservists was that it would not be required to change much of the statutory law which requires officers in that a civilian who holds a reserve commission is an officer for many purposes. And it might be possible to utilize such personnel in many of the places in which the statute speaks of officers, which is something which, unfortunately, cannot be said of the enlisted lawyer.

And if I might expand for a moment on my thoughts on the enlisted lawyers, if they were fully utilized, they would thereby free more offi-

cers with legal training for the court-martial work with which we are dealing.

Mr. EVERETT. Would it be a fair inference that you would not share Colonel Wiener's view, expressed this morning, that in some types of more or less routine military offenses, lawyers could be dispensed with for the prosecution of the offense, even in a general court-martial?

Mr. WEIL. I would say this, sir: He used two examples, the routine AWOL and the clearcut desertion.

The routine AWOL, it would seem to me, would fit under the expanded powers for nonjudicial punishment and therefore lawyers would not be required. Desertion being a serious offense, presumably you would be required to have a full panoply of lawyers, since you are dealing with a general court. However, if it is as clearcut as the colonel suggested, I do not imagine that a trial would take more than a few minutes.

Mr. EVERETT. With the commensurate brief loss of time by the court.

Mr. WEIL. Precisely.

Mr. EVERETT. The committee has been informed that the Air Force has a policy of requiring a prima facie case to be proved when an accused pleads guilty, whether or not his defense counsel wants such a case presented.

Would you consider there were any problems connected with this type of policy?

Mr. WEIL. I would have no objections to that requirement, sir. However, if the services concerned or Congress in its wisdom suggests the saving of manpower and time by not requiring the prima facie case to be proved, we would concur, provided that the plea has been discussed with counsel who is a lawyer within the meaning of article 27.

Mr. EVERETT. Thank you.

No more questions, Mr. Chairman.

Mr. WATERS. No questions.

Senator ERVIN. The committee is very grateful to you and the American Veterans Committee for your interest in these serious problems in this field, and particularly indebted to you for coming and giving us the benefit of your views in person.

Mr. WEIL. Thank you very much indeed, sir.

Senator ERVIN. I will insert in the record at this point a statement of Robert H. Reiter, a member of the Washington Bar, dealing with this area.

(The document referred to is as follows:)

STATEMENT OF ROBERT H. REITER

My name is Robert H. Reiter and I am a member of the law firm of Spaulding, Reiter & Rose, with offices at 1311 G Street, N.W., Washington, D.C.

My purpose is to present a problem which has been litigated and where the courts are apparently powerless to cure what they found (and the Government admitted) to be a violation of statute committed in the course of a court-martial, which resulted in a terrible injustice. My purpose here is not to attempt to obtain relief in this particular case, which can presumably be done only by private legislation, but rather to place on record what did happen so that steps can be taken to insure that it will not happen again.

The statutory provision involved is found at 34 U.S.C., section 1200, article 60, reading as follows:

"The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the judge advocate and shall, in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court-martial, provided oral testimony cannot be obtained."

The comparable provision under the Uniform Code of Military Justice is found at 50 U.S.C. (1952 ed.) section 625.

Col. Leslie F. Narum, senior colonel in the U.S. Marine Corps with almost 25 years of service, was court-martialed in China in 1948 for shipping private goods through military channels, and the principal evidence on the basis of which he was convicted was the testimony of two civilians, taken before a court of inquiry, sometime prior to the trial, after they had been held incommunicado by the Chinese authorities without the assistance of counsel or any outside contact. Both these men refused to testify at the court-martial itself, although one of them went as far as to say that he was sorry because he felt he could clarify questions which might clear the defendant in some charges. These men were white-Russian refugees in China, and Chinese police were sitting in the courtroom, so that they were fearful of testifying. No effort was made by the court or the military authorities to restrain them or compel their testimony, and they were simply permitted to walk out of the courtroom, without any opportunity by Col. Narum to question them.

Thereupon the prosecution offered the testimony taken before a preliminary hearing, and it was admitted in evidence. Col. Narum was convicted and discharged.

As you can see, this procedure was a clear violation of the statute I have quoted above, which limits the use of such testimony to minor offenses. The case was taken to the Court of Claims, where the court decided by a 3 to 2 majority that although a wrong had been committed, there was no jurisdiction in the court to cure it. The minority of opinion, written by Judge Whitaker, stated that it is incumbent upon the civil courts to afford an accused the protection guaranteed him by the Constitution.

Colonel Narum petitioned the Supreme Court for certiorari, and the Solicitor General of the United States in his reply acknowledged that an error had been committed, but argued that there was no jurisdiction in any court to consider the error. The Supreme Court denied the petition for certiorari, so that the case was never considered on its merits by the Court.

I feel very strongly that legislative clarification is required to establish beyond any remaining doubt that when proper constitutional issues are raised in cases such as this, the courts of the United States do have jurisdiction to consider such constitutional questions even though they arise in the course of military proceedings. According to the decision in this case, the military's clear violation of the expressed will of the Congress was with complete impunity. It was not the intention of Congress to create a right without a remedy, nor was it the intention of our Founding Fathers to permit the violation of a constitutional right as basic as that of confrontation of witnesses as guaranteed under the Bill of Rights, without recourse to courts of the United States. The effect is to make the military a law in itself, and to that extent for all practical purposes to exempt it from constitutional restraints on violation of personal liberties, since without recourse to the courts to enforce it, a legal right is meaningless.

Senator Ervin. This concludes the hearings. The subcommittee will keep the record open for a period of 2 weeks for the purpose of receiving any statements which anyone may wish to submit to the subcommittee to constitute a part of the record.

I wish to thank the civilians and the judge advocates who have come to us from the Armed Forces for giving us the benefit of their experience and study and views on the subject we have been considering.

I want to thank the organizations of veterans, such as the American Legion, the American Veterans Committee, and the Veterans of Foreign Wars, for making presentation to the committee of their

views in respect to the matters under consideration, and also to thank the committees of the various bar associations and the individual lawyers who have seen fit to come before us and give us the benefit of their experience.

I think that anyone who has attended these hearings is impressed with the fact that this is a field in which there is room for a good deal of disagreement on the part of reasonable men as to exactly what should be done.

I think all of us, and certainly the chairman of the subcommittee, recognizes that the primary function of the Armed Forces and the primary function of civil government are different. If there is any one thing that caused civil government to be established, it was in order that justice could be administered between man and man and I have always felt that perhaps the administration of justice is the most sacred obligation to fall upon civil government.

The military force is concerned primarily with defending the security and independence of our Nation. It was not created primarily for the purpose of administering justice. But in the course of its activities, it has certainly found it necessary to engage in the administration of justice, both from the standpoint of discipline of the Armed Forces, a thing which has to exist for the efficiency of the Armed Forces, but also for the purpose of ridding itself of those unfit for service.

I would like to see the administration of military justice maintained primarily in the hands of the military so far as is consistent with recognition of basic constitutional rights, and it seems to me that we have some very serious questions here in the field, particularly of administrative discharges.

I have some feeling that much can be done in this field by the Armed Forces themselves making some changes in their procedures. I recognize that it is not only the right but also the duty of the Armed Forces to separate from the service men whose unfitness to remain in the service is demonstrated.

At the same time, I also realize that there are certain basic rights that ought to be accorded to all men in any system of justice.

I think all Americans are wedded to the idea that there must be such a thing as due process of law, or as it is called in many States, the law of the land, which Daniel Webster very well defined in the *Dartmouth College* case when he said the law of the land is the law which proceeds upon the inquiry and renders judgment only after notice and a hearing.

This is very difficult to legislate because of the difference in the primary functions of the Armed Forces and the primary function of civil government. And certainly it is highly desirable that the Armed Forces be able to separate from service men who are unfit for service, and with the least of technicalities.

But at the same time, there should be something to insure the basic rights of an American citizen to fair treatment and an opportunity to present any defense he may have. So I trust that this committee, in its work, will have the benefit of the views of all the persons interested in this field, which is a most difficult field, and that we might be able to devise some method whereby as much as possible of the control of this situation as would be left in the hands of the Armed

Forces, subject to insuring the recognition and enforcement of the basic right to a fair hearing.

My own opinion is that in most cases, where a person is considered for an undesirable discharge, he would probably prefer to take an undesirable discharge rather than to be subjected to court-martial or anything of that kind.

But, certainly, so many of these men who are dealt with are very young and inexperienced, without mature judgment; and I am certain that something reasonable can be done to afford them the basic protections, without disrupting in any way the administration of the armed services.

I think Colonel Wiener made it very clear when he said that we have difficulty in this field because in a way, we are almost compelled to try to resolve irreconciliable conflicts. He perhaps exaggerated that to some slight extent, but there is a great deal of soundness in his observation to that effect.

But as chairman of the committee, I want to thank the staff for the very fine work it has done in preparing and presenting the material for these hearings and all who participated in them for their cooperation.

We will stand in adjournment.

(Whereupon, at 4:10 p.m., the committee adjourned, subject to the call of the Chair.)

# APPENDIX

## DEPARTMENT OF THE ARMY ANSWERS TO SUBCOMMITTEE QUESTIONNAIRE

Question 1. *What are the discharge figures, by type—i.e., honorable, general, undesirable, bad conduct, and dishonorable—with respect to each armed service for each year beginning with 1950? Figures prior to fiscal year 1951 not available.*

Answer. Character of discharge or service of enlisted personnel of the Active Forces:

*Service; Army*

| | |
|---|---|
| Fiscal year: Last half of fiscal year 1951: | |
| Retirement (all types) | 3, 577 |
| Character of discharge[1] or service: | |
| Honorable[1] | 102, 881 |
| General (under honorable conditions) | 4, 200 |
| Undesirable | 2, 523 |
| Bad conduct[2] | [3] 1, 164 |
| Dishonorable[2] | [3] 2, 379 |
| Total | 16, 724 |
| Fiscal year 1952: | |
| Retirement (all types) | 6, 565 |
| Character of discharge[1] or service: | |
| Honorable[1] | 412, 882 |
| General (under honorable conditions) | 13, 087 |
| Undesirable | 5, 194 |
| Bad Conduct[2] | 1, 744 |
| Dishonorable[2] | 2, 452 |
| Total | 441, 924 |
| Fiscal year 1953: | |
| Retirement (all types) | 8, 442 |
| Character of discharge[1] or service: | |
| Honorable[1] | 772, 335 |
| General (under honorable conditions) | 15, 888 |
| Undesirable | 6, 617 |
| Bad conduct[2] | 1, 708 |
| Dishonorable[2] | 4, 285 |
| Total | 809, 275 |
| Fiscal year 1954: | |
| Retirement (all types) | 6,822 |
| Character of discharge[1] or service: | |
| Honorable[1] | 556, 441 |
| General (under honorable conditions) | 23, 674 |
| Undesirable | 12, 179 |
| Bad conduct[2] | 1, 644 |
| Dishonorable[2] | 4, 840 |
| Total | 605, 600 |

See footnotes at end of table.

| | |
|---|---|
| Fiscal year 1955: | |
| Retirement (all types) | 4,742 |
| Character of discharge[1] or service: | |
| Honorable [1] | 691,012 |
| General (under honorable conditions) | 18,726 |
| Undesirable | 14,611 |
| Bad conduct [2] | 960 |
| Dishonorable [2] | 2,546 |
| Total | 732,597 |
| Fiscal year 1956: | |
| Retirement (all types) | 3,709 |
| Character of discharge[1] or service: | |
| Honorable [1] | 394,394 |
| General (under honorable conditions) | 10,783 |
| Undesirable | 11,877 |
| Bad conduct [2] | 2,214 |
| Dishonorable [2] | 3,742 |
| Total | 426,719 |
| Fiscal year 1957: | |
| Retirement (all types) | 3,449 |
| Character of discharge[1] or service: | |
| Honorable [1] | 355,616 |
| General (under honorable conditions) | 6,593 |
| Undesirable | 15,228 |
| Bad conduct [2] | 1,681 |
| Dishonorable [2] | 2,711 |
| Total | 385,278 |
| Fiscal year 1958: | |
| Retirement (all types) | 4,467 |
| Character of discharge [1] or service: | |
| Honorable [1] | 381,906 |
| General (under honorable conditions) | 7,814 |
| Undesirable | 17,515 |
| Bad conduct [2] | 1,321 |
| Dishonorable [2] | 1,692 |
| Total | 414,715 |
| Fiscal year 1959: | |
| Retirement (all types) | 4,056 |
| Character of discharge [1] or service: | |
| Honorable [1] | 334,744 |
| General (under honorable conditions) [4] | 5,910 |
| Undesirable [4] | 11,031 |
| Bad conduct [2] | 1,074 |
| Dishonorable [2] | 869 |
| Total | 357,684 |
| Fiscal year 1960: | |
| Retirement (all types) | 4,590 |
| Character of discharge [1] or service: | |
| Honorable [1] | 224,235 |
| General (under honorable conditions) | 10,178 |
| Undesirable | 7,474 |
| Bad conduct [2] | 802 |
| Dishonorable [2] | 648 |
| Total | 247,927 |

See footnote at end of table, p. 829.

Fiscal year 1961:[5]

| | |
|---|---|
| Retirement (all types) | 8,007 |
| Character of discharge[1] or service: | |
| Honorable[1] | 254,046 |
| General (under honorable conditions) | 11,889 |
| Undesirable | 8,319 |
| Bad conduct[2] | 693 |
| Dishonorable[2] | 510 |
| Total | 283,464 |

[1] Includes discharged for immediate enlistment or reenlistment and discharged from enlisted status to accept commissions.
[2] Discharges approved on appellate review.
[3] Figures cover entire fiscal year 1951 period.
[4] Figures previously furnished to Congressman Doyle for use in hearings on H.R. 1150, 87th Cong., 1st sess., are slightly higher due to inclusion of statistics on officers and estimates of discharges issued to female enlisted members. These categories are excluded from figures provided herein.
[5] Years prior to fiscal year 1961 do not include enlisted females since data was not maintained.

Question 2. *Are trends evident with respect to different types of discharges and what are the explanations of those trends?*

Answer. Since the Uniform Code of Military Justice became effective on May 31, 1951, the percentages of punitive discharges, i.e., dishonorable and bad conduct, as compared with the total number of all other types of discharges effected by the Department of the Army have remained rather constant. Since fiscal year 1952, the percentages of dishonorable discharges adjudged have ranged from a high of 0.9 percent (fiscal year 1956) to a low of 0.3 percent (fiscal year 1961). Likewise, the percentages of bad conduct discharges adjudged during the cited period have stabilized between 0.7 percent (fiscal year 1951) and 0.3 percent (fiscal year 1961).

The Judge Advocate General is of the opinion that several factors have contributed to the stabilization of the percentages of punitive discharges adjudged during this period. The Army expended considerable effort during the cited period to raise the caliber of personnel inducted into the Army. Previous Army studies had indicated a direct relationship between educational level of Army personnel and the court-martial rates. As the educational level of Army personnel was raised subsequent to World War II, there was a corresponding decline in the numbers of courts-martial. The Army stressed to its commanders at all levels that positive leadership would prevent the commission of criminal offenses. Unit commanders were urged to use minimum sanctions consistent with correction and deterrence in dealing with military criminal offenders, with the result that the commanders disposed of such offenders through their corrective powers under article 15, Uniform Code of Military Justice, or referred the charges to trial by summary or special courts-martial. These inferior courts do not, under the code and current Army procedures, impose punitive discharges. The Department of the Army emphasized the full use of mental health facilities, legal assistance, and opportunities for religious guidance as a leadership supplement in the prevention of criminal offenses. The job performance potential program or "aptitude program," instituted in fiscal year 1958, was directed toward the administrative elimination by honorable discharges of personnel who were determined to be unable to meet the Army's modern training and performance standards. The program was beneficial to the state of overall discipline in the Department of the Army.

Definitive trends in issuance of various types of administrative discharges are not readily apparent. However, it is concluded from the statistics supplied in answer to question No. 1 that there appears to be a trend developing which encompasses a gradual shift from issuance of the least desirable type discharge toward issuance of the higher type discharges. If this condition continues, it can probably be attributed to the combined effects of the aptitude program, the establishment of higher entrance standards and the other quality improvement measures discussed above.

Question 3. *In your view are administrative discharges being used, as the Court of Military Appeals has indicated, to bypass procedures for discharge by court-martial?*

Answer. Army Regulations 635–105 (officers) and 635–200 (enlisted persons) expressly prohibit Army commanders from using administrative procedures in

lieu of trials by courts-martial. The Department of the Army is not aware of any attempt by its commanders to circumvent the intent of Congress that administrative discharges not be used to bypass trials by courts-martial. The fact that there was a rise in administrative discharges during fiscal years 1956–58 inclusive while punitive discharges were declining does not justify a conclusion that administrative discharges have been used by commanders in lieu of trials by courts-martial. Punitive discharge percentage rates have remained rather constant since fiscal year 1951 while administrative discharge percentage rates have fluctuated during this period, showing decreases in fiscal years 1951–53, 1955, and 1959–61 inclusive.

The rise in administrative discharge rates in fiscal years 1954, 1957, and 1958 are correlatable to the rise in delinquency rates in the United States. The rise in administrative discharges in fiscal year 1958 may be attributed, in large measure, to the job performance potential program ("aptitude program"), instituted on July 23, 1957, for the dual purpose of reducing Army strength without loss of quality, and screening the Army draftees pending legislative authority to raise induction standards. Separations were based upon trainability, not on behavior. Nevertheless, the resulting improvement in behavior trends, together with the reduction in disciplinary incidents, courts-martial, and confinements were direct evidence of the strong relationship between this group and delinquency.

Undesirable discharges are based on an already demonstrated unfitness for Army service which may be evidenced in various ways, including undesirable habits or traits of character, repeated acts of minor misconduct not warranting court-martial, and records of prior convictions. Undesirable discharges are not substitutes for courts-martial, and the Department of the Army has no evidence that they are being so used.

Question 4. *To what extent is there uniformity in the armed services with respect to discharge procedures?*

Answer. The basic criteria and procedural guidance for the administrative discharge of enlisted members are set forth in Department of Defense Directive 1332.14, dated January 14, 1959, in which full cognizance was taken of the legal implications concerned. Army regulations dealing with administrative discharges are in complete consonance therewith. Tab A and enclosures thereto are annotated to indicate specific paragraphs of Army regulations which implement the directive.

Tab A with 10 enclosures:

1. AR 635–200—General Provisions for Discharge and Release.
2. AR 635–205—Convenience of the Government.
3. AR 635–207—Enlisted Personnel Discharge or Release Minority, and Dependency or Hardship.
4. a. AR 635–40A—Physical Evaluation for Retention, Separation or Retirement for Physical Disability.
   b. AR 635–40B—Physical Evaluation for Retention, Separation or Retirement for Physical Disability.
5. AR 635–209—Discharge, Unsuitability.
6. AR 604–10—Military Personnel Security Program.
7. AR 635–220—Discharge, Resignation.
8. AR 635–210—Discharge of Enlisted Personnel, Marriage, Pregnancy, or Parenthood.
9. AR 635–208—Discharge, Unfitness.
10. AR 635–206—Discharge, Misconduct (Fraudulent Entry, Conviction by Civil Court, AWOL, Desertion).

(Above regulations furnished counsel.)

Question 5. *What are the criteria in each armed service for issuance of a general discharge instead of an honorable discharge?*

Answer. An honorable discharge is a separation from the Army with honor. The issuance of this type discharge is conditioned upon proper military behavior and proficient and industrious performance of duty, giving due regard to the rank or grade held and the capabilities of the individual concerned. Issuance of an honorable discharge is based on the following criteria:

(*a*) Conduct ratings of at least "Good."
(*b*) Efficiency ratings of at least "Fair."
(*c*) No general court-martial convictions.
(*d*) No convictions by more than one special court-martial.

Notwithstanding the foregoing criteria, an honorable discharge may be issued when the individual's service in his current enlistment is honest and faithful to a degree which outweighs disqualifying entries contained in the record of previous service.

A general discharge is a separation from the Army under honorable conditions of an individual whose military record is not sufficiently meritorious to warrant an honorable discharge. A general discharge may be issued if an individual has been convicted of an offense by general court-martial or has been convicted by more than one special court-martial in the current enlistment period. The decision is discretionary and is made only after a careful analysis of the individual's military behavior subsequent to court-martial conviction.

When there is doubt as to whether an honorable or general discharge should be issued, the doubt is resolved in favor of the individual.

Question 6. *What inducements, if any, are given to a serviceman to persuade him to waive a board hearing with reference to a projected discharge? Is he given any reason to anticipate more favorable action if he waives a board hearing?*

Answer. There are no provisions in Army regulations which authorize any inducements to an individual to persuade him to waive a board hearing, nor to suggest that he may receive more favorable action if he waives a board hearing. The regulations are specific as to the action to be taken to cause enlisted personnel to appear before a board of officers to determine their fitness for continued military service. These actions include a detailed report to the next higher commander prepared by the individual's immediate commander. This must include a statement by the enlisted man concerned, that he has been counseled and advised of the basis for the action recommended. Any deviations from these regulations coming to the attention of the Department are subject to prompt and corrective action.

Question 7. *In instances where board hearings are held with respect to possible discharge or revocation of an officer's commission, to what extent does the action ultimately taken by the service generally conform to the recommendation of the board?*

Answer. The only instances where board hearings are held with respect to possible discharge or revocation of an officer's commission within the Department of the Army are those "show cause" hearings conducted under authority of title 10, United States Code, sections 3781 through 3797.

Shown below are the results of the Department of the Army's experience with "show cause" proceedings during the past 5 years. The column entitled "Ultimate Service Action" reflects the total numbers of officers separated from the Army as a result of "show cause" action being initiated even though the officers may have resigned, retired, or been discharged at their own request prior to completion of the proceedings and separation at the direction of the Secretary of the Army.

| Year | Required to show cause by selection board | Retained by board of inquiry | Retained by board of review | Ultimate service action separation |
|---|---|---|---|---|
| | Officers with more than 3 years service | | | |
| 1957 | 214 | 29 | 34 | 150 |
| 1958 | 298 | 69 | 35 | 116 |
| 1959 | 108 | 22 | 5 | 78 |
| 1960 | 52 | 7 | 4 | 37 |
| 1961 | 92 | 5 | 2 | [1] 37 |
| | Officers with less than 3 years service | | | |
| 1957 | 76 | | | 76 |
| 1958 | 79 | | | 78 |
| 1959 | 52 | | | 46 |
| 1960 | 33 | | | 32 |
| 1960 | 33 | | | [1] 18 |

[1] Some cases still in process.

The final action taken by the Department of the Army in officer elimination cases conforms to the recommendations of the board in about 60 percent of such cases. In the remaining 40 percent the final determination of the Secretary of the Army varies from the board recommendations because of substantive or clemency reasons. These variations include reversal of the board recommendations, suspending final action until eligibility for retirement is reached, modifying the type of discharge to be awarded and granting permission to enlist.

In all other types of officer cases, such as security or resignation for the good of the service, final action by the Department of the Army generally conforms to the recommendations of the board.

Question 8. *To what extent are lawyers made available to represent respondents in board hearings on discharge?*

Answer. (1) Army Regulations 15-6, dated November 3, 1960, the general regulations governing procedures for investigating officers and boards of officers, provide in pertinent part, as follows:

"8. *Individual entitled to have counsel.* When the law or regulations so provide, an individual under investigation is entitled to have counsel, either military or civilian, and any military person requested by the individual under investigation will be appointed as counsel if reasonably available. A decision by the appointing authority as to availability is final. If the law or regulations do not so provide, such an individual is not entitled as a matter of right to be represented by counsel. However, when it appears that a full and fair investigation will be expedited thereby, or when the nature of the case warrants, or for other cogent reasons, including cases in which an officer or enlisted man is under investigation for conduct which might involve him in criminal prosecution or furnish grounds for disciplinary action, or which might be fairly regarded as jeopardizing his commission, grade, rating, or status, military counsel will be provided, if requested. Civilian counsel will not be provided at Government expense in any case.

* * * * * * *

"17. *Written brief.* When the regulations under which an investigating officer or board functions so provide, the individual concerned or his counsel may submit a written brief covering the whole or any portion or phase of the case under investigation, and a reasonable time will be afforded him in which to submit it. If the regulations do not so provide, the investigating officer or board may nevertheless, upon request, grant the individual concerned or his counsel the same privilege, especially when it concerns a contested point or phase of the inquiry."

(2) Subparagraph 5*j*, Army Regulations 635-105, dated December 13, 1960, pertaining to the elimination of officers from the Army, provides:

"*j. Respondent's counsel.* An officer of The Judge Advocate General's Corps will be assigned to each board of inquiry as counsel for the respondent. Upon electing a board of inquiry hearing, the respondent will be advised that he is entitled to counsel of his own selection, military if reasonably available, or civilian counsel at his own expense. If civilian counsel is retained, the assigned counsel will be relieved of all duties and responsibilities in connection with the case, except to the extent that respondent elects to utilize his services. If other military counsel is furnished the respondent, assigned counsel will normally be relieved of all duties and responsibilities in connection with the case."

(3) Army Regulations 604-10, dated November 4, 1959, govern the elimination of members of the Army in the interests of national security. Subparagraph 36a(3) of these regulations provides that respondents who elect to appear before a field board with counsel will be furnished the services of a military counsel, certified under article 27b, Uniform Code of Military Justice, if reasonably available. Civilian counsel, if desired, will be permitted at respondent's expense.

(4) Army Regulations 635-89, dated September 8, 1958, which govern the disposition of homosexuals in the Army provide in subparagraph 10b(3), as follows:

"*10. Board of officers.*

"*b. Board procedure.*

"(3) An enlisted person appearing before a board of officers convened under these regulations is entitled to be present at all hearings, to be confronted with the witnesses against him to the maximum extent practicable, as determined by the convening authority, and to military counsel of his own selection, if reasonably available. He may also be represented by civilian counsel at his own expense. If counsel of the enlisted person's own

choosing is not available, counsel will be furnished by the convening authority. The commander recommending elimination pursuant to action of board of officers will afford the enlisted person the opportunity of requesting counsel. In cases where personnel appear before boards of officers without counsel, the record will show that the president or the recorder of the board advised the respondent of the type of discharge that he may ultimately receive as a result of the pending board action and that he may request representation by counsel. The record will show the response of the respondent."

Board proceedings of officers within the purview of these regulations are processed under Army Regulations 635–105, which are referred to in paragraph 2, above.

(5) Army Regulations 635–208, dated April 8, 1959, govern the elimination of enlisted personnel for unfitness. Subparagraph 11*b*(3) of these regulations provides that a respondent appearing before a board of officers is entitled to civilian counsel at his own expense, military counsel of his own selection, or counsel furnished by the convening authority. Furnished counsel is a lawyer if reasonably available, and if not, he will be an experienced officer of mature judgment who is aware of his responsibility with respect to respondent's case.

(6) Army Regulations 635–209, dated April 8, 1959, which authorize general or honorable discharge but not undesirable discharge, provide for the separation of enlisted personnel for unsuitability. Subparagraph 9*b*(3) provides that a respondent appearing before such a board of officers is entitled to military counsel of his own selection if reasonably available, civilian counsel at his own expense, or counsel furnished by the convening authority. Furnished counsel will be an experienced officer of mature judgment who is aware of his responsibility with respect to respondent's case.

(7) In hearings before the Army Discharge Review Board, applicants are entitled by law to appear in person or by counsel (10 U.S.C. 1553). Subparagraph 6*a*(1), Army Regulations 15–180, dated March 7, 1960, provides that the term "counsel" includes, among others, accredited representatives of veteran's organizations recognized by the Veterans' Administration under act of September 2, 1958 (72 Stat. 1238; 38 U.S.C. 3402), but that expenses of counsel will not be paid by the Government. Counsel is not furnished by the Government.

(8) In hearings before the Army Board for Correction of Military Records, applicants may appear in person or by counsel. The term "counsel" is construed to include those representatives mentioned in paragraph 7, above (par. 13, AR 15–185). Counsel is not furnished by the Government.

Question 9. *What is the workload of the discharge review boards and the boards for the correction of military (or naval) records? What is the average or median time for review of cases by these boards?*

Answer:

*Army discharge review board*

[In fiscal years]

| | 1951 | 1952 | 1953 | 1954 | 1955 | 1956 |
|---|---|---|---|---|---|---|
| Cases heard | 4, 402 | 2, 913 | 2, 536 | 3, 017 | 4, 359 | 3, 220 |
| Discharges changed | 721 | 295 | 227 | 423 | 459 | 378 |
| Percent change | 16 | 10 | 9 | 14 | 10 | 12 |

| | 1957 | 1958 | 1959 | 1960 | 1961 | Total |
|---|---|---|---|---|---|---|
| Cases heard | 3, 220 | 4, 414 | 4, 257 | 2, 774 | 2, 476 | 37, 588 |
| Discharges changed | 770 | 1, 056 | 673 | 262 | 70 | 5, 334 |
| Percent change | 24 | 24 | 16 | 9 | 3 | 14 |

The average time required for review of cases by the Army Discharge Review Board is approximately 45 working days (from the date of receipt of the records until the case is heard by the Board). In instances where this average is exceeded the delay can generally be attributed to personal appearance cases (with or without counsel). In these cases the Board is prepared to hear the case on the date selected by the applicant. Many times the latter or his counsel will request a postponement, and this is always granted.

*Army board for correction of military records—Cumulative summary of board recommendations acted upon by the Secretary of the Army as of Dec. 31, 1961 (period 1951–61)*

GENERAL COURT-MARTIAL CASES

| | Board recommended | Action by the Secretary of the Army | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Honorable discharge | | General discharge | | Blue or undesirable | | No change | | Other | |
| | | Number | Percent | Number | Percent | Number | Percent | Number | Percent | Number | Percent |
| Honorable discharge | 122 | 103 | 84.4 | 4 | 3.3 | 8 | 6.5 | 7 | 5.7 | | |
| General discharge | 211 | 3 | 1.4 | 191 | 90.5 | 14 | 6.6 | 3 | 1.4 | | |
| Blue discharge | 579 | 2 | .3 | 3 | .5 | 573 | 98.9 | 1 | .2 | | |
| Undesirable | 117 | | | 6 | 5.1 | 105 | 89.7 | 6 | 51.0 | | |
| BCD | 1 | | | | | | | 1 | 100.0 | | |
| Other | 16 | | | 1 | 6.3 | | | 1 | 6.3 | 14 | 87.5 |
| No change | 292 | 1 | .3 | 20 | 6.8 | 11 | 3.8 | 256 | 87.7 | 4 | 1.4 |
| Total | 1,338 | 109 | 8.1 | 225 | 16.8 | 711 | 53.1 | 275 | 20.6 | 18 | 1.3 |

MISCELLANEOUS CASES [1]

| | Board recommended | Action by the Secretary of the Army | | | |
|---|---|---|---|---|---|
| | | Approved | | Disapproved | |
| | | Number | Percent | Number | Percent |
| Change | 2,739 | 2,680 | 97.8 | 59 | 2.2 |
| No change | 748 | 606 | 81.0 | 142 | 19.0 |
| Total | 3,487 | 3,286 | 94.2 | 201 | 15.8 |

[1] Statistics involve petitions for correction of characterization of administrative discharges.

The average or median time for review of an application by the Army Board for Correction of Military Records is 122 days, based on the overall processing time during calendar year 1961.

Based on a 5-year average, including all types of cases, the Army Board for Correction of Military Records granted relief in 19.8 percent of the cases. The Army Board for Correction of Military Records grants relief previously denied by the Army Discharge Review Board in 1 to 3 percent of the cases. This is an estimated figure based on a sampling of cases.

Question 10. *In what percentage of cases do these boards grant relief to the applicant? And in what percentage of cases does a board for correction of military records provide relief previously denied by a discharge review board?*

Answer. The response to this question appears as part of the response to question 9.

Question 11. *What is the procedure utilized by each service in requiring officers to "show cause" why they should be retained in the service or should retain their commission?*

Answer. The procedure used by the Army is prescribed in considerable detail by law (title 10, U.S.C. secs. 3781 through 3797). Although the law pertains only to Regular Army officers, the Army has extended the same procedure, with all of its rights, privileges, and safeguards, to officers of the Reserve components. Implementing instructions are contained in AR 635–105, attached. The procedure is summarized as follows:

(a) An officer may be recommended for "show cause" by a major field commander, or by various agencies within the Headquarters, Department of the Army.

(b) After review by the Office of the Deputy Chief of Staff for Personnel, the recommendation is forwarded to a selection board for decision as to whether the officer should be required to show cause. (This board, and all succeeding

boards are composed of officers in the grades of colonel and/or general to insure mature consideration of the cases.) This selection board can:

(1) Not require the officer to show cause, in which case action is terminated.

(2) Require the officer to show cause, in which case a field board of inquiry is directed.

(c) The field board of inquiry is conducted in the major command where the officer is assigned. He is afforded a minimum of 30 days to prepare his case, is provided with all information considered by the elimination board, and appears in person with legal counsel provided by the Government and/or of his own choice as he prefers. The board of inquiry can retain the officer, thereby terminating the case, or recommend elimination.

(d) In cases where elimination is recommended, the case is referred to a board of review, which operates under the direction of the Secretary of the Army. This board reviews the records in the case and may retain the officer or recommend his elimination. In the latter case, the complete record is forwarded to the Secretary of the Army for final decision.

(e) At any stage in the proceedings the officer may apply for retirement, if eligible, resign, or request discharge.

(f) Cases involving officers with less than 3 years service are not normally referred to the board of inquiry and board of review. Such cases are forwarded from the elimination board, through the major commander, to the officer who is provided 30 days to submit evidence or matters in his own behalf, in refutation of the allegation, or in mitigation. If, after consideration of material submitted by the officer, the selection board adheres to its recommendation to separate the officer, that recommendation is forwarded directly to the Secretary of the Army for final decision.

(g) Statistics reflecting Department of the Army experiences with show-cause procedure for the past 5 years are contained in the answer to question 7.

(Copy of AR 635-105 provided counsel.)

Question 12. *To what extent have undesirable discharges been based on alleged misconduct for which a serviceman has requested, but been denied, a trial by court-martial? Is there any provision for allowing a serviceman to request a court-martial to vindicate himself with respect to alleged misconduct which he anticipates will be made the basis of proceedings leading to an undesirable discharge?*

Answer. Undesirable discharges are not issued in lieu of trial by court-martial except upon the determination by an officer exercising general court-martial jurisdiction, or by higher authority, that the best interests of the service as well as the individual will best be served by administrative discharge. There are no provisions in regulations which preclude a serviceman requesting trial by court-martial. However, a determination of his request will be made by the officer exercising court-martial jurisdiction or by higher authority as to whether he may be tried by court-martial.

Question 13. *Could the subcommittee be furnished with brief summaries of the facts and legal issues involved in some of the typical cases from each service with respect to the validity or legality of administrative discharges?*

Answer. Digests of cases:

(1) JAGA 1950/4394, August 15, 1950. Evidence before board of officers reflected that member had contracted venereal disease on two occasions. However, his record was otherwise good for the 3 years preceding board action, and his immediate commander testified that he was a good soldier whose retention was justified. The convening authority approved the finding of the board that the member "gives evidence of habits which render retention in the service undesirable." Opinion rendered: The evidence is technically sufficient to support the finding of the board. However, discharge is not mandatory and retention is legally unobjectionable.

(2) JAGA 1961/3570, February 15, 1961. The submitted file disclosed that named member engaged in a homosexual act on June 4, 1960. Intermediate headquarters recommended to the officer exercising general court-martial jurisdiction that he be given a general discharge under the provisions of AR 635-89, September 8, 1958, as a class II homosexual. The member waived hearing before a board of officers convened under AR 635-89, supra, and requested a discharge for the good of the service under the provisions of that regulation. The officer exercising general court-martial jurisdiction, however, directed that

member be given a general discharge under the provisions of AR 635-208, April 8, 1959 (unfitness). Opinion rendered: A waiver pertaining to appearance before a board of officers only under AR 635-89, supra, could not be construed to extend to a board which would consider his undesirability or unsuitability, apart from questions of homosexuality, under other regulations.

(3) JAGA 1958/4988, July 1, 1958. Member's commanding officer recommended he be brought before a board of officers under the provisions of AR 615-369, November 15, 1951 (predecessor regulation to AR 635-209, April 8, 1959) by reason of unsuitability for further military service. Such a board was convened. The same board had also been appointed to consider cases of unfitness under AR 615-368, October 27, 1948 (predecessor regulation to AR 635-208, supra). Evidence before the board revealed a pattern of emotional insecurity and instability and the neuropsychiatrist recommended separation under the provisions of AR 615-369, supra. However, based on respondent's statement that he had no desire to remain in the service and was putting forth every effort to get discharged, the board found that he was a malingerer and recommended discharge for unfitness under the provisions of AR 615-368, supra. Opinion rendered: The undesirable discharge was issued in error and the Secretary of the Army was authorized to recharacterize the discharge.

(4) JAGA 1955/5303, June 1, 1955. A board of inquiry found that an Army officer "was intemperate in the use of alcohol during the month of September 1952 and on September 17, 1952, was suffering from chronic alcoholism," and that during the periods February 10, 1953, to May 31, 1954, and January 4 to February 28, 1955, he was on several different occasions intemperate in the use of alcohol. Opinion rendered: The evidence before the board of inquiry is legally sufficient to support the findings and recommendation for elimination.

(5) JAGA 1950/5108, September 8, 1950. On June 30, 1949, an enlisted member was given an undesirable discharge for fraudulent enlistment on the ground that he had answered in the negative questions on an enlistment application pertaining to convictions of felonies and other offenses, when in fact he had only a juvenile record in California and had been a ward of a juvenile court. California law specifically provided that an order adjudging a person to be a ward of a juvenile court would not be deemed to be a conviction of a crime. Because of the wording of the California statute, Department of the Army directives in effect at the time of member's enlistment would have authorized his enlistment even if all the facts were known. Opinion rendered: The enlistment was not fraudulent and the Secretary of the Army may administratively change the character of discharge to honorable.

(6) JAGA 1959/1118, January 12, 1959; id. 1959/1358, January 22, 1959. A named member allegedly made homosexual advances toward two other enlisted men at Fort Dix, N.J. His commanding officer informed him of the nature of the accusations made against him and the maximum punishment provided for such offenses in the Manual for Courts-Martial, 1951. The member then signed a request for discharge under the provisions of AR 635-89, September 8, 1958. That regulation required that charges and specifications be prepared and that the accused be confronted with them prior to executing an acceptance of undesirable discharge. In this case the member was not confronted with charges until 12 days after he executed the statement accepting undesirable discharge. Further, the member's native language was Spanish and although an interpreter was used, the file reflected a reasonable doubt whether the member understood the meaning of the statement he signed. Opinion rendered: The file does not support a legal conclusion that the member was properly discharged under the provisions of AR 635-89, supra.

(7) JAGA 1961/4099, May 1, 1961. A board of officers was convened under the provisions of AR 635-208, April 8, 1959, to determine whether member's discharge for unfitness was warranted by reason of indecent acts with his daughter and chronic alcoholism. The board found member unfit within the meaning of paragraph 3, AR 635-208, supra, by reason of "indecent acts with, or assault upon, a child" and recommended a general discharge. The officer exercising general court-martial jurisdiction approved this recommendation. Counsel for the respondent objected to the introduction of various reports and depositions on the grounds of hearsay. Paragraph 10, AR 15-6, November 3,

1960, provides that in proceedings that are administrative rather than judicial in nature, a "board of officers is not bound by the rules of evidence prescribed for trials by courts-martial or for court proceedings generally." The test for admissibility is relevancy and materiality. Opinion rendered: The findings are supported by substantial evidence and the substantial rights of the member were not prejudiced.

Question 14. *To what extent does the Army utilize a soldier's conviction by special court-martial as the basis for a subsequent undesirable discharge? To what extent does the Army make counsel available to an accused soldier whose case has been referred to a special court-martial?*

Answer. This type discharge can be issued for unfitness, misconduct, for security reasons, and similar offenses not normally appropriate for trial by court-martial; however, each such case wherein an undesirable discharge is recommended is afforded the rights, safeguards, and privileges of a board hearing followed by a review of the proceedings at a higher headquarters. Arbitrary standards such as a record of a certain number of trials by court-martial have not been established by the Army as a prerequisite for award of an undesirable discharge. Current regulations do prescribe that an individual may be considered for a *general* discharge when he has a history of conviction by at least one general court-martial or more than one special court-martial during his current enlistment. Since these instructions apply to award of a higher caliber discharge it is apparent that the Army does not intend to utilize a soldier's conviction by a single special court-martial as the basis for issuance of an undesirable discharge. Nevertheless, it is reasonable to assume that an individual's court-martial history is given due weight in deliberations by the board of officers and, subsequently, by the reviewing officers.

The Army appoints counsel for the accused in every case referred to a special court-martial (art. 27(a), U.C.M.J., 10 U.S.C. 827(a); par. 6*a*, M.C.M., U.S. 1951). Special courts-martial may try persons subject to the code for noncapital offenses and for certain capital offenses directed to be tried as noncapital. Special courts may adjudge any punishment not forbidden by the code except death, dismissal, dishonorable discharge, confinement for more than 6 months, hard labor without confinement for more than 3 months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than 6 months (art. 19, U.C.M.J., 10 U.S.C. 819; par. 15, M.C.M., U.S., 1951). At the present time, bad conduct discharges may not be adjudged by Army special courts-martial. Army Regulations 22–145 prohibit the appointment of reporters for special courts-martial without special authorization in each instance from the Secretary of the Army. A bad conduct discharge may not be adjudged by a special court-martial unless a complete record of the proceedings and testimony before the court has been made (art. 19, U.C.M.J.). Summary courts-martial may try enlisted persons for noncapital offenses. The accused cannot be tried by summary court over his objection, unless he has been offered, and has refused, punishment under article 15, U.C.M.J., 10 U.S.C. 815. Summary courts may adjudge any punishment not forbidden by the code except death, dismissal, dishonorable or bad conduct discharge, confinement for more than 1 month, hard labor without confinement for more than 45 days, restriction for more than 2 months, or forfeiture of more than two-thirds of 1 month's pay (art. 20, U.C.M.J., 10 U.S.C. 820). In the case of noncommissioned officers above the fourth enlisted pay grade, summary courts may not adjudge confinement, hard labor without confinement, or reduction except to the next inferior grade (par. 16*b*, M.C.M., U.S., 1951). Specialists above pay grade E–4 and corporals may not be sentenced by Army summary courts to confinement, hard labor without confinement, or reduction except to the next inferior pay grade (par. 6*b*, AR 600–201).

Question 15. *To what extent are legally trained counsel made available to accused servicemen whose cases are referred to summary or special courts-martial?*

Answer. Neither the Government nor the accused is provided with counsel before summary courts-martial (par. 79*a*, M.C.M., U.S., 1951). In special courts-martial, if the trial counsel is qualified to act as counsel before a general court-martial, then the defense counsel detailed by the convening authority must be

a person similarly qualified. If the trial counsel of a special court-martial 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 detailed by the convening authority must be one of the foregoing (art. 27(c), U.C.M.J., 10 U.S.C. 827(c); par. 6*c*, MCM, US, 1951). Additionally, an accused, in a special court-martial, may request the appointment of legally trained individual military counsel. Such request will be granted if the person requested is reasonably available, as determined by the commanding officer of the person requested (art. 38(b), UCMJ, 10 U.S.C. 838(b); par. 48*a*, *b*, MCM, US, 1951). Because of the critical shortage of judge advocate personnel, convening authorities seldom detail legally trained counsel for the Government or defense before special courts-martial. Active duty strength of the Judge Advocate General's Corps of the Army is marginal for the performance of mandatory military justice functions under the Uniform Code of Military Justice. The Army does not have sufficient judge advocates available for detail as counsel before special courts-martial.

Question 16. *What are the effects on a serviceman's career of conviction by summary or special court-martial?*

Answer. Conviction by a court-martial creates a criminal record which will color consideration of any subsequent misconduct by the soldier. A noncommissioned officer may survive one summary court-martial without reduction being effected, but it is unlikely that, with one conviction on his record, he will survive a second trial and retain his status. A conviction of an officer by any court-martial could have a devastating aftereffect upon his career. It could be described in some cases as a sentence to a passover on a promotion list and may serve as a basis for initiation of administrative elimination action.

For any man, the fact of a criminal conviction on his record is a handicap in civilian life. It may interfere with his job opportunities; it may be counted against him if he has difficulty with a civilian law enforcement agency; and in general he tends to be a marked man.

Question 17. *To what extent has the Navy, by use of "dockside courts" and otherwise, tried to provide for the use of lawyers as trial and defense counsel in its special courts-martial?*

Answer. Question does not apply to the Department of the Army.

Question 18. *Has the Army's specialized law officer plan been successful? If so, to what extent has it been adopted by the other services?*

Answer. Yes. A survey of data concerning appellate reversals based on law officer error in Army general courts-martial tried since January 1, 1957, shows that frequency of law officer error to total cases tried dropped from about 4 percent in 1957 to about 1.2 percent in 1960, the first year of full operation of the professional law officer plan. The decline continued in 1961.

The success of the professional law officer plan, however, cannot be measured solely on a judicial officer's "box score" appellate record. Rather, the effectiveness of the plan must be determined through reliance upon imprecise gages, such as acceptance by the Army and favorable opinion from many sources including accused persons, counsel, courts, and the public. Within the Army, commanders, members of courts, and high responsible officials—the Secretary and the Judge Advocate General—have expressed the opinion that the plan is a success. Army judge advocates generally share this view. The U.S. Court of Military Appeals has enthusiastically endorsed the plan.

Extent of adoption by the Navy and Air Force could be answered better by those services. Informal information available suggests that the Navy is preparing to adopt a similar plan; the Air Force is not.

Question 19. *Under the Army's specialized law officer plan what steps are taken to assure the independence of the law officer? How is the independence of the law officer assured in the other services?*

Answer. Effective November 1, 1958, the Field Judiciary Division, Office of the Judge Advocate General, was created, and each officer of the Judge Advocate General's Corps selected to serve as a full-time law officer is assigned to the Field Judiciary. Each judicial officer, save the Presiding Judicial Officer and his immediate assistants, is given a permanent duty station at a post close to

the jurisdictions he serves. The duty posts are selected on the basis of geographical location and projected workloads, with an eye to providing the best service within reasonable limitations upon expenditure of funds and effort. For this purpose the world is divided into areas, which in turn are divided into circuits. One or more judcial officers are assigned to a circuit; each has the primary duty of serving as law officer on every general court-martial convened within his circuit. In case of inability to serve or conflict in calendar settings, a circuit officer seeks assistance from another judicial officer. The senior among the circuit judicial officers within an area is the area officer, with an additional responsibility for the minimal administration required in the area.

No judicial officer is under the command of a local commanding officer. The commands selected as duty stations, however, are required to provide logistical and administrative support for the judicial officers (exhibit 1).

For the purpose of further emphasizing the independence of judicial officers, an order issued in 1961 designated the Assistant Judge Advocate General as Coordinator of the Field Judiciary and made him responsible for the activities thereof in accordance with law. Under the Coordinator's supervision, the Presiding Judicial Officer renders assistance in performing necessary management and administrative functions pertaining to the Field Judiciary.

Upon appointment, the Presiding Judicial Officer was given a directive by the Judge Advocate General that "A primary part of * * * [his] mission is to safeguard the complete independence and freedom of discretion of all members of the U.S. Army Judiciary. * * * it is * * * [his] responsibility to insure that there is no interference or control by anyone, * * * with any judicial officer, law officer, or member of a Board of Review in the performance of his judicial functions."

The making of efficiency reports is important in the Army and, of course, in the field judiciary. The system used for law officers is consistent with the requirements of Army regulations and provides for the area judicial officers to rate their respective circuit officers. Each area judicial officer in turn is rated by the Assistant Judge Advocate General in his capacity as coordinator of the field judiciary.

Careful selection of senior officers for assignment to the field judiciary contributes to their independence as law officers. Mature men of stature, judicial temperament, self-restraint, and with the desire to serve as trial judges generate their own independence in their relationships with other officers of the Army—commanders, court members, and judge advocates—as well as enlisted personnel, all of whom respect that independence.

The autonomous nature of the judicial officers serving as law officers in the Army was enhanced through the establishment of the Army Judge Advocates Judicial Conference on January 1, 1961, created and organized by the Judge Advocate General of the Army. The membership is made up of all judicial officers and members of Boards of Review in the Army. Its purposes are to advise means of improving the judicial aspects of the administration of military justice and to make recommendations pertinent thereto. The Conference has interested itself primarily in rules, practices, procedures, and other matters in respect of which the trial and appellate review of courts-martial may be improved.

No answer is suggested as to measures taken by the other services, as information is not available.

Question 20. *Under the Army's specialized law officer plan, would it be feasible to provide that service as law officer would not be limited to officers on active duty, but could also be performed by qualified civilian employees of suitable maturity and experience?*

Answer. No. Utilization of civilian trial judges in courts-martial, particularly if the military courts are expected to function in time of war, is not feasible. Members of the Judge Advocate General's Corps are both lawyers and officers of the U.S. Army. As an officer, the military trial judge has the capability of moving and living with the troops, just as do other officers. They go where the requirements of the situation take them. They themselves are subject to the jurisdiction of courts-martial anywhere in the world.

Focused in the effective judge are the mores of the community in which he serves. Independent though he may be, he must reflect its thoughts, beliefs, actions, and life. The civilian law officer would not absorb this necessary element; he could not be required to go where the Army goes; he would not share the feelings of the military community; and in the end he would find himself handicapped by his status. Ultimately, the effectiveness of the Army would suffer.

In any event, no need is perceived for the utilization of persons in a civilian status as law officers. Experience factors which have been developed and carefully analyzed show that the active Army Judge Advocate General's Corps, augmented by members of the Reserve components who are in training for immediate service as active duty law officers, has the capability of providing military trial judges for any anticipated expansion of the Army. During this phase of any mobilization, the civilian bench and bar would provide ample material for officer-lawyers with the capability of sitting as military trial judges. In peacetime, the Judge Advocate General's Corps can provide an adequate number of competent professional law officers to fulfill the needs of the court-martial system.

Question 21. *What instances have there been in recent years of "command influence" with respect to members of courts-martial, including the trial and defense counsel of special and general courts-martial?*

Answer. The cases involving command influence issues may be grouped into three general categories.

The first category of cases deals with directives issued by the Secretary of the Department concerned, major military commanders and local convening authorities. Such directives deal with various subjects such as retention of thieves in the military service, disposition of homosexuals, and disposition of repeated offenders. The contention has been made, under the theory of "command influence," that such directives impinged upon the exercise of the free judgment of the court members. In some cases, it has been held, both by boards of review and the Court of Military Appeals, that such directives were improper. In no instance, however, has improper motive been attributed to the official issuing the directive. In other cases, the directives have been found to be proper.

The second category of cases deals with lectures and instructions given to present and prospective court members by staff judge advocates and convening authorities. Such instructions are specifically authorized by paragraph 38, "Manual for Courts-Martial, United States, 1951," and, in several decisions, the Court of Military Appeals has recognized the beneficial results which flow from such instructions when properly administered. Counsel for the accused have, in a number of instances, contended that the content or timing of the lectures was improper. In certain cases, appellate tribunals have accepted this contention; in many others, the contention has been rejected. Once again, the question of personal malice has not been the key issue; the cases are ultimately resolved upon a question of "delicate balance," with shades of emphasis and phraseology becoming the deciding factors.

The final category of cases relates to isolated misguided efforts on the part of individuals to improve the administration of military justice. In a few cases, it has been determined that such activities constituted "command influence." In such cases prompt and vigorous corrective action has been taken. This action has been twofold in nature; designed, through rehearings and other procedures, to insure that the individual accused affected received impartial hearings, and designed, through administrative action of various types, to insure that there were no future recurrences.

The vigorous attitude of defense counsel indicates that this issue will continue to be litigated. The equally vigorous attitude of the services to correct any potential abuses compels the conclusion that in increasingly fewer instances will such allegations be found to be substantiated.

Attached as exhibit 1 is a chart reflecting decisions of the U.S. Court of Military Appeals concerning the issue of "command influence." This chart is not exhaustive; it contains only leading Army cases which have been decided in recent years.

*Table of leading recent decisions of the U.S. Court of Military Appeals in Army cases involving "command influence"*

| Case | Held | USCMA positions | | | Who gave the instructions | To whom given | When given | Nature of instructions | Principal comments of the court |
|---|---|---|---|---|---|---|---|---|---|
| | | Maj opn | Con opn | Dis opn | | | | | |
| *Lackey*, 8 USCMA 718, 25 CMR 222 (1958). | Prej | L | Q, F | | Trial counsel | Court members | Argument on sentence. | TC stated that it was undoubtedly the thought of the CA that accused should be separated from the service with a punitive discharge & conf. | No waiver where command control is interjected into a trial. |
| *Shepherd*, 9 USCMA 90, 25 CMR 352 (1958). | None. | Q | L | Sep opn concurred in by F. | Convening authority. | Members of the command public generally. | Prior to trial and continuing. | CA formulated, administered and ruthlessly enforced a weight reduction program. Stated he would punish all violators and brook no interference with his program. | Latimer in concurring opinion discussed problem not raised in majority opinion; stated CM not a free agent; knew CA wanted a conviction; CA's interest was personal rather than official. |
| *Hurt*, 9 USCMA 735, 27 CMR 3 (1958). | Not prej. | Q | L | F, but not spec on cmd con. | CA–SJA | Press, public in general, staff and comdrs. | After offense but before trial. | Stated abhorrence of rape-murder, extended sympathy to victim's family outlined American legal procedures and measures to prevent future incidents. | CA's remarks showed no determination to convict accused regardless of evidence, in fact he insisted on fair trial. |
| *Carter*, 9 USCMA 108, 25 CMR 370 (1958). | Not prej. | L | Q, F | W/o opn | CINCUSAR* EUR. | At conf. attended by U.S. Ambassador and major cmdrs; minutes later distributed. | After offense | Army did many good acts in Germany; 1 serious incident could wipe out good acts; German-American relations were very important; steps must be taken to improve *discipline*. | There was no showing that remarks were directed only at particular incident which formed basis for this case; no showing that intent was to deprive accused of trial before an *uninfluenced* court. |

*Table of leading recent decisions of the U.S. Court of Military Appeals in Army cases involving "command influence"*—Continued

| Case | Held | USCMA positions | | | Who gave the instructions | To whom given | When given | Nature of instructions | Principal comments of the court |
|---|---|---|---|---|---|---|---|---|---|
| | | Maj opn | Con opn | Dis opn | | | | | |
| *Danzine*, 12 USCMA 350, 30 CMR 350 (1961). | Not prej. | L | Q, C/R w/o opn. | F | CA with his SJA. | Members of court. | Before any cases referred to court; 1 month before this case. | Lecture on duties and responsibilities of court members; law relating to their duties as members; sentence appropriateness; general principles. | Record and circumstances do not support allegations of improper command influence. |
| *Kitchens*, — USCMA —, — CMR — (1961). | Prej. | Q, K, F. | | | Asst. SJA | Officers of the command. | Prior to trial; not directed to this case. | Questionnaire as to causes for reduction in sentences compared to those previously imposed. | Substantial doubt as to whether under facts of case letter did not impress court with command dissatisfaction as to leniency of sentences. |

LIST OF ABBREVIATIONS USED IN ATTACHED TABLE OF USCMA CASES

| | |
|---|---|
| USCMA | United States Court of Military Appeals. |
| Maj opn | Majority Opinion. |
| Con opn | Concurring Opinion. |
| Dis opn | Dissenting Opinion. |
| — USCMA — | Citation for Decision of United States Court of Military Appeals in Reports of that Court. |
| — CMR — | Companion Citation for Decision of United States Court of Military Appeals in Court Martial Reports. |
| Prej | Prejudicial Error Found. |
| Not prej | Prejudicial Error Not Found. |
| Q | Chief Judge Quinn. |
| L | Judge Latimer. |
| F | Judge Ferguson. |
| K | Judge Kilday. |
| TC | Trial Counsel. |
| CA | Convening Authority. |
| CM | Court-Martial. |
| C/R | Concur in Result. |
| CINCUSAREUR | Commander in Chief, United States Army, Europe. |
| SJA | Staff Judge Advocate. |

Question 22. *Has the practice of negotiated guilty pleas by the Army and Navy been successful? * * *.*

Answer. Yes. The program was initiated in the Army in 1953. In establishing the program, certain statistics were considered highly important. For example, statistics furnished by the Director of the Administrative Office of the U.S. Courts showed that in 1950, of an aggregate of 33,502 convictions in the Federal courts, 31,739, or slightly over 94.4 percent were based on pleas of guilty or nolo contendere. Examination of the records of trial by general courts-martial in the Army for calendar year 1952 showed that of 9,383 convictions, in only 750 cases or 8 percent of the total convictions were there pleas of guilty to all charges and specifications. This may be compared with fiscal year 1961 during which the U.S. courts had 28,625 convictions, of which 24,830 were based upon pleas of guilty or nolo contendere. These guilty or nolo contendere pleas accounted for about 86 percent of the total convictions in U.S. courts. During the same period of time, there were 1,768 convictions by Army general courts-martial, of which number about 1,025 were based upon pleas of guilty to all charges and specifications. This amounts to about 58 percent of the total convictions.

The guilty plea program is premised on the belief that it must benefit both the accused and the Government. Experience has shown that the accused's interests are served by the assurance of a definite sentence below the maximum imposable, often greatly below the maximum. Shorter periods of pretrial confinement or other restraint benefit the accused. The rights of the accused are guarded to prevent inadvertent pleas of guilty. For example, prior to accepting a plea of guilty at a general court-martial, the law officer makes a searching inquiry to determine the accused's understanding of the meaning and effect of his plea of guilty, and the accused has the right to change his plea at any time before findings are announced. In addition, the accused may present all matters in mitigation and extenuation. Another advantage to the accused is that the guilty plea usually results in a much shorter trial and one wherein fewer facts concerning the accused's crime are exposed to public scrutiny.

Pleas of guilty in general courts-martial cases are accepted only after the service of a qualified counsel has been made available to the accused, and such counsel and the accused have agreed that the plea is appropriate. The offer to plead guilty must be initiated by the accused, and every effort is made both prior to and during trial to insure that the accused thoroughly understands his rights, the meaning and effect of his plea, and that he may withdraw his plea. During the appellate review procedures, the guilty plea is subjected to thorough testing to determine whether it was provident and appropriate.

Benefits to the Government from this program are principally in the saving of time, money, and manpower during pretrial, trial, and appellate processing of the guilty plea case.

Question 23. *What are the percentages of guilty pleas for each type of court-martial: summary, special, and general—for each service for each year since 1950?*

Answer. Percentage of guilty pleas: [1]

| Fiscal year | General [1] | | Special | | Summary | |
|---|---|---|---|---|---|---|
| | Not guilty | Guilty | Not guilty | Guilty | Not guilty | Guilty |
| 1954 [2] | 55.3 | 44.7 | (3) | (3) | (3) | (3) |
| 1955 | 44.5 | 55.5 | | | | |
| 1956 | 47.1 | 52.9 | | | | |
| 1957 | 37.4 | 62.6 | | | | |
| 1958 | 37.2 | 62.8 | | | | |
| 1959 | 34.2 | 65.8 | | | | |
| 1960 | 34.4 | 65.6 | | | | |
| 1961 | 41.8 | 58.2 | [4] 18 | [4] 82 | [4] 15 | [4] 85 |

[1] Separate statistics for officers and enlisted persons not maintained.
[2] Statistics not available prior to fiscal year 1954 for general courts-martial pleas.
[3] Figures not available for Army inferior courts.
[4] Estimates based upon an actual survey of four representative jurisdictions in the United States.

[1] If an accused is tried for violation of two or more charges or specifications and enters a please of "not guilty" to any of the charges or specifications, that case is reported under the "Not guilty" column.

Question 24. *What are the percentages of convictions for each type of court-martial—summary, special, and general for each service for each year since 1950?*

Answer. Percentage of convictions: [2]

| Fiscal year | General [1] | Special | Summary | Fiscal year | General [1] | Special | Summary |
|---|---|---|---|---|---|---|---|
| 1951 | 92.6 | 92.9 | (2) | 1957 | 95.0 | 93.8 | 96.0 |
| 1952 | 91.8 | 94.1 | 97.4 | 1958 | 94.5 | 93.9 | 96.0 |
| 1953 | 93.5 | 94.7 | 96.4 | 1959 | 94.7 | 94.0 | 96.3 |
| 1954 | 95.0 | 94.2 | 96.7 | 1960 | 95.1 | 94.4 | 96.3 |
| 1955 | 94.7 | 93.8 | 96.8 | 1961 | 93.1 | 94.2 | 95.9 |
| 1956 | 95.5 | 93.8 | 96.4 | | | | |

[1] Separate statistics for officers and enlisted persons not maintained.
[2] Statistics not available.

Question 25. *What are typical or "average" sentences in each service for some of the more frequent violations of the Uniform Code, such as unauthorized absence, desertion, failure to obey, larceny, and assault?*

Answer. Median or "average" sentences: [3]

| Offense | General [1] | Special [2] | Summary [3] |
|---|---|---|---|
| Absence without leave (art. 86, UCMJ). | 6 to 9 months | Confinement at hard labor for 3½ months, partial forfeitures of pay for 4 months, and reduction to lowest enlisted grade. | Partial forfeiture of pay for 1 month. |
| Desertion, (art. 85, UCMJ). | 9 to 12 months | (3) | (3). |
| Failure to obey a lawful general order, or regulation, or any other lawful order (art. 92, UCMJ). | 6 to 9 months | Confinement at hard labor for 2½ months, partial forfeiturs of pay, and reduction to lowest enlisted grade. | Hard labor without confinement for 15 days, partial forfeiture of pay for 1 month, and reduction to the lowest enlisted grade. |
| Larceny (art. 121, UCMJ) | do | Confinement at hard labor for 4 months, partial forfeiture of pay for 4½ months, and reduction to lowest enlisted grade. | Confinement at hard labor for 1 month, partial forfeiture of pay for 1 month, and reduction to lowest enlisted grade. |
| Wrongful appropriation (art. 121, UCMJ). | do | Confinement at hard labor for 3 months, partial forfeiture of pay for 2 months and reduction to lowest enlisted grade. | Hard labor without confinement for 1 month, partial forfeiture of pay, and reduction to lowest enlisted grade. |
| Assault (simple and aggravated) (art. 128, UCMJ). | 9 to 12 months | Confinement at hard labor for 2½ months, partial forforfeiture of pay for 3½ months, and reduction to lowest enlisted grade. | Hard labor without confinement for 20 days, partial forfeiture of pay for 1 month, and reduction to lowest enlisted grade. |

[1] Available general court-martial statistics reflect only the median of confinement at hard labor adjudged for each type of offense; available statistics do not reflect whether a punitive discharge, reduction in grade, forfeitures of pay, or other various forms of punishment were also imposed.
[2] No Army-wide statistics on average sentences adjudged by special and summary courts-martial are available. Accordingly, the statistics are based upon reports obtained from four representative commands for cases tried in fiscal year 1961. Inasmuch as the inferior courts-martial are empowered to adjudge various forms of punishment, such as hard labor with or without confinement, restriction, forfeiture of pay, detention of pay, reprimand, and reduction in grade, all of which are subject to well-defined limitations no attempt was made to "average" sentences with the view of obtaining any degree of precision. Consequently, the figures are considered typical sentences in the sense that in the majority of the cases tried the accused would receive the forms and amounts of punishment as indicated. It should be further noted that a special court-martial in the Army may not adjudge a bad conduct discharge.
[3] No desertion cases tried by inferior courts in the jurisdictions surveyed.

Question 26. *To what extent are civilians used in the boards of review operating under the Uniform Code of Military Justice?*

Answer. Civilians are not appointed to Army boards of review.

Question 27. *What is the average tour of duty on these boards and what provision, if any, is made to assure the independence of these boards?*

Answer. During the period January 1955 to date the average tour of duty on boards of review has been 13.76 months. However, this average is misleading

[2] In cases where an accused is tried for violation of two or more charges or specifications, a conviction of at least one of the charges or specifications is reflected as a conviction.
[3] Median or average sentences are based upon fiscal year 1961 statistics.

in that three of the nine positions on the boards of review are filled by judge advocate officers who, for various reasons, are assigned for short tours. Excluding these three positions for computation purposes, the average tour of duty for the remaining six positions has been 27.3 months.

Upon being assigned to an Army board of review every member is oriented as to his absolute independence in the exercise of his duties. All officers are enjoined carefully to respect that independence at all times. Efficiency reports on the members of a board of review are rendered by the chairman of each board and endorsed by the Assistant Judge Advocate General. The chairman is rated by the Assistant Judge Advocate General and the rating is endorsed by the Judge Advocate General. Under no circumstances does a court-martial convening authority or other commander render an efficiency report on a board of review member. Individuals selected for membership are the most mature and senior judge advocate colonels available at the time the vacancy occurs. The only reports required of boards of review are monthly reports of cases whose disposition is delayed beyond 60 days.

Question 28. *With respect to each service and for each year since 1951, what is the percentage of cases in which boards of review have disapproved findings? In what percentage of cases have they reduced the sentence?*

Answer. Department of the Army boards of review:

| Fiscal year | Affirmed | | Sentence modified | | Rehearing ordered | | Charges dismissed | | Findings disapproved in part, sentence approved | | Findings and/or sentence disapproved in part | | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Number | Percent | Number | Percent | Number | Percent | Number | Percent | Number | Percent | Number | Percent | |
| 1957[1] | 3,506 | 75.0 | 971 | 20.8 | 58 | 1.2 | 44 | 0.9 | 17 | 0.5 | 82 | 1.6 | 4,676 |
| 1958 | 2,098 | 69.6 | 651 | 21.6 | 79 | 2.6 | 47 | 1.6 | 19 | .6 | 122 | 4.0 | 3,016 |
| 1959 | 1,215 | 62.9 | 560 | 29.0 | 93 | 4.8 | 29 | 1.5 | 7 | .4 | 27 | 1.4 | 1,931 |
| 1960 | 1,075 | 67.0 | 453 | 28.2 | 32 | 2.0 | 23 | 1.4 | 3 | .2 | 18 | 1.2 | 1,604 |
| 1961 | 1,065 | 74.7 | 301 | 21.1 | 16 | 1.1 | 14 | 1.0 | 3 | .2 | 26 | 1.9 | 1,425 |

[1] Statistics prior to fiscal year 1957 are not available.

Question 29. *To what extent have convening authorities and/or the officers exercising general court jurisdiction acted either to disapprove findings or reduce sentences in cases which they reviewed?*

Answer. Convening authority actions upon general courts-martial findings and sentences:[4]

| | Total convening authority actions | Sentence and findings approved | | Sentence modified | | Findings modified | |
|---|---|---|---|---|---|---|---|
| | | Number | Percent | Number | Percent | Number | Percent |
| Calendar year:[1] | | | | | | | |
| 1951 | 5,838 | 3,547 | 60.8 | 1,903 | 32.6 | 388 | 6.6 |
| 1952 | 8,795 | 6,152 | 69.9 | 2,109 | 24.0 | 534 | 6.1 |
| 1953 | 9,404 | 5,427 | 57.8 | 3,326 | 35.7 | 591 | 6.5 |
| 1954 | 9,149 | 5,606 | 61.3 | 3,366 | 36.8 | 176 | 1.9 |
| 1955 | 9,049 | 5,242 | 58.0 | 3,636 | 40.1 | 171 | 1.9 |
| 1956 | 6,428 | 3,575 | 55.6 | 2,714 | 42.2 | 139 | 2.2 |
| 1957 | 4,357 | 1,910 | 43.9 | 2,327 | 53.4 | 120 | 2.7 |
| 1958 | 2,803 | 1,317 | 47.0 | 1,399 | 50.0 | 87 | 3.0 |
| Fiscal year: | | | | | | | |
| 1959 | 2,251 | 1,063 | 47.2 | 1,145 | 50.9 | 43 | 1.9 |
| 1960 | 1,959 | 947 | 48.3 | 985 | 50.3 | 27 | 1.4 |
| 1961 | 1,768 | 798 | 45.1 | 935 | 52.9 | 35 | 2.0 |

[1] Statistics prior to fiscal year 1959 were maintained on calendar year basis.

Question 30. *Has the Air Force's Amarillo Retraining Group been successful? If so, have other services undertaken similar retraining projects? Could excess*

[4] Statistics are not available for convening authority actions upon summary and special courts-martial proceedings.

*capacity at Amarillo feasibly be used for rehabilitation of personnel from the other services?*

Answer. Information informally furnished by representatives of the Department of the Air Force indicates that the Amarillo program is considered to have been successful in meeting the particular needs of the Air Force. Prisoners selected on the basis of having a potential for further military service are transferred to the Amarillo Retraining Group. Approximately 1 out of 10 Air Force prisoners is sent to Amarillo. The remainder are confined at local base confinement facilities and the U.S. Disciplinary Barracks, or Federal institutions. Approximately 50 percent of the total prisoners processed at Amarillo since its establishment in 1951 have been returned to duty. Amarillo reports indicate that approximately 42 percent are currently being returned to duty. Seventy percent of those returned to duty are reported as successfully completing their enlistments. Eighty-four percent were reported to be performing successfully 6 months after return to duty.

The Army operates rehabilitation training centers during periods of war and mobilization, when the large numbers of rehabilitable prisoners justify such separate installations. The program of rehabilitation training centers is essentially similar to the Amarillo program.

Separate rehabilitation training centers are not operated during peacetime because the greatly reduced number of prisoners makes operation of such separate facilities uneconomical and unnecessary. A retraining unit attached to the U.S. Disciplinary Barracks, Fort Leavenworth, Kans., is utilized for the retraining of disciplinary barracks prisoners found to possess potential for further service. Military prisoners with longer sentences and more serious offenses (prisoners with 6 months or more remaining to serve and a bad conduct or dishonorable discharge) are sent to the disciplinary barracks. Operation of the retraining program contiguous to the disciplinary barracks makes it possible to utilize the overhead and administrative services of the disciplinary barracks, reducing costs.

Provision is made for the professional evaluation, rehabilitation and organized training at Army stockades for prisoners confined at that level (prisoners whose sentences do not include punitive discharges and those with shorter sentences). Retention of prisoners at the post level for rehabilitation and retraining for return to duty makes it possible to utilize the services of professional personnel (psychiatrists, psychologists, and social workers of the mental hygiene service unit), chaplains, unit commanders, and other staff in the evaluation, counseling and correctional treatment of the prisoner. The retention of personnel close to their "home" units, and opportunity to train with their units where practicable, facilitates their rehabilitation and expeditious return to duty status.

While it is felt that the Amarillo program meets the particular needs of the Air Force, the retraining and rehabilitation of Army prisoners at the post level and the disciplinary barracks during peacetime is considered to be more satisfactory in meeting the Army's needs and to provide fully for the retraining and restoration needs of the military personnel confined. The Air Force is faced with the problem of operating small stockades at a large number of individual airbases, where it would not be practicable to provide the personnel and training facilities locally, as is done on the larger Army posts where stockades are located.

Approximately 53 percent of those confined in Army stockades are returned to duty. An additional 14 percent of prisoners confined in the U.S. disciplinary barracks with punitive discharges are being restored to duty following retraining. The recidivist rate for disciplinary barracks prisoners restored to duty during fiscal year 1961 was 2.1 percent.

The experience of the Navy is reported to be similar to that of the Army. Naval retraining commands were operated during and immediately following World War II, after which they were converted into general confinement facilities. At this time the Navy is providing rehabilitation and retraining for return to duty primarily at the local base (brig) level.

It would not be feasible for the Army to utilize the Amarillo retraining facility for the rehabilitation and retraining of personnel selected for possible return to duty. Vital elements of a rehabilitation program for restoration to duty involve the development of service motivation and esprit de corps, and the training of personnel in the environment and particular occupational specialties and requirements of their service. This is recognized in Department of Defense uniform policies and procedures affecting military prisoners and places of confinement (DOD Instruction 1325.4) which state: "Each service should provide

restoration training for its own personnel, with a course of instruction based on the military training program of that service." Transportation of prisoners to Amarillo by the Army would involve prohibitive costs. Furthermore, the Amarillo facility was reported recently as being near desired capacity, and would therefore presumably not be able to provide space for personnel from other services.

Question 31. *In view of the unavailability of a bail procedure under military law, what steps have been taken by the three services to minimize pretrial confinement?*

Answer. The basic guidance as to pretrial confinement is found in paragraph 20*c* of the Manual for Courts-Martial, United States, 1951, which provides in part: "* * * Confinement will not be imposed pending trial unless deemed necessary to insure the presence of the accused at the trial or because of the seriousness of the offense charged." This provision is enforced vigorously throughout the Army. Daily review of stockade inmates and reports as to their status, and frequent checks and inspections, are carried out at every installation having confinement facilities. In addition, the majority of commanders exercising general court-martial jurisdiction and having responsibility over confinement facilities require that pretrial confinements be kept to an absolute minimum. To enforce this policy, many commanders publish orders to the effect that no personnel will be placed in pretrial confinement without prior approval of the staff judge advocate. This "screening" device tends to insure that pretrial confinement is kept to a minimum, and has been recognized as a lawful measure by the U.S. Court of Military Appeals, which has held that pretrial confinement imposed in noncompliance with such an order (requiring approval of SJA prior to pretrial confinement) is illegal (*U.S.* v. *Gray*, 6 USCMA 615, 20 CMR 331).

Question 32. *When a serviceman is subject to trial in either a Federal district court or a court-martial, what are the criteria for determining which court shall exercise jurisdiction? Are these criteria satisfactory?*

Answer. The Departments of Defense and Justice have entered into a memorandum of understanding (July 19, 1955), the provisions of which delineate the areas of responsibility for the investigation and prosecution of offenses over which the two Departments have concurrent jurisdiction. The memorandum expressly states, "it is not feasible to impose inflexible rules to determine the respective responsibility of the civilian and military authorities," and, accordingly, informal arrangements and agreements are authorized as the circumstances of the particular case may require. Briefly, the memorandum provides that—

() All crimes committed on a military reservation, except those specified in (2) below, shall be prosecuted by the military department upon a determination that only individuals subject to the code are involved.

(2) Unless a determination is made that only individuals subject to the code are involved in or are victims of a crime committed on a military reservation, the FBI shall be notified and shall investigate such a crime for the purpose of prosecution in the civil courts.

(3) All crimes committed outside of military installations except as noted in (4) below, shall be investigated by the FBI for the purpose of prosecution in civil courts, unless it is determined that investigation and prosecution may be conducted more efficiently and expeditiously by other authorities.

(4) When persons subject to the code are involved in a crime outside of a military installation but while on scheduled military activities, responsibility for investigation and prosecution is in military authorities.

The Department of the Army has promulgated Army Regulations 22–160, October 7, 1955, in implementation of the memorandum of understanding and for the guidance of personnel responsible for the actions contemplated in the memorandum.

The criteria for determination of jurisdiction as between Federal authorities and military authorities have been generally satisfactory insofar as the Department of the Army is concerned. The Department of the Army, however, has concurred with the Departments of the Navy and Air Force that action be taken to delete that part of the agreement giving the Department of Justice primary jurisdiction over offenses involving fraud against the Government or larceny of Government property or funds committed on a military installation, and transferring such primary jurisdiction to the military departments.

Question 33. *Under circumstances where a serviceman's alleged misconduct violates both the Uniform Code of Military Justice and the law of some State under what circumstances, if any, is the serviceman tried by court-martial if he has already been tried by a State court?*

Answer. The policy of the Department of the Army, as expressed in Army Regulations 22–12, April 24, 1958, paragraph 2, is that, "A person subject to the Uniform Code of Military Justice who has been tried in a civil court normally will not be tried by court-martial * * * for the same act or acts * * *." However, upon the personal determination of an officer who exercises general courts-martial jurisdiction that some form of authorized administrative action alone is adequate and that punitive action is essential to maintain discipline in the command, the case may be disposed of under the Uniform Code of Military Justice and the Manual for Courts-Martial, United States, 1951, subject to certain procedural limitations.

Question 34. *In situations where State authorities have indicated their willingness to relinquish jurisdiction over a serviceman if the armed services will prosecute him, under what circumstances is prosecution undertaken by the armed services?*

Answer. Prosecution of a person subject to the Uniform Code of Military Justice is undertaken only when it is determined that, on the basis of all available evidence, an offense punishable under the code appears to have been committed by the accused person and that he should be punished for such offense. The fact that civilian authorities have relinquished jurisdiction over the accused in the expectation that military authorities would prosecute is collateral to the determination made by the military authorities and could not be the sole basis for prosecution under the code.

Question 35. *Is legislation needed to give the Federal district courts jurisdiction over misconduct overseas by civilian dependents and employees accompanying the armed services in peacetime?*

Answer. Yes. Recent decisions of the Supreme Court (*Kinsella* v. *Singleton*, 361 U.S. 234 (1960); *Grisham* v. *Hagan*, 361 U.S. 278 (1960); *McElroy* v. *Guagliardo*, 361 U.S. 281 (1960); and *Toth* v. *Quarles*, 350 U.S. 11 (1955) have declared unconstitutional article 2(11) of the Uniform Code of Military Justice (10 U.S.C. 802(11)) insofar as it provides for the trial by court-martial of persons serving with, employed by or accompanying the U.S. Armed Forces abroad in time of peace, and article 3(a) of the Uniform Code of Military Justice (10 U.S.C. 803(a)) insofar as it provides for the trial by court-martial of former servicemen for certain offenses against the Uniform Code of Military Justice committed by them prior to their discharge.

As a result of these decisions such civilians and former servicemen are now immune from the jurisdiction of U.S. courts for all offenses which they may commit abroad except for a few offenses such as frauds against the Government and counterfeiting which are subject to the jurisdiction of Federal district courts under title 18, United States Code.

The fact that foreign courts have jurisdiction over certain offenses committed by persons within these categories does not provide an adequate substitute for U.S. jurisdiction. The trial of service-connected personnel by foreign courts is the very thing which the United States desired to avoid through the negotiation of status of forces agreements. Furthermore, many offenses which relate to the security interests of the United States are not cognizable under foreign law. In some countries although many offenses may be cognizable under the local law, they are subject to the exclusive jurisdiction of the United States which the United States is unwilling to relinquish because of the system of justice or the conditions of confinement which prevail (e.g., a recent aggravated assault against a Korean national by a dependent of a U.S. Army officer). Additionally, foreign courts may have little or no interest in prosecuting U.S. personnel for offenses which the United States considers to be serious (e.g., a recent case in which the Japanese refused to prosecute the wife of a U.S. serviceman who had thrown lye on his face). In some cases the punishment which is authorized or which is imposed by foreign courts is inadequate (e.g., recent cases in which German courts imposed upon wives who had murdered their serviceman-husbands or their children sentences to confinement for 1 year and 3 months, 10 months of which were suspended; confinement for 1 year, 11 months of which were suspended; and confinement for 9 months which was suspended for 4 years). In some cases the punishment imposed by foreign courts is too severe (e.g., a sentence to confinement for 16 years imposed by a Greek court

on appeal after earlier acquittal of the wife of a serviceman who had killed her children while temporarily insane).

The Department of the Army has prepared draft legislation which the Department of Defense submitted to the Department of Justice for comment on June 27, 1961, which would vest in Federal district courts jurisdiction over all serious offenses which are committed abroad by citizens, nationals, and other persons owing allegiance to the United States. This draft legislation would also create new offenses. It would subject to the jurisdiction of Federal district courts any persons (1) who in time of war or armed hostilities and in a theater of war or area of belligerent activities (*a*) fails to give notice and deliver up to proper authority captured or abandoned property in his possession or custody, or who in any way deals in or disposes of captured or abandoned property and receives or expects from such dealing or disposition profit or advantage to himself or another, or who engages in looting or pillaging; or (*b*) willfully aids or attempts to aid, the enemy or a hostile government with which the United States is engaged in armed hostilities with arms, ammunition, supplies, money, propaganda material, or other thing, or knowingly harbors or protects or gives intelligence to, or corresponds with or holds any intercourse with the enemy or a hostile government with which the United States is engaged in armed hostilities; or (2) who while in the hands of a foreign power (*a*) willfully acts to the detriment of others of whatever nationality held by the foreign power as civilian or military prisoners for the purpose of securing favorable treatment from his captors; or (*b*) while in a position of authority over such persons maltreats them without justifiable cause. Additionally, this proposed legislation would make the offenses specified in sections 2387 and 2388 of title 18, United States Code (espionage and activities affecting armed forces), applicable wherever the offenses may occur. At the present time sections 2387 and 2388 are applicable only within the United States, its maritime jurisdiction, and on the high seas.

The proposed legislation would fill the gap which now exists in the jurisdiction of the courts of the United States with respect to (1) serious offenses committed abroad in time of peace by any U.S. citizen, national or other person owing allegiance to the United States, including U.S. military personnel and persons serving with, employed by, or accompanying the U.S. Armed Forces abroad, (2) serious offenses committed by such persons in time of war, and (3) serious offenses committed abroad by such persons which are now punishable by U.S. courts only when committed within the United States (e.g., murder, and other serious offenses against the person).

The reasons presented as requiring an extension of Federal court jurisdiction over offenses committed abroad by servicemen and by persons formerly covered by article 2(11) of the Uniform Code of Military Justice apply with equal validity to all persons owing allegiance to the United States and it is for this reason that the proposed legislation extends the jurisdiction of Federal courts to all citizens, nationals, and other persons owing allegiance to the United States.

*Civilians and dependents tried and/or convicted in foreign courts*
*(No reports priod to Jan. 1, 1954)*

[Statistics include civilians and dependents of all services]

[These reports are not prepared on a fiscal year basis as sec. V, par. B, DOD Directive 5525.1, dated Mar 25, 1960, specifies the reporting period for these reports to be Dec. 1, to Nov. 30]

| | |
|---|---|
| I. Jan. 1, to Nov. 30, 1954: | |
| Civilians tried | 89 |
| Dependents tried | 8 |
| Total | 97 |
| Acquittals: | |
| Civilians | 4 |
| Dependents | 3 |
| Total | 7 |
| Convictions: | |
| Civilians | 85 |
| Dependents | 5 |
| Total | 90 |

*Civilians and dependents tried and/or converted in foreign courts*—Continued

| | |
|---|---|
| II. Dec. 1, 1954, to Nov. 30, 1955: | |
| Civilians tried | 106 |
| Dependents tried | 34 |
| Total | 140 |
| Acquittals: | |
| Civilians | 3 |
| Dependents | 3 |
| Total | 6 |
| Convictions: | |
| Civilians | 103 |
| Dependents | 31 |
| Total | 134 |
| III. Dec. 1, 1955, to Nov. 30, 1956: | |
| Civilians tried | 194 |
| Dependents tried | 73 |
| Total | 267 |
| Acquittals: | |
| Civilians | 6 |
| Dependents | 5 |
| Total | 11 |
| Convictions: | |
| Civilians | 188 |
| Dependents | 68 |
| Total | 256 |
| IV. Dec. 1, 1956 to Nov. 30, 1957: | |
| Civilians tried | 111 |
| Dependents tried | 77 |
| Total | 188 |
| Acquittals: | |
| Civilians | 6 |
| Dependents | 8 |
| Total | 14 |
| Convictions: | |
| Civilians | 105 |
| Dependents | 69 |
| Total | 174 |
| V. Dec. 1, 1957 to Nov. 30, 1958: | |
| Civilians tried | 100 |
| Dependents tried | 82 |
| Total | 182 |
| Acquittals: | |
| Civilians | 2 |
| Dependents | 7 |
| Total | 9 |

*Civilians and dependents tried and/or converted in foreign courts*—Continued

| | |
|---|---|
| V. Dec. 1, 1957 to Nov. 30, 1958—Continued | |
| Convictions: | |
| Civilians | 98 |
| Dependents | 75 |
| Total | 173 |
| VI. Dec. 1, 1958 to Nov. 30, 1959: | |
| Civilians tried | 165 |
| Dependents tried | 86 |
| Total | 251 |
| Acquittals: | |
| Civilians | 4 |
| Dependents | 8 |
| Total | 12 |
| Convictions: | |
| Civilians | 161 |
| Dependents | 78 |
| Total | 239 |
| VII. Dec. 1, 1959–Nov. 30, 1960: | |
| Civilians tried | 93 |
| Dependents tried | 105 |
| Total | 198 |
| Acquittals: | |
| Civilians | 6 |
| Dependents | 7 |
| Total | 13 |
| Convictions: | |
| Civilians | 87 |
| Dependents | 98 |
| Total | 185 |
| VIII. Dec. 1, 1960–Nov. 30, 1961: | |
| Civilians tried | 108 |
| Dependents tried | 108 |
| Total | 216 |
| Acquittals: | |
| Civilians | 4 |
| Dependents | 13 |
| Total | 17 |
| Convictions: | |
| Civilians | 104 |
| Dependents | 95 |
| Total | 199 |

Question 36. *Is legislation needed to give the district courts jurisdiction over violations of the Uniform Code by ex-servicemen while they were on active duty?*

Answer. Yes. The Supreme Court in the case of *Toth* v. *Quarles* (350 U.S. 11 (1955)) declared unconstitutional article 3(a) of the Uniform Code of Military Justice (10 U.S.C. 803(a)) insofar as it provides for the trial by court-martial of former servicemen for certain offenses against the Uniform Code of Military Justice (those punishable by confinement for 5 years or more and for which they cannot be tried by a court of the United States) committed by them prior to their discharge. As a result there is now no U.S. court which has jurisdiction to try many serious offenses which are committed abroad by servicemen prior to their discharge. Examples of the need for such legislation are the case of Toth whose alleged murder of a Korean national was discovered after his discharge from the Air Force and his return to the United States and the case of Lo Dolce whose alleged murder of a U.S. officer in Italy during World War II was not discovered until after his discharge from the Army and his return to the United States. No U.S. court had jurisdiction over their offenses and an Italian request that Lo Dolce be extradited to Italy for trial was refused.

The legislation proposed by the Department of the Army and submitted to the Department of Justice by the Department of Defense for comment in June of 1961 would vest in Federal district courts jurisdiction over all serious offenses which were committed by former servicemen prior to their discharge from the Armed Forces. This proposed legislation, furthermore, gives the Federal district court a concurrent jurisdiction over all serious offenses committed by U.S. servicemen abroad.

---

## DEPARTMENT OF THE ARMY ANSWERS TO SUBCOMMITTEE "AIDE MEMOIRE"

With respect to question 1: *It would be desirable to determine the extent to which the total number of discharges tends to correspond to the total strength of each service at a particular time.*

Answer. Statistics previously submitted have been placed in two tabulations for ease of reference. End strength for each fiscal year has been added as requested.

*Department of Army enlisted administrative separations*

| | Enlisted strength end fiscal year | Total discharged | Type discharge | | | | | | Retirements (all types) |
|---|---|---|---|---|---|---|---|---|---|
| | | | Honorable [1] | Percent | General | Percent | Undesirable | Percent | |
| Last half fiscal year— | | | | | | | | | |
| 1951 | | 116,724 | 102,881 | 91.2 | 4,200 | 3.6 | 2,523 | 2.2 | 3,577 |
| 1952 | 1,446,266 | 441,924 | 412,882 | 94.9 | 13,087 | 2.9 | 5,194 | 1.2 | 6,565 |
| 1953 | 1,386,500 | 809,275 | 772,335 | 96.5 | 15,888 | 2.0 | 6,617 | .8 | 8,442 |
| 1954 | 1,274,803 | 605,600 | 556,441 | 93.0 | 23,674 | 3.9 | 12,179 | 2.0 | 6,822 |
| 1955 | 985,659 | 732,597 | 691,012 | 95.0 | 18,726 | 2.6 | 14,611 | 2.0 | 4,742 |
| 1956 | 905,711 | 426,719 | 394,394 | 93.3 | 10,783 | 2.5 | 11,877 | 2.8 | 3,709 |
| 1957 | 885,056 | 385,278 | 355,616 | 93.2 | 6,593 | 1.7 | 15,228 | 4.0 | 3,449 |
| 1958 | 792,508 | 414,715 | 381,906 | 93.2 | 7,814 | 1.9 | 17,515 | 4.2 | 4,467 |
| 1959 | 758,458 | 357,684 | 334,744 | 94.7 | 5,910 | 1.7 | 11,031 | 3.1 | 4,056 |
| 1960 | 770,112 | 247,927 | 224,235 | 92.3 | 10,178 | 4.1 | 7,474 | 3.0 | 4,590 |
| 1961 [2] | 756,932 | 283,464 | 254,046 | 92.4 | 11,889 | 4.2 | 8,319 | 2.9 | 8,007 |

[1] Includes discharged for immediate enlistment or reenlistment and discharged from enlisted status to accept commissions. Percent also includes retirements.

[2] Years prior to fiscal year 1961 do not include enlisted females in discharge data since data was not maintained. Strengths do include enlisted females.

*Department of Army enlisted punitive separations*

| | Enlisted strength end fiscal year | Total discharged | Bad conduct | Percent | Dishonorable | Percent |
|---|---|---|---|---|---|---|
| Last half fiscal year— | | | | | | |
| 1951 | | 116,724 | [1] 1,164 | 1.0 | [1] 2,379 | 2.0 |
| 1952 | 1,446,266 | 441,924 | 1,744 | .4 | 2,452 | .6 |
| 1953 | 1,386,500 | 809,275 | 1,708 | .2 | 4,285 | .5 |
| 1954 | 1,274,803 | 605,600 | 1,644 | .3 | 4,840 | .8 |
| 1955 | 985,659 | 732,597 | 960 | .1 | 2,546 | .3 |
| 1956 | 905,711 | 426,719 | 2,214 | .5 | 3,742 | .9 |
| 1957 | 885,056 | 385,278 | 1,681 | .4 | 2,711 | .7 |
| 1958 | 792,508 | 414,715 | 1,321 | .3 | 1,692 | .4 |
| 1959 | 758,458 | 357,684 | 1,074 | .3 | 869 | .2 |
| 1960 | 770,112 | 247,927 | 802 | .3 | 648 | .3 |
| 1961 [2] | 756,932 | 283,464 | 693 | .3 | 510 | .2 |

[1] Figures cover entire fiscal year 1951 period.
[2] Years prior to fiscal year 1961 do not include enlisted females in discharge data since data was not maintained. Average strengths do include enlisted females.

With respect to question 1: *The statistics furnished the subcommittee do not appear to include officer cases, although presumably officer dismissal tends to follow the same trends. The subcommittee will appreciate your providing comparable information concerning officers.*

Answer. The requested information follows:

| Fiscal year | Officer strength, end of fiscal year | Total officer separations | Honorable separations | Other than honorable separations | Dismissals [1] pursuant to courts-martial |
|---|---|---|---|---|---|
| 1957 | 111,187 | 21,755 | 21,643 | 78 | 34 |
| 1958 | 104,716 | 24,796 | 24,796 | 66 | 34 |
| 1959 | 101,690 | 14,944 | 14,914 | 9 | 21 |
| 1960 | 101,236 | 11,134 | 11,067 | [2] 55 | 12 |
| 1961 | 99,921 | 13,008 | 12,994 | [2] 55 | 9 |

[1] As approved upon completion of appellate review.
[2] Estimate.

The above information is not available broken out to show Regular Army versus Reserve component officers.

The following information is furnished in amplification of the above. The discharges resulting from the following resignations or revocations may be either honorable or other than honorable separations and are included in the above table.

| Fiscal year | Resignations in lieu of trial | | Revocations [1] of Commission | | Resignations in lieu of Board action | | | |
|---|---|---|---|---|---|---|---|---|
| | | | | | Other than Homosexual | | Homosexual | |
| | Regular Army | Reserve | Regular Army | Reserve | Regular Army | Reserve | Regular Army | Reserve |
| 1957 | 25 | 80 | | 98 | 6 | 119 | 8 | 50 |
| 1958 | 9 | 53 | | 90 | 2 | 51 | 6 | 23 |
| 1959 | 11 | 28 | 2 | 73 | 5 | 44 | 8 | 22 |
| 1960 | 6 | 22 | 11 | 34 | | 17 | 4 | 10 |
| 1961 | 5 | 56 | 4 | 58 | 1 | 8 | 6 | 21 |

[1] Revocations of commission occurs during an officer's probationary tour. Most are for inefficiency (failure to complete school course) and result in honorable discharge.

With respect to question 1: *Also, can you furnish the subcommittee the breakdown of the basis, reason, or authority for the issuance of the general and undesirable discharges to which you refer in the information you have provided the subcommittee?*

Answer. The authority to discharge enlisted members of the Army initially was enacted as article 2, section III, of the Articles of War of 1776, as follows:

"After a non-commissioned officer or soldier shall have been duly inlisted and sworn, he shall not be dismissed from the service without a discharge in writing; and no discharge, granted to him, shall be allowed of as sufficient, which is not signed by a field officer of the regiment into which he was inlisted, or commanding officer, where no field officer of the regiment is in the same state."

This statute was reenacted in substantially the same words in subsequent articles of war until the act of June 24, 1948, in which it appeared as article of war 108:

"No enlisted person, lawfully inducted into the military services of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial."

The statute now appears in title 10, United States Code, section 3811, in the following form:

"(a) A discharge certificate shall be given to each lawfully inducted or enlisted member of the Army upon his discharge.

"(b) No enlisted member of the Army may be discharged before his term of service expires, except—

"(1) as prescribed by the Secretary of the Army;

"(2) by sentence of a general or special court-martial; or

"(3) as otherwise provided by law."

Prior to 1947 a "blue discharge" was adopted by the services under the authority set forth above and generally was issued for the following reasons:

(a) Misconduct:

(1) Fraudulent entry;

(2) Desertion or a.w.o.l. bordering on desertion, where the individual was physically unfit; and

(3) Final conviction by civil court of offenses indicating moral unfitness.

(b) Convenience of the Government because of enemy or allied enemy alienage.

(c) Undesirable traits of character.

(d) Character of service determined by a board of officers as not honest and faithful with the member not entitled to a character rating of at least "good."

As administered, the "blue discharge" represented an intent to distinguish and preserve the high degree of merit attributed to an honorable discharge and yet not to stigmatize the "blue discharge" as dishonorable.

Following congressional criticism of the "blue discharge," a joint Army-Navy committee was appointed in early 1946 to consider its elimination. On June 1, 1946 "general" and "undesirable" discharges were introduced on a test basis, and on July 1, 1947, the entire system was changed by eliminating the "blue discharge" and adopting in lieu thereof two types of administrative discharges now in effect, the "general" and the "undesirable."

*With respect to the Army answer to question 1, the following questions suggest themselves:*

*Why is there such an increase of undesirable discharges in the Army as between fiscal year 1953 and fiscal year 1954, while the bad conduct discharges and dishonorable discharges are remaining constant?*

*Why is there such a significant increase in the number of Army undesirable discharges, as related to total discharges, in fiscal year 1954 as compared to fiscal year 1952?*

*With a smaller number of total discharges in fiscal year 1956, why were there so many more undesirable discharges then than in fiscal year 1952? (Note also that the bad conduct and dishonorable discharges were substantially greater in 1956 than in 1952.)*

*As between fiscal year 1956 and 1954, when there were almost the same number of undesirable discharges, why was there such a tremendous difference in total number of discharges?*

*As between fiscal year 1956 and 1957, why was there a decrease in total discharges but a great increase in undesirable discharges? Why was there a peak reached for undesirable discharges in fiscal year 1958 but no commensurate increase in total discharges?*

*Why was there a large number of dishonorable discharges in 1954 but fewer total discharges than in 1955? Does this reflect combat offenses?*

*Comparing fiscal year 1958 with fiscal year 1960, why was there such a drop in undesirable and dishonorable discharges, without apparently a commensurate drop in total discharges?*

*With respect to the large number of general discharges in 1960 and 1961, with the number of total discharges relatively small, is a liberalization of policy reflected?*

Answer. Several facts are worthy of preliminary consideration in any attempt to determine the causes for fluctuations in the type and number of discharges issued from year to year:

(1) Many personnel who are marginally acceptable during time of war are kept aboard by commanders who are fully engaged in other pursuits and cannot devote their time and energies to the administrative actions attendant to the separation of these persons. It is expected that many of the soldiers discharged with honorable discharges in fiscal years 1952 and 1953, upon expiration of 2-year draft calls, would have received a lower character of discharge had they served at any time and place other than Korea. Consequently, any comparison of the volume and character of discharges issued during years when the Korean war existed with similar data from other years would not produce valid conclusions.

(2) More than 30 percent of total Army accessions obtained through the draft are classified in the lower mental groups. These persons are, historically, the "professional privates," the incident prone, the persons who are constantly in trouble yet are not often seriously enough involved to warrant a trial for a single offense for which a punitive discharge is justified. These persons most frequently are the repeat offenders who eventually earn the lowest character discharge. They also comprise the larger percentage of our stockade and disciplinary barracks population.

(3) The juvenile and police arrest rates in the United States have risen more than 220 and 80 percent, respectively, since 1948. In this connection, the latest Federal Bureau of Investigation report indicates that crime is outstripping population growth rates at a ratio of more than 4 to 1. For these reasons it must be assumed that more and more persons who have been involved in juvenile offenses or who otherwise have criminal records are among those obtained through annual draft calls. Their presence on the rolls would tend to increase the number of delinquency actions and would also tend to increase the number of separations for fraud (concealment of convictions).

(4) Except for the years 1957 and 1958 when undesirable discharges peaked at 4 and 4.2 percent of total discharges issued, this type discharge has represented from 2 to 3 percent of total discharges. This percentage is not considered excessive when it is related to total discharges.

(5) The Army was a strength of approximately 1½ million men at the close of the Korean conflict and was required to reduce in size to approximately 875,000 by fiscal year 1958. These reductions were accomplished by quality control methods aimed at producing the best Army possible within the strength authorizations.

The specific questions listed above cannot be answered with any degree of accuracy because an answer to these questions requires extensive speculation. Therefore, the following general comments only are presented.

Reductions in strength began in fiscal year 1953 with the release of units and personnel called up for the Korean war. In 1954, continued reductions occurred; however, the administrative elimination of personnel with established patterns of misconduct, unfitness, or unsuitability who had been marginally acceptable during time of war, but who could not adapt themselves to postwar Army activities received first priority. As a result, the number of undesirable and general discharges rose. The percentage of punitive discharges issued as a result of court-martial action also rose during this period of postwar adjustments.

During the following 4 fiscal years the Army entered into several programs designed to meet reduced strengths without loss in quality.

(*a*) Department of the Army Circular 635–11, promulgated in fiscal year 1956, provided for involuntary separation of enlisted personnel who were below current minimum standards for reenlistment.

(*b*) Concerted efforts were made in fiscal year 1957 to drastically reduce the number of inept and noneffective personnel, particularly in oversea commands. This action was dictated by the increase in incidents in Europe which were damaging to U.S. relations abroad, particularly in Europe.

(c) In fiscal year 1958 the then Assistant Secretary of the Army, Mr Milton, pointed out that "the elimination of nonproductive and undesirable personnel is our most pressing problem * * * and * * * all commanders are not making the most effective use of the administrative procedures available to them for effecting prompt severance from their rolls of inept and undesirable personnel." Consequently, Department of the Army Circular 635–2 was promulgated. This circular provided for the discharge of enlisted personnel who lacked job performance potential. Separations were based on a combination of low scored upon being tested with the Army classification battery (ACB), plus observed substandard performance. The type discharge certificate issued under this program was based on the character of service of the individual concerned and, lacking good evidence to the contrary, the honorable discharge certificate was issued. The provisions of this circular also applied to stockade prisoners and commanders were encouraged to institute clemency action, where appropriate, with concurrent separation from the service. Many of these persons were issued undesirable discharge certificates based on an analysis of service rendered.

(d) In fiscal year 1959, two actions served the objectives of the Army quality control program. Public Law 85–564, July 28, 1958, provided for Presidential modification of standards and requirements for induction of persons into the Armed Forces. Presidential authority was delegated to the Secretary of Defense who established a quota of 12 percent mental group IV for chargeable accessions. Enactment of this law together with higher reenlistment standards established at the same time aided materially in reducing the number of potentially inept and unsuitable persons on the Army rolls.

With respect to the Army answer to question 3: If, as the Army answer indicates, the rise in administrative discharges in fiscal year 1958 may be attributed to an aptitude program, under which separations were based on trainability, not on behavior, did the Army label a man undesirable because of his lack of aptitude? If this was done, was it fair to do so?

Answer. The job performance potential program was initiated on July 23, 1957, for the dual purpose of reducing the strength of the Army without the loss of effective personnel, and maintaining a continuous screening of the draft input. The program was largely suspended on July 29, 1958, following enactment of legislation which permitted the rejection of draft registrants who, if accepted, would not have been able to meet the performance standards of the modern peacetime Army. During fiscal year 1958, a total of 69,600 soldiers of lesser potential was discharged, with an additional 7,800 estimated separations during the first 3 quarters of fiscal year 1959, consisting primarily of trainees who were in the process of evaluation at the time the program was suspended.

All of those enlisted personnel separated under the job performance potential program were adjudged by their commanders, assisted by the individual's performance under the Army classification battery tests, to be the least effective in the Army at that time.

The type of discharge certificate issued under this program was based upon the individual's character of service. Lacking concrete evidence of unsatisfactory service based, for example, upon specific acts of misconduct, these individuals were issued honorable discharge certificates. If the individual was separated solely because of his lack of job performance potential, he was issued an honorable discharge certificate.

With respect to the Navy answer to question 4: *It will be noted that the Navy points out various differences in procedure as between it and the other services, particularly with respect to the availability of a board hearing and the level at which certain determinations to discharge are made. It would be desirable to have each service comment on these differences and on which procedure is preferable or whether the procedure used by each service is the best adapted to its particular problems. For example, would it be desirable for the other services to follow the Navy practice of requiring headquarters approval for the issuance of an undesirable discharge?*

Answer. Navy comment 1: "In the Army an undesirable discharge may be approved by an officer exercising general court-martial jurisdiction. Undesirable discharges in the Navy may be approved only by headquarters."

Response: Navy field activity is characterized by worldwide nomadic operation which lends itself to centralized administrative functions. Although Army elements are also on duty throughout the world, these units are more permanently fixed and, therefore, are more amenable to decentralized administrative functions. Furthermore, each Army officer exercising general court-martial jurisdic-

tion has a qualified legal staff which reviews each board case and opines on sufficiency and legality prior to final determination as to type discharge to be awarded. Current Army procedure is best suited to the Army's peacetime needs and lends itself to continued operations during periods of mobilization. Retention of this authority at Headquarters, Department of the Army is not desirable.

Navy comment 2: "Army personnel being considered for a discharge by reason of unsuitability are afforded an opportunity to request or waive a field board hearing. Navy personnel are not afforded this privilege."

Response: The Army considers that the option to request or waive board hearing in cases involving unsuitability should be the same as that authorized for cases involving unfitness. The majority of individuals identified as unfit or unsuitable recognize their own shortcomings and desire to be separated from the service. In many instances the objectives of the individual are served by allowing him to waive board hearing, thereby hastening his release from the Army. On the other hand, the Government is not required to expend large sums of money to conduct board hearings for many individuals who recognize that their character of service or aptitude is such that they may not qualify for honorable discharge even though they complete their full period of service. Current Army procedure is preferred.

Navy comment 3: "In the Army, field activities have authority to effect discharges by reason of hardship/dependency. In the Navy such discharges are approved only by headquarters."

Response: Discharges for hardship/dependency in the Army are effected by major commanders in the field who apply to each case the eligibility criteria furnished by Headquarters, Department of the Army. These commanders are senior officers of mature judgment who usually rule in favor of the soldier who has a well-documented, legitimate hardship or dependency. Decentralization normally produces faster results. Therefore, in this type case where immediate action is frequently indicated, centralization of the administrative action is not considered desirable from the Army point of view.

Navy comment 4: "Army personnel being separated as undesirable are reduced to the lowest enlisted grade prior to separation. Navy personnel are not reduced.

Response: Army personnel are reduced to the lowest enlisted grade immediately after the reviewing authority approves a board recommendation or otherwise directs issuance of an undesirable discharge. It sometimes takes weeks to outprocess a soldier and return him from an oversea station. These soldiers are not separated until they arrive in the United States. Meanwhile, reduction to the lowest grade at the time of determination is not considered inappropriate for an adjudged undesirable. Army procedure is preferred.

Navy comment 5: "Army personnel involved in homosexual acts solely as a result of immaturity, curiosity, or intoxication are not processed under homosexual procedures for possible separation. In the Navy all such cases are so processed and a decision relative to retention or discharge is made upon completion of processing."

Response: The Army procedure which requires more concrete evidence prior to board action is considered best adapted to Army problems.

Navy comment 6: "Under Army procedure, special courts-martial are precluded from awarding bad conduct discharges."

Response: The Department of the Army is of the opinion that an accused is entitled to the protections and procedures available only in trials by general court-martial, e.g., law officer, in those instances wherein a punitive discharge sentence may be warranted.

In connection with the answer to question 5:

*In applying the criteria for issuance of a general discharge instead of an honorable discharge, at what level is the determination made to give such a discharge?*

*As to each service, what are the disabilities attached to a general discharge? And would it be possible to accomplish the same objectives without using the term "General discharge?"*

Answer. The determination to issue a general discharge instead of an honorable discharge is made by the soldier's immediate commander at the time of separation.

From the Army point of view there are no disabilities attached to a general discharge certificate. The certificate is awarded to the "satisfactory" soldier who becomes eligible for the same postservice benefits as the "excellent" soldier who receives an honorable discharge.

Recognition of service and conduct which are merely satisfactory could probably be accomplished without reference to the term "general discharge"; however, some form of conditionally honorable certificate is essential to properly separate those whose performance and/or conduct was merely satisfactory from those who exhibit proper military behavior and were proficient and industrious.

*Concerning question 6, how many separations of enlisted personnel were the result of the exercise of waivers?*

Answer (figures prior to April 14, 1959, not available):

Part I: Board action waived by Department of Army (DOD Directive 1332.14, dated Jan. 14, 1959, and AR 635-206):

| | |
|---|---|
| (1) Period Apr. 14, 1959, through June 15, 1959: | |
| (a) Fraudulent entry | 99 |
| (b) Conviction by civil court | 152 |
| (c) Juvenile offender | 6 |
| (d) Prolonged unauthorized absence | [1] 323 |
| Total | 580 |
| (2) Period June 16, 1959, through June 15, 1960: | |
| (a) Fraudulent entry | 617 |
| (b) Conviction by civil court | 697 |
| (c) Juvenile offender | 16 |
| (d) Prolonged unauthorized absence | [2] 2, 609 |
| Total | 3, 939 |
| (3) Period June 16, 1960, through June 15, 1961: | |
| (a) Fraudulent entry | 724 |
| (b) Conviction by civil court | 851 |
| (c) Juvenile offender | 49 |
| (d) Prolonged unauthorized absence | [3] 658 |
| Total | 2, 282 |

[1] Includes 312 World War II deserters.
[2] Includes 2,598 World War II deserters.
[3] Includes 642 World War II deserters.

Part II: Board action waived by individual:

| | |
|---|---|
| (1) Period Apr. 14, 1959 through June 15, 1959: | |
| (a) AR 635-89—Homosexuals | 111 |
| (b) AR 635-206—Misconduct | 39 |
| (c) AR 635-208—Unfitness | 390 |
| (d) AR 635-209—Unsuitability | 3 |
| (e) AR 635-220—Resignation (in lieu of board) | 4 |
| Total | 547 |
| (2) Period June 16, 1959 through June 15, 1960: | |
| (a) AR 635-89 | 344 |
| (b) AR 635-206 | 96 |
| (c) AR 635-208 | 4, 493 |
| (d) AR 635-209 | |
| (e) AR 635-220 | 12 |
| Total | 4, 945 |
| (3) Period June 16, 1960 through June 15, 1961: | |
| (a) AR 635-89 | 381 |
| (b) AR 625-206 | 74 |
| (c) AR 635-208 | 5, 348 |
| (d) AR 635-209 | 509 |
| (e) AR 635-220 | 3 |
| Total | 6, 315 |

With respect to answers to question 7:

*How often do the Air Force or the Army ultimately take action less favorable than that recommended by the full Board? To what extent is a procedure available to refer the case to another board for determining if the recommendations of the first full Board are unsatisfactory?*

*To what extent do the Army and the Air Force follow the Navy practice of giving notice to an individual when action less favorable than that recommended by a field board is being contemplated? How often does the Air Force or the Army take action less favorable than that recommended by a field board?*

*The Navy indicates that in no officer case is the action taken by the Secretary of the Navy more severe than that recommended by the Board of Officers. Is this true of the other services?*

*How many separation of officers involve resignations and/or waivers of Board action after adverse action has been recommended or initiated?*

Answer. Army regulations do not permit a higher echelon to take an action less favorable than that recommended by the full Board. For example paragraph 12c, AR 635–208 prescribes:

"The convening authority will not authorize the issuance of a discharge of lesser character than that recommended by the Board (i.e., honorable to general). He may authorize the issuance of a discharge of a higher character than that recommended by the Board (i.e., general to honorable, undesirable to general)."

With respect to officer cases, action less favorable than that recommended by the full Board has not been taken in the past 2 years except for special action taken personally by the Secretary in the case of one homosexual, wherein he was awarded a general discharge over the Board recommendation for an honorable discharge.

Cases involving enlisted men may be referred to a second board only if newly discovered substantial evidence or subsequent conduct of the individual clearly indicate such action is necessary or if it is apparent that the rights of the respondent were substantially prejudiced through errors committed by the first Board. The question of "unsatisfactory" recommendations has no bearing on the decision to order a second Board.

The Army does not take less favorable action than that recommended by a board.

The action taken by the Secretary of the Army in officer cases is no more severe than that recommended by the Board of Officers except for the one homosexual case referred to previously.

Statistics regarding separations of officers involving resignations and/or waivers of Board action after adverse action has been recommended or initiated have been kept since July 12, 1960, the enactment of Public Law 86–616. Since that date, through February 15, 1962, 92 officers were separated upon their request for resignation or discharge in lieu of elimination (show cause) proceedings. In addition, 28 officers were permitted to retire in lieu of elimination proceedings at their request.

With respect to the answers to question 7: *How often do the Air Force or the Army ultimately take action less favorable than that recommended by the full Board? To what extent is a procedure available to refer the case to another Board for determining if the recommendations of the first full Board are unsatisfactory?*

Answer. The Army has not in recent years taken action less favorable than that recommended by the Review Board in any type of case before boards administered by the Army Council of Review Boards. There is no provision for consideration of a case by another board.

Question. *To what extent do the Army and Air Force follow the Navy practice of giving notice to an individual when action less favorable than that recommended by a field board is being contemplated? How often does the Air Force or the Army take action less favorable than that recommended by a field board?*

Answer. The Army does not give notice to the individual when action less favorable than that recommended by a field board is being contemplated. In security cases, however, notice is given of contemplated adverse action and respondent is given additional opportunity to rebut prior to final action by the Secretary of the Army.

A review of the records available in this office reveals that an Army review board has recommended less favorable action than the field board in only two

cases during the past 18 months. In one of these cases the final Army action was more favorable than recommended by either board. In the other the Secretary has not as yet taken final action.

Question. *The Navy indicates that in no officer case is the action taken by the Secretary of the Navy more severe than that recommended by the Board of Officers. Is this true of the other services?*

Answer. In officer cases the action taken by the Secretary of the Army has not been more severe than that recommended by the Review Board.

Question. *How many separations of officers involve resignations and/or waivers of Board action after adverse action has been recommended or initiated?*

Answer. During the past 18 months the Army Council of Review Boards has received 116 resignations from the Army for the good of the service in lieu of board action or trial by court-martial.

There were 27 cases in which Reserve officers submitted resignations by reason of homosexuality and waived their rights to appear before a board of officers. The Review Board recommended discharges under other than honorable conditions in 26 of these cases and a general discharge in 1. Final action resulted in issuance of 22 discharge certificates (under other than honorable conditions) and 4 general discharge certificates.

Ten Regular Army officers submitted their resignations under the homosexual regulations in lieu of board action. The Review Board recommended discharges under other than honorable conditions in each of these cases. Final action resulted in the issuance of eight discharge certificates (under other than honorable conditions) and two general discharge certificates.

Question. *How many separations of officers involve resignations and/or waivers of Board action after adverse action has been recommended or initiated?*

Answer. There were 79 officers who submitted resignations in lieu of trial by court-martial. The Review Board recommended that—

(*a*) Seven resignations be returned for disciplinary or other appropriate action by the commander concerned.

(*b*) Discharges under other than honorable conditions be issued in 54 cases.

(*c*) General discharge certificates be issued in 16 cases.

(*d*) Two officers be permitted to withdraw their resignations. Final action resulted in return of 5 resignations, issuance of 53 discharge certificates (under other than honorable conditions), 17 general discharge certificates, and 1 honorable discharge certificate. One officer was given an opportunity to apply for retirement, and two officers were permitted to withdraw their resignations.

*With respect to the answer to question 8, you will notice in some of the answers there is reference to providing counsel "if reasonably available." It seems very important to determine what standards are applied by a commanding officer in ruling on the availability of counsel for respondents in administrative actions or for accused personnel in summary or special courts-martial. For instance, there are some complaints that some commanders, as a matter of policy, never declare a lawyer to be "reasonably available" for a board action or a summary or special court-martial. Perhaps statistics are available on the representation of defendants or respondents by legally trained attorneys.*

Answer. Whether requested counsel is reasonably available in any case is a discretionary command determination. It does not imply solely physical availability and is normally based on several factors, such as—

(1) Functions and duties imposed on the requested counsel by law.

(2) Operational considerations.

(3) Existing responsibilities of the officer requested.

(4) The nature and complexity of the case.

(5) Statutory and administrative provisions relating to the qualifications and availability of counsel; e.g., grade, experience, training, appeal from determination, etc.

(6) Relevant workload of the requested counsel.

(7) Availability of a replacement for the requested counsel.

(8) Seriousness of the possible consequences of the proceedings to the individual making the request.

(9) Disqualification of requested counsel from performance of subsequent functions in the case.

(10) Time and space factors in relation to the location of the requested counsel and the respondent, witnesses, and place of hearings.

(11) Expense to the Government.

(12) Period of time the services of requested counsel will be required.

Statistics are not maintained by the Department of the Army as to the frequency with which commanders honor the respondent's request for individual military counsel.

Question. *To what extent, if any, are enlisted lawyers used by the services as counsel to represent respondents in board hearings or accused persons in criminal proceedings?*

Answer. There is no statutory provision excluding enlisted military counsel from representing military personnel before boards and courts-martial proceedings. While such personnel are not normally assigned by the convening authority of the board or the court-martial to appear as regularly assigned defense counsel, some enlisted personnel do, in fact, appear before boards and courts-martial as individually requested military counsel.

With respect to the Army's answer to question 9:

*Why was there a large drop from fiscal year 1958 to fiscal year 1961 in percentage of discharges changed by the Army Discharge Board of Review, which does not seem to correlate with other trends? If current discharge standards are more liberal than in past years, why is the percentage of discharges so low?*

Answer. In fiscal years 1957 and 1958, 631 cases involving aliens and enemy aliens of World War I were reviewed in accordance with the policy set forth in the Assistant Secretary of the Army's memorandum dated January 7, 1957, "Review of Alien and Enemy Alien Discharges, World War I." As a result of this review 584 (92 percent) discharges were changed, thereby increasing appreciably the overall percentage of change.

The peak of World War II and Korean action cases had been handled prior to fiscal year 1960, and a portion of the higher percentage of change in the years before fiscal year 1960 can certainly be attributed to the mere size of the Army, wartime conditions, and the administrative errors which can and did occur during periods of national emergency. Further, on June 21, 1959, the statute of limitations expired with respect to persons discharged on or prior to June 22, 1944. In each succeeding year the 15-year limitation would eliminate the bulk of the cases which might have contained errors or inequities due to the pressure of the full scale mobilization for World War II and the increase of the Army during Korea.

While it is true that current discharge standards are, to a certain extent, more liberal than in past years, this has been concurrent with other administrative improvements and procedures in personnel administration. These include the requirement that for a separation under AR 635–208, a neuropsychiatric consultation is mandatory, and the commander exercising general court-martial jurisdiction must personally sign the action awarding an "undesirable" discharge. In addition, there has been a clear distinction between "unsuitable" and "unfit." Records management is better, and cases are better documented. With the tightening of entrance standards and better preparation and documentation of a case for administrative separation, there has been less chance that a review will reveal that the individual was not properly or equitably discharged.

It can reasonably be expected, therefore, that with the more stringent entry standards and the release of marginal personnel in 1957 and 1958, the percentage of change in cases heard by the Army Discharge Review Board will remain at a low figure in future years, even though the board now has the authority to adjudge cases in light of current regulations where the facts and circumstances of a case so warrant.

*With respect to question 9, each service should be asked to describe the number of members on its discharge review board and the board of correction of military records, the composition of the boards, the tenure of its members and other duties, if any, performed by the members, the number of hours spent by the members in adjudicating their cases. There have been complaints to the subcommittee that the board of correction of military records seldom grants hearings and that the board members may meet only once a week—and then only for a very short time. The truth or falsity of such allegations should be determined since the Congress relies on these boards to rectify any injustice.*

Answer. By statute there are at least five members of the Army Discharge Review Board who sit throughout each case. An additional eight officers are designated as alternate members. The latter are authorized to review cases in the absence of any member of the regular panel for any reason. Five of the alternate members are members of the Judge Advocate General's Corps and one of these must sit during the review of a security case. One of the alternate members is a Women's Army Corps officer who is required to participate in reviews of separations of former servicewomen.

Three of the permanent members are colonels and two are lieutenant colonels. All are combat arms officers. All alternate members are officers of field grade.

Members of the board usually are retained for a regular tour of 3 years. They are assigned to the Army Council of Review Boards with primary duty as members of the Army Discharge Review Board and additional duties within the council of review boards as required by the workload or other circumstances. Normally their duties with the Army Discharge Review Board require their full time.

In order to provide a wide range of interest, experience, and background, one member of the board and one alternate member are members of the Reserve Forces on extended active duty. Four of the alternate members of the Army Discharge Review Board are assigned to the Army Council of Review Boards as their primary duty. Three are members of the office of the Judge Advocate General and the Women's Army Corps member is on duty with the Army General Staff. Since alternate members are employed on board matters only as an additional duty, the time spent as members of the Army Discharge Review Board can best be described as occasional.

*With respect to question 9, each service should be asked to describe the number of members on its Discharge Review Board and the Board of Correction of Military Records, the composition of the Boards, the tenure of its members, and other duties, if any, performed by the members, the number of hours spent by the members in adjudicating their cases. There have been complaints to the subcommittee that the Board of Correction of Military Records seldom grants hearings and that the Board members may meet only once a week—and then only for a very short time. The truth or falsity of such allegations should be determined since the Congress relies on these Boards to rectify any injustice.*

Answer. The ABCMR is composed of civilian employees of the Department of the Army as required by 10 U.S.C. 1552. The regulations promulgated in implementation of the statute and governing the operation of the Board are prescribed in AR 15–185 and have been approved by the Secretary of Defense. With the exception of the position of Chairman, which is a full-time permanent position, the members of the Board are designated to serve, on a rotating basis, in addition to their regularly assigned duties. The Board as presently constituted consists of 13 members. The names of the present Board members, the date of their appointment to the Board and their civilian positions are as follows:

Mr. Gordon D. Taft: Appointed to Board January 2, 1947. Full-time duty as Chairman of the ABCMR.

Mr. John G. Connell: Appointed to Board May 23, 1947. Deputy Administrative Assistant, OSA.

Mr. Chelsea L. Henson: Appointed to Board March 19, 1951. Director of Defense Supply Service, OSA.

Mr. Richard B. Belnap: Appointed to Board May 25, 1953. Administrative officer, The Adjutant General's Office.

Mr. Claude A. Bugg: Appointed to Board December 3, 1953. Assistant Chief, Replacement Branch, The Adjutant General's Office.

Mr. Albert J. Esgain: Appointed to Board December 3, 1953. Chief, Operations Branch, International Affairs Division, Judge Advocate General's Office.

Dr. Marlin S. Reichley: Appointed to Board November 6, 1956. Director of Instruction, Industrial College of the Armed Forces.

Mr. William B. Hanback: Appointed to Board November 6, 1956. Attorney adviser, Litigation Division, Judge Advocate General's Office.

Mr. Paul J. Burnette: Appointed to Board January 17, 1957. Director of Army Library.

Mr. Oliver E. Deming: Appointed to Board January 17, 1957. Assistant Chief, Materiel, Policy and Programs Branch, Deputy Chief of Staff for Logistics.

Mr. Norman E. Elmore: Appointed to Board January 17, 1957. Deputy Chief, Distribution Branch, Office of Deputy Chief of Staff for Logistics.

Dr. Samuel McKee, Jr.: Appointed to Board January 17, 1957. Consultant to Director of Foreign Intelligence, Assistant Chief of Staff for Intelligence.

Mr. Frank W. Thomas: Appointed to Board January 17, 1957. Supervisory Supply Officer, Mutual Security Division, Office of Deputy Chief of Staff for Logistics.

The members of the Board spent an average of 3.6 hours per member per week in the formal hearing and adjudication of cases during calendar year 1961. This figure does not include the hours devoted to study of case summaries prepared by the staff of the Board prior to formal hearing. Such summaries, which are a detailed outline of the facts, law, or regulations in each case, are delivered to the panel members approximately 1 week prior to the hearing date, during which time the panel members will have an opportunity to familiarize themselves with the cases scheduled to be heard. Many of the cases, because of their complex nature, may require considerable time to study. It is estimated that prior to formal hearing the panel members devote about 3 to 4 hours to the study of case summaries of cases scheduled to be heard.

Regarding the complaint that the Board seldom grants hearings, it is desired to point out that the Board does grant a formal hearing in all cases in which examination of the military records or evidence submitted indicates a possibility of material error or injustice. The cases are prepared by the staff of the Board and are screened by a panel of the Board to determine whether to grant relief without a formal hearing, to authorize a formal hearing or to deny the application without hearing. Based on the experience of the Board members which ranges from 5 years to 15 years, the members are able to screen out with reasonable dispatch those cases falling into the categories enumerated above. Statistics will show that during the most recent 5-year period, 1957–61 the Board granted formal hearings in 23.3 percent of the cases.

The Board usually meets once a week, but meets more often as the need arises. The complaint that the Board is in session for only a short period of time each week should be judged in the light of the information that the Board members spend an average of 3.6 hours each week in adjudicating cases. This time does not include hours devoted to study of case summaries prior to hearing. Depending upon the nature of the cases, the Board may be in session most of the day. Some cases have been known to require 2 and 3 full days for a complete and fair hearing. It appears that the experience which the Board members have gained over the years in the adjudication of cases is an important factor in minimizing the time devoted to each case. It is likely that this has been misconstrued as a tendency to give only minimal consideration to the evidence presented in each case. Also, the members of the staff of the Board have had considerable experience in the processing of applications and are able to assist the Board in the evaluation of all facets of the cases considered.

Question 9. *In what percentage of applications filed with the Boards of Correction for Military Records during the past decade were hearings granted?*

Answer. During the period 1952–61 the Army Board for Correction of Military Records considered a total of 20,989 applications. Hearings were granted in 3,967 of the cases or in 18.9 percent of the applications filed.

Question 9. *With respect to the time for review by the Board of Correction of Records in each service, why does the Army's time period seem to differ from that of the other two services?*

Answer. The Army Board for Correction of Military Records reported an average processing time for all types of cases during calendar year 1961 of 122 days. This figure represents the number of days required to process an application from the date of its receipt by the staff through the various steps of development and presentation to the Board and terminates when the Board proceedings are submitted to the Secretary of the Army for approval. The average time required by the Secretary of the Army to take final action on a case during the same period was 29 days.

Questions 9 and 10. *In light of the very few cases of relief granted by a correction board after denial by a discharge review board, isn't the second review almost a complete waste of time? Should such review be required for exhaustion of administrative remedies before going into court?*

Answer. At first glance, it would appear that correction board review of this type of case serves very little useful purpose. However, if but one case were to receive relief under these circumstances, it would appear to indicate the desirability of permitting applicants to continue to seek relief at the hands of correction boards. The fact that relief has been granted in some of such cases supports this conclusion. Admittedly, removal of such cases from the jurisdiction of correction boards would result in a considerable saving of money, time, and effort. Nevertheless, to deprive these applicants of the possibility of obtaining at least a measure of relief, if warranted, would be unconscionable and contrary to the intent of the Congress in establishing the correction boards.

With respect to the second part of the question, it is believed that this is a matter for determination by the court involved.

Questions 9 and 10. *What is the feasibility of consolidating in each service the Board for Discharge Review and the Correction Board?*

Answer. The Department is of the opinion that it is feasible; however, there are a number of factors which raise the question as to the desirability of consolidating such boards. While it is admitted that the operation of the two boards can be consolidated, it should be noted that the Discharge Review Board works in a limited and highly specialized area and is concerned almost entirely with the review of administrative discharge procedures. The volume of applications indicate the need to retain this process in a specialized field. Such review is based almost entirely upon compliance with procedural aspects of separation policies and the protection of the individual's rights. The discharge review boards are composed of military officers who have a lifelong knowledge of the problems of military service. Also maintaining another step in the appellate process is considered paramount in insuring that a serviceman's individual rights are protected. It provides a means whereby an individual, who is unsuccessful before the Discharge Review Board, may bring his case to the correction boards, composed of civilians, for a determination as to whether under the equitable and humanitarian concepts of the Board there is an error or injustice in his discharge. The correction boards function in an almost unlimited range of personnel actions and are so much concerned with equity as right in its adjudication.

Question. *If some sort of consolidation were decided upon, how should it be handled?*

Answer. In view of the divergence in composition of the respective boards, i.e., the Discharge Review Board by statute being a military board and the correction boards being civilian boards, it appears that a basic determination for the Congress would be whether a consolidated board should be military or civilian. It is believed that some legislation would be needed either to amend the present statutes or to set out anew the intent of Congress in this regard.

Questions 9 and 10. *To insure uniformity would it feasible to unify the correction boards of the three services?*

Answer. The Department of Army is of the opinion that it is feasible to unify the correction boards of the three services, in that this function can be performed on a unified basis; however, the present system of separate service boards is, in our judgment, working well, and while uniformity is desirable, we are more interested in justice in a particular case. We have a workable system of meting out justice wherever an injustice is brought to our attention. Also, the nature of regulations, policies, grades, terminology, etc., inherent in the diverse services would definitely result in such difficulty of operation that it could be predicted that such boards would ultimately be compartmented and would operate almost as independently as they do at the present time.

With respect to the combining of the three service discharge review board at DOD level, it is believed that while this is administratively feasible, it is neither essential nor desirable. While uniformity is a desirable objectve, it should not be an end in itself. In the subject under discussion, a matter of justice and equity is involved and, while not excluded by the establishment of a board with joint service membership, it is believed that the particular department concerned can best handle the review of a discharge of a former member.

The Army Discharge Review Board is composed of senior officers with command experience. They are familiar not only with the customs of the Army as a service, but also with the standards and maintenance of discipline as well as the requirements and procedures which lead to the issuance of an administrative separation.

It is firmly believed that the present decentralization to the services provides the quickest, most equitable and effective method of reviewing discharges which are appealed.

Questions 9 and 10. *Isn't it true that the Air Force differs with the other two services concerning the authority of the correction board? The Air Force seems to consider that the correction board has power to wipe out the conviction itself, while the Army and Navy seem to feel that only some of the facts of a court-martial conviction can be altered but not the conviction itself. Should these diverse interpretations exist? If not, which should be adopted?*

Answer. The Department of the Army has adopted the position that in view of the opinions of the Attorney General dated February 24, 1947, and December 29, 1949, the Army Board for Correction of Military Records may not disturb the finality of a court-martial conviction.

In reply to a joint letter from the Secretary of War and the Secretary of the Navy requesting opinion whether entries in naval and military records resulting from actions of general courts-martial and other statutory bodies come within the purview of section 207 of the Legislative Reorganization Act of 1946, the Attorney General replied on February 24, 1947, that "On the other hand, the language of section 207 cannot be construed as permitting the reopening of the proceedings, findings and judgments of courts-martial so as to disturb the conclusiveness of such judgments which has long been recognized by the courts. This conclusiveness of judgments of courts-martial is indicated by the following excerpt from the opinion of the Supreme Court in *Ex Parte Reed* (100 U.S. 13, 23). * * *

"The correction of the record and the issuance of a new discharge may be regarded as acts of clemency or in mitigation, precisely comparable in effect to a successful appeal to the Congress for relief by private act."

It is not believed that a diverse interpretation of the authority of the correction boards should exist, since all of the boards derive their statutory authority from the same state and operate under regulations approved by the Secretary of Defense.

Questions 9 and 10. *What legal advice is made available for the Discharge Review Board and the Board of Correction for Military Records in matters involving legal problems? Do lawyers serve on either board in any of the services?*

Answer. The Army Board for Correction of Military Records has, upon request, legal advice available to it from the Judge Advocate General's Office, as well as the Department Counselor. Also, at least half of the permanent examining staff of the Army Board for Correction of Military Records are members of the bar or graduates of accredited law schools.

Lawyers do serve as members of the Army Board for Correction of Military Records; however, the fact that some members are law graduates is not a factor in their appointment to membership of the board, nor selection for any panel.

Two officers of the Judge Advocate General's Corps are assigned to the Army Council of Review Boards and their services are always available to the President and members of the Army Discharge Review Board. As stated in the answer to question 9, a member of the Judge Advocate General's Corps must sit as a member of the Army Discharge Review Board when a security case is reviewed. Further, the services of the Office of the Judge Advocate General are readily available to the board. A lawyer may sit as a member during other than security cases, but normally does not.

With respect to the answers to question 11:

*The Navy answer seems to indicate that an applicant can obtain a hearing, confrontation, and cross-examination before the Board for Correction of Navy Records if circumstances are such as to require these procedures. Is there a subpena power of this Board and what are the circumstances which require these procedures? What is the situation in the other services?*

*The Navy indicates that it used procedures which permit confrontation of adverse witnesses and an opportunity to cross-examine them. Is there any similar right of confrontation provided for under Air Force and Army procedures in the same type of case?*

*In connection with show-cause procedures for eliminating officers, note the difference between the Navy on the one hand and the Army and Air Force on the other. Would it be desirable to reconcile these differences?*

*Would it be desirable to provide some type of subpena power in discharge cases or show-cause cases and to what extent can depositions be taken for use in such procedures?*

Answer. The Army Board for Correction of Military Records does not consider that it has subpena power. However, the Board may, and has, invited witnesses to appear before it to clarify any matters which are in dispute. The proceedings before the Army Board for Correction of Military Records are not regarded as adversary proceedings. The applicant is permitted to appear with or without counsel and such witnesses as he may desire, and may present his case to the Board in whatever light he considers most favorable to substantiate his allegations of error or injustice in his military records.

Attention is invited to the previous Army reply on this procedure (10 U.S.C. 3781–3793, 8781, 8791). It appears that this procedure is much less summary in nature than that described by the Navy in their response to question 11. Each officer in the Army is provided consideration by three boards and the Secretary of the Army prior to discharge (for officers with less than 3 years' service, one board and the Secretary). Although the statutes require this procedure only for Regulars, the Army has extended the protection of this procedure to Reserve component officers also. It would appear, therefore, that there would be much less requirement for resort to a Board for Correction of Records in the Army-Air Force system.

In the Army confrontation of adverse witnesses is provided for before the Board of Inquiry. (See app. I, par. 14b(2)(d), AR 635–105, previously furnished.) Use of depositions and affidavits is encouraged in the same reference.

The Army concurs in a reconciliation of the differences between the Navy system on the one hand versus the Army-Air Force system on the other. The Army-Air Force system is preferred, primarily because it appears to better protect the rights of the individual. This condition was noted by the Bolte Commission in its review of the Officer Personnel Act. The legislation proposed as a result of that Commission's deliberations proposes to bring the Navy and Marine Corps under the Army-Air Force system.

It would be idealistic and perhaps desirable, though expensive and impractical, to have subpena powers. We are not aware of any other governmental agency which has this power in connection with the separation of its personnel.

With respect to questions 11 through 13: *In situations where the Board hearing is granted with respect to an administrative discharge and the Board makes a recommendation favorable to the serviceman, under what circumstances can the commander refer the matter again—to the same Board or to another Board for a second determination?*

Answer. Request you refer to the response pertaining to question 7.

With respect to the Army and Air Force answers to question 12, and the directives which those answers reflect:

*What is the meaning of an administrative discharge in the "best interest of the service and of the individual?" What is meant by the "best interest of the individual?"*

*If the individual requests trial by court-martial, should the services determine that it was not in his "best interests" to be tried by court-martial and that he should be administratively discharged?*

*In connection with administrative discharges for prosecution under State law, is primary attention given to the wording of the information or indictment in the State court as a basis for determining what the punishment would be under the Uniform Code of Military Justice?*

*With respect to the Navy's answer to question 12: Note that the Navy indicates that where a court-martial is denied despite the request for a trial by court-martial, the discharge directed is almost invariably under honorable conditions. Do the other services followed the same procedure?*

Answer. As used by the Army the term "best interest of the individual" normally is associated with a decision which is made by the soldier himself. There are instances, however, wherein the officer exercising general court jurisdiction could logically deduce that issuance of a discharge through administrative process rather than resort to court-martial would best serve the interest of the individual, regardless of the individual's desires. For example: a soldier with a large family has previously been tried by several inferior courts-martial for minor infractions and demands trial for an alleged similar infraction.

General court-martial might be indicated which probably would result in confinement and forfeiture of pay. In this instance the commander considers immediate discharge of the soldier involved to be an acceptable solution which does not temporarily deprive the family of a means of livelihood. Another example would be the case of a retirement eligible individual who is administratively separated rather than allow him to jeopardize his retirement equity by appearance before a court-martial.

The Army does not always deny trial when such is demanded and, as stated below, in most cases where trial is denied, separation of the soldier is under honorable conditions.

The discharge provisions of Army Regulations 635–206 are based upon the offense(s) of which the military person stands convicted by the domestic or foreign tribunal, not by the offense(s) under which the serviceman was indicted. Therefore, the criminal information or indictment is of no importance to military commanders acting pursuant to the provisions of AR 635–206 unless the serviceman is, in fact, convicted of the exact offense(s) charged in the information or indictment.

In cases where a court-martial is denied despite the request for a trial by court-martial, the character of discharge issued is based upon the soldier's military record. In the absence of a Board hearing (unless waived by the individual) in all cases other than those involving fraudulent entry, conviction by a civil court, a juvenile offender, or a prolonged absentee, the type discharge is, as stated by the Navy, invariably under honorable conditions.

With respect to the Army answer to question 12: *Would it be desirable to eliminate nonpayment of debts—even if "dishonorable"—as a basis for discharge or for prosecution? Is the argument valid that to eliminate this sanction would dry up the credit of servicemen since there are no Federal garnishment laws?*

Answer. The nonpayment of lawful debts, while it involves a small percentage of service personnel, is a problem of considerable magnitude to the Army. It is recognized that in many cases the individual is unable to pay his lawful obligations due to unforeseeable circumstances, i.e., a sudden and unexpected loss of income, medical bills, and other factors. This type of case, it is agreed, is not a proper subject for disciplinary action. A dishonorable failure to pay debts which is so gross as to be service discrediting in violation of article 134, Uniform Code of Military Justice, is one where the individual has obtained credit and has subsequently failed to satisfy his lawful obligations, by deceit, fraud, willful evasion, bad faith, gross indifference, or false promise. A mere negligent failure to pay a just debt is not an offense punishable under the Uniform Code of Military Justice.

Current Army regulations (par. 3e, AR 635–208, Apr. 8, 1959) provide for administrative discharge of enlisted personnel for failure to pay debts when it is determined that there exists "an established pattern showing *dishonorable* failure to pay just debts." [Italic supplied.] This policy is considered to be appropriate for continuation. Similar regulations and policies are applicable to officer personnel.

The Army is not a collection agency and there is no legal basis by which the Army may force a member to pay creditors. The Army has no means whereby it may determine the validity of a disputed debt. However, in an effort to protect its own good name, standing and reputation, including that of its members, the Army attempts to impress upon members being "dunned" by creditors their legal and moral obligations to settle their financial obligations.

In this connection it is noted that service members whose records are characterized by an established pattern for dishonorable failure to pay indebtednesses are usually instrumental in contributing to one or more of the following conditions:

(1) An adverse effect on the availability of credit to other military personnel.

(2) Creation of burdens involving administrative problems for their commanding officers resulting from the handling of inquiries from creditors.

(3) In oversea areas, development of an unfavorable image of the American way of life and causing governmental interest because of their lack of amenability to local civil process under international agreements.

To eliminate the mentioned basis for discharge would, generally, have some adverse effect on the availability of credit for servicemen. However, elimination of this basis for discharge could result in a situation that should currently exist—but apparently does not—that is, better business procedures by prospec-

tive creditors in extending credit to service personnel. Further, the elimination of such a basis for separation of military personnel could be construed as creating a haven for individuals who are disinclined to satisfy their financial obligations. Lastly, consideration should be given to the fact that the Army must and does shift its personnel around without regard for any local civilian consideration. Thus, the Army may well take from the local creditor the only means he has to enforce his debt: legal action in the local court.

It may be of interest to note that civilian personnel regulations (CPR C2, Mar. 21, 1961) of the Department of the Army concerning the discharge of private financial obligations are substantially the same as those for military personnel, and provide for official reprimand, suspension, or removal for failure to pay just debts. This long-standing rule is consistent with civil service regulations. It is believed that other civilian agencies of the Federal Government have similar deterrents.

*With respect to the Army answers to questions 14 and 15, it should be inquired whether there are instances where lawyers have been declared not reasonably available as defense counsel in special courts-martial, but one or more lawyers have been assigned as members of the court. The subcommittee has received information indicating that this has occurred on some Army posts.*

Answer. Rarely is a judge advocate appointed to serve as a member of a special court-martial. In those instances (unless he is the senior member and therefore president), he has no more authority or responsibility than any other member of the court. It is possible that a judge advocate has been appointed as a member of a court-marital which tried an accused who had requested specific counsel and the person requested was determined to be not reasonably available. Confirmatory statistics are not available; however, an examination of pertinent departmental files pertaining to requests for individual military counsel did not reveal a single instance where requested counsel was denied on the basis that such counsel was unavailable because of appointment as a member of a special court-martial. Nor does it appear that an accused has complained to appropriate authority that he was deprived of requested counsel because judge advocate personnel were being appointed as members of special courts-martial. It is believed that such an allegation if made would prove to be unsubstantiated.

Pertaining to question 18: *With reference to the Army's specialized law officer plan, would there be possibilities in peacetime only of using civilians as law officers—and in time of war have as law officers Reserve officers and retired personnel recalled to duty?*

Answer. The field judiciary in the Army is adequately staffed with JAG personnel, and consequently, no problem exists which would require serious consideration of the solution suggested by the question. However, the following comments are believed pertinent.

One of the country's prominent jurists once said:

"* * * I am not one of those who think that a man ceases to be a man and a citizen when he becomes a judge and would have him retire from the life of his community as though he were entering a monastery. A judge will be a better judge if he is a good citizen and takes his full part in bettering the life of the community in which he lives." [1]

A shorter way of putting it is that one serving as a trial judge must be a part of the social group in which he serves and responsive to its needs. Sympathetic as a civilian law officer might be toward the military, it is doubtful that he ever could be a part of the military community. Consequently, the effectiveness of a civilian law officer would be reduced and thus, the civilian law officer would not be able to contribute to the accomplishment of the Army and JAG mission to the degree that an officer could.

More significant is the fact that a civilian would not be attuned to military needs to the same extent as an officer in respect of the latter's responsiveness to requirements for going any place under any condition with the same sort of logistical support as is provided other members of the military. In addition, their use to any appreciable extent would eliminate the cadre and core of experience which active Army judge advocates now provide as a base for wartime expansion, and it would deny to many capable and deserving judge advocates a rewarding career field in the Judge Advocate General's Corps.

---

[1] Parker, John J., "The Judicial Office in the U.S.," 23 NYU L. Rev. 237.

With respect to the answer of all services to question 21: *In those cases which involve instructions given to the court members by the convening authority and staff judge advocates, is it really necessary to have such instructions? Could not the same purpose be accomplished by some other means?*

Answer. The problem of the issue of "command influence" arising from instructions given to court members by staff judge advocates and convening authorities has been of continuing concern to the Department of the Army. It was recognized that even when allegations of "command influence" were not substantiated, the taint remained in the public mind and confidence in the essential fairness of the military justice system was diminished. On the other hand, instructions to court members by the staff judge advocates and convening authorities were specifically sanctioned by paragraph 38, Manual for Courts-Martial, United States, 1951. Their beneficial effect when properly administered had been noted with approval by the U.S. Court of Military Appeals.

Recently, however, it was concluded by both the Judge Advocate General of the Army and the Chief of Staff of the Army that whatever beneficial results flowed from such instructions were overshadowed by the detrimental results occurring when such instructions were improperly, albeit unintentionally so, administered. Accordingly, on January 26, 1962, the Judge Advocate General dispatched the attached letter (enclosure 1) to the staff judge advocates of all commands exercising general court-martial jurisdiction. On February 5, 1962, the Chief of Staff dispatched the attached letter (enclosure 2) to all commanders authorized to convene general courts-martial. Both of these officials concluded that special instructions to court members should be discontinued. It was further concluded that reliance should be placed upon the instructions given by law officers in individual cases, and the general instructions in the administration of military justice in service school and unit training.

[Enclosure 1]

HEADQUARTERS,
DEPARTMENT OF THE ARMY,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
*Washington, D.C., January 26, 1962.*

JAGJ 1962/8215

[This letter, addressed to the individual concerned, was sent to the staff justice advocate of each Army commander exercising general court-martial *jurisdiction.*]

The purpose of this letter, which is being sent in identical form to all staff judge advocates, is to express my views and concern regarding the question of "command influence." You should not regard this letter as being in any way a criticism of the operations of your particular office.

One of the prime objectives of The Judge Advocate General's Corps and the Army as a whole is to instill public confidence in the administration of military justice. No other single factor has a greater tendency to sap this public confidence than allegations of "command influence." Although many of these allegations are ultimately found to be unsubstantiated, the appearance of evil in only a few cases is sufficient to tarnish the reputation for fairplay and careful concern for the legal rights of all which we are attempting to maintain in the daily administration of military justice.

Regularly scheduled basic instruction in military justice forms a key portion of the Army's traditional educational program. This instruction is included in the curricula of service schools and unit instruction for all personnel. However, in recent years one of the most fertile grounds for the development of allegations of command influence has been the apparently increasing practice of giving additional instruction to present and prospective members of courts-martial. These activities have included group lectures, instructions given only to members of a particular court, directives on disposition of specific categories of offenders, and questionnaires.

These activities have resulted in numerous decisions of the Court of Military Appeals in which the question of command influence has been discussed at great length. Newspapers have exploited the sensational aspects of these decisions. The overall result has been detrimental not only to the corps but to the Army as a whole. The resulting evil far outweighs any benefit which could flow from such activities.

The law officer is required to instruct the members of a general court-martial with respect to the law applicable to the particular case at bar. In addition,

it is now the custom of members of our field judiciary to instruct the court on the duties and procedures of court members and, in practical effect, on all matters that the members should properly take into consideration in connection with their sitting upon the case and in arriving at their findings and sentence. The instructions of the law officer are tailored to fit the issues of the specific case, and abstract discussions of legal principles without reference to specific circumstances, which are so confusing to a layman, are thus avoided.

It is my opinion that the general instruction on military justice contained in the regular educational program and the instructions of the law officer will eliminate the future need for any instructional activities on the part of staff judge advocates of the nature discussed above. I suggest that you adjust the practices of your office accordingly, if there is any need for you to do so.

Sincerely yours,

CHARLES L. DECKER,
*Major General, U.S. Army,*
*The Judge Advocate General.*

[Enclosure 2]

[This letter, addressed to the individual concerned, was sent to each officer in the U.S. Army exercising general court-martial jurisdiction.]

FEBRUARY 5, 1962.

DEAR ——— ———: The purpose of this letter, which is being sent in identical form to all commanders exercising general court-martial jurisdiction, is to express my views and concern regarding the question of "command influence." You should not regard this letter as being in any way a criticism of the operations of your command.

As you are aware, it is essential that our excellent court-martial system generate public confidence in the basic fairness of the administration of military justice. No other single factor has a greater tendency to destroy public confidence in the system than allegations of "command influence." Although these allegations may often be unsubstantiated, the appearance of evil in only a relatively few cases is all that is required to undermine the faith of the public in the essential fairness and impartiality of our military justice procedures.

Many of the recent allegations of "command influence" have arisen from instructions given either by commanders or by staff judge advocates to present or prospective members of courts-martial. In my opinion, such special instructions are wholly unnecessary. Basic instruction in military justice forms a key portion of the curricula of service schools and unit instruction for all personnel. Such instruction affords personnel an adequate foundation in the basic principles of military law. The law officer of a general court-martial is required to instruct members of the court in detail both with respect to legal issues and procedural matters in the particular case being tried. They are tailored to fit the specific facts under consideration and do not confuse court members with theories and propositions unrelated to particular problems before them.

The Judge Advocate General, in the discharge of his technical supervisory responsibility for the administration of military justice throughout the Army, has directed that staff judge advocates eliminate special instructions to members of courts-martial from the future activities of their offices. In view of the above, it is suggested that you also eliminate such instructions given by you, your senior representatives, or subordinate commanders exercising court-martial jurisdiction if there is any need for you to do so. The long-range, concrete benefit to the Army as a whole from such action should be apparent to all.

With regards and best wishes,

Sincerely,

G. H. DECKER,
*General, U.S. Army,*
*Chief of Staff.*

With respect to Army and Navy answers to question 22: *To what extent is a negotiated plea program used in special courts-martial?*

Answer. There are very few negotiated pleas in the Army special courts-martial. A sampling of a few jurisdictions indicates that less than 1 percent of the guilty plea cases tried by special courts-martial involve any pretrial negotia-

tion on the sentence. In many cases where the negotiated plea has been used, it was initiated by civilian counsel representing the accused.

Question. *Why does the Air Force have a policy of requiring prima facie proof even when the defense counsel requests no evidence be received?*

*Can't the objections made by the Air Force be solved by the Army method on a full hearing before the law officer concerning the reason that the defendant is entering his plea?*

*What are the Army and Navy reactions to the objections stated by the Air Force?*

Answer. Insofar as the Air Force views in guilty plea cases are concerned, it is observed that the Army practice in negotiated pleas has been generally successful and meets the ends of justice. As has been indicated in the Army's original answer to this question, the law officer, in an out-of-court hearing, questions the accused in detail as to his understanding of the meaning and the effect of his plea. The Army believes that there are sufficient safeguards in the procedures to avoid any misunderstanding on the part of the accused concerning his plea of guilty.

With respect to the Army answer to question 23: *What reason, if any, is there for what appears to be the drop in percentages of guilty pleas in 1961 as compared with the previous 4 years?*

Answer. The following is submitted only as one possible explanation for the increased percentage of "not guilty" pleas during fiscal year 1961; there well may be other factors involved that are not known by the administrators of the Army's courts-martial system:

On May 6, 1960, the U.S. Court of Military Appeals handed down the decision in the case of *United States* v. *Jacoby* (11 USCMA 429, 29 CMR 244). This decision overruled a long series of cases upholding the use of written depositions by the military establishment in courts-martial trials pursuant to article 49, UCMJ. The *Jacoby* decision held that the accused, not merely his counsel, must be afforded an opportunity to be present at the taking of depositions on written interrogatories of prosecution witnesses. The Government, therefore, to comply with the court's decision, must either bring the accused and his counsel to the witness, or bring the witness to the accused.

In some instances, essential civilian witnesses residing in the United States have refused to appear in a court-martial convened in an oversea area. The Government has not sought to bring the accused and his counsel (and guards if pretrial confinement is involved) to the witness due to the great expense involved. The Government may, nevertheless, believe that the case can be successfully prosecuted without the civilian witness(es). The accused and his counsel, however, may believe that the Government's case must fail without the testimony of the civilian witness(es) who refuse to appear and testify before the tribunal. Therefore, the accused, upon the advice of counsel, enters a plea of "not guilty," thereby requiring the Government to prove its case beyond a reasonable doubt.

If the Government would have been able to either produce this civilian witness(es) at the court-martial or have been able to introduce the deposition of the witness(es), the accused and his counsel might well have entered a negotiated plea of "guilty."

With respect to question 25: *Each service might comment on whether statistics from the three services indicate that sentences are relatively uniform in the Army, Navy, and the Air Force.*

Answer. A statistical comparison of the median or "average" sentences of the Army, Navy, and Air Force courts-martial discloses a rather uniform pattern of confinement adjudged for the reported types of offenses. For example, consider the offense of larceny in violation of article 121, Uniform Code of Military Justice (exclude the larcenies tried by an inferior court-martial); the average confinement adjudged in the Army general courts-martial was 6 to 9 months; Navy, 10 months; Air Force, 5 to 10 months. A similar uniformity exists in the other reported statistics.

With respect to the answer to questions 26 and 27:

*In the interest of uniformity, would it be desirable or feasible to have a joint board of review composed of members of all three armed services—but in any special case including a member of the service from which the case comes? Or would it be feasible to have an all-civilian board of review as some have recommended?*

*To what extent, if any, are retired officers used—with their consent—as members of boards of review?*

Answer. There would be no advantage to having a joint board of review composed of members of all three services. Members who have had extensive experience with the formulation and administration of policies and regulations of a particular service are best equipped to dispose of problems arising in that service in an efficient and expeditious manner. Even though the policies and regulations of all services were uniform, the problem arising in the Army in sustained land combat are so unique to that service that it would be difficult if not impossible for a person without some knowledge of these problems to consider them intelligently and dispose of them with impartiality.

The Judge Advocate General of the Army appoints as members of boards of review senior officers with outstanding records.

One retired officer is now serving as a member of a board of review in the Army. It is contemplated that at least two other outstanding officers will be selected from among the officers retiring in 1962 for recall to active duty and service on a board of review.

With respect to the Army answer to question 27: *The Army indicates that the chairman of a board of review rates the other two members. This system is somewhat similar to a former Navy practice, apparently disapproved by the Court of Military Appeals, of having a court-martial president rate the performances by the junior members. Doesn't such a system tend to impose control of the junior members by the chairman of the board?*

Answer. For various reasons, it is considered that the chairman can objectively rate the two junior members of a board of review without influencing them in the performance of their judicial duties. All members of a board of review are senior in grade (ordinarily, they are within 4 or 5 years of mandatory retirement) and have had wide experience in the practice of military law. Great care is exercised in selecting the chairman of each board to insure that he possesses a high degree of objectivity, impartiality, and judicial temperament. The efficiency reports rendered by him are reviewed and endorsed by The Assistant Judge Advocate General, who is the chairman's immediate supervisor.

Under these circumstances, it is inconceivable that a chairman would attempt to use an efficiency report as a means of influencing a member of the board, or that the member would ever feel that he must tailor his views to those of the chairman in order to avoid a poor report.

Actual experience during the past 11 years discloses no instance of undue influence being exercised by the chairman of a board of review because of his efficiency reporting authority.

With respect to the answers to question 28:

*Do there seem to be significant differences as between the Army and the Air Force and between the Navy and the Air Force in sentence reductions in cases tried by general courts-martial? What is the explanation for these differences?*

*What interservice differences, if any, seem to exist in boards-of-review action as shown by the statistics furnished here? Why do these differences exist?*

Answer. It would appear more appropriate for that portion of the question concerning differences, if any, between figures for the Departments of the Navy and Air Force to be answered by those services.

The Department of the Air Force submitted figures only on cases considered during calendar years 1960 and 1961. Accordingly, any comparison between Army and Air Force figures must be limited to these 2 years. Parenthetically, it should be noted that the figures submitted by the Department of the Army are based on fiscal years computation.

In fiscal year 1960 boards of review in the Office of The Judge Advocate General, Department of the Army, reduced sentences in a total of 29.4 percent of the cases considered, for example, 28.2 percent sentence reduced and 1.2 percent sentence disapproved in part. In fiscal year 1961 the total was 23 percent. The total cases considered was 3,029. In calendar year 1960 boards of review in the Office of The Judge Advocate General, Department of the Air Force, reduced sentences in a total of 4.6 percent. In 1961 the total was 11.6 percent. The total number of cases considered by such boards is not shown; however, in the Air Force answer to question 24 it is shown that in 1960 there were only 644 trials by general court-martial. Within that total are, of course, cases resulting in acquittal and cases which, pursuant to article 69, Uniform Code of Military Justice, were not reviewed by a board of review. Acquittals amounted

to 11 percent of the cases tried. Accordingly, the total cases reviewed was something less than 563. It is the opinion of the Department of the Army that this number is not sufficiently large from a statistical standpoint to make any comparison between Army and Air Force figures realistic.

It is submitted that the subject of appellate sentence reduction does not lend itself validity to a statistical approach. Each case must be judged on an individual basis. The factors considered such as nature of the offense, age of the offender, prior history of the offender, elements in aggravation, et cetera, must be considered not on an individual basis but rather as interacting factors. Even were an attempt to be made to compare results reached on a case-by-case basis no truly realistic conclusions could be drawn. One additional or absent fact would render two superficially similar cases inapposites. Accordingly, the specific answers to the questions posed are as follows:

(*a*) There are bare numerical differences between the Air Force and the Army with respect to sentence reductions in cases tried by general court-martial. These differences are not significant.

(*b*) These numerical variations exist because of the inherent nature of the subject matter sought to be analyzed statistically, and because of the small number of the statistical sample involved.

(*c*) The remaining figures relating to actions of boards of review do not reflect substantial variations of even a bare numerical nature.

With respect to the answers to question 29: *The statistics seem to show sharp discrepancies between the Army and Navy on the one hand, and the Air Force, on the other, with respect to reduction of sentence by the convening authority. Is this primarily a reflection of the Army's and Navy's negotiated guilty plea procedures? Or what does it reflect?*

Answer. The discrepancies between the Army and Navy statistics on the one side and the Air Force statistics on the other, with respect to the percentage of court-martial sentences reduced by convening authorities, is primarily a reflection of the successful use of negotiated guilty pleas by the Army and Navy and the nonuse of such a program by the Air Force.

In fiscal year 1952, the last year during which the Army did not utilize a guilty plea program, Army convening authorities modified 24 percent of the adjudged general court-martial sentences. This is in contrast to the 52 percent of the general court-martial sentences which were modified by convening authorities in fiscal year 1961.

To avoid prejudice to accused who have entered into a guilty plea agreement the sentence mutually agreed to by convening authority and accused are not made known to the court-martial. Army and Navy statistics pertaining to action by convening authorities on court-martial sentence include those cases where adjudged sentences have been reduced to bring them into line with the guilty plea agreement.

Question. *What differences, if any, seem to exist in convening authority action as between the services and what is the explanation for these differences?*

Answer. Armywide statistics on average sentences approved by convening authorities for typical offenses which would allow a comparison with convening authority actions of the other services are not available. Spot checks made by the Army comparing average approved sentences similarly ascertained by the other services (see question 25) suggest more similarity than differences in convening authority actions as between the services on courts-martial sentences.

With respect to answers to question 31: *The Army answer mentions one safeguard concerning pretrial confinements that has been recognized as lawful by the Court of Military Appeals. This safeguard is the requirement that the staff judge advocate approve the pretrial confinement. Do the other services have similar procedures? Could this perhaps be tied in with the full judicial program? Or would there be other possibilities formalizing this type of procedure?*

Answer. In answer to the second question, neither the Uniform Code of Military Justice nor the Manual of Courts-Martial, United States, 1951, requires the approval of the staff judge advocate as a prerequisite to ordering an accused into pretrial confinement. As a policy maker, many Army commanders who exercise general court-martial jurisdiction require such approval. Since the determination is a matter of discretion properly lying within the province of the commander concerned, the decision is not judicial in nature. In addition, there are numerous posts and units that do not have the services of a staff judge advocate or other judge advocate personnel immediately available. The administrative difficulties under these circumstances are readily apparent.

With respect to the answer to question 33: *There seems to be some difference between the practice of the Army and the Navy in the requirements of approval for trial by general or special court-martial of conduct that was previously tried in a State court. Would the Navy practice be a desirable requirement for the other services?*

Answer. No. It is a rare occasion in the Army when a member is tried by court-martial after having been tried for the same act or acts in a State court. It is believed that the Army procedure is equal or superior to that employed by the Navy. The same general criteria in determining the fairness of referring those cases to trial are employed by both the Army and the Navy. The only substantial difference, in practice, is that the Navy requires secretarial approval prior to trial of such persons by general or special court-martial, whereas the Army requires the personal determination of an officer who exercises general court-martial jurisdiction as a prerequisite to trial by any court-martial.

---

DEPARTMENT OF THE ARMY,
OFFICE OF THE UNDER SECRETARY,
*Washington, D.C., March 23, 1962.*

Mr. WILLIAM A. CREECH,
*Chief Counsel and Staff Director,*
*Constitutional Rights Subcommittee,*
*U.S. Senate, Washington, D.C.*

DEAR MR. CREECH: In reference to our recent telephone conversation, I am forwarding to you certain additional or clarifying material which has been developed in an effort to assist the subcommittee. This material is based upon a review of the original subcommittee questionnaire, the aide memoire, and the testimony given by the various witnesses during the hearings of the subcommittee. This supplementary information either amplifies the replies given to certain of the original questions or contains comments on matters raised by non-Army witnesses. It is respectfully requested that this material be made a part of the subcommittee's official record.

There are certain points which I believe the subcommittee will find of particular interest in these supplementary responses. These areas concern: the legality of requiring the respondent to bear the burden of proof in officer elimination proceedings (at pp. 8–10) and the desirability or feasibility of giving service personnel the option of electing trial by court-martial where a discharge under other than honorable conditions may be warranted (at p. 17). In addition, I am sure the committee will be pleased to learn that the efficiency rating system for members of the Army Judge Advocate General Boards of Review has been modified so that they are no longer rated by the chairman of the individual boards of review.

The opportunity to submit this clarifying material to your committee for its consideration is appreciated.

Sincerely,

ALFRED B. FITT,
*Deputy Under Secretary (Manpower).*

With respect to question 1: *Mr. Creech stated that the subcommittee has been told informally and unofficially that, as recently as 1958, there were quotas assigned for the administrative separation of enlisted men. A witness was asked if he was familiar with this procedure, to which a negative reply was given.*

Army answer. The information informally provided the subcommittee relates to the job performance potential program (JPPP) instituted on July 23, 1957. This program, referred to in other data supplied the subcommitee by Department of the Army, had the objective of reducing enlisted strength without loss of effective personnel. Separations were based on a combination of low scores upon being tested by the Army Classification Battery (ACB), plus observed substandard performance. The program was conducted in three phases and major commanders were allocated quotas in each phase for the separation of assigned personnel based on numbers selected for discharge, adjusted downward to meet the overall numerical and qualitative objectives of the program. Each soldier discharged wherein a quota was assigned under this program was issued a discharge under honorable conditions. Therefore, it is true that the Army assigned quotas for the administrative discharge of soldiers in 1958, but the Army has never established quotas for the issuance of discharges of a specific character.

With respect to questions 7 and 11: *An analysis of the testimony before the Subcommittee on Constitutional Rights of Service Personnel reveals that many witnesses are obviously unfamiliar with the current administrative discharge system for eliminating officers. The Army recognizes that some of the procedural faults discussed by these witnesses were not alined with the concepts or standards embodied in the laws that Congress has seen fit to provide; therefore, the majority, if not all, of the faults which they point out were eliminated from the system in July 1960. A discussion of the principal complaints follows:*

Army answer. (*a*). One witness stated that he had seen instances where a record of an individual, his military record, was unavailable for inspection by counsel prior to a board hearing, thereby depriving counsel of the opportunity to adequately prepare his case.

Current procedure grants the respondent in an officer elimination case not less than 30 days from date of notification in which to prepare his case. During this time he is allowed full access to all records relevant to his case to include a copy of that portion of his military record upon which the elimination action is based. In addition, the respondent has an absolute right to request and receive copies of any additional documents contained in his military records or efficiency report files at Headquarters, Department of the Army. The only exceptions to the foregoing under current practices might occur when requested documents are withheld if such action is deemed to be in the interest of national security.

(*b*) Several witnesses refer to the inappropriateness of the use of a recorder to represent the respondent as well as the Government.

The Army requires that each officer electing to appear before a board of inquiry be provided with a counsel who is an officer of the Judge Advocate General's Corps; or counsel of his own selection without expense to the Government, in lieu of or in addition to military defense counsel. The only instance, under current procedure, where a recorder might present a respondent's case would be one wherein the respondent refused the legal representation proffered him. The procedure likewise applies to enlisted elimination cases, where the recorder will present the respondent's case only when the serviceman has refused the assistance of counsel.

(*c*) One witness referred to the "show cause" selection board as being composed of five general officers.

The composition of these boards was changed from five general officers to three general officers in July 1960.

(*d*) In their testimony in support of a judicial system to supplant current administrative elimination procedures, several witnesses complained that they had appeared before boards of inquiry which accepted unmistakably inadmissible evidence over their objections as counsel for the respondent.

This situation probably did exist prior to July 1960. Although field boards of inquiry continue to be administrative in nature and are not subject to the rules and procedures governing court action, a staff legal adviser is now required to be present at all board sessions. The legal adviser is prohibited from taking an active part in presenting the case or cross-examining witnesses. He is present at all open sessions and may be called upon to advise the board on admissibility of evidence, arguments, motions, or other contentions of counsel, procedures, and any other matter determined appropriate by the president of the board.

With respect to questions 9 and 10: *Several witnesses appearing before the subcommittee have questioned the independence of action by the Army Board for Correction of Military Records. One witness testified that the members of the Board are appointed by the Judge Advocate General. Similar comments were made by various witnesses concerning the Army Discharge Review Record.*

Army answer. The Army Board for Correction of Military Records is, by statute (10 U.S.C. 1552), composed of civilian members of the Department of the Army appointed by the Secretary. Army Regulations 15–185, promulgated in implementation of the statute, provides that the function of the Board is to consider all applications properly before it for the purpose of determining the existence of an error or an injustice and to make appropriate recommendations to the Secretary of the Army. Such regulations further provide that the record of the proceedings of the Board will be forwarded to the Secretary of the Army, who will direct such action in each case as he determines to be appropriate. The authority to correct a military record reposes in the Secretary of the Army. The Board makes appropriate recommendations in each case.

The Judge Advocate General of the Army exercises no control over the Board and has no direct responsibility for the assignment of members to the Board, As presently constituted, the Board consists of 13 civilian employees of the Department who, with the exception of the Chairman, serve on a rotating basis, in addition to their regularly assigned duties. If requested by the Secretary of the Army, the Judge Advocate General may nominate a civilian employee of his staff to membership on the Board. However, appointment is subject to the approval of the Secretary.

There is no reluctance on the part of the Board to recommend a correction of military records to remove an injustice notwithstanding that the Judge Advocate General may have at some time expressed an opinion that there is no legal error in the records. The Secretary of the Army has indeed corrected military records in every instance in which such action is necessary to remove an injustice even though prior boards or staff opinions may have held that the action taken in a given case was proper.

The desire of the Secretary to correct a military record when such action is necessary to correct an error or remove an injustice is reflected in the report that during the most recent 5-year period, 1957–61, 19.1 percent of the applications considered by the Board resulted in correction.

The Army Discharge Review Board is a statutory board (10 U.S.C. 1553) which has no connection with the Office of the Judge Advocate General. Further, the officers assigned to the Army Discharge Review Board and its parent organization, the Army Council of Review Boards, are not assigned by the Judge Advocate General. The cases which are reviewed primarily involve discharges accomplished by administrative boards, the actions of which are not reviewed by the Office of the Judge Advocate General.

With respect to questions 9 and 10: *One of the witnesses appearing before the subcommittee criticized the Army Board for Correction of Military Records because the Board failed to grant a formal hearing to each applicant.*

Army answer. The Army Board for Correction of Military Records grants a formal hearing in all cases in which examination of the military records or evidence submitted indicates a possibility of material error or injustice. The cases are prepared by the staff of the Board and are reviewed by a panel of the Board to determine whether to grant relief without a formal hearing, to authorize a formal hearings, or to deny the application without hearing it. Statistics show that during the most recent 5-year period, 1957–61, the Board granted formal hearings in 23.3 percent of the cases. The regulations governing the operation of the Board authorize the denial of the application without formal hearing if insufficient evidence has been presented to indicate probable material error or injustice (139 Ct. Cl. 152).

With respect to questions 9 and 10: *The subcommittee has expressed interest in the divergent views of the military services concerning the power of correction boards to expunge the fact of conviction by court-martial.*

Army answer. Section 207(a), Legislative Reorganization Act of 1946 (60 Stat. 837), as amended (5 U.S.C 191a), authorized the service Secretaries, acting through boards of civilian officers, to correct any military or naval record where, in their judgment, such action was necessary to correct an error or remove an injustice. The scope of authority thereby granted to the service Secretaries has not been judicially decided. The U.S. Supreme Court has held, however, that the proceedings, findings, and sentence of a court-martial may not be disturbed by an appellate tribunal within the same judicial hierarchy (*Ex parte Reed*, 100 U.S. 13 (1897); *Grafton* v. *U.S.*, 206 U.S. 33 (1907)). The military correction boards would not appear to be "appellate tribunals within the same judicial hierarchy."

Article 76, Uniform Code of Military Justice (10 U.S.C. 876), provides, in pertinent part:

"ART. 76. Finality of courts-martial judgments.

"The * * * findings * * * of courts-martial as approved, reviewed, or affirmed as required by this code * * * shall be final and conclusive, and orders publishing the proceedings * * * shall be binding upon all departments, courts, agencies, and officers of the United States. * * *"

The Attorney General of the United States, in response to a joint inquiry from the Secretaries of War and Navy concerning the authority of correction boards to erase the fact of conviction pursuant to the enabling provisions of

section 207, Legislative Reorganization Act of 1946, supra, stated, in pertinent part:

"* * * [S]ection 207 cannot be construed as permitting the reopening of the proceedings, findings, and judgments of court-martial so as to disturb the conclusiveness of such judgments. * * *

"The correction of the record * * * may be regarded as an act of clemency, or in mitigation, precisely comparable in effect to a successful appeal to the Congress for relief by private act" (40 Ops. Atty Gen. 504, 508 (1947).

On 29 December 1949, the Attorney General of the United States reaffirmed his original opinion (41 Ops. Atty Gen. 8 (1949)).

Based upon these rulings by the Attorney General, the Department of the Army is of the opinion that the Army Board for the Correction of Military Records, not being an appellate body in the courts-martial system, may not determine that the proceedings, findings, and sentences of courts-martial are null and void. The Board may determine, however, that an injustice or error has been effected by the imposition of a particular sentence. The Board, therefore, may legally recommend to the Secrtary of the Army that the results of a court-martial sentence be altered. In effect, the Department of the Army is of the opinion that the Army Board for the Correction of Military Records "may forgive, but not forget."

The Department of the Army is aware that the Comptroller General of the United States has stated, in pertinent part:

"The correction of a person's military record to remove a record of conviction of an offense under the Uniform Code of Military Justice is within the authority of a board convened under section 207(a) of the Legislative Reorganization Act of 1946 * * *" (35 Comp. Gen. 302, 306 (1955)).

The Department of the Army is of the opinion that the opinions of the Attorney General of the United States are controlling in this area, the opinion of the Comptroller General notwithstanding.

With respect to question 11: *Several witnesses appearing before the subcommittee have questioned the legality of requiring the respondent to show cause why he should be retained in the service. One witness has challenged the constitutionality of such a procedure whereby the respondent, rather than the Government, must bear the burden of proof in show cause proceedings.*

Army answer. The placing of the burden of proof on a respondent by requiring him to show cause for his retention on the active list of the Regular Army (10 U.S.C. 3791) does not contravene the due process requirements of the fifth amendment of the Constitution of the United States. By law a respondent is entitled to a fair and impartial hearing before a board of inquiry (10 U.S.C. 3792(b)). That Congress has specifically decided that at this administrative hearing the respondent be required to shoulder the burden of proving why he should be retained in active service and not eliminated because of moral or professional dereliction (10 U.S.C. 3791) is clear, not only from the statute itself, but by being underscored in the hearings prior to its enactment (if recourse to legislative history is deemed necessary). For example, the counsel of the Committee on Armed Services of the House of Representatives stated to Subcommittee No. 1:

"Mr. BLANDFORD. * * * I think with all this discussion that we have here on the record now, it must be mighty clear that the subcommittee means that the individual officer—make sure we get this down—means that the individual officer has the burden of establishing that he should be retained and if he fails to establish that he should be retained, and if his removal is recommended to the Secretary of the Army, that the Secretary of the Army may take action on the basis of that recommendation. That is what is intended" (hearings before subcommittee of House Committee on Armed Services on S. 1795, 86th Cong., 2d sess., p. 3802 (1960)).

Other indications and expressions of this "explicit," "careful and purposeful" action by the lawmakers (see *Green* v. *McElroy*, 360 U.S. 474), appear in the subcommittee and committee hearings and report (see e.g., hearings before subcommittee of House Committee on Armed Services on S. 1795, 86th Cong., 2d sess., pp. 3674, 3788, 3794, 3801 (1960); hearings before House Committee on Armed Services on S. 1795, 86th Cong., 2d sess., pp. 3829–3830, 3832, 3834–3835 (1960); H. Rept. No. 1406, 86th Cong., 2d sess., pp. 12, 13, 21 (1960)).

The predecessor statutes to the provisions of law quoted above show that Congress was aware of, and has used, the show cause procedure in the officer elimination area for many years. A show cause statute was first enacted in

section 11, act of 15 July 1870 (16 Stat. 318). Subsection 24*b*, National Defense Act of 1916 (39 Stat. 166), as added by the Army Reorganization Act, act of 1920 (41 Stat. 773), also prescribed this type of proceeding. Sections 3781 through 3785 of title 10, United States Code, was a codification of title I of the Army and Air Force Vitalization and Retirement Equilization Act of 1948 (62 Stat. 1081). By subsection 3(a) of the act of 12 July 1960 (74 Stat. 388), Congress split former chapter 359 of title 10, United States Code, into two parts by reenacting an amended chapter 359 to apply to the administrative elimination of regular officers for substandard performance of duty and by adding chapter 360 to effect the administrative elimination of regular officers for moral or professional dereliction or in interests of national security. Although this administrative procedure has been questioned in the courts on several occasions, none of these cases have dealt with the specific question posed here. Several of these cases did make clear that the general procedures prescribed were appropriate particularly as the statutes in question were not penal in nature (see *Creary* v. *Weeks*, 259 U.S. 336 (1922); *French* v. *Weeks*, 259 U.S. 326 (1922); and *Rogers* v. *United States*, 270 U.S. 154 (1926)).

In the Administrative Procedure Act (subsec. 7(c)), Congress recognized that other statutes could and would prescribe that a party other than the proponent of an order shall have the burden of proof. Such a case is subsection 2b of the Clayton Act, as amended by the Robinson-Patman Act (49 Stat. 1526, 15 U.S.C. 13(b)) which provides:

"(b) *Burden of rebutting prima-facie case of discrimination*

"Upon proof being made, at any hearings on a complaint under this section, that there has been discrimination in price or services or facilities furnished, *the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section*, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained in sections 12, 13, 14–21, and 22–27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price of the furnishing of services or facilities to any purchases or purchasers was made in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor." [Italic added.]

This provision is analogous to the burden of proof requirement before the board of inquiry. Although subsection 2b, supra, has been interpreted by the courts, at no time was the procedure requiring respondent to carry the burden of rebuttal questioned. (See *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231 (1951); *Minneapolis Honeywell Reg. Co.* v. *Federal Trade Commission*, 191 F. 2d 786 (1951).)

It does not appear that the show cause procedure is unfair either in terms of the statutory requirement of a fair and impartial hearing (10 U.S.C. 3792(b)) or in terms of the due process clause of the fifth amendment of the Constitution. Congress has provided that when a board of senior or experienced officers considers that the records of an officer disclose that he is unfit, then a prima facie case against his retention has been established. Unless he can overcome that case, he should be separated. Certainly the records of an officer which contain the basic information on his moral or professional conduct constitute a reasonable basis for the retention or removal determination. If the respondent presents a persuasive case at the board of inquiry hearing, an order of retention is entered and the matter is closed (10 U.S.C. 3792(d)). In each instance, this order is final. Certainly these procedures comport with other traditional ideas of fair procedure.

Accordingly, it is concluded that because Congress has explicitly provided that the officer concerned bear the burden of proving his fitness for retention, there is no inconsistency between that statutory requirement and that of the respondent's entitlement to a fair and impartial hearing; and that the placing of the burden of proof upon the respondent does not contravene the due process clause of the fifth amendment.

With respect to question 12: *It has been suggested by a number of witnesses that whenever any of the services contemplate separating a serviceman with any discharge less than honorable or under less than honorable conditions, that he be given the option of electing trial by court-martial. On the other hand, several witnesses have proposed an administrative procedure which would require a qualified law officer to preside in each case wherein an undesirable discharge was contemplated.*

Army answer. Proposed legislation which would provide that persons discharged from the Armed Forces who are proffered discharges other than honorable may reject such discharges and receive a court-martial, or if not court-martialed, shall be given honorable discharges has been introduced in the 84th, 86th, and 87th Congresses. The Department of the Army has strongly opposed enactment of each such legislative item for the reasons stated below.

In the vast majority of cases wherein undesirable discharges are eventually issued, trial by court-martial is impractical, if not impossible. For example, the most recent act or offense which illustrates the member's unfitness may not constitute an offense over which courts-martial have jurisdiction, or be of sufficient magnitude to warrant trial, let alone punitive discharge. Such is the conduct of the repeated civil offender, the habitual shirker, and others of like traits, many of whom have been tried by courts-martial on several occasions. It may not always be possible to eliminate by sentence of court-martial those military personnel who have been convicted and sentenced to confinement in a State court inasmuch as such prosecutions normally would be against Department of the Army policy (par. 2, AR 22-12, which provides in pertinent part, "A person subject to the Uniform Code of Military Justice who has been tried in a civil court normally will not be tried by court-martial * * * for the same act or acts." * * *). Likewise, a serviceman who has been convicted by a Federal court may not be eliminated by sentence of court-martial convened to adjudicate the identical act or acts presented to the Federal tribunal because of the former jeopardy protections provided by the Constitution. Additionally, those service personnel serving in countries which are parties to the NATO Status of Forces, or similar agreements, who have been convicted by the receiving state and are serving, or who have served, sentences to confinement may not be tried again by court-martial for the same offense or offenses (See art. VII, par. 8, NATO Status of Forces Agreement).

Nevertheless, such individuals do not merit a discharge under honorable conditions, or an honorable discharge which has traditionally represented the highest degree of faithful and excellent service to the Nation. Enactment of legislation which would dictate a court-martial or honorable discharge in these cases would require that, in many instances, an honorable discharge be awarded, thereby attesting to society that each such individual had served with honor. In effect, the undesirable would be placed in the same distinguished and honorable category as the veteran of long, faithful, and exemplary service. By thus detracting from the position of respect and honor traditionally reserved for recipients of honorable discharges, incentive on the part of loyal, well-disciplined and otherwise deserving personnel who aspire through their conduct to attain this goal would be destroyed.

One witness expressed the feeling that, in the absence of an absolute right to demand trial, chronic troublemakers should be retained until they get into some serious trouble and are then discharged with a punitive discharge. Manifestly, the retention of such individuals in the Army would be highly detrimental to morale, welfare, and discipline of the Army as a whole.

The assignment of a senior judge advocate to preside as a law officer over each administrative proceeding wherein a discharge under other than honorable conditions may be adjudged is neither feasible nor desirable. Such a proposal would, in effect, establish two judiciary systems in the Military Establishment. One system would include the present courts-martial system; the other system would purport to create judicial hearings to determine merely an individual's fitness for service in the Army.

The Army would object to a requirement for a formal judicial hearing to determine whether one of its servicemen is fit for continued military service. A program whereby an employee, prior to his discharge, could demand and receive a judicial hearing, presided over by a Federal judge, to determine whether he should be retained as an employee would be, to say the least, unique. Furthermore, there appears to be no justifiable reason for requiring the military services to hold a judicial hearing to eliminate an alcoholic, a homosexual, a shirker, or a troublemaker while a civilian employee of other Federal agencies can be discharged for cause upon the recommendation of a grievance board which held an informal administrative hearing to determine the employee's fitness to serve. [NOTE.—Pertinent civil service regulations provide merely for an administrative hearing by a grievance board, at which proceeding the civilian employee may be represented by legal counsel; if the grievance board recommends that the employee be discharged for cause the recommendation is

forwarded to the employee's supervisor for approval or disapproval; if the supervisor approves the dismissal the head of the Federal agency will review the proceeding, but there is no requirement that a hearing be held or that the employee be given an opportunity to rebut the recommendations for dismissal.] The Department of the Army questions whether a serviceman who receives an administrative discharge under other than honorable conditions is thereby placed in a worse, or better, position in seeking subsequent employment than is a civilian employee dismissed for cause by his employer.

The Department of the Army has had some experience in providing attorney-advisers to preside over administrative elimination cases (see sec. II, par. 5*h*(3), AR 635–105, copies of which have previously been furnished the subcommittee). This arrangement has not been entirely satisfactory, either from the viewpoint of the officers appointed as attorney-advisers, or from the standpoint of the members of the boards of inquiry, inasmuch as the proceedings are not judicial in nature. The senior Army officers appointed to preside over boards of inquiry may be just as able as any law officer to conduct a fair and impartial hearing into the respondent's fitness for continued military service because this is truly an administrative determination and, as senior commanders, they have intimate knowledge of the types of service personnel required to perform the Army's missions.

Assuming, arguendo, that a judicial hearing, presided over by a law officer, is desirable to make such administrative determinations, the feasibility of such a proposal is questionable under the present Army manpower structure. The Army presently has 24 senior judge advocates serving as law officers. The number of Army administrative elimination proceedings held each year would require the assignment of some 130 additional judge advocates to sit as presiding law officers in administrative proceedings. This number, of course, is without regard to the number of judge advocates that might be called upon to serve as counsel before such administrative hearings.

With respect to question 22: *Several witnesses appearing before the subcommittee have questioned whether the rights and interests of the accused are adequately protected where the accused enters into a negotiated guilty plea agreement with the convening authority.*

Army answer. The negotiated guilty plea is rarely used in inferior courts where the accused normally does not have the advice and assistance of legal counsel. The Department of the Army response to question 22 of the subcommittee aide memoire reflects that less than 1 percent of the guilty pleas entered before special courts-martial involve pretrial negotiations on the sentence. The accused's offer to plead guilty in return for an agreed maximum punishment that would be approved by the convening authority upon post trial review is used extensively in general courts-martial, where the accused has the advice and assistance of legal counsel.

The following established and accepted policies and procedures in the area of guilty pleas have been established in the Department of the Army to protect the rights and interests of the accused:

(1) The offer to plead guilty must originate from the accused and his counsel;

(2) Unreasonable multiplication of charges to induce the accused to enter a plea of guilty is forbidden;

(3) The pretrial agreement is written in unambiguous terms;

(4) The negotiated terms must be scrupulously carried out by the Government;

(5) The pretrial agreement does not contain any provision whereby the accused and his counsel forgo their right to present to the court-martial matters in extenuation or mitigation of any offense charged;

(6) The negotiated plea concerns only the maximum sentence that will be approved upon posttrial review; the defense counsel is completely free to fight before the court-martial for a more favorable sentence for his client inasmuch as the terms of the pretrial agreement are not made known to the court members;

(7) The law officer, during trial, and in an out-of-court hearing, will determine whether an accused entering a plea of guilty understands the meaning of his guilty plea; the law officer will advise the accused of his right to withdraw the plea at any time prior to sentencing; the accused's satisfaction with counsel is ascertained at this time; and, finally, the law officer will

determine from the accused personally the fact that the accused is pleading guilty because he is, in fact, guilty. The hearing will be recorded, and the pretrial agreement, if there be one, will be attached to the record of trial as an exhibit.

The U.S. Court of Military Appeals, in the case of *United States* v. *Watkins*, 11 USCMA 611, 615, 29 CMR 427, 431 (1960), made the following favorable comments concerning the military's negotiated guilty plea program:

"In the military service, a practice has been developed which permits an accused to initiate proceedings for leniency in the event he enters a plea of guilty. This consists of an overture to the convening authority to set the maximum sentence he will affirm if a plea of guilty is entered. A reading of many records in which pleas of guilty have been entered has established a sound base for the belief that this is a salutary procedure for an accused. He does not make a deal with the tribunal which imposes the original sentence, but he does fix a ceiling which is binding on appellate authorities. The convening authority must eventually determine the appropriateness of sentence, and he gives the accused advance information on his views if the accused elects to confess his guilt. The procedure offers the accused a chance to make certain that his sentence will not exceed fixed limits and yet leaves him unbridled in the presentation of extenuating and mitigating evidence at the trial. He can bring before the court-martial members any fact or circumstance which might influence them to lessen the punishment and his lot is better if they find appropriateness at a lower level than the understood maximum. The arrangement with the convening authority cannot help but benefit the accused, for it reduces his punishment if a guilty plea is entered from the permissible maximum set by law. Certainly that procedure does not smack of compulsion.

"It is feared by some that this procedure may work to the disadvantage of the accused, but I assert experience shows to the contrary. It is not unlike the well-established civilian practice, but it is more beneficial to the accused. It is generally known that in civilian courts the great bulk of criminal cases is disposed of by pleas of guilty after some discussion between the defendant and his counsel and the prosecuting attorney. The latter frequently makes some commitment as to the sentence he will recommend or as to other charges or prosecutions he will nolle prosequi. If such a practice were discouraged, there would be little incentive for a guilty man to confess his error and seek clemency at the hand of the judge. In the military, the same principle should be applicable, and in the end justice would be harmed if accused persons could not be assured of some clemency if they plead guilty. * * *"

With respect to questions 26 and 27: *One witness intimated that the qualifications for boards of review membership were lax, citing the fact that captains and, occasionally, lieutenants have served as board members.*

Army answer. No company grade officers have been assigned as board of review members since February 1957. Records show that prior to that date, for very limited periods, one captain and one lieutenant acted as board members. The captain served for about 15 days, and the lieutenant served for about 21 days. Other company grade officers have served as administrative assistants to the boards, but even this practice ceased 3 years ago due to a shortage of personnel. For the past several years, members of boards of review have been predominately in the grade of full colonel. At the present time, there are seven full colonels and three lieutenant colonels serving as board members.

With respect to question 27: *Criticism has been made of the fact that the board of review chairman prepares efficiency reports on the other board members. Some concern has been expressed as to whether the junior members of the board of review are completely free of any undue influence of the board chairman.*

Army answer. As has been stated in previous replies to this question, 11 years of experience have disclosed no instance of undue influence having been exercised by the chairman of the board because of his efficiency reporting authority. In order to remove, however, any suggestion or even the appearance of the possibility of improper influence, the Judge Advocate General of the Army has directed that the following system of efficiency reporting of members of boards of review be effective on March 21, 1962:

(*a*) All members of the boards of review will be rated individually by the Assistant Judge Advocate General.

(*b*) On all such reports, the Judge Advocate General, personally, will be the endorsing officer.

With respect to question 28: *One witness testified that he did not believe that the boards of review helped the accused substantially and recommended their elimination.*

Army answer. Statistics furnished by the Army in its original answer to this question do not support this conclusion. For fiscal year 1961, boards of review disapproved or dismissed findings of guilty in 59 cases. These decisions were based, in practically every instance, upon the law of the case as viewed by the boards, and not upon their factfinding powers. In the same fiscal year, boards of review modified the sentence in 301 additional cases. Most of these modifications were based upon the factfinding powers of the boards. The point is that boards of review have taken action in 360 of 1425 cases reviewed by them, based upon the law or facts of the case, all of which enured to the benefit of the accused.

Question. *Reference is made to testimony before the subcommittee to the effect that Army enlisted personnel are not aware of the adverse consequences of a discharge under less than honorable conditions at the time they waive their right to an administrative hearing before a board of officers convened to determine their fitness for continued military service.*

Army answer. Paragraph 5*b*(2), Army Regulations 635–206, dated April 8, 1959 (copies of which have previously been furnished to the subcommittee), provides:

"(2) Waive his right to board action (in which event he will be required to submit a signed statement (fig. 1) which will become a permanent record in his individual personnel records)."

Paragraph 4, figure 1, Army Regulations 635–206, supra, provides:

"4. I further understand that if an Undesirable Discharge is issued to me that such discharge will be under conditions other than honorable; that as a result of such discharge I may be deprived of many or all rights as a veteran under both Federal and state laws and that I may expect to encounter substantial prejudice in civilian life in situations where the type of service rendered in any branch of the Armed Forces or the type of discharge received therefrom may have a bearing."

While a similar statement is not provided for in Army Regulations 635–208 and 635–209, many commanders have incorporated the cited Army Regulations 635–206 statement into Army Regulations 635–208 and 635–209 proceedings to insure that the serviceman is aware of, and acknowledges that he has been advised of, the disabilities that may attach to a discharge issued under other than honorable conditions.

Question. *With respect to predischarge counseling, reassignment, and rehabilitative efforts: A witness has stated that in no case involving administrative discharge is predischarge counseling, reassignment, or other rehabilitative efforts required by any regulation and certainly not by statute.*

Army answer. Threaded throughout the Army Regulations governing administrative discharges are instructions to the effect that soldiers will not be administratively discharged unless it is clearly established that reasonable efforts to rehabilitate or develop the individual as a satisfactory soldier have failed and that further effort is unlikely to succeed. Furthermore, each commander's report wherein an other than honorable discharge is recommended must contain a full description of the attempts to rehabilitate the individual. Such reports must also contain statements as to whether the individual has been given varied assignments and duties under different officers and noncommissioned officers, in a different unit or organization, and the time spent in such status. Additionally, the report of psychiatrist or medical officer always contains an evaluation of the probable effectiveness of further rehabilitative efforts.

These data are made a part of the record in each case and are given full recognition by the board of officers appointed to hear each case.

Question. *With respect to Congressman Doyle's testimony appearing on page 607 which reads, "In determining the acceptability of such applicants for reenlistment these lads had no reasonable opportunity to reenlist even."*

Army answer. The Adjutant General, within the Department of the Army, is authorized to process applications for reenlistment in the Regular Army of former Army personnel having other than honorable discharges. The decision to reenlist personnel of this type is determined after complete review of existing records of the individual concerned. Included in this review is an evaluation of

the nature, seriousness and circumstances surrounding the offense or conduct for which previously discharged, age and military experience at the time of commission of the offense, or offenses, civilian background, employment records, and general reputation in the civilian community before and after military service. Coordination with the office of the Provost Marshal General is made in each case involving a punitive discharge to determine whether favorable consideration is warranted in relation to those individuals currently being restored to duty for similar offenses. Final action taken on cases which appear to warrant favorable consideration involves an investigation by field agencies concerning conduct, employment habits, and standing of the individual in the community in which he resided subsequent to his release from the Army.

Prior to August 1957 this program produced very few reenlistments. However, subsequent to a policy change which required certain applications to be reviewed at Headquarters, Department of the Army, considerable improvement was noted. Statistics relating to the application of this policy follow:

*Actions on applications for waiver of less than honorable discharge (for purpose of reenlistment)*

| Fiscal year | Undesirable | | | Bad conduct | | | Dishonorable | | | Total | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Approved | Disapproved | Total | Approved | Disapproved | Total | Approved | Disapproved | Total | Approved | Disapproved | Total |
| 1957 [1] | | 2 6 | 286 | | 45 | 45 | 2 | 73 | 75 | 2 | 404 | 406 |
| 1958 | 11 | 218 | 229 | 3 | 18 | 21 | 2 | 43 | 45 | 16 | 279 | 295 |
| 1959 | 45 | 43 | 88 | 3 | 3 | 6 | 4 | 6 | 10 | 52 | 52 | 104 |
| 1960 | 31 | 56 | 87 | | 7 | 7 | | 4 | 4 | 31 | 67 | 98 |
| 1961 | 35 | 92 | 127 | 4 | 10 | 14 | | 9 | 9 | 39 | 111 | 150 |
| 1962 [2] | 23 | 48 | 71 | 1 | 3 | 4 | | 2 | 2 | 24 | 53 | 77 |

[1] April through June 1957 only.
[2] 1st half.

NOTE.—Percentage approved: Prior to August 1957, 0.45; since August 1957, 34.33.

Question. *The subcommittee has expressed interest in the Department of the Army policy concerning the administrative elimination of service personnel pursuant to the provisions of Army Regulations 635-206 because of conviction of a felony-type offense by a civil court where the individual appeals his civil conviction.*

Army answer. Section III, paragraph 21, Army Regulations 635-206, dated April 8, 1959, provides:

"21. APPEALS. An individual shall be considered as having been convicted or adjudged a juvenile offender even though an appeal is pending or is subsequently filed. The discharge or recommendation for discharge, however, will not be effected or submitted until the individual has indicated in writing that he does not intend to appeal the conviction or adjudication as a juvenile offender, or until the time in which an appeal may be made has expired, whichever is the earlier, or if an appeal has been made, until final action has been taken thereon."

Question. *One of the witnesses appearing before the subcommittee has questioned the extent to which Army line officers are educated in the general area of military law.*

Army answer. It is the aim of the Army to provide line officers with as much training in military law as possible, consistent with limitations of the Army's missions, budget, and academic schedules. Cadets in their second year at the U.S. Military Academy receive 90 hours of general legal training, one-half in elementary constitutional and criminal law, the other half in evidence and military law. The course comprises 5 semester hours of academic study, and is a major part of the curriculum of the cadet at the Academy. Senior ROTC students receive 15 hours of training in military law. The course is, of necessity, introductory in nature, but the students are offered the opportunity to gain a basic understanding of the essential features of the Uniform Code of Military Justice and some knowledge of how a case is handled. Students at officer candidate schools receive 12 hours training in the field of military law and justice.

One of the highest level Army service schools, the Command and General Staff College, Fort Leavenworth, Kans., devotes 8 hours to the subject of military

justice. A substantial portion of this training is devoted to the education of the student officers regarding the recognition and prevention of "unlawful command influence," as defined by the U.S. Court of Military Appeals. The remainder of the course concerns problems encountered in the exercise of investigative and trial jurisdiction over (1) members of the Armed Forces who commit offenses cognizable under military and civilian law, and (2) other persons who commit offenses within the limits of a military installation. The various branch schools of the Army; e.g., Infantry, Adjutant General, etc., also conduct courses in military justice.

Almost every Army officer who holds a responsible line or staff position has at some time received formal instruction in military law.

Question. *One witness appearing before the subcommittee has questioned the Army's nonuse of special courts-martial to impose bad conduct discharges.*

Army answer. The Army practice is designed to insure that in those instances where trial by court-martial may result in the imposition of a punitive discharge, the serviceman is fully protected. The presence of a law officer and qualified legal counsel guarantees maximum protection of the accused's rights. While the Air Force apparently does provide qualified counsel, information furnished by the Navy indicates that legally qualified counsel are not ordinarily furnished for trials by Navy special courts-martial. Further, the president of a special court-martial is not normally a lawyer, and he cannot be expected to provide the accuracy, control and judicial temperament which should guide judicial proceedings which may result in punitive separation of the accused.

In addition to a shortage of legally qualified personnel in the Army to protect fully an accused who may be given a punitive discharge by special court-martial, there is a severe shortage of trained court reporters to record verbatim the proceedings of courts-martial. The tremendous number of Army troops overseas, where this shortage of reporters is aggravated by a lack of qualified contract civilian reporters who may be available in CONUS, compounds the problems in the Army.

There is no factual evidence to support the implication (p. 963, hearings of Subcommittee on Constitutional Rights)* that commanders in the Army utilize the special court-martial and subsequent Board action to effect separation unfairly or improperly in instances where the other services might utilize a special court-martial with authority to impose a bad conduct discharge.

The statement that, "The Army passed a regulation which said no Department of the Army funds could be used for a reporter before a special court-martial," is incorrect. The Regulations (AR 22–145) state that the Judge Advocate General, acting for the Secretary of the Army, will consider, and issue or withhold, authorization for appointment of a reporter for trial by special courts-martial. No funding restrictions for hire of reporters for special courts-martial are contained in these Regulations.

The statement has been made, "You may send a case before a special court-martial without the fear of reversal if something improper occurs. * * *" Legal review of special courts-martial records of trial not involving an imposed bad conduct discharge is provided for in article 66(*c*), Uniform Code of Military Justice. In the Army, such review must be accomplished by a judge advocate. There is no evidence to indicate that this statutory requirement for legal review is ignored or improperly conducted.

Question. *One of the witnesses appearing before the subcommittee commented on a provision of the Department of Defense's proposed legislation commonly referred to as the B bill. He felt the legislation derogated the right of an accused, who requests trial before a single officer (law officer) court, to know the identity of such law officer.*

Army answer. The B bill provides that an accused may be tried by a general court-martial consisting of "only a law officer if, before the court is convened, the accused, knowing the identity of the law officer, and after consultation with counsel, requests in writing a court composed only of a law officer and the convening authority has consented thereto." The same provision prevails with respect to special courts-martial composed only of a law officer "unless otherwise prescribed by the Secretary concerned in the case of accused persons who demand trial by court-martial in lieu of punishment under section 815 (art. 15)." The latter provision was considered necessary by the services for several reasons.

*References are to the original transcript of hearings.

Nonjudicial punishment under the provisions of article 15 is designed for the disposition of minor offenses. Under present procedures if an offender refuses to accept nonjudicial punishment and demands trial by court-martial in lieu thereof he may tried by a summary court-martial without his consent. This is a single officer court, whose identity is not necessarily known to the accused, and who, only infrequently, is trained in the law. The B bill insures that if he is tried by a single officer court in lieu of being punished under article 15, that he will be afforded trial before a legally qualified officer. The fact that an offender could delay ultimate dispostion of his case because the "judge" is not personally acceptable to him is without precedent for the disposition of minor infractions in either military or civil law.

The grant of secretarial authority in this area is considered necessary in order to provide for the prompt and fair disposition of minor offenses when trial is demanded in lieu of nonjudicial punishment.

Question. *The subcommittee has expressed an interest in the legality of searches of property which is located in a foreign country and is owned, used, or occupied by persons subject to the Uniform Code of Military Justice.*

Army answer. In general, the search of a dwelling is illegal unless authorized by a warrant which meets the requirements of the fourth amendment of the Constitution. Accordingly, a military person's offpost dwelling—located in the United States—may not lawfully be searched without a warrant.

With respect to searches of offpost military housing situated in a foreign country, the U.S. Court of Military Appeals has, in pertinent part, held:

"* * * [T]he unqualified doctrine that an American warrant must constitute the foundation for a legal search can scarcely apply outside the United States, its territories and possessions—for no American court is available and empowered to issue warrants overseas. * * * [I]n light of the palpable overseas inapplicability of the usual requirements of a search warrant issued by a competent American court—and of Rule 41, Federal Rules of Criminal Procedure—Federal courts have consistently refused to invalidate such searches by reason of the want of such authority. In these circumstances the test is simply one of reasonableness" (*United States* v. *Deleo*, 5 USCMA 148, 17 CMR 148 (1954)).

Paragraph 152, Manual for Courts-Martial, United States, 1951, sets forth examples of searches which are considered to be lawful for the Military Establishment. The fifth such example, in part, reads as follows:

"A search of property * * * which is located * * * in a foreign country * * * and is owned, used, or occupied by persons subject to military law * * *, having jurisdiction * * * over personnel subject to military law * * * in the place where the property is situated."

A search of the offpost non-Government quarters of a member of the Military Establishment in a foreign country is legal, notwithstanding the absence of a warrant, if the provisions of paragraph 152, Manual for Courts-Martial, United States, 1951, are observed, and if the search is otherwise reasonable.

Question. *Several witnesses appearing before the subcommittee have advocated the establishment of a separate defense counsel corps in the Armed Forces.*

Army answer. The feasibility of establishing a separate defense counsel corps has been the subject of careful study in the Office of the Judge Advocate General on several occasions since 1957. The opinions of those who have studied the problem are substantially in accord that the suggested program is neither feasible nor desirable.

Some sources believe that a separate defense counsel corps would eliminate any vestige of unlawful influence by the staff judge advocate and convening authority. It is submitted, however, that incidents of unlawful influence, whether intended or otherwise, are so extremely rare in the services that this factor alone would not justify specialized assignments of numerous judge advocates, thereby denying to such officers opportunities for gaining other military legal experience.

Any program of this nature would necessarily involve assignment of judge advocates to defense counsel duties for a minimum of 3 years. While such an assignment may be attractive to the average officer for a year or so, it is not difficult to visualize that specialized duty of this type might become tiring and repetitious for many. More mature and experienced officers would be understandably reluctant to serve in a specialized corps of this type for protracted periods of time. Most officers would certainly prefer to develop themselves in other fields of military law while gaining, at the same time, trial experience as a prosecutor as well as a defense counsel.

## DEPARTMENT OF THE ARMY—SUMMARY OF FACTS AND LEGAL ISSUES

*Beard* v. *Stahr* (U.S. District Court for the District of Columbia, civil action No. 3528–61, as yet unreported) (1961)

*Facts*

Beard, a lieutenant colonel in the Regular Army, was processed by the Army for elimination by reason of misconduct. The action taken against him was pursuant to 10 U.S.C. 3781 through 3797, as amended. Just prior to his discharge he brought action in Federal court to enjoin the Secretary of the Army from discharging him. In all respects this case was similar to that of *Ledford* v. *Brucker*, civil action No. 3583–59, U.S. District Court for the District of Columbia, unreported. The plaintiff alleged that the Army administrative boards did not grant him the rights of confrontation, cross-examination and other trial-like procedures. He, therefore, claimed that he was deprived of certain rights without due process of law, in violation of the fifth amendment to the Constitution. The plaintiff had approximately 19 years of service at the time he brought this action. Because the unconstitutionality of a Federal statute was alleged, the action was heard before a three-judge Federal district court, which would permit an appeal direct to the Supreme Court of the United States.

*Issues*

1. Did procedures used by the Army board deprive plaintiff of due process of law as guaranteed by the fifth amendment to the Constitution?
2. If so, were the Federal statutes under which the Army proceeded unconstitutional?

*Held*

The statutes involved are constitutional. Administrative due process does not require trial-like procedures and does not guarantee an individual the constitutional rights of cross-examination, confrontation, etc. An important portion of the court's opinion reads as follows:

"If unbridled and unlimited power to dismiss officers is inherent in the President unless limited by acts of Congress, it follows a fortiori that such statutory restrictions and administrative procedures as may be imposed or created by Congress, are not subject to the limitations of the Bill of Rights or any other constitutional provisions."

NOTE.—An appeal has been filed in this case to the Supreme Court of the United States, and the appeal has been docketed. The case is presently awaiting decision on the Government's motion to affirm the decision of the lower court.

---

*Davis* v. *Stahr*, 293 F. 2d 860 (1961) (U.S. District Court for the District of Columbia)

*Facts*

Davis was inducted into the Army in 1950. He was relieved from active duty in 1952 and transferred to the Ready Reserve. In the ordinary course his obligated period of service would have expired in September 1957. In 1956, The Adjutant General sent Davis a letter which alleged that prior to induction Davis had engaged in subversive activities; that while on active duty he had made false statements regarding his preinduction activities, and had also made subversive statements; and that following his relief from active duty and while a member of the Ready Reserve, Davis had falsified a statement of personal history. He had refused also to answer inquiries in the course of an official investigation. The letter stated that allegations not explained or refuted might be taken as admitted and that Davis was entitled to a hearing before a "field board" at which he could submit evidence. A field board hearing was requested and held. Davis appeared and was represented by counsel. He introduced no evidence and made no attempt to refute the allegations. The Army called no witnesses. The board made findings of fact and recommended an undesirable discharge, which was issued on April 2, 1957. On appeal to the Army Discharge Review Board, the characterization of the discharge was changed to "General, under honorable conditions." A further appeal to the Army Board for Correction of Military Records was unsuccessful. It should be noted that Davis' preinduction conduct was not considered in reaching the final decision as to the type of discharge. Davis then filed in the district court a suit to have the

discharge declared void and for an order that an honorable discharge should be granted.

*Action in lower court*

Defendant's motion for summary judgment was granted. On the first appeal the court of appeals vacated the judgment and remanded for a determination whether the military tribunals had considered preinduction activities. *Davis* v. *Brucker*, 275 F. 2d 181. After the remand the finding of the field board and the affidavit of the Chairman of the Board for Correction of Military Records were introduced, and the Government's motion was again granted. Davis again appealed.

*Issues*

1. Did the Secretary of the Army have statutory authority to issue Davis a general discharge, under honorable conditions, on the basis of his activities and conduct in the Ready Reserve as well as on the basis of his conduct on active duty?
2. Whether appellant was denied due process of law even though he was advised in detail of the allegations and given a hearing before a field board of inquiry, where he was represented by counsel and given an opportunity to offer testimony and evidence, but was not permitted to confront and cross-examine the persons who had given information to the Army?
3. Whether the issuance to appellant of a general discharge infringed upon his rights under the first amendment?

*Held*

Choosing not to decide the constitutional question, the court held that the Secretary of the Army has no authority to issue a less than honorable discharge to an inactive reservist, either for his failure to disclose preinduction subversive associations (actually falsification) or, without granting him the privilege of confrontation, for utterance of derogatory remarks against the Army while serving on active duty. The court took the position that preinduction conduct, under the *Harmon* v. *Brucker* principle, is irrelevant matter. In *Harmon* v. *Brucker*, the Supreme Court ruled that discharges must be based upon an individual's activities and military record while on active duty. In the opinion of the Court of Appeals, the Secretary of the Army had no authority to consider the individual's failure to disclose these matters the basis for a "derogatory" discharge because it thereby circumvented the prohibition of the *Harmon* decision. With regard to the denial of confrontation, the court said that the denial of this right is so prejudicial that it must be explicitly authorized by Congress.

---

*Olenick* v. *Brucker*, 273 F. 2d 819 (1960)

*Facts*

Plaintiff was discharged from the Army Reserve as a security risk with an undesirable discharge. Action was taken pursuant to 10 U.S.C. 1163(c)(1). The Army administrative boards considering plaintiff's case had utilized classified evidence. After exhausting his administrative remedies, the plaintiff brought action in Federal court for a declaratory judgment to the effect that he was entitled to an honorable discharge because the procedure used against him deprived him of due process of law as guaranteed by the fifth amendment to the Constitution.

*Action in lower court*

The District Court granted Government's motion for summary judgment on the theory that no constitutional issue was involved.

*Issues*

Did the Army's administrative procedures deprive plaintiff of due process of law?

*Held*

The constitutional issue need not be decided. The provisions of 10 U.S.C. 1163(c)(1) require the approved findings of a board of officers prior to the issuance of an undesirable discharge in a case of this type. It is not clear from the record whether such findings were in fact made; therefore, the case is remanded to the district court to determine this issue. In the absence of such findings being filed in the district court, that court cannot properly perform its function of judicial review.

NOTE 1. Counsel for the plaintiff did not plead or argue the lack of findings issue but proceeded solely on the constitutional issue.

NOTE 2. After remand to the district court, board findings could not be produced. The specific findings were informal in nature and had been destroyed. The district court then held that plaintiff had been discharged from the Army but the characterization of his discharge as undesirable was null and void. The Army subsequently held another administrative hearing, made specific findings and characterized Olenick's discharge again as undesirable. Olenick has not as yet returned to the courts.

---

*Ledford* v. *Brucker*, civil action No. 3583–59

*Facts*

The plaintiff, a lieutenant colonel in the Regular Army, was recommended for discharge from the Army because of misconduct. The action was taken against him by administrative boards convened pursuant to title 10, United States Code, sections 3881, 3782, 3783 and other related statutes. Just prior to his discharge he brought action in Federal court to enjoin the Secretary of the Army from discharging him. He alleged that the Army boards did not grant him the rights of confrontation, cross-examination and other trial-like procedures. He therefore claimed that he was being deprived of certain rights without due process of law, in violation of the fifth amendment of the Constitution. The plaintiff had approximately 19 years of service at the time he brought this action. By a series of motions, restraining orders and other legal delays, which included a mandamus action in the Supreme Court against the Federal district judge, he was able to postpone any decision in this case until he had acquired 20 years of active duty service and was able to voluntarily retire from the Army. After his retirement the case became moot and was dismissed without any legal issues having been decided.

NOTE.—This case involved the right to discharge, whereas previous cases dealt solely with the right to characterize a discharge.

---

*Harmon* v. *Brucker*, 335 U.S. 579 (1958)

*Facts*

Plaintiff was given a general discharge for security reasons. This action was taken pursuant to the recommendations of an administrative board which considered plaintiff's action prior to induction into the Army and also utilized classified evidence. Plaintiff exhausted his administrative remedies and then brought action in a Federal court for a declaratory judgment to the effect that the Secretary of the Army had exceeded his statutory authority and plaintiff was entitled to an honorable discharge.

*Action in lower court*

The district court and circuit court of appeals held they had no jurisdiction to consider this complaint.

*Issues*

1. Did the Federal courts have jurisdiction to hear the case, and if so did the Secretary of the Army exceed his statutory authority by considering plaintiff's preinduction activity as a basis for characterizing his discharge as less than honorable?

2. Did procedures used by the Army board deprive plaintiff of due process of law as guaranteed by the fifth amendment to the Constitution?

*Held*

1. The court need not decide the constitutional issue in order to dispose of the case.

2. The Federal courts have jurisdiction to review the administrative decisions of the Secretary of the Army when he acts pursuant to statute. The courts have the duty of construing the statute and determining whether the statutory authority has been exceeded. In this case the Secretary of the Army exceeded his statutory authority by considering plaintiff's preinduction activity as a basis for characterizing his discharge.

*Gentila* v. *Pace*, 193 F. 2d 924 (1951)

*Facts*

Plaintiff was inducted into the Army in 1942. He went absent without leave in 1943 and returned in 1944. He was found to have a mental problem upon his return to duty. He was given a dishonorable discharge for absence without leave and physical unfitness (mental condition). He was not tried by court-martial nor did he appear before an administrative board. He made application to the Army Discharge Review Board and was denied relief. Plaintiff brought action for mandatory injunction against the Secretary of the Army for the issuance of an honorable discharge or a medical discharge.

*Issues*

Did the court have jurisdiction to review administrative decisions of the Secretary of the Army pertaining to discharges?

*Held*

The court has no jurisdiction to review this type of case. Statute relating to Army Discharge Review Board placed final authority in the Secretary of the Army and did not provide for judicial review. Further, the Administrative Procedures Act (5 U.S.C. 1009), does not permit judicial review of this type of case.

---

## DEPARTMENT OF THE NAVY ANSWERS TO SUBCOMMITTEE QUESTIONNAIRE

*Separations [1] from active duty, U.S. Navy*

| Fiscal year | Honorable | General | Bad conduct | Undesirable | Dishonorable | Total |
|---|---|---|---|---|---|---|
| 1950 [2] | 129,100 | 5,095 | 5,178 | 1,647 | 791 | 141,811 |
| 1951 [2] | 82,367 | 4,912 | 2,532 | 1,398 | 370 | 91,579 |
| 1952 [2] | 130,829 | 5,663 | 1,893 | 2,439 | 170 | 140,994 |
| 1953 | 148,355 | 3,270 | 3,112 | 2,863 | 75 | 157,675 |
| 1954 | 143,123 | 4,986 | 4,013 | 3,867 | 68 | 156,057 |
| 1955 | 214,035 | 12,126 | 3,127 | 3,529 | 76 | 232,893 |
| 1956 | 211,114 | 9,219 | 1,846 | 2,540 | 66 | 224,785 |
| 1957 | 142,329 | 5,431 | 2,220 | 3,882 | 50 | 153,912 |
| 1958 | 178,414 | 6,901 | 2,784 | 4,259 | 40 | 192,398 |
| 1959 | 142,117 | 7,346 | 1,971 | 3,846 | 30 | 155,310 |
| 1960 | 143,165 | 6,342 | 1,663 | 2,697 | 30 | 153,897 |
| 1961 | 143,990 | 5,866 | 1,521 | 2,972 | 10 | 154,359 |
| Total | 1,808,938 | 77,157 | 31,860 | 35,939 | 1,776 | 1,955,670 |

[1] Separations consists of those discharged or released from active duty.
[2] Discharges only. Total separations not available.

*Character of discharge or service of enlisted personnel of the active forces*

| Character of discharge or service | Retirement (all types) | Discharges [1] and releases | Service: Aggregate |
|---|---|---|---|
| Fiscal year 1950: | | | |
| Honorable | 2,763 | 129,100 | 131,863 |
| General (under honorable conditions) | | 5,095 | 5,095 |
| Undesirable | | 1,647 | 1,647 |
| Bad conduct [2] | | 5,178 | 5,178 |
| Dishonorable [2] | | 791 | 791 |
| Total | 2,763 | 141,811 | 144,574 |
| Fiscal year 1951: | | | |
| Honorable | 2,055 | 82,367 | 84,422 |
| General (under honorable conditions) | | 4,912 | 4,912 |
| Undesirable | | 1,398 | 1,398 |
| Bad conduct [2] | | 2,532 | 2,532 |
| Dishonorable [2] | | 370 | 370 |
| Total | 2,055 | 91,579 | 93,634 |
| Fiscal year 1952: | | | |
| Honorable | 2,608 | 130,829 | 133,437 |
| General (under honorable conditions) | | 5,663 | 5,663 |
| Undesirable | | 2,439 | 2,439 |
| Bad conduct [2] | | 1,893 | 1,893 |
| Dishonorable [2] | | 170 | 170 |
| Total | 2,608 | 140,994 | 143,602 |

See footnotes **at end of table.**

*Character of discharge or service of enlisted personnel of the active forces*—Con.

| Character of discharge or service | Retirement (all types) | Discharges [1] and releases | Service: Aggregate |
|---|---|---|---|
| Fiscal year 1953: | | | |
| Honorable | 2,858 | 145,497 | 148,355 |
| General (under honorable conditions) | | 3,270 | 3,270 |
| Undesirable | | 2,863 | 2,863 |
| Bad conduct [2] | | 3,112 | 3,112 |
| Dishonorable [2] | | 75 | 75 |
| Total | 2,858 | 154,817 | 157,675 |
| Fiscal year 1954: | | | |
| Honorable | 3,991 | 139,132 | 143,123 |
| General (under honorable conditions) | | 4,986 | 4,986 |
| Undesirable | | 3,867 | 3,867 |
| Bad conduct [2] | | 4,013 | 4,013 |
| Dishonorable [2] | | 68 | 68 |
| Total | 3,991 | 152,066 | 156,057 |
| Fiscal year 1955: | | | |
| Honorable | 5,296 | 208,739 | 214,035 |
| General (under honorable conditions) | | 12,126 | 12,126 |
| Undesirable | | 3,529 | 3,529 |
| Bad conduct [2] | | 3,127 | 3,127 |
| Dishonorable [2] | | 76 | 76 |
| Total | 5,296 | 227,597 | 232,893 |
| Fiscal year 1956: | | | |
| Honorable | 5,805 | 205,309 | 211,114 |
| General (under honorable conditions) | | 9,219 | 9,219 |
| Undesirable | | 2,540 | 2,540 |
| Bad conduct [2] | | 1,846 | 1,846 |
| Dishonorable [2] | | 66 | 66 |
| Total | 5,805 | 218,980 | 224,785 |
| Fiscal year 1957: | | | |
| Honorable | 5,379 | 136,950 | 142,329 |
| General (under honorable conditions) | | 5,431 | 5,431 |
| Undesirable | | 3,882 | 3,882 |
| Bad conduct [2] | | 2,220 | 2,220 |
| Dishonorable [2] | | 50 | 50 |
| Total | 5,379 | 148,533 | 153,912 |
| Fiscal year 1958: | | | |
| Honorable | 5,816 | 172,598 | 178,414 |
| General (under honorable conditions) | | 6,901 | 6,901 |
| Undesirable | | 4,259 | 4,259 |
| Bad conduct [2] | | 2,784 | 2,784 |
| Dishonorable [2] | | 40 | 40 |
| Total | 5,816 | 186,582 | 192,398 |
| Fiscal year 1959: | | | |
| Honorable | 5,930 | 136,187 | 142,117 |
| General (under honorable conditions) | | 7,346 | 7,346 |
| Undesirable | | 3,846 | 3,846 |
| Bad conduct [2] | | 1,971 | 1,971 |
| Dishonorable [2] | | 30 | 30 |
| Total | 5,930 | 149,380 | 155,310 |
| Fiscal year 1960: | | | |
| Honorable | 10,348 | 132,817 | 143,165 |
| General (under honorable conditions) | | 6,342 | 6,342 |
| Undesirable | | 2,697 | 2,697 |
| Bad conduct [2] | | 1,663 | 1,663 |
| Dishonorable [2] | | 30 | 30 |
| Total | 10,348 | 143,549 | 153,897 |
| Fiscal year 1961: | | | |
| Honorable | 11,470 | 132,520 | 143,990 |
| General (under honorable conditions) | | 5,866 | 5,866 |
| Undesirable | | 2,972 | 2,972 |
| Bad conduct [2] | | 1,521 | 1,521 |
| Dishonorable [2] | | 10 | 10 |
| Total | 11,470 | 142,889 | 154,359 |

[1] Includes discharged for immediate enlistment or reenlistment and discharged from enlisted status to accept commissions.
[2] Discharges approved on appellate review.

*U.S. Marine Corps—Selected discharges and average enlisted strength, fiscal years 1950–61, inclusive*

| Fiscal year | Discharges | | | | | | | Average enlisted strength |
|---|---|---|---|---|---|---|---|---|
| | Discharges, honorable and general [1] (unsuitability) | Releases, honorable and general | Total discharges and releases, honorable and general | Undesirable discharges | Punitive discharges, bad conduct and dishonorable discharges | Retirements | Total discharges and releases (all types) and retirement | |
| 1950 | 32,779 | ---------- | 32,779 | 379 | 1,166 (181) | 160 | 34,484 | 67,797 |
| 1951 | 26,592 | ---------- | 26,592 | 514 | 700 (115) | 431 | 28,237 | 142,127 |
| 1952 | 39,364 | ---------- | 39,364 | 880 | 700 (61) | 1,981 | 42,925 | 201,911 |
| 1953 | 38,133 | ---------- | 38,133 | 1,262 | 1,268 (43) | 1,851 | 42,514 | 219,701 |
| 1954 | 56,437 | ---------- | 56,437 | 1,551 | 2,268 (94) | 1,950 | 62,206 | 223,062 |
| 1955 | 23,430 | 28,242 | 51,672 | 1,901 | 2,796 (127) | 1,058 | 57,427 | 198,230 |
| 1956 | 25,340 | 39,962 | 65,302 | 1,873 | 2,537 (212) | 1,099 | 70,811 | 182,862 |
| 1957 | 29,820 (3,911) | 42,395 | 72,215 | 1,462 | 1,787 (175) | 917 | 76,381 | 182,810 |
| 1958 | 22,113 (2,117) | 32,631 | 54,744 | 1,375 | 1,458 (63) | 994 | 58,571 | 177,136 |
| 1959 | 18,181 (1,968) | 44,664 | 62,845 | 1,486 | 1,227 (47) | 1,207 | 66,765 | 168,794 |
| 1960 | 15,075 (2,514) | 35,264 | 50,339 | 1,868 | 1,114 (24) | 1,819 | 55,140 | 156,470 |
| 1961 | 13,782 (2,025) | 15,292 | 29,074 | 1,604 | 881 (9) | 1,513 | 33,072 | 161,230 |

[1] Total general discharges for 1960, 2,667; 1961, 2,233. Figures 1950–59 not available.

*U.S. Marine Corps—Character of discharge or service of enlisted personnel of the active forces*

| Character of discharge or service | Retirement (all types) | Discharges [1] and releases | Service: USMC aggregate |
|---|---|---|---|
| Fiscal year 1961: | | | |
| Honorable | [2] 1,513 | [3] 29,074 | ---------- |
| General (under honorable conditions) | ---------- | [4] 2,233 | ---------- |
| Undesirable | ---------- | 1,604 | ---------- |
| Bad conduct [5] | ---------- | 872 | ---------- |
| Dishonorable [5] | ---------- | 9 | ---------- |
| Total | 1,513 | 31,559 | 33,072 |
| Average enlisted strength, 161,230. | | | |
| Fiscal year 1960: | | | |
| Honorable | [2] 1,819 | [3] 50,339 | ---------- |
| General (under honorable conditions) | ---------- | [6] 2,667 | ---------- |
| Undesirable | ---------- | 1,868 | ---------- |
| Bad conduct [5] | ---------- | 1,090 | ---------- |
| Dishonorable | ---------- | 24 | ---------- |
| Total | 1,819 | 53,321 | 55,140 |
| Average enlisted strength, 156,470. | | | |
| Fiscal year 1959: | | | |
| Honorable | [2] 1,207 | [3] 62,845 | ---------- |
| General (under honorable conditions, unsuitability) | ---------- | 1,968 | ---------- |
| Undesirable | ---------- | 1,486 | ---------- |
| Bad conduct [5] | ---------- | 1,180 | ---------- |
| Dishonorable [5] | ---------- | 47 | ---------- |
| Total | 1,207 | 65,558 | 66,765 |
| Average enlisted strength, 168,794. | | | |
| Fiscal year 1958: | | | |
| Honorable | [2] 994 | [3] 54,744 | ---------- |
| General (under honorable conditions, unsuitability) | ---------- | 2,117 | ---------- |
| Undesirable | ---------- | 1,375 | ---------- |
| Bad conduct [5] | ---------- | 1,395 | ---------- |
| Dishonorable [5] | ---------- | 63 | ---------- |
| Total | 994 | 57,577 | 58,571 |
| Average enlisted strength, 177,136. | | | |
| Fiscal year 1957: | | | |
| Honorable | [2] 917 | [3] 72,215 | ---------- |
| General (under honorable conditions, unsuitability) | ---------- | 3,911 | ---------- |
| Undesirable | ---------- | 1,462 | ---------- |
| Bad conduct [5] | ---------- | 1,612 | ---------- |
| Dishonorable [5] | ---------- | 175 | ---------- |
| Total | 917 | 75,464 | 76,381 |
| Average enlisted strength, 182,810. | | | |

See footnote at end of table.

*U.S. Marine Corps—Character of discharge or service of enlisted personnel of the active forces*—Continued

| Character of discharge or service | Retirement (all types) | Discharges [1] and releases | Service: USMC aggregate |
|---|---|---|---|
| Fiscal year 1956: | | | |
| Honorable | [2] 1,099 | [3] 65,302 | |
| General (under honorable conditions) | | | |
| Undesirable | | 1,873 | |
| Bad conduct [5] | | 2,325 | |
| Dishonorable [5] | | 212 | |
| Total | 1,099 | 69,712 | 70,811 |
| Average enlisted strength, 182,862. | | | |
| Fiscal year 1955: | | | |
| Honorable | [2] 1,058 | [3] 51,672 | |
| General (under honorable conditions) | | | |
| Undesirable | | 1,901 | |
| Bad conduct [6] | | 2,669 | |
| Dishonorable [5] | | 127 | |
| Total | 1,058 | 56,369 | 57,427 |
| Average enlisted strength, 198,230. | | | |
| Fiscal year 1954: | | | |
| Honorable | [2] 1,950 | [3] 56,437 | |
| General (under honorable conditions) | | | |
| Undesirable | | 1,551 | |
| Bad conduct [5] | | 2,174 | |
| Dishonorable [5] | | 94 | |
| Total | 1,950 | 60,256 | 62,206 |
| Average enlisted strength, 223,062. | | | |
| Fiscal year 1953: | | | |
| Honorable | [2] 1,851 | [3] 38,133 | |
| General (under honorable conditions) | | | |
| Undesirable | | 1,262 | |
| Bad conduct [5] | | 1,225 | |
| Dishonorable [5] | | 43 | |
| Total | 1,851 | 40,663 | 42,514 |
| Average enlisted strength, 219,701. | | | |
| Fiscal year 1952: | | | |
| Honorable | [2] 1,981 | [3] 39,364 | |
| General (under honorable conditions) | | | |
| Undesirable | | 880 | |
| Bad conduct [5] | | 639 | |
| Dishonorable [5] | | 61 | |
| Total | 1,981 | 40,944 | 42,925 |
| Average enlisted strength, 201,911. | | | |
| Fiscal year 1951: | | | |
| Honorable | [2] 431 | [3] 26,592 | |
| General (under honorable conditions) | | | |
| Undesirable | | 514 | |
| Bad conduct [5] | | 585 | |
| Dishonorable [5] | | 115 | |
| Total | 431 | 27,806 | 28,237 |
| Average enlisted strength, 142,127. | | | |
| Fiscal year 1950: | | | |
| Honorable | [2] 160 | [3] 32,779 | |
| General (under honorable conditions) | | | |
| Undesirable | | 379 | |
| Bad conduct [5] | | 985 | |
| Dishonorable [5] | | 181 | |
| Total | 160 | 34,324 | 34,484 |
| Average enlisted strength, 67,797. | | | |

[1] Includes discharged for immediate enlistment or reenlistment and discharged from enlisted status to accept commissions.
[2] Inherently an honorable or general discharge-type separation.
[3] Includes general discharges.
[4] 2,025 unsuitability discharges.
[5] Discharges approved on appellate review.
[6] 2,514 unsuitability discharges.

Question 2. *Are trends evident with respect to different types of discharges and what are the explanations of those trends?*

Answer:

1. Trends are difficult to distinguish in the Navy and the Marine Corps during the period 1950–56 for the following reasons:

Fluctuation in strength due to the Korean war;

Passage of the Universal Military Training and Service Act of 1951 and the Armed Forces Reserve Act of 1952;

Changes in the period of enlistment.

Since 1957 however two trends have been noted:

A substantial reduction in the number of discharges resulting from trial by court-martial;

A less severe attitude in the application of the administrative separation criteria.

2. Trends in the U.S. Navy:

(*a*) The most significant trend with respect to the different types of discharges is that in recent years higher type discharges are frequently given for reasons (unsuitability, unfitness, etc.) that previously would have resulted in less favorable type discharges. Before the new Department of Defense standards for discharge became effective on April 14, 1959, all discharges given by reason of unsuitability and inaptitude were general discharges, and all discharges given by reason of unfitness and misconduct were undesirable discharges. Under previous standards, if a person being processed for discharge by reason of unfitness or misconduct was considered to be deserving of a higher type discharge than undesirable, because of extenuating circumstances, he was given a general discharge by reason of unsuitability. The new standards permit the issuance of the type of discharge deemed appropriate to the case without changing the reason for discharge. During the 2 full fiscal years (1960 and 1961) which elapsed after such standards became effective:

(1) Approximately 67 percent of all persons discharged from the Navy by reason of unsuitability (including inaptitude) received honorable discharges and the rest received general discharges.

(2) Approximately 54 percent of all persons discharged from the Navy by reason of unfitness received general discharges and the rest received undesirable discharges.

(3) Approximately 25 percent of all persons discharged from the Navy by reason of misconduct received general discharges and the rest received undesirable discharges.

(*b*) The following table shows that the number of bad conduct discharges issued in recent years has been gradually decreasing:

*Number of bad-conduct discharges*

| Fiscal year | Number | Fiscal year—Continued | Number |
|---|---|---|---|
| 1954 | 4,013 | 1958 | 2,784 |
| 1955 | 3,127 | 1959 | 1,971 |
| 1956 | 1,846 | 1960 | 1,663 |
| 1957 | 2,220 | 1961 | 1,521 |

This gradual decrease is attributed to a number of factors such as the program for eliminating low-caliber persons before they got into serious trouble and the beneficial results of the Navy-wide leadership program. These programs in turn made possible a decrease in the number of courts-martial awarded. A contributing factor may be the increasing complexity in court-martial procedures with a consequent increase in the number of convictions set aside upon an appellate review. The increased use of clemency and probation also has a bearing on this trend.

(*c*) The number of dishonorable discharges awarded by general court-martial has decreased to an almost negligible number. During fiscal year 1952 the first full year during which the Uniform Code of Justice was in effect, 170 such discharges were executed. This number has gradually decreased to such an extent that in fiscal year 1961 only 10 dishonorable discharges were executed. This marked decrease in dishonorable discharges is apparently due to the increasing reluctance by court-martial and reviewing authorities to impose the worse type discharge upon service personnel when other more lenient discharge procedures are available.

84154—62——57

3. Trends in the U.S. Marine Corps:

(*a*) Since 1957 enlisted strength has fluctuated between 160,000 and 180,000. During this period, undesirable discharges moved from a low of 7.75 per thousan (1958) to a high of 11.9 per thousand (1960) of the population. The average for the period was nine undesirable discharges per year per thousand of the enlisted population. Due to the nature of their acts, men whose conduct results in an undesirable discharge are weeded out as early as possible in their service careers. The number of men in this category is related to the rate of imput of young men into the Marine Corps and the overall population of the Marine Corps. Unfortunately, the number of undesirable discharges has remained relatively stable through the years. Statistics indicate that a substantial majority of the undesirable discharges issued by the Marine Corps are given for homosexual acts and for convictions by civil authorities.

(*b*) A drop of almost 50 percent in punitive discharges awarded to Marines has been noted during the period 1957–61. This is explained by the effort to rehabilitate offenders and a less severe attitude on the part of reviewing authorities, including the Court of Military Appeals, toward deserters. The military offender who is convicted by court-martial and is awarded a punitive discharge is potentially restorable. Better procedures for rehabilitation and remotivation can salvage these people; but the chronic offender or homosexual and the men convicted by civil authority are beyond the reach of these restorative facilities. Consequently, the decline in punitive discharges in the Marine Corps is not matched by a decline in discharges for misconduct and unfitness (undesirable discharges).

Question 3. *In your view are administrative discharges being used, as the court of military appeals has indicated, to bypass procedures for discharge by court-martial?*

Answer: 1. There is no evidence to support the contention that administrative discharge procedures are being used in the Navy to bypass court-martial trial or other punitive measures authorized by the Code of Military Justice. For many years it has been the written and clearly understood policy of the Navy that administrative discharges are not to be given in lieu of court-martial. It is clearly recognized that punitive measures authorized by the code and administrative separations for cause each serve a vital requirement of the military organization. Through the code, discipline is maintained by specific treatment of individual offenses. The administrative discharge, on the other hand, has a much broader application in disposing of a variety of problems which are not amenable to solution by court-martial action.

2. The administrative discharge performs a vital service in separating persons from the service who for one reason or another are not able to complete their originally contracted service obligation. A large number of these separations each year are given for medical reasons or for other causes having nothing to do with misbehavior. Among this group are recruits who fail to meet training requirements, inept persons who endanger themselves and their shipmates and other persons who constitute a burden on command through inability to meet ordinary standards of professional performance. The character of discharge for such persons, whether it be honorable or general, is determined by the character of their service. In the case of discharged recruits, enlistment fraud may be cause for general discharge rather than honorable.

3. Administrative discharge for cause is generally appropriate in those cases where continued service of the individual is inappropriate but where bad conduct discharge or dishonorable discharge is not warranted or is not feasible. This group includes the typical case of homosexual involvement, persons convicted of serious offenses by civil authorities, and chronic military offenders. As in the previously described group, character of discharge is determined by character of service. In this group, however, the nature of misbehavior is frequently serious enough to warrant an undesirable discharge. For example, the typical homosexual involvement results in signed statements by the respondent admitting homosexual conduct. Frequently, however, the high mobility of witnesses and the clandestine nature of the offense prevents the development of corroborating evidence which would result in speedy trial and conviction. Since this type of individual brings disgrace on the service and frequently contaminates other Navy men by his overt conduct, expeditious administrative discharge under other than honorable conditions is often appropriate. In fiscal year 1961 homosexuals and other sexual perversion accounted for approximately 40 percent of all undesirable discharges issued by the Navy. Administrative dis-

charges for homosexuals or other aberrant sexual perversion account for 18 percent of the undesirable discharges issued by the Marine Corps.

4. Similarly, it is seldom appropriate to try a person by court-martial for an offense which has already been tried by civil court. Such action is expressly forbidden when previous conviction was by a Federal court. Secretarial regulations likewise prohibit military trial for offenses which have resulted in court convictions except under rare circumstances strictly controlled by the Secretary. Administrative discharge is therefore the only appropriate action which may be taken to eliminate from the service those individuals who have been convicted of serious crimes against the civilian community. During fiscal year 1961 this group accounted for approximately 31 percent of the undesirable discharges issued by the Navy. Administrative discharges for civil conviction account for 50 percent of the undesirable discharges issued by the Marine Corps.

5. Chronic military offenders which account for a significant number of administrative discharges are frequently not subject to punitive discharge through courts-martial action because individual triable offenses do not warrant such action. The total record of such persons, however, may provide indisputable evidence that further service will produce additional offenses and that administrative separation is indicated. To characterize the discharge of such persons as honorable would negate the value of honorable service and seem to publicly condone chronic misbehavior as a means of obtaining a satisfactory discharge while at the same time wiping out all Inactive Reserve service obligation.

6. In summary, it is felt that the Navy's procedures for administrative discharge are fair and equitable and that they do not bypass court-martial action.

7. If such a bypass procedure was operating, we could expect an inverse relationship between the numbers of punitive discharges given by courts-martial and the administrative discharges given for the same period. Such is not the case. Experience of the past several years shows that there has been no general rise in the number of administrative separations for cause as courts-martial discharges declined.

8. In fact, during the past 4 years, reduction in administrative discharges for cause has paralleled the decline in punitive discharges.

9. The following chart graphically illustrates decline in all types of discharges for cause since fiscal year 1958. (Graph will be found on page 23.)

Question 4. *To what extent is there uniformity in the armed services with respect to discharge procedures?*

Answer:

1. *Punitive separations.*—Punitive separations for the armed services are standardized by the Uniform Code of Military Justice.

2. *Administrative separations.*—All three services operate under the basic standards and procedures for administrative discharges as set forth in Department of Defense Directive 1332.14 of January 14, 1959.

3. *Differences between Army and Navy procedures.*—The following differences have been noted:

(*a*) In the Army an undesirable discharge may be approved by an officer exercising general court-martial jurisdiction. Undesirable discharges in the Navy may be approved only by headquarters.

(*b*) Army personnel being considered for a discharge by reason of unsuitability are afforded an opportunity to request or waive a field board hearing. Navy personnel are not afforded this privilege.

(*c*) In the Army, field activities have authority to effect discharges by reason of hardship/dependency. In the Navy such discharges are approved only by headquarters.

(*d*) Army personnel separated as undesirable are reduced to the lowest enlisted grade prior to separation. Navy personnel are not reduced.

(*e*) Army personnel involved in homosexual acts solely as a result of immaturity, curiosity, or intoxication are not processed under homosexual procedures for possible separation. In the Navy all such cases are so processed and a decision relative to retention or discharge is made upon completion of processing.

(*f*) Under Army procedures, special courts-martial are precluded from awarding bad conduct discharges.

4. *Differences between Air Force and Navy procedures.*—The following differences have been noted:

(*a*) In the Air Force an undesirable discharge may be approved by an officer exercising general court-martial jurisdiction. Undesirable discharges in the Navy may be approved only by headquarters.

(*b*) Certain Air Force personnel being considered for a discharge by reason of unsuitability are afforded an opportunity to request or waive a field board hearing. Navy personnel are not afforded this privilege.

(*c*) In the Air Force, field activities have authority to effect discharges by reason of hardship/dependency. In the Navy such discharges are approved only by headquarters.

5. *Marine Corps procedures.*—Unsuitable, unfitness, and misconduct discharge procedures in the Marine Corps are the same as in the Navy except as follows:

(*a*) The Commandant of the Marine Corps and Marine general officers in command can discharge without a field board for reason of unsuitability; however, the individual must be afforded an opportunity to submit a statement prior to discharge.

(*b*) The Commandant of the Marine Corps or any Marine Corps general officer exercising general court-martial jurisdiction, after field board action, may discharge marines for unfitness or for misconduct; except that unfitness discharges for reasons of sexual perversion will be referred to the Commandant of the Marine Corps for final action. Additionally, if a field board has recommended that a man be retained and a commanding general disagrees and thinks the man should be discharged, the case will be forwarded to the Commandant for final action. Referral to the Commandant of the Marine Corps is also required where the field board recommends a higher type discharge and the commanding general considers a lower type discharge is appropriate.

Question 5. *What are the criteria in each armed service for issuance of a general discharge instead of an honorable discharge?*

Answer:

1. The issuance of a general discharge rather than honorable discharge to personnel in the naval service stems from one of two general reasons: overall deficiency in performance and specific misconduct, unfitness, or unsuitability.

(*a*) Overall deficiency in performance: (1) Under the Navy's system of assigning periodic performance marks to enlisted personnel, certain minimum average marks in performance must be maintained in order to qualify for an honorable discharge. If the minimum proficiency for honorable discharge is not maintained during the period of enlistment, a general discharge rather than honorable discharge is issued. Minimum proficiency standards for issuance of honorable discharge are as follows: On a Navy grading scale of 4 as perfect, an individual must have made a final overall average in perforamnce marks of 2.7, and an average of not less than 3 in the trait of military behavior. He must not have been convicted by general court-martial or more than one special court-martial (the portion regarding courts-martial is disregarded in the cases of first enlistments where the individual maintained an average of 3 in the trait of military behavior for the last 24 months of active duty). Performance marks are assigned on a semiannual basis and on certain special occasions to take cognizance of such things as particularly meritorious or derogatory performance. Prior to separation, all assigned marks are averaged and used in determining whether an honorable or general separation is warranted. Individuals who are to be administratively separated without having received performance marks (such as recruits) are normally issued honorable separations if they make a sincere effort to maintain proper military behavior and to perform duties in a proficient and industrious manner.

(2) The Marine Corps also prescribes certain minimum average marks in conduct and proficiency in order to qualify for an honorable discharge. On a grading scale of 5 as perfect, an individual must have made a final overall average in conduct of 4 and proficiency 3. He must not have been convicted by a general court-martial or more than one special court-martial. Marks in conduct and proficiency are assigned on a semiannual basis and on occasion of changes in duty assignment, transfers and derogatory performance. Upon separation, all assigned marks are averaged to determine the type discharge—honorable or general—to be issued. As in the Navy, individuals who are administratively separated from the Marine Corps without having received conduct and proficiency marks (such as recruits) are normally issued honorable separations if they have made a sincere effort to maintain proper military behavior and to perform duties in a proficient and industrious manner. Regulations also provide that an honorable discharge rather than a general discharge may be issued where circumstances make a general discharge inappropriate, such as, the case of an individual cited for exceptionally meritorious conduct.

(*b*) General discharge issued for specific misconduct, military unfitness, or unsuitability: Persons separated for unfitness or misconduct may be given an undesirable, general, or honorable discharge depending upon the nature of misbehavior involved and the circumstances of individual cases. In view of the failure to satisfactorily complete the enlistment contracted for, an honorable discharge is rarely appropriate in these cases. General discharges are assigned in those cases involving poor performance where further service is not appropriate but where circumstances of the case including previous record and commanding officers recommendation dictate against an undesirable discharge. Administrative discharge for cause stemming from unfitness, misconduct, or unsuitability includes the following categories:

(1) Unfitness: Frequent involvement of a discreditable nature with civil or military authorities, sexual perversion including but not limited to lewd and lascivious acts, homosexual acts, sodomy, indecent exposure, indecent acts or assault upon a child under age 16, drug addiction or use of narcotics, established pattern of shirking, and established pattern of dishonorable failure to pay just debts.

(2) Misconduct: Conviction by civil authorities or civil action tantamount to finding of guilty of felonies or serious offenses involving moral turpitude, prolonged unauthorized absence of 1 year or more, and fraudulent enlistment. (Where the fraudulent enlistment consists of failure to reveal a juvenile record a general discharge is appropriate except where circumstances warrant a lower type of discharge).

(3) Unsuitability: Inaptitude (those individuals who are inapt due to lack of general adaptibility, want of readiness or skill, or inability to learn), duly diagnosed character and behavior disorders, disorder of intelligence and transient personality disorders due to stress, apathy (defective attitudes and inability to expend effort constructively or a significant observable defect apparently beyond the control of the individual), enuresis, alcoholism, and homosexual tendencies.

2. Enlisted persons in the Navy being considered for administrative separation with undesirable discharge by reason of unfitness or misconduct are advised of the reasons therefor and are offered the following privileges:

(*a*) To have his case heard by a field board of not less than three officers.

(*b*) To appear in person before such board.

(*c*) To be represented by counsel who, if reasonably available should be a lawyer.

(*d*) To submit a statement in his own behalf.

All such cases are forwarded to the Chief of Naval Personnel for review prior to a discharge being directed. If an undesirable discharge is contemplated the case is further reviewed by a board of senior officers. This board reviews all available information including the proceedings of the field board and the entire service record of the respondent. Decisions involving undesirable discharges are finally based upon this board's recommendations as well as those of the commanding officer and the field board (if such a board was held). Final action of the Chief of Naval Personnel may dismiss the case, retain in a probationary status, or direct administrative separation.

3. Enlisted persons in the Marine Corps being considered for administrative separation by reason of unfitness or misconduct, are advised of the reasons therefor and are offered the same privileges with respect to a hearing, assistance of counsel, and the opportunity to make a statement as in the Navy. In addition, persons considered for a general discharge for unsuitability, misconduct, or unfitness are also afforded an opportunity to make a statement in their own behalf before the discharge may be effected. All such cases are forwarded to a Marine general officer in command for action. The decision on such cases is normally made by the Marine general officer in command, if he approves the recommendation. Should the general officer disapprove a recommendation for discharge he may direct retention of the individual concerned. If retention is recommended, and the Marine general officer disapproves the recommendation, the entire proceedings must be forwarded to the Commandant of the Marine Corps for decision. Likewise all cases involving sex perversion must be referred to the Commandant of the Marine Corps for decision. And the CMC also decides cases which would normally warrant an undesirable discharge but a higher type of administrative discharge has been recommended.

4. In addition to the above two broad reasons for general discharge (overall performance and specific unfitness, misconduct, or unsuitability) these are

minor programs operating in the Navy and Marine Corps which authorize general discharge without reference to the Chief of Naval Personnel or the Commandant of the Marine Corps. Examples of these programs include the separation of foreign nationals (Filipinos) who have entered into fraudulent enlistments and the separation of persons who are not equipped mentally to meet service performance standards. In these cases the discharge may be general if the performance grades of the individual do not meet honorable discharge requirements.

5. Recruit training commands are authorized to discharge inapt recruits without reference to departmental review. General discharges are used in this group when there is evidence of fraudulent enlistment or where the recruits' performance is particularly bad.

Question 6. *What inducements, if any, are given to a serviceman to persuade him to waive a board hearing with reference to a projected discharge? Is he given reason to anticipate more favorable action if he waives a board hearing?*

Answer:

1. There is no evidence of Navy or Marine Corps commanding officers offering or causing to be offered any preferential treatment to persons who agree to waive appearance before a field board.

2. When a commanding officer has exhausted the resources of leadership, incentive, and the Code of Military Justice to keep a serviceman productively employed he must weigh the probability of further misconduct against the individual's overall worth to the service with a view toward possible administrative separation. In reaching his decision the commanding officer must relate the individual's performance to that of his entire command. When the respondent's poor performance has been such that he is legitimately classified as undesirable in the command, there is no purpose to be served in offering leniency or the inducement of a general discharge to avoid field board hearings. To do so would be to advertise within the command that minor administrative inconvenience is enough to dissuade the commanding officer from recommending a type of discharge which truly reflects the character of the offender's performance.

3. When the commanding officer feels that general discharge is appropriate rather than undesirable discharge it is his duty to so inform the individual concerned. Since the majority of these individuals fully recognize their inaptitude for further service, their own interest is often served by waiving field board proceedings in order to achieve quick discharge. Additionally the respondent often recognizes that the character of his service is such that he cannot qualify for honorable discharge even though he completes his contract.

4. When the commanding officer recommends a general discharge and the respondent waives field board privileges, an undesirable discharge is never ordered without extending the privilege of further representation by the respondent. If the individual should then negate his previous waiver and request a field board proceeding, it is invariably granted at the departmental level.

Question 7. *In instances where board hearings are held with respect to possible discharge or revocation of an officer's commission, to what extent does the action ultimately taken by the service generally conform to the recommendations of the Board?*

Answer:

1. In no officer case is the action taken by the Secretary of the Navy more severe than that recommended by the board of officers, whether or not the officer concerned was actually heard by such board. In some cases more lenient action will be taken. For example, the Secretary of the Navy may decide that an officer recommended for discharge should be retained; that one recommended for other than honorable discharge should receive a general discharge (under honorable conditions); or that one recommended for general discharge should receive a fully honorable discharge. There is no economical way of determining the number of cases in which clemency may be thus exercised. Perhaps 10 percent would represent a fair estimate. In direct answer to the question, it is estimated that in 90 percent of officer cases, the action taken by the service generally conforms to the recommendations of a board of officers.

2. In the case of enlisted Navy personnel, the action ultimately taken by the Chief of Naval Personnel generally conforms to the recommendation of the field board when retention, honorable discharge, or discharge under honorable conditions is recommended. In those rare cases where this rule is not followed, action is not taken until the individual concerned is advised that action less favorable than that recommended is contemplated. The individual is given op-

portunity to make representation as to why such less favorable action should not be taken. This further representation, together with the comment and recommendation of the commanding officer, is evaluated by the Chief of Naval Personnel before final decision in the case.

The action ultimately taken by the Chief of Naval Personnel in cases where an undesirable discharge of an enlisted man is recommended conforms to the field board recommendation for separation from the naval service, but in a very large number of cases a more favorable discharge is awarded. This action is taken without further referral to the command initiating the recommendation. The gray area which is resolved in such cases is the determination of the dividing line where a record becomes sufficiently aggravated to justify an undesirable discharge. All matters of record are examined including such variables as age, GCT, education, length of service, performance marks, psychiatric evaluation if available, nature of offenses, length of time between offenses and civil record.

Although precise records of the recommendations of field boards are not available, a reasonably accurate estimate can be made of the number of undesirable discharges recommended because such cases are referred to an enlisted performance evaluation board convened in the Bureau of Naval Personnel. Using records available of the actions of this board indicates that the Chief of Naval Personnel action on recommended undesirable discharge cases is in consonance with the recommendations of field boards only between 50 and 60 percent of the time. In the remainder of the cases more favorable action is taken.

3. Marine Corps procedures—the action of field boards with respect to officer and enlisted, is reviewed at Headquarters, U.S. Marine Corps. Experience indicates that board recommendations are usually followed.

Question 8. *To what extent are lawyers made available to represent respondents in board hearings on discharge?*

Answer:

1. Under Navy procedures when an enlisted member exercises his privilege to be represented by counsel in a board hearing, the commanding officer shall appoint an officer on active duty who, if reasonably available, is a law specialist, a graduate of a law school, or a member of the bar of a Federal or State court; otherwise he shall appoint an officer he considers qualified to act as counsel for the respondent. The availability of a lawyer in any given case depends primarily upon the respondent's place of duty. If he is assigned to a ship or an isolated shore station, it is unlikely that a lawyer will be available. If he is assigned to or near a major shore command or a naval station, or receiving station, a lawyer will usually be available to represent him. Since virtually all board proceedings involving officers are held in the Bureau of Naval Personnel or at headquarters of naval districts, lawyers will usually be available to represent officers. Regardless of whether the respondent is an enlisted member or an officer, he is privileged to retain civilian counsel at his own expense.

Question 9. *What is the workload of the discharge review boards and the boards for the correction of military (or naval) records? What is the average or median time for review of cases by these boards?*

Answer:

1. The Navy Discharge Review Board during calendar year 1961 received and docketed 1,883 cases.

2. The average time for review of cases by the Navy Discharge Review Board is 3 to 4 months.

3. The Board for Correction of Naval Records during calendar year 1961 received and docketed 1,611 cases. Action was completed in 313 cases involving review of discharges.

4. The average time for review of cases by the Board for Correction of Naval Records is 7 months.

Question 10. *In what percentage of cases do these boards grant relief to the applicant? And in what percentage of cases does a board for correction of military records provide relief previously denied by a discharge review board?*

Answer:

1. The Navy Discharge Review Board during calendar year 1961 granted relief in 9.87 percent of its cases.

2. The Board for Correction of Naval Records during calendar year 1961 granted relief in 50.8 percent of its cases. Relief was granted in 22.6 percent of the 313 discharge cases.

3. The Board for Correction of Naval Records during calendar year 1961 granted relief in 0.005 percent of the cases previously denied by the Navy Discharge Review Board.

Question 11. *What is the procedure utilized by each service in requiring officers to show cause why they should be retained in the service or should retain their commissions?*

Answer:

1. In the Navy and in the Marine Corps, Regular officers of less than 3 years of service and all Reserve officers are subject to a show cause administrative notice and hearing procedure. The officer is given a specific written statement of reasons for which his separation is under contemplation, and is given an opportunity to make either or both a written and oral answer. In rare situations it is either apparent at the outset or becomes apparent from the individual's response that there is a controverted determinative issue in the case. In these cases if the separation action is pressed further any one of three adjudicative procedures may be utilized. A general or special court-martial trial may be held if there is involved a matter legally susceptible to such treatment. A court of inquiry may be ordered if it is necessary to subpena witnesses not in the Armed Forces. A formal investigation may be convened in the appropriate locality if there is no need for subpena power. Any of those procedures permits confrontation with adverse witnesses and an opportunity to cross-examine them. Occasions for utilizing these procedures are vitually nonexistent, however, as there is seldom any determinative fact which is in controversy, and any less material issues are usually conceded to be as contended by the individual.

2. In the typical case, the officer does not controvert any fact, but presents the occurrences as viewed from his vantage point and makes a compassionate plea, presenting written personal testimonials from reputable civilians and military personnel who know him. For these cases, a conference type of informal hearing procedure, before boards of officers in the Bureau of Naval Personnel or Headquarters of the Marine Corps, has worked well for over 18 years now.

3. In the case of a Regular officer under a permanent appointment who has over 3 years of continuous commissioned service, the Navy and Marine Corps, unlike the Army and Air Force, have no statutory authority for a show cause type of proceeding. In lieu of a show cause type of procedure for career Regulars, the Navy and Marine Corps have had, since 1938, statutory authority for reports of the names of officers as unsatisfactory by selection boards. The currently applicable statute is section 6384 of title 10, United States Code. Under this statute a board convened to select officers for recommendation for promotion is required to report also the name of any officer who (*a*) is eligible for selection for promotion; (*b*) has less than 20 years of total commissioned service; and (*c*) has a record indicating to the board that he is unsatisfactory in his present grade and would be unsatisfactory if promoted to higher grade. If such a report is approved the officer is discharged with 2 months basic pay per year of total commissioned service, up to a maximum of 2 years basic pay. The following are the objectionable features of this procedure:

(*a*) There is no provision for notice to or hearing of the officer prior to the board report. Offsetting considerations, however, are:

(1) Under longstanding naval and Marine Corps personnel administrative practice, he will have had an opportunity to make a written statement concerning every adverse entry in his record which might prompt such a report.

(2) After the event, he can apply to the Board for Correction of Naval Records, established under section 1552 of title 10, United States Code, and could obtain a hearing, confrontation, and cross-examination if the circumstances are such as to require these procedures to assure substantial fairness.

(*b*) The report as unsatisfactory can be made only after the officer is eligible for consideration for promotion. A lieutenant or lieutenant commander (captain or major, Marine Corps) is not eligible for consideration for promotion until such time as he will complete 4 years service in his present grade before the end of the fiscal year; a lieutenant (junior grade) or first lieutenant, until such time as he will so complete 2 years service in his present grade; a commander or lieutenant colonel, 5 years; and a captain or colonel, 3 years. This means that if unsatisfactory performance is detected shortly after an officer has been promoted, a wait of up to 5 years may be required before he could be reported unsatisfactory by a selection board.

(*c*) Once an officer has completed 20 years of total commissioned service, he can be removed from the active list only by court-martial dismissal, physical

disability retirement, or retirement by reason of nonselection. A commander or lieutenant colonel is not forced to retire, in the absence of a physical disability, until he has completed 26 years of total commissioned service; a captain or colonel, until he has completed 30 years such service. In some cases these more senior officers complete 20 years of total commissioned service before they complete the period of service in grade required to render them eligible for consideration for promotion, hence eligible to be reported unsatisfactory. In this event the combined effect is to render it impossible to eliminate them by report of unsatisfactory once they have completed a period of 15 or more years of total commissioned service. A temporary alleviation for the above condition is provided by Public Law 85–155 approved August 11, 1959, as amended, title 10, United States Code, section 5701, note. This legislation is effective only until June 20, 1965, but so long as it is effective the two senior grades of Navy and Marine Corps officers mentioned above can be forced to retire at an earlier date by reason of not being recommended for continuation on the active list by boards convened for that purpose.

Question 12. *To what extent have undesirable discharges been based on alleged misconduct for which a serviceman has requested, but been denied, a trial by court-martial? Is there any provision for allowing a serviceman to request a court-martial to vindicate himself with respect to alleged misconduct which he anticipates will be made the basis of proceedings leading to an undesirable discharge?*

Answer: 1. In approximately one-half of 1 percent of the administrative discharge cases involving homosexual conduct, the individual concerned requests and is denied trial by courts-martial. In such cases the commanding officer invariably acts in the best interest of the service in his attempt to expeditiously remove from his command and from the Navy any person who has become involved in homosexual conduct. Since the nature of this type offense is clandestine and secretive and the availability of witnesses often uncertain, trial by courts-martial is often not feasible even though the respondent has submitted sworn statements attesting to his frequent involvement in perverted acts. In the fact of probable long delay in processing through courts-martial procedures and with written admission of homosexuality the commanding officer infrequently exercises his prerogative to deny trial by courts-martial in favor of administrative processing. In such a case the discharge directed is almost invariably under honorable conditions.

2. The request for and denial of courts-martial trial in other areas of administrative processing is for practical purpose nonexistent. Since administrative discharge for frequent and chronic involvement with civil or military authorities considers the total record of past performance (including courts-martial) in arriving at a decision, it would be inappropriate to attempt court-martial trial for the purpose of arriving at a discharge decision. Such trial of a total record is not authorized and its use would almost certainly imply double jeopardy. Accordingly, no provisions exist which provide for request for trial by courts-martial for each offense which might be subsequently used in administrative discharge proceedings.

Question 13. *Could the subcommittee be furnished with brief summaries of the facts and legal issues involved in some of the typical cases from each service with respect to the validity or legality of administrative discharges?*

Answer: 1. In responding to this question it seems appropriate to develop "typical" cases in the various areas of administrative processing and to look at the legality or validity of each case separately. The infinite variety of circumstances which surround individual recommendations for administrative separation prevent the construction of a truly typical case in any single area of misbehavior. The typical cases outlined below are therefore only approximations which represent the unremarkable and most frequently occurring case.

(*a*) *Civil conviction.*—Most frequently involved is the young serviceman who while on authorized or unauthorized absence commits a serious crime in the civilian community. Offenses which are most common are car theft, assault, robbery, burglary, and accidents involving drunkenness. In the course of time a conviction is obtained in civil court and the serviceman is sentenced to confinement or is returned to the service under lengthy and occasionally complex probationary terms. When the severity of the crime indicates that the individual should be separated as a bad influence on command morale or a serious discredit to the service, the commanding officer may commence administrative discharge

proceedings. These proceedings may take the form of field board hearings or in less serious cases a recommendation for general or honorable discharge. In many such cases the commanding officer upon the conclusion of local proceedings may conclude that further retention in the service under probationary status is appropriate and he will so recommend. Departmental review of such cases considers all aspects of the case and arrives at a decision based upon individual case circumstances and the overall equity of treatment given similar cases throughout the Navy.

The validity of this procedure rests upon two considerations:

(1) That the military organization depending upon the good will and respect of the whole society for successful recruitment and overall reputation cannot be the harbor for convicted felons and that retention of such persons can only lower the military effectiveness of the organization.

(2) That trial by courts-martial is not appropriate for offenses which have been previously tried by civil courts.

(*b*) *Frequent involvement in military offenses.*—The typical case under this heading again involves the young serviceman who in the course of a single enlistment demonstrates a complete refusal to respond to the stimuli which produce good service in the great majority of young men. Although the offense involved most frequently in this "typical" case is unauthorized absence, the offender is usually involved in other chronic misbehavior such as insubordination, petty theft, unclean habits, and other minor infractions.

Administrative processing of such individuals is undertaken only after other measures have failed. The character of eventual discharge is determined by the individual's apparent original potential for good service (intelligence, education, etc.) and by the total record presented.

Administrative discharge in this type case not only rids the service of the unproductive command burden but also prevents the continuation of chronic bad performance which invariably leads to the even more serious consequences of a bad conduct discharge or dishonorable discharge. As in other types of cases involving separation for cause, the individual is afforded rights and privileges designed to protect his interest.

(*c*) *Homosexual involvement.*—In this "typical" case, information is received in a command indicating that a member of the command has been a partner in a homosexual act. This information may stem from the statement of another homosexual or from the accusation of an offended party. Subsequent investigation by the command or by the Office of Naval Intelligence produces written admissions by the individual concerned naming dates and partners involved in homosexual acts. In accordance with Secretarial policy every such person is considered for administrative separation. After development of the case in the field, it is forwarded to the Chief of Naval Personnel or the Commandant of the Marine Corps for review and decision. The character of discharge whether it be undesirable or general is finally determined on the basis of degree of involvement, the degree to which the individual's conduct has damaged the Navy and the total service record of the individual.

The Navy's strong sanction against homosexual conduct has as its basic validity the unique environment of shipboard life. The unusually crowded conditions under which seamen live, coupled with the very restricted opportunity for normal social outlet, makes the contamination of homosexuality particularly onerous. Persons involved in homosexual conduct are considered to be military liabilities to the Navy. Their separation is in the best interest of the service as well as the Nation.

The Marine Corps is faced with the same problem. Garrisoned in isolated areas and training under conditions which preclude normal social contacts, too often our young men fall prey to the same temptations. Once they have succumbed to such practices, however, their administrative separation is essential to the well-being of the Marine Corps.

Administrative processing of homosexuals provides the most expeditious means of effecing separation. In the great majority of cases, such processing is in the best interest of the man concerned and is undertaken with his affirmative concurrence in lieu of court-martial.

Question 14. *To what extent does the Army utilize a soldier's conviction by special court-martial as the basis for a subsequent undesirable discharge? To what extent does the Army make counsel available to an accused soldier whose case has been referred to a special court-martial?*

Navy response:

1. Navy Department policy precludes issuance of an undesirable discharge solely or primarily for an offense for which the individual was convicted by court-martial. Any deviation from this policy requires express approval by the Secretary of the Navy. Thus, the awarding of an undesirable discharge for military offenses comes only after repeated infractions of the UCMJ. Such a discharge is reserved for personnel who have demonstrated a frequent involvement of a discreditable nature with civil or military authorities. Discharge by reason of unfitness is not issued in lieu of disciplinary action except upon the determination by the Chief of Naval Personnel or appropriate Marine Corps review that the best interests of the service as well as the individual will be served by administrative discharge. The use of this procedure is extremely rare.

2. Fair, impartial, and uniform treatment to all personnel being considered for undesirable discharges is accorded. Each case is decided on its individual merits. Matters of record, including such variables as the person's military record, civil record, age, GCT/AFQT, education, length of service, performance marks, psychiatric and medical determinations, duty stations, nature of offenses and action taken thereon, length of time between offenses, length of time since commission of a last offense, individual's statement, the field board action (when applicable), commanding officer's comments and recommendations, and other pertinent factors are carefully considered, evaluated, and correlated in arriving at a proper decision (retain, honorable, general, or undesirable type discharge).

3. An accused has the right to be represented in his defense before a special court-martial by civilian counsel, if provided by him, or by military counsel of his own selection if reasonably available.

4. In compliance with article 27, UCMJ, counsel for an accused is appointed in every special court-martial case. Paragraph 6c, MCM, requires that, if trial counsel is a lawyer, appointed counsel for the accused must be similarly qualified. If the accused requests a particular officer to serve as his counsel, his request is honored if the officer requested is reasonably available.

Question 15. *To what extent are legally trained counsel made available to accused servicemen whose cases are referred to summary or special courts-martial?*

Answer:

1. The UCMJ does not require the use of legally trained counsel. Units of the fleet (except for a few major combatants) are without the services of an assigned lawyer. Shore activities of the echelon of command empowered to convene summary and special courts-martial ordinarily have either no lawyers assigned or, at best, one. When but one lawyer is assigned to a command, he must serve as its adviser and is therefore precluded from serving as counsel for an accused. The limited number of lawyers in the Navy precludes their assignment to commands unless their special qualifications as such can be fully utilized.

In concentrated areas of naval activities, legally trained counsel are utilized when their services are requested and they can reasonably be made available by the command to which assigned.

Question 16. *What are the effects on a serviceman's career of conviction by summary or special courts-martial?*

Answer:

1. Courts-martial convictions may have an effect on (1) character of separation, (2) eligibility for reenlistment, (3) eligibility for Good Conduct Medal, and (4) advancement in rate. Among other things, performance marks in the trait of military behtavior are based primarily on an individual's conduct. When an individual is convicted by courts-martial the mark in military behavior for the semiannual period involved is lowered substantially.

(*a*) *Honorable discharge.*—To receive an honorable discharge, an individual must receive a final overall trait average of 2.7 and an average of 3.0 in the trait of military behavior plus no general courts-martial or more than one special court-martial (for first enlistment only, courts-martial conviction may be disregarded if the individual maintained an average of 3.0 in the trait of military behavior for the last 24 months of active duty). Numerical grades are based upon 4.0 top grade.

(*b*) *Reenlistment.*—For a first reenlistment an individual must attain a final overall trait average of 2.6 and a minimum average of 3.0 in the trait of military

behavior for the last 12 months of active duty. For second and subsequent reenlistments an individual must receive an honorable discharge.

(c) *Good Conduct Medal.*—To receive a Good Conduct Medal an individual's record must be clear of military offenses for a period of 3 years and the individual must maintain an average of 3.0 in all traits for the 3-year period.

2. Courts-martial convictions may have an effect on eligibility for special programs, security clearances, and assignment to sensitive areas.

(a) *Special programs.*—Courts-martial convictions may preclude an individual from being recommended or, if recommended, from being selected for training in certain desirable programs such as the Polaris program or officer candidate school. Normally such recommendations and selections take into consideration the individual's conduct and a record of courts-martial, particularly within the last year, would probably be disqualifying.

(b) *Security clearances.*—Among other things, security clearances are based on an individual's conduct and a record of repeated courts-martial convictions might well raise a question concerning the individual's eligibility for security clearance, thus, in some cases, preventing the individual from serving effectively in his chosen rate.

(c) *Assignment to sensitive areas.*—A record of courts-martial convictions may preclude the assignment of an individual to a highly desirable billet in foreign shore assignment or other potentially sensitive area. In view of the nature of such billets, assignments must be on a very selective basis, which normally eliminated an individual with a substandard conduct record.

3. Repeated courts-martial convictions may have the effect of terminating an individual's career. Under certain circumstances, courts-martial may adjudge punitive discharge based upon previous convictions.

Question 17. *To what extent has the Navy, by use of dockside courts and otherwise, tried to provide for the use of lawyers as trial and defense counsel in its special courts-martial?*

Answer: 1. The dockside court concept permits furnishing multiple commands, who do not have lawyers, with legally trained officers to try and defend special court-martial cases which they (the commands) convene. Its broad utilization is not possible without the availability of legally qualified personnel and facilities.

At the present time, dockside courts are utilized infrequently and only in areas where there is a concentration of uniformed lawyers who can be spared from their primary duties.

Question 18. *Has the Army's specialized law officer plan been successful? If so, to what extent has it been adopted by the other services?*

Navy response:

1. A pilot judiciary program, sponsored by the Commandant of the Marine Corps for most Marine commands in the continental United States, and a pilot judiciary program, authorized by the Secretary of the Navy for certain naval commands on the east coast (both patterned after the Army Field Judiciary System), have been operating for about a year. The law officer error factor has been reduced from 8.7 percent to approximately 2 percent. The commands serviced, in approving the program, have evaluated it as efficient, effective, economical, and militarily sound. The expansion of the program to cover all general courts convened within the Navy and Marine Corps is presently under active consideration.

Question 19. *Under the Army's specialized law officer plan what steps are taken to assure the independence of the law officer? How is the independence of the law officer assured in the other services?*

Navy response:

1. The principal assurance is contained in code provisions which are designed to insure independence of the law officer. The staff legal officers' continuing advice to command on the law officers' function, as interpreted by decisional law, serves as a secondary assurance. In recent years, no documented instances of direct or intentional attempts to influence law officers are known.

2. The proposed Navy judiciary program would remove any appearance of influence since the law officer, under the program, would be assigned to an independent activity rather than to the staff of the convening authority.

Question 20. *Under the Army's specialized law officer plan, would it be feasible to provide that service as law officer would not be limited to officers on active duty, but could also be performed by qualified civilian employees of suitable maturity and experience?*

Navy response:

1. Article 26a, of the code, and paragraph 40 of the Manual for Courts-Martial, preclude the use of any but active duty personnel to serve as law officer of a general court-martial.

The code and manual could, of course, be amended. But the following drawbacks are observed:

(1) Courts-martial serve the military society. Many offenses are of a purely military nature. It is therefore desirable that their judiciary officers be appointed from the members of that society.

(2) Military personnel assigned as law officers, who do not meet the requirement for maturity, experience, and judicial temperament, can be reassigned to other duties without affecting the career potential of the officer involved.

Civilian attorneys specially employed to serve as law officers, who did not prove themselves to have the judicial temperament necessary to carry out their duties, would not be subject to reassignment with the same facility as military personnel.

(3) Military personnel are moved from one location to another as part of normal military life. Moving civilian employees—especially to less desirable locations, including forward areas, for extended periods, is fraught with obstacles.

(4) The position of law officer represents a career opportunity which should not be taken from the uniformed lawyer.

Question 21. *What instances have there been in recent years of "command influence" with respect to members of courts-martial, including the trial and defense counsel of special or general courts-martial?*

Answer:

1. No documented instances of direct or intentional attempts in recent years to influence members of special or general courts-martial, including the trial and defense counsel, have been brought to departmental level's attention. There have been instances which the U.S. Court of Military Appeals has held to constitute command influence, but those relate to acts which, when taken, were not necessarily intended to influence the action of a court. For example, in one case reported in 10 U.S.C.M.A. 77, a convening authority's remark on a prior conviction was held to constitute improper command influence, even though at the time it was made its possible use in a subsequent case was obviously not contemplated. In like manner, U.S. Court of Military Appeals decisions have held that policy directives such as one directing the separation of homosexuals by either judicial or administrative procedures, constitute improper command influence if brought to the attention of the court immediately before or during trial (see, for example, *U.S.* v. *Walinch*, 8 U.S.C.M.A. 3).

Question 22. *Has the practice of negotiated guilty pleas used by the Army and Navy been successful? If so, why is it not used by the Air Force?*

Answer:

1. The practice of negotiating guilty pleas in exchange for agreement to limit the sentence or to drop or reduce pending charges, which has been officially sponsored in the Navy since 1957, is considered successful. While no exact figures are available, experience indicates that it has definitely resulted in substantial savings of time and expense for trial without impinging upon substantial justice. No instances have come to official attention in which the practice has resulted in any denial of rights to an accused, or has resulted in demonstrated prejudice to him. The few difficulties which have been encountered stem from the use of the negotiated plea by defense counsel who are not legally qualified.

Question 23. *What are the percentages of guilty pleas for each type of court-martial—summary, special, and general—for each service for each year since 1950?*

Answer:

NOTE 1.—No statistics are available prior to January 1, 1953. Therefore fiscal year 1953 represents only the last 6 months of that fiscal year.

NOTE 2.—This office began a new statistical system on October 1, 1958. Therefore fiscal year 1959 figures represent only the last 9 months of that fiscal year.

NOTE 3.—No summary or non-bad-conduct-discharge–special-court-martial figures are available. The percentages in the second column were figured on bad-conduct-discharge–special-court-martial cases only.

| Fiscal year | Percentage of guilty pleas general court-martial | Percentage of guilty pleas bad-conduct discharge—special court-martial | Fiscal year | Percentage of guilty pleas general court-martial | Percentage of guilty pleas bad-conduct discharge—special court-martial |
|---|---|---|---|---|---|
| 1953 | 62 | 89 | 1958 | 65 | 84 |
| 1954 | 34 | 82 | 1959 | 81 | 85 |
| 1955 | 40 | 73 | 1960 | 75 | 90 |
| 1956 | 63 | 79 | 1961 | 76 | 92 |
| 1957 | 65 | 81 | | | |

Question 24. *What are the percentages of convictions for each type of court-martial—summary, special, and general—for each year since 1950?*

Answer:

NOTE 1.—No statistics are available prior to January 1, 1953. Therefore fiscal year 1953 represents only the last 6 months of that fiscal year.

NOTE 2.—This office began a new statistical system on October 1, 1958. Therefore fiscal year 1959 figures represent only the last 9 months of that fiscal year.

| Fiscal year | Percentage of general court-martial convictions | Percentage of special court-martial convictions | Percentage of summary court-martial convictions |
|---|---|---|---|
| 1953 | 97 | [1] 92 | [1] 97 |
| 1954 | 95 | 93 | 97 |
| 1955 | 91 | 92 | 96 |
| 1956 | 97 | 93 | 98 |
| 1957 | 96 | 93 | 98 |
| 1958 | 95 | 94 | 96 |
| 1959 | 95 | [1] 95 | 96 |
| 1960 | 95 | [1] 95 | 97 |
| 1961 | 92 | 96 | 97 |

[1] Estimate.

Question 25. *What are typical or "average" sentences in each service for some of the more frequent violations of the uniform code, such as unauthorized absence, desertion, failure to obey, larceny, and assault?*

Answer:

1. Sentence statistics are not maintained at departmental level of sentences of special courts-martial not involving a bad conduct discharge or of sentences of summary courts-martial. However, a spot check was made of cases involving such sentences tried in the Norfolk, Va., and Newport, R.I., areas. The following are found to be typical sentences: [1]

Unauthorized absence:
- 1st offense:
  - 1 to 15 days — Confinement 18 days, forfeiture of $45.
  - 15 to 30 days — Confinement 30 days, forfeiture of $65.
  - 30 to 60 days — Confinement 118 days, forfeiture of $194, reduction.
- 2d offense:
  - 1 to 15 days — Confinement 30 days, forfeiture of $69.
  - 15 to 30 days — Confinement 40 days, forfeiture of $83.
  - 30 to 60 days — Confinement 51 days, forfeiture of $105, reduction.
- 3d offense:
  - 1 to 15 days — Confinement 44 days, forfeiture of $82.
  - 15 to 30 days — Confinement 50 days, forfeiture of $86.
  - 30 to 60 days — Confinement 60 days, forfeiture of $124.

Failure-to-obey offenses:
- 1st offense — Confinement 18 days, forfeiture of $46.
- 2d offense — Confinement 26 days, forfeiture of $52, reduction.

Larceny:
- 1st offense — Confinement 54 days, forfeiture of $81.
- 2d offense — Confinement 74 days, forfeiture of $109.

Assault:
- 1st offense — Confinement 24 days, forfeiture of $60.
- 2d offense — Confinement 54 days, forfeiture of $73.

[1] Since sentence by court-martial must take into account the offender as well as the offense, no uniformity can be realistically expected.

2. The following are typical sentences adjudged for the listed offenses by special courts-martial which adjudged also a bad conduct discharge and by general courts-martial:

Special court-martial:

| | |
|---|---|
| Unauthorized absence | BCD, confinement for 4 months, partial forfeiture, reduction. |
| Failure to obey | Do. |
| Assault | BCD, confinement for 4½ months, partial forfeiture, reduction. |
| Larceny | Do. |

General court-martial:

| | |
|---|---|
| Unauthorized absence | BCD, confinement for 9 months, total forfeiture, reduction. |
| Desertion | BCD, confinement for 10½ months, total forfeiture, reduction. |
| Failure to obey | BCD, confinement for 10 months, partial forfeiture, reduction. |
| Assault | BCD, confinement for 10 months, total forfeiture, reduction. |
| Larceny | Do. |

Question 26. *To what extent are civilians used in the board of review operating under the Uniform Code of Military Justice?*

Answer:

1. At the present time, the Navy has five boards of review, each consisting of three members. Of the 15 board members, 7 are civilians. Each board of review has at least one military member assigned.

Question 27. *What is the average tour of duty on these boards and what provision, if any, is made to assure the independence of these boards?*

Answer:

1. Civilian board of review members are not rotated. Military board of review members are assigned for normal tours of duty (3–4 years).

2. Boards of review in the Navy operate with complete independence—the Judge Advocate General providing logistic support, including management control. No attempt is made to influence the decisions of boards of review.

Question 28. *With respect to each service and for each year since 1961, what is the percentage of cases in which boards of review have disapproved findings? In what percentage of cases have they reduced the sentence?*

Answer:

NOTE 1.—No statistics are available prior to January 1, 1953. Therefore fiscal year 1953 represents only the last 6 months of that fiscal year.

NOTE 2.—This office began a new statistical system on October 1, 1958. Therefore fiscal year 1959 figures represent only the last 9 months of that fiscal year.

| Fiscal year | Percentage of board of review disapproval of findings | | Percentage of board of review reduction of sentence | |
|---|---|---|---|---|
| | GCM | BCD-SPCM | GCM | BCD-SPCM |
| 1953 | 1 | 3 | 9 | [1] 11 |
| 1954 | 2 | 3 | 6 | 11 |
| 1955 | 1 | 1 | 8 | [1] 10 |
| 1956 | 1 | 1 | 13 | 9 |
| 1957 | 1 | 2 | 14 | 9 |
| 1958 | 2 | 3 | 23 | 11 |
| 1959 | 3 | 3 | 24 | [1] 12 |
| 1960 | 4 | 2 | 31 | [1] 13 |
| 1961 | 5 | 2 | 23 | [1] 12 |

[1] Estimate.

Question 29. *To what extent have convening authorities and/or the officers exercising general court jurisdiction acted either to disapprove findings or reduce sentences in cases which they reviewed?*

Answer:

NOTE 1.—No statistics are available prior to January 1, 1953. Therefore fiscal year 1953 represents only the last 6 months of that fiscal year.

NOTE 2.—This office began a new statistical system on October 1, 1958. Therefore fiscal year 1959 figures represent only the last 9 months of that fiscal year.

NOTE 3.—No summary or non-BCD special court-martial figures are available.

| Fiscal year | Percentage of convening and supervisory authority disapproval findings | | Percentage of convening authority reduction of sentence | |
|---|---|---|---|---|
| | GCM | BCD-SPCM | GCM | BCD-SPCM |
| 1953 | 1 | 4 | 20 | 17 |
| 1954 | 1 | 5 | 29 | 30 |
| 1955 | 1 | 8 | 31 | 38 |
| 1956 | 1 | 7 | 29 | 31 |
| 1957 | 2 | 5 | 30 | 29 |
| 1958 | 1 | 6 | 31 | 26 |
| 1959 | 5 | 8 | 54 | 42 |
| 1960 | 5 | 7 | 63 | 49 |
| 1961 | 8 | 7 | 50 | 50 |

Question 30. *Has the Air Force's Amarillo retraining group been successful? If so, have the other services undertaken similar retraining projects? Could excess capacity at Amarillo feasibly be used for rehabilitation of personnel from the other services?*

Answer:

1. In the period following demobilization after World War II, and until 1960, the Navy operated three retraining commands for the purpose of restoring court-martial prisoners to active service. In response to requirements of rehabilitation, and in the interest of efficiency, two of these retraining commands have been closed and the mission of the third has been changed to that of a disciplinary command for prisoners awaiting discharge. Retraining responsibilities held by these three major activities have been shifted to the numerous brigs throughout the Navy and Marine Corps. Retraining at the brig level includes evaluation, counseling, reindoctrination in service responsibility and efforts toward overall acceptance of service discipline. Upon restoration of an individual, this program of rehabilitation is extended to the restoree's new duty station. Shipboard counseling and guidance is stressed at division officer level as a means of returning the restored individual to effective service. Experience with this program of rehabilitation during the past 2 years indicates that it is effective in the majority of cases. Although statistical analysis of restoration success has not been compiled for all restorees, there is positive evidence that failure of probation is the exception rather than the rule.

2. It would not be feasible for the Navy and Marine Corps to utilize excess capacity at Amarillo. Amarillo is geared to the training of airmen. Prisoners are taught skills peculiar to the Air Force and facilities for such instruction are already available. The Navy and Marine Corps, due to the present trend toward very short sentences, would have few individuals with restorative potential who would have long enough sentences to warrant transfer to Amarillo. Transportation to Amarillo which is no problem to the Air Force, would be difficult for the Navy. Also, the Air Force reports (November 1961) that Amarillo is "near capacity" and "this tended to dilute the individual attention, which is a basic feature of our system. * * *"

Question 31. *In view of the unavailability of a bail procedure under military law, what steps have been taken by the three services to minimize pretrial confinement?*

Answer:

1. For many years now, the Navy has had in operation an active policy to cope with the unavailability of bail in the court-martial system. OpNav Instruction 1640.2, of June 3, 1957, directs that "personnel awaiting trial should be confined only when essential to insure their presence or to prevent recurrence of their offenses, and every effort must be made to expedite the trial of those who must be confined," and further directs and enjoins commanding officers "to review their existing policies and procedures governing the confinement of accused persons prior to trial," and to make every effort to reduce the number of persons confined prior to trial by careful evaluation of necessity for confinement and by eliminating delays in bringing confined persons to trial.

2. SecNav Instruction 1640.5, of September 22, 1961, restates a prior policy in connection with the use of confinement by providing as follows: "* * * pretrial confinement should be avoided with minor offenders and most first offenders whenever suitable alternatives exist. The maximum use in appropriate

cases of no restraint, arrest, or restriction in lieu of arrest before trial is encouraged. Adherence to this policy insures full compliance with article 10 (UCMJ) and paragraph 88e(1), (MCM)."

3. BuPers field correction specialists, when visiting commands operating brigs, stress the foregoing policies to the officers concerned and brig specialists monitor the implementation of the above policies to insure compliance. In addition, reporting procedures and onsite survey and inspection teams insure compliance with directives.

4. Operation Tapecut, a program sparked by the Judge Advocate General of the Navy, in 1957, was directed toward the improvement and speeding up of the judicial procedures in the military.

All of the above programs are aimed at cutting down the number of personnel in pretrial confinement.

Question 32. *When a serviceman is subject to trial in either a Federal district court or a court-martial, what are the criteria for determining which court shall exercise jurisdiction? Are these criteria satisfactory?*

Answer:

1. The criteria for determining which court shall exercise jurisdiction have been set forth in a memorandum of understanding between the Department of Justice and the Department of Defense relating to investigation and prosecution of crimes over which the two departments have concurrent jurisdiction. This memorandum is implemented in the Navy by SecNav Instruction 5820.2. These criteria which have been in effect since 1955 are considered satisfactory.

Question 33. *Under circumstances where a serviceman's alleged misconduct violates both the Uniform Code of Military Justice and the law of some State under what circumstances, if any, is the serviceman tried by court-martial if he has already been tried by a State court?*

Answer:

1. Secretarial policy limits trial by court-martial of service personnel who have been tried by State courts to situations involving substantial discredit to the naval service, or where, in the interest of justice, discipline, and the proper administration of the naval service, trial by court-martial is essential. In these cases, prior secretarial approval is a condition precedent to trial by general and special courts-martial. Trial by summary court-martial can be authorized by the cognizant general court-martial authority.

2. In determining whether or not a court-martial is warranted, the following guidelines have been established and are detailed in paragraph 0106d of the JAG Manual:

(a) Cases in which punishment by civil authorities consists solely of probation, and local practice does not provide rigid supervision of probationers, or military duties of the probationer make supervision impractical.

(b) Cases in which civil authorities have, in effect, divested themselves of responsibility by an acquittal manifestly against the evidence, or by the imposition of an exceptionally light sentence on the theory that the individual will be returned to the naval service and thus removed as a problem to the community.

(*c*) Cases of homosexuality in which mild penalties have been imposed upon conviction. (Homosexuality is a more serious problem in the military society because of the close contact living and working conditions of its members.)

(*d*) Other cases in which the interests of justice and discipline are considered to require further action under the Uniform Code of Military Justice.

Question 34. *In situations where State authorities have indicated their willingness to relinquish jurisdiction over a serviceman if the armed services will prosecute him, under what circumstances is prosecution undertaken by the armed services?*

Answer:

1. There are no written Navy Department policies on this question. However, most shore commands maintain close liaison with the local civil authorities and Navy personnel who commit minor civil offenses, other than traffic violations, are often released to the Navy for disciplinary action. When individuals are turned over to the Navy under such informal arrangements disciplinary action appropriate to the offense is generally taken. The civil authorities, however, are given no guarantees as to the type of disciplinary action which will be taken. In serious cases (felonies) the civil authorities normally retain jurisdiction.

2. There is a long-established tradition in the naval service that the "Navy takes care of its own." In the interest of good morale and esprit de corps, commanding officers attempt to protect the interests of members of their commands before civil tribunals by having a command representative present at the proceedings. When the commanding officer feels that the best interests of the service as well as the community will be served by returning an offender to naval jurisdiction, he will so recommend to the civil court.

Question 35. *Is legislation needed to give the Federal district courts jurisdiction over misconduct overseas by civilian dependents and employees accompanying the armed services in peace time?*

Answer:

1. As the result of recent Supreme Court decisions, a serious "void" presently exists with respect to criminal jurisdiction over civilian dependents and employees of the Armed Forces overseas in peacetime. The only recourse now available, other than administrative action, is to turn such persons over to courts of the foreign country where they are stationed for trial. Consequently, some form of criminal jurisdiction, exercised by the United States, is clearly needed.

2. The Navy Department has previously favored the enactment of legislation submitted as DOD items 87-109 and 87-138. The latter proposal would extend the jurisdiction of Federal district courts in espionage cases. The former DOD proposal (87-109) proposes a constitutional amendment authorizing the exercise of court-martial jurisdiction over persons serving with, employed by, or accompanying the Armed Forces of the United States. As an alternative, the proposal recommends that the jurisdiction of Federal district courts be extended to offenses committed overseas by any person owing allegiance to the United States. If the constitutional amendment cannot be obtained, the alternative proposal is needed.

Question 36. *Is jurisdiction needed to give the district courts jurisdiction over violations of the Uniform Code by ex-servicemen while they were on active duty?*

Answer:

1. Yes. Article 3(a) of the Uniform Code of Military Justice, insofar as it purported to authorize the trial of former servicemen, now civilians, by military courts-martial, was declared unconstitutional by the U.S. Supreme Court in *Toth* v. *Quarles* (350 U.S. 11, 100 L. ed. 8, 76 S. Ct. 1). The Court made it clear that Congress has power under the Constitution to provide for trial in Federal district courts of discharged servicemen of offenses committed while on active duty.

2. Under Article 3(a), two types of offenses are involved: those of a purely military nature, and those committed outside the territorial jurisdiction of any Federal district court. Although the Navy has attempted no trials under article 3(a), it is considered that legislation is needed to give Federal district courts jurisdiction over offenses, other than purely military offenses, which are committed overseas. The constitutional amendment referred to in question No. 35, will not answer this need since it would provide jurisdiction only over persons while they are still under military control. However, the legislation favored as an alternative to the constitutional amendment (to subject persons owing allegiance to the United States to the jurisdiction of Federal district courts for crimes committed overseas), if enacted, would adequately provide the needed jurisdiction.

## DEPARTMENT OF THE NAVY RESPONSES TO SUBCOMMITTEE "AIDE MEMOIRE"

### ORIGINAL QUESTION 1

Related aide memoire question: *With respect to the request for total service strength at a particular time, each service will provide the total enlisted strength on board as of July 1 of each fiscal year included in its previous response to question 1 of the subcommittee's original questionnaire.*

Answer:

1. The following is the Navy enlisted active duty strength as of June 30 for fiscal years 1950 through 1961:

*End strength*

| Fiscal year: | | Fiscal year—Continued | |
|---|---|---|---|
| 1950 | 331,860 | 1956 | 591,996 |
| 1951 | 661,639 | 1957 | 597,859 |
| 1952 | 735,753 | 1958 | 563,506 |
| 1953 | 706,375 | 1959 | 552,221 |
| 1954 | 642,048 | 1960 | 544,040 |
| 1955 | 579,864 | 1961 | 551,603 |

Related aide memoire question: *The statistics furnished the subcommittee do not appear to include officer cases, although presumably officer dismissal tends to follow the same trends. The subcommittee will appreciate your providing comparable information concerning officers. With respect to data pertaining to officer cases, each service will furnish meaningful data pertaining to the separation of Regular and Reserve officers for fiscal years 1957 through 1961. Data should include July 1 strength, dismissals as a result of trial by general court-martial, resignations in lieu of trial, revocations of commissions, resignations in lieu of board action, and separations by category, i.e., honorable, under honorable conditions, and under other than honorable conditions.*

Answer:

1. The attached table sets forth the statistical data requested with regard to officer separations:

| Fiscal year | Total active officer strength | Total active separations | Percent total active officer strength | Total active resignations | Percent active separations | Total other separations | Total other resignations | Percent other[1] separations | Total dismissals | Total revocations. | Total honorable separations | Total honorable/general[2] separations |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1957 | 72,518 | 808 | 0.011 | 357 | 44 | 43 | 35 | 81 | 1 | 0 | 744 | 21 |
| 1958 | 72,152 | 496 | .007 | 375 | 76 | 42 | 31 | 75 | 2 | 1 | 431 | 23 |
| 1959 | 70,312 | 693 | .0098 | 314 | 45 | 51 | 45 | 88 | 0 | 2 | 630 | 12 |
| 1960 | 68,591 | 649 | .0096 | 445 | 67 | 57 | 41 | 72 | 2 | 0 | 569 | 23 |
| 1961 | 68,627 | 377 | .005 | 237 | 63 | 48 | 46 | 96 | 3 | 1 | 295 | 34 |

[1] Other than honorable.
[2] Under honorable conditions with provision for the issuance of a general discharge certificate.

Related aide memoire question: *Statistics of officer dismissals.*

U.S. Marine Corps answer:

| | 1957 | 1958 | 1959 | 1960 | 1961 |
|---|---|---|---|---|---|
| Strength: | | | | | |
| Regular (including temporary) | 11,411 | 11,086 | 11,032 | 11,264 | 11,198 |
| Reserve | 6,040 | 5,670 | 5,047 | 4,951 | 4,964 |
| Separations: | | | | | |
| Dismissals by court-martial: | | | | | |
| Regular | 1 | 2 | 1 | ------- | 3 |
| Reserve | ------- | ------- | ------- | ------- | ------- |
| Resignations in lieu of trial by court-martial: | | | | | |
| Regular | 9 | 7 | 1 | 2 | 3 |
| Reserve | 4 | 6 | 6 | 2 | 2 |
| Revocation of commissions: | | | | | |
| Regular | ------- | ------- | ------- | ------- | ------- |
| Reserve | ------- | ------- | ------- | ------- | ------- |
| Discharge for cause: | | | | | |
| Regular | | | 1 | 1 | ------- |
| Reserve | ------- | 2 | ------- | ------- | 1 |
| Discharge for unfitness, drunk, etc.: | | | | | |
| Regular | ------- | ------- | ------- | ------- | 1 |
| Reserve | ------- | ------- | ------- | ------- | ------- |
| Resignations in lieu of board action: | | | | | |
| Regular.[1] | | | | | |
| Reserve.[2] | | | | | |
| Character of separations: | | | | | |
| Honorable: | | | | | |
| Regular | 779 | 912 | 699 | 641 | 806 |
| Reserve | 1,780 | 2,055 | 1,809 | 1,236 | 1,317 |
| Under honorable conditions: | | | | | |
| Regular | ------- | ------- | ------- | ------- | ------- |
| Reserve | ------- | ------- | 1 | 1 | ------- |
| Under other than honorable conditions: | | | | | |
| Regular | 10 | 9 | 3 | 3 | 7 |
| Reserve | 4 | 8 | 6 | 2 | 3 |

[1] Included in resignations in lieu of trial by court-martial, Regular.
[2] Included in resignations in lieu of trial by court-martial, Reserve.

Related aide memoire question: *With respect to question 1, it would be desirable to determine the extent to which the total number of discharges tend to correspond to the total strength of each service at a particular time.*

Answer:

*Separations [1] from active duty, U.S. Navy*

| Fiscal year | Honorable | Percent [2] | General | Percent [2] | Bad conduct | Percent [2] | Undesirable | Percent [2] | Dishonorable | Percent [2] | Total | Strength | Percent [2] |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1950 [3] | 129, 100 | 38.9 | 5, 095 | 1.5 | 5, 178 | 1.6 | 1, 647 | 0.5 | 791 | 0.2 | 141, 811 | 331, 860 | 42.7 |
| 1951 [3] | 82, 367 | 12.4 | 4, 912 | .7 | 2, 532 | .4 | 1, 398 | .2 | 370 | .1 | 91, 579 | 661, 639 | 13.8 |
| 1952 [3] | 130, 829 | 17.8 | 5, 663 | .8 | 1, 893 | .3 | 2, 439 | .3 | 170 | .0 | 140, 994 | 735, 753 | 19.2 |
| 1953 | 148, 355 | 21.0 | 3, 270 | .5 | 3, 112 | .4 | 2, 863 | .4 | 75 | .0 | 157, 675 | 706, 375 | 22.3 |
| 1954 | 143, 123 | 22.3 | 4, 986 | .8 | 4, 013 | .6 | 3, 867 | .6 | 68 | .0 | 156, 057 | 642, 048 | 24.3 |
| 1955 | 214, 035 | 36.9 | 12, 126 | 2.1 | 3, 127 | .5 | 3, 529 | .6 | 76 | .0 | 232, 093 | 579, 864 | 40.2 |
| 1956 | 211, 114 | 35.7 | 9, 219 | 1.6 | 1, 846 | .3 | 2, 540 | .4 | 66 | .0 | 224, 785 | 591, 996 | 38.0 |
| 1957 | 142, 329 | 23.8 | 5, 431 | .9 | 2, 220 | .4 | 3, 882 | .7 | 50 | .0 | 153, 912 | 597, 859 | 25.7 |
| 1958 | 178, 414 | 31.7 | 6, 901 | 1.2 | 2, 784 | .5 | 4, 259 | .8 | 40 | .0 | 192, 398 | 563, 506 | 34.1 |
| 1959 | 142, 117 | 25.7 | 7, 346 | 1.3 | 1, 971 | .4 | 3, 846 | .7 | 30 | .0 | 155, 310 | 552, 221 | 28.1 |
| 1960 | 143, 165 | 26.3 | 6, 342 | 1.1 | 1, 663 | .3 | 2, 697 | .5 | 30 | .0 | 153, 897 | 544, 040 | 28.3 |
| 1961 | 143, 990 | 26.1 | 5, 866 | 1.1 | 1, 521 | .3 | 2, 972 | .5 | 10 | .0 | 154, 359 | 551, 603 | 28.0 |
| Total | 1, 808, 938 | 25.6 | 77, 157 | 1.1 | 31, 860 | .5 | 35, 939 | .5 | 1, 776 | .0 | 1, 955, 670 | 7, 058, 764 | 27.7 |

[1] Separations consist of those discharged or released from active duty.
[2] Percent of total strength.
[3] Discharges only. Total separations not available.

Related aire memoire question: *Also, can you furnish the subcommittee the breakdown of the basis, reason, or authority for the issuance of the general and undesirable discharges to which you refer in the information you have provided the subcommittee?*

Answer:

1. The following is a general breakdown of the reasons for undesirable discharges for fiscal year 1950 through 1961:

| Fiscal year | Unfitness | Homosexual | Civil conviction | Fraudulent enlistment | Total |
|---|---|---|---|---|---|
| 1950 | 621 | 483 | 543 | 0 | 1,647 |
| 1951 | 197 | 533 | 423 | 245 | 1,398 |
| 1952 | 338 | 1,352 | 669 | 80 | 2,439 |
| 1953 | 704 | 1,335 | 674 | 150 | 2,863 |
| 1954 | 2,105 | 1,020 | 645 | 97 | 3,867 |
| 1955 | 2,110 | 833 | 477 | 109 | 3,529 |
| 1956 | 992 | 933 | 525 | 90 | 2,540 |
| 1957 | 1,349 | 1,307 | 1,090 | 136 | 3,882 |
| 1958 | 1,562 | 1,244 | 1,349 | 104 | 4,259 |
| 1959 | 1,428 | 1,223 | 1,127 | 68 | 3,846 |
| 1960 | 888 | 958 | 814 | 37 | 2,697 |
| 1961 | 708 | 1,148 | 1,067 | 49 | 2,972 |

2. The following is a breakdown of the reasons for general discharges for fiscal year 1957 through 1961 (breakdown for 1950–56 not available):

| Fiscal year | EOS, COG, etc. | Unsuitability | Inapt | Security | Unfit | Misconduct | Total |
|---|---|---|---|---|---|---|---|
| 1957 | 396 | 4,712 | 323 | | | | 5,431 |
| 1958 | 515 | 5,869 | 517 | | | | 6,901 |
| 1959 | 634 | 6,443 | 269 | | | | 7,346 |
| 1960 | 406 | 3,532 | | 3 | 2,170 | 231 | 6,342 |
| 1961 | 390 | 2,402 | | 2 | 2,857 | 215 | 5,866 |

Related aide memoire question: *Reason or authority for the issuance of general and undesirable discharges (enlisted personnel).*

U.S. Marine Corps answer:

*1. General discharges (enlisted)*

| | Fiscal year 1960 | Fiscal year 1961 |
|---|---|---|
| Total general discharges | 2,667 | 2,233 |
| Total discharges for unsuitability | 2,514 | 2,025 |

NOTE.—A man discharged by reason of unsuitability may be given an honorable or a general discharge depending on his military record. No statistics of specific authority for issuance of discharges by reason of unsuitability are recorded.

*2. Undesirable discharges*

| | Fiscal year 1960 | Fiscal year 1961 |
|---|---|---|
| Unfitness: | | |
| Lewd acts | 23 | 41 |
| Homo acts | 129 | 159 |
| Sodomy | 52 | 108 |
| Indecent exposure | 8 | 3 |
| Indecent acts with child | 3 | 10 |
| Other indecent acts | 4 | 5 |
| Frequent involvement | 493 | 315 |
| Pattern for shirking | 21 | 11 |
| Drug addiction or possession | 6 | 6 |
| Failure to pay debts | 111 | 48 |
| Other good and sufficient reasons | 30 | 27 |
| Misconduct: | | |
| Prolonged unauthorized absence | 6 | 2 |
| Fraudulent enlistment: | | |
| Police record | 59 | 23 |
| Juvenile record | 28 | 11 |
| Previous service in another branch | 26 | 11 |
| Physical defects | 3 | 2 |
| Marriage or dependents | 49 | 11 |
| Preservice homosexual acts | 55 | 25 |
| Conviction by civil authorities | 762 | 786 |

Related aide memoire question: *Why are there so few dishonorable discharges in the Navy in comparison with the other services? And a somewhat greater use of the bad conduct discharge?*

Answer:

1. Fewer general courts-martial.

2. For the most part, the Navy's shore-based activities are concentrated in the continental United States. Serious type offenses committed ashore usually result in arrest and trial by civil authorities. The Army and Air Force have large concentrations of personnel overseas. Serious type offenses committed either on or off post by their personnel are normally tried by general court-martial where dishonorable discharge is authorized.

3. Operational commitments of commands afloat require units of the fleet to operate independently (a tender in the Persian Gulf; an icebreaker in the Antarctic). Afloat commands do not have general court-martial authority, nor do they have sufficient uniformed lawyers to conduct a general court-martial. As a result, they resort to the substitute forum of the special court-martial for relatively serious type offenses. Special courts-martial are not authorized to adjudge dishonorable discharges but are authorized to adjudge bad conduct discharges.

Related aide memoire question: *Why does the Navy seem to have a more constant ratio of undesirable discharges to total discharges than the other two services?*

Answer:

1. The relatively constant ratio of undesirable discharges to total discharges in the Navy can most probably be attributed to a minimum of policy changes (except for that occasioned by the DOD directive in 1959); the relative stability of the Navy's strength; a fairly constant caliber of personnel input; and the Navy's centralized system of personnel administration.

Related aide memoire question: *What is the explanation for the drop of discharges in the Marine Corps in recent years?*

Answer:

1. Decline in general courts-marital.

2. Decline in number of desertion convictions as a result of USCMA decision in 1957 (*U.S.* v. *Cothern*, 8 USCMA 158), holding that length of absence alone insufficient to sustain conviction of desertion. This ruling has resulted in reducing the number of desertion cases in the Navy, as well as the Marine Corps. Those convicted of prolonged unauthorized absence receive a bad conduct discharge vice a dishonorable discharge.

3. General change in attitude of senior commanders toward use of the dishonorable discharge.

ORIGINAL QUESTION 3

Related aide memoire question: *Does the Navy think that these procedures are too complex now? Does the complexity of court-martial procedures lead to bypassing of the court-martial by administrative discharges?*

Answer:

1. The code is complex, but perhaps it has to be. We certainly agree that all constitutional rights of servicemen must be protected. At the same time it is necessary that military legal processes be as simple as practicable in view of the environment in which military forces operate.

2. As previously pointed out in the Navy's response to this question, there are positive prohibitions against the use of administrative separations in lieu of trial by court-martial. These prohibitions are contained in secretarial and departmental instructions; they are well understood by the operational commanders; and, their observance is monitored at the departmental level.

Related aide memoire question: *If the respondent demands a trial, and, if for some reason, it is impossible to develop corroborating evidence which would result in speedy trial and conviction, is he discharged under honorable conditions? If he is not discharged under honorable conditions, is it fair to him, in the light of the stigma that attaches to an undesirable discharge?*

Answer:

1. The situation presented seems applicable to a confessed homosexual who demands trial but is processed for an administrative discharge because of the impossibility of developing witness evidence which can be used in a court-martial trial. If in the administrative processing of the case the evidence presented is

sufficient to convince an impartial board of officers that the individual has committed an in-service homosexual act, it is likely that he would be administratively discharged. The discharge, however, would almost certainly be under honorable conditions.

Related aide memoire question: *In the situation of a person described as a chronic military offender, isn't there specific provision in the Manual for Courts-Martial for discharge of these individuals with a punitive discharge as habitual offenders? If so, wouldn't there exist the authority to get rid of these men by court-martial where they have full protection under the uniform code instead of by administrative discharge?*

Answer:

1. The Manual for Courts-Martial provides that if an accused is found guilty of an offense for which a punitive discharge is not authorized, proof of two or more previous convictions will authorize bad conduct discharge. This provision, however, is subject to a number of qualifications which preclude consideration of the accused's entire disciplinary record covering his current enlistment. For example, evidence of the following may not be introduced for consideration by the court-martial in regard to the sentence to be awarded:

(*a*) The accused's record of nonjudicial punishments. (Normally an accused whose record includes prior court-martial convictions has also received several nonjudicial punishments during the current enlistment).

(*b*) Civil convictions.

(*c*) Court-martial convictions which occurred more than 3 years before the current offense was committed.

2. Accordingly, it will be observed that the Manual for Courts-Martial provisions are not applicable in all cases involving chronic military offenders. In many cases, administrative separation under honorable conditions has the effect of avoiding punitive discharge by eliminating misfits at an early stage. This is particularly true in those instances where a definite pattern of misbehavior has been established and where there is every indication that continued service can only result in more serious misbehavior and ultimate punitive discharge.

ORIGINAL QUESTION 4

Related aide memoire question: *With respect to the Navy answer to question 4, it will be noted that the Navy points out various differences in procedure as between it and the other services, particularly with respect to the availability of a board hearing and the level at which certain determinations to discharge are made. It would be desirable to have each service comment on these differences and on which procedure is preferable or whether the procedure used by each service is the best adapted to its particular problems. For example, would it be desirable for the other services to follow the Navy practice of requiring headquarters approval for the issuance of an undesirable discharge?*

Answer:

1. The major difference in procedure between the Navy and the other services in administrative discharges appears to be in the area of final case resolution. Army, Air Force, and Marine Corps procedures permit decisions on undesirable discharges to be made by officers exercising general court-martial jurisdiction whereas the Navy decides all such cases at the Washington level. The level of judgment exercised by each service is probably similar. Speaking for centralized control of undesirable discharges, this system has been found to be particularly suited to the Navy's organization. In many such cases the originating command is far removed geographically from normal administrative channels including type commanders. Under such circumstances, the consideration of all undesirable discharge cases at the headquarters level has proven to be a most equitable system.

ORIGINAL QUESTION 5

Related aide memoire question: *In applying the criteria for issuance of a general instead of an honorable discharge, at what level is the determination made to give such discharge? As to each service, what are the disabilities attached to a general discharge? And would it be possible to accomplish the same objectives without using the term "general discharge"?*

Answer:

1. Except in the cases of discharges by reason of unfitness, misconduct, or for security or certain unsuitability cases referred to the Chief of Naval Personnel,

the determination as to whether an honorable or general discharge will be issued is normally made by the immediate commanding officer, based upon criteria issued by the Chief of Naval Personnel. On a Navy grading scale of 4 as perfect, an individual must have made a final overall average in performance marks of 2.7, and an average of not less than 3 in the trait of military behavior. He must not have been convicted by general court-martial or more than one special court-martial (the portion regarding courts-martial is disregarded in the cases of first enlistments where the individual maintains an average of 3 in the trait of military behavior for the last 24 months of active duty). Performance marks are assigned on a semiannual basis and on certain special occasions to take cognizance of such things as particularly meritorious or derogatory performance. Prior to separation, all assigned marks are averaged and used in determining whether an honorable or general separation is warranted. Individuals who are to be administratively separated without having received performance marks (such as recruits) are normally issued honorable separations if they make a sincere effort to maintain proper military behavior and to perform duties in a proficient and industrious manner.

2. Persons separated for unfitness, misconduct, or security reasons may be given an undesirable, general, or honorable discharge depending upon the nature of misbehavior involved and the circumstances of individual cases. In view of the failure to satisfactorily complete the enlistment contracted for, an honorable discharge is rarely appropriate in these cases. General discharges are assigned in those cases involving poor performance where further service is not appropriate but where circumstances of the case, including previous record and commanding officer's recommendation, dictate against an undesirable discharge. Except as noted in paragraph 3 below, determination in such cases is made by the Chief of Naval Personnel on an individual basis at headquarters level.

3. Commander, Naval Forces, Philippines, is authorized to issue general discharges by reason of misconduct in the cases of Filipinos who have entered into fraudulent enlistments and separation is indicated. Recruit training commands are authorized to effect general discharges by reason of misconduct in the cases of recruits who entered into fraudulent enlistments, and retention in the service is not warranted.

4. Under current standards, "disabilities" are normally attached to the reason for discharge rather than the type of discharge. Personnel separated with either an honorable or general discharge by reason of unfitness, misconduct, or for security reasons are not recommended for reenlistment. Normally they are subject to checkage in pay (on a prorated basis) for any current reenlistment bonus received. The same is true in the case of personnel separated by reason of unsuitability, except their pay incident to reenlistment bonus is not checked. For all other reasons (expiration of enlistment, convenience of the Government, etc.) there are no "disabilities" attaching to general discharge. The only difference is that an honorable discharge is a separation from the service with honor and an indication of proficient and industrious performance of duty. A general discharge indicates that the individual's service was not sufficiently meritorious to warrant an honorable discharge.

5. Since one of the principal elements of the general discharge concept is to encourage proficient, industrious service and since the vast majority of dischargees qualify for honorable discharges, it is not possible to develop a system which recognizes different shades of service without identifying the end product. Elimination of the term "general discharge" would require the use of another term having the same meaning.

Related aide memoire question: *The Navy indicates that a general discharge is given on the basis of minimum proficiency standards. Should "proficiency" be a criterion for determining whether someone gets anything other than an honorable discharge?*

Answer:

1. Proficiency, as used in the previous Navy reply, means the overall evaluation of the man in the factors of professional performance, military behavior, leadership and supervisory ability, military appearance, and adaptability. The average of the marks he has received in these factors establishes his eligibility for an honorable discharge. A man needs only to be rated as adequate to earn this eligibility. He must, additionally, have received marks which average out as satisfactory conduct. He need not earn marks equating to good or exemplary conduct. It is felt that these minimum standards are an extremely fair criterion for determining whether a man should receive an honorable discharge.

Related aide memoire question: *If a general discharge does accomplish a function and if, as some of the courts seem to indicate, there is some stigma attached to it, should there be a board meeting for it just as for the undesirable discharge?*

Answer:

1. The Navy presently holds board hearings in many cases where a general discharge is finally awarded. There is no objection to a requirement for extending the field board hearing privilege to all general discharge cases for unfitness and misconduct as is currently provided for undesirable discharges. Board meetings for unsuitability and average mark cases are not considered appropriate for two reasons. The very great majority of unsuitability discharges are for duly diagnosed character and behavior disorders. In these there would be nothing for a board to consider except the psychiatrist's diagnosis which does not require a board evaluation; In performance cases, the discharge awarded is not given as a result of single evaluation but rather through evaluation by a series of different division officers and commanding officers. Such evaluations over a period of time insure that the character of service is accurately assessed.

Related aide memoire question: *In connection with the general discharge, it would be desirable to ask some of the witnesses whether or not they feel that a general discharge creates a stigma and whether they would be as willing to have a general discharge as an honorable discharge. If not, why not?*

Answer:

1. It is felt that a general discharge creates a stigma only in the sense that it is evidence that the man's service was not as meritorious as it could have been. It is an indication that the man failed to meet minimum standards of performance which are met by all but a few of his contemporaries. No man should be as willing to have a general discharge as an honorable discharge, because it reflects on his willingness and ability to adjust in an environment which is shared by practically all young men at some time in their adult life.

ORIGINAL QUESTION 6

Related aide memoire question: *Concerning question 6, how many separations of enlisted personnel were the result of the exercise of waivers?*

Answer:

1. Procedures used by the Navy in central processing of administrative discharges do not provide exact records on the number of waivers executed. These procedures do provide in every case for extension of waiver privileges before any processing for undesirable discharge may be undertaken. By Defense Department policy and implementing Navy instructions, no enlisted person is given an undesirable discharge without the extension of these privileges.

2. A sampling of cases now in the Department indicates that in three out of four cases of processing for unfitness or misconduct discharge, the respondent executes a waiver of privileges. This sampling which is considered to be valid would indicate that in fiscal year 1961 approximately 2,250 undesirable discharges were issued after a waiver of field board privileges had been executed.

3. In relation to the above, it should be noted that the Navy's procedure of centralized control of undesirable discharges makes mandatory an evaluation by a board of senior officers in Washington before an undesirable discharge may be issued. This procedure is used regardless of whether a waiver of privileges has been executed in the field. Further, final action of the Chief of Naval Personnel is never more severe than that recommended by the board of officers convened for centralized evaluation of the case. It is, therefore, considered that the waiver of field board privileges in the field does not unduly prejudice or endanger the constitutional rights of a Navy enlisted person who is being considered for administrative discharge for cause.

ORIGINAL QUESTION 7

Related aide memoire question: *How many separations of officers involve resignations and/or waivers of board action after adverse action has been recommended or initiated?*

Answer:

1. The table below gives this information.

*Active duty disciplinary separations of officers*

| Fiscal year | Total disciplinary separations | Total resignations | Percent of resignations |
|---|---|---|---|
| 1957 | 64 | 44 | 69 |
| 1958 | 65 | 49 | 75 |
| 1959 | 63 | 53 | 84 |
| 1960 | 80 | 57 | 71 |
| 1961 | 82 | 69 | 84 |

In from 69 to 84 percent of officer disciplinary separations during the 5-year period in question, separations involved resignations and waivers of board action.

ORIGINAL QUESTION 8

Related aide memoire question: *With respect to the answer to question 8, you will notice in some of the answers there is reference to providing counsel "if reasonably available." It seems very important to determine what standards are applied by a commanding officer in ruling on the availability of counsel for respondents in administrative actions or for accused persons in summary or special courts-martial. For instance, there are some complaints that some commanders, as a matter of policy, never declare a lawyer to be "reasonably available" for a board action or a summary or special court-martial. Perhaps statistics are available on the representation of defendants or respondents by legally trained attorneys.*

*To what extent, if any, are enlisted lawyers used by the services as counsel to represent respondents in board hearings or accused persons in criminal proceedings?*

Answer:

1. Providing a respondent in an administrative action or accused in a court-martial proceeding with a qualified lawyer is determined in accordance with the standards previously outlined in answering questions Nos. 8 and 15. The Navy is unaware of any command policy which denies a qualified lawyer to an individual by resort to a command decision that he is not "reasonably available." No statistics are maintained, and hence not available, with respect to the representation of accused or respondents by legally trained attorneys.

2. Since lawyers are rarely found in the enlisted ranks, it follows that they are seldom, if ever, used.

ORIGINAL QUESTION 9

Related aide memoire question: *With respect to question 9, each service should be asked to describe the number of members on its Discharge Review Board and the Board of Correction of Military Records, the composition of the Boards, the tenure of its members, and other duties, if any, performed by the members in adjudicating their cases. There have been complaints to the subcommittee that the Board for Correction of Military Records seldom grants hearings and that the Board members may meet only once a week—and then only for a very short time. The truth or falsity of such allegatons should be determined since the Congress relies on the Boards to rectify any injustice.*

Answer:

1. The Navy Discharge Review Board present complement of full-time members consists of one Navy captain, three commanders, two lieutenant commanders, and two majors. In addition, as collateral duty, two Marine colonels and one lieutenant colonel are available to insure a majority of Marine members for review of Marine cases. The tenure of members is normally 3 years. An average of 9 hours per week is spent in adjudicating cases.

2. The Board for Correction of Naval Records is composed of seven civilian employees of the Department of the Navy as members. The members have full-time positions in various offices and bureaus, and they serve at the pleasure of the Secretary of the Navy. Although there is no fixed period of time, two of the present members have served more than 5 years. Generally, members have served for minimum periods of at least 3 years. The Board has a permanent staff of seven civilian lawyers. The staff prepares complete and exhaustive briefs in each case and, although the time required to prepare briefs

varies in individual cases, preparation requires several hours to several days. Briefs are furnished to Board members for study and adjudication approximately 5 days prior to Board meetings. The members spend a minimum of several hours each week on Board matters prior to meetings and, depending on the number and complexity of the cases, may spend numerous hours. Meetings are held at least once each week and on occasion extra meetings are held for hearing and adjudicating complex cases. The Board meets each week for a minimum of several hours. During the past decade hearings were granted in 18 percent of the cases where applications were filed. Additionally, during the past decade relief was granted without the necessity for hearing in 21 percent of the cases where applications were filed.

3. Each request addressed to the Navy Correction Board receives most careful and conscientious consideration. If an applicant desires a hearing and one or more members determine that there is some indication of probable error or injustice, and that a hearing will serve a useful purpose, a hearing is always granted. In those cases where hearings are denied, applicants are advised of their privilege to submit new and material evidence for consideration. It is believed, therefore, that the complaints addressed to the subcommittee that hearings are seldom granted and that the Board spends but a minimum of time in adjudicating cases are misleading and inaccurate.

Related aide memoire question: *Do the Navy figures concerning the time spent in reviewing cases by the Navy Discharge Review Board include the same processing as the Army and Air Force, or does the 3- to 4-month period also include time for transmission of records?*

Answer:

1. Time for transmission of records is also included in the Navy figure for the Navy Discharge Review Board.

Related aide memoire question: *With respect to the time for review by the Board for Correction of Records in each service, why does the Army's time period seem to differ from that of the other two services?*

Answer:

1. With respect to the time required for review by the Board for Correction of Naval Records, 7 months, this period includes the time between receipt of the application and the date when final action is taken by the Secretary of the Navy. It is believed that the time reported by the Army, 122 days, does not include the time required for the secretarial review. Further, the differing procedures followed by the three services in processing cases account for the variance in time.

ORIGINAL QUESTIONS 9 AND 10

Related aide memoire question: *In light of the very few cases of relief granted by a correction board after denial by a discharge review board, isn't the second review almost a complete waste of time? Should such review be required for exhaustion of administrative remedies before going into court?*

Answer:

1. Although relief has been granted in comparatively few cases by a correction board after denial by a discharge review board, it is believed that the second review serves a useful purpose. Although it was previously reported that the Navy Correction Board had granted relief in less than 1 percent of the cases previously denied by the Navy Discharge Review Board for calendar year 1961, the percentage of cases changed since the Board's inception is somewhat greater. Additionally, the correction board has granted relief in numerous cases in which the discharge review board is barred from considering because of the applicable statute of the limitations.

2. In view of the much broader scope of relief which may be afforded by a correction board, and since the correction board must, by law, be composed of civilian rather than military personnel, it would seem proper to require review by the second board in exhaustion of administrative remedies.

Related aide memoire question: *What is the feasibility of consolidating in each service the board for discharge review and the correction board? If some sort of consolidation were decided upon, how should it be handled?*

Answer:

1. It is not feasible to consolidate the correction and discharge review boards in light of their differing purposes as disclosed by the legislative histories of the statutes under which they are established.

Related aide memoire question: *To insure uniformity, would it be feasible to unify the correction boards of the three services? And the discharge review boards?*

Answer:

1. It would not be feasible to establish one correction or discharge review board for all Armed Forces. A unified board would lack expertise relative to administrative procedures peculiar to the service which took the action under review, and would not be responsible to the Secretary of that service.

Related aide memoire question: *Isn't it true that the Air Force differs with the other two services concerning the authority of the correction board? The Air Force seems to consider that the correction board has power to wipe out the conviction itself, while the Army and Navy seem to feel that only some of the facts of a court-martial conviction can be altered but not the conviction itself. Should these diverse interpretations exist? If not, which should be adopted?*

Answer:

1. It is the position of the Navy that the Board for Correction of Naval Records and comparable boards in the other military departments, not being established as appellate tribunals in the court-martial system, may not reopen the proceedings and findings of courts-martial, nor recommend that the proceedings and findings of a court-martial be declared null and void. The Navy position is in consonance with an opinion expressed by the Attorney General of the United States in interpreting the permissible scope of section 207 of the Legislative Reorganization Act of 1946. In this opinion, the Attorney General stated that section 207 of the Legislative Reorganization Act empowers the board to change a punitive discharge to an honorable discharge and to issue an honorable discharge certificate on the basis of such correction; however, the opinion contains the following language: "On the other hand, the language of section 207 cannot be construed as permitting the reopening of the proceedings, findings, and judgments of courts-martial so as to disturb the conclusiveness of such judgments, which has long been recognized by the courts" (40 Ops. Atty. Gen. 504, at 508 (1948)).

2. In further support of the Navy's position the Congress, after establishment of correction boards, by virtue of the act of May 5, 1950, provided that persons convicted of offenses during World War II could petition for a new trial and the Judge Advocate General was authorized, upon good cause shown, and if application was made within 1 year after termination of the war, to grant a new trial, or to vacate a sentence, and to restore rights, privileges, and property affected by such sentence.

3. The Navy position does not preclude correction of injustices in cases involving courts-martial. Punitive discharges have been changed by the Board in hundreds of cases where it has been determined that a court-martial sentence was too severe.

ORIGINAL QUESTION 9

Related aide memoire question: *What legal advice is made available for the Discharge Review Board and the Board for Correction of Military Records in matters involving legal problems? Do lawyers serve on either Board in any of the services?*

Answer:

1. The Navy Discharge Review Board has available a legal specialist (captain, U.S. Navy) who is on the staff of the Navy Council of Personnel Boards. The Navy Discharge Review Board is one of the four Boards comprising the Navy Council of Personnel Boards. In addition the Board may refer to the Navy Judge Advocate General for legal opinion. There are no lawyers on the Board.

2. The Judge Advocate General furnishes legal advice to the Correction Board. Further, as previously stated, the Board's permanent staff is composed of seven civilian lawyers. At the present time, two of the Board's seven members are lawyers.

ORIGINAL QUESTION 11

Related aide memoire question: *The Navy answer seems to indicate that an applicant can obtain a hearing, confrontation and cross-examination before the Board for Correction of Naval Records if circumstances are such as to require these procedures. Is there a subpena power of this Board and what are the circumstances which require these procedures? What is the situation in the other services?*

Answer:

1. In the Navy an applicant can obtain a hearing, confrontation, and cross-examination before the Board for Correction of Naval Records if the Board and the Secretary of the Navy determine that the circumstances of a case are such as to require these procedures, and if the witnesses voluntarily appear. The Board has no subpena power. However, when the Board determines that the use of interrogatories and cross-interrogatories are not sufficient to resolve an issue before the Board, the Secretary of the Navy has directed the appearance of military witnesses.

2. In amplification of this answer it should be noted that a typical case in which a hearing with confrontation and cross-examination could be obtained would be one in which an officer had been reported unsatisfactory by a selection board, and it appeared that such report—which by statute must be based on the officer's record—was premised on matter in the record which the officer claims to have been placed there erroneously. To cite an extreme case, let it be assumed that he contends that some very adverse material in his record in fact was intended to refer to a different officer. Either in support of its position or his, the Department of the Navy could order in the officer who had made the adverse entry in the record, and, under oath and subject to cross-examination, he could be examined as to the true identity of the person he had in mind. If the petitioner's contention is sustained, and it is found that the material was erroneously filed in his record, then the report as unsatisfactory by the selection board—which can be supported only on a record which has been demonstrated to be erroneous—is legally void.

3. It should not be assumed from the answer given to question 11 that any officer dissatisfied with the results of a selection for promotion can go before the Board for Correction of Naval Records and have members of the selection board produced for cross-examination as to why they made certain choices and did not make others. The members of a selection board are oathbound to refrain from disclosing anything taking place during the selection board proceedings. Further, it would obviously be chaotic for a civilian correction board to attempt to substitute its judgment as to qualifications for promotion for those of experienced naval officers comprising a selection board.

Related aide memoire question: *In connection with show-cause procedures for eliminating officers, note the difference between the Navy on the one hand and the Army and Air Force on the other. Would it be desirable to reconcile these differences?*

Answer:

1. Very briefly, in those cases in which the Navy has general statutory authority to discharge officers, it utilizes a "conference type" of board hearing procedure in all cases which do not present disputed determinative issues of fact. A formal adjudicative board procedure is used where material facts are truly in dispute. Permanent Regular officers of over 3 years but less than 20 years of commissioned service are not the subject of general authority for discharge, but are subject to a special statutory discharge if reported unsatisfactory by a selection board. The statute itself provides no hearing in the latter instance, and the only practicable means of affording a hearing would be after the fact, before the Board for Correction of Naval Records.

2. The Army and Air Force have for years had a general statutory authority for the separation of Regular officers, the essential features of which are—

(*a*) Report by a board of names of officers to be processed for separation.

(*b*) An adjudicative type of proceeding by a separate board in the field, before which the officer concerned may appear personally.

(*c*) Review by a third separate board in the Department in Washington.

(*d*) Final action by the Secretary if all three boards have recommended separation.

3. It would be desirable for the Navy to have a procedure for involuntarily separating Regular officers, but we would prefer a more flexible and less-cumbersome procedure than that employed by the Army and Air Force. A general statutory authority for discharge upon recommendation of a board of officers—similar to that now existing for Reserve officers—subject to implementing regulations prescribed by the Secretary, would be desirable.

Related aide memoire question: *Would it be desirable to provide some type of subpena power in discharge cases or show-cause cases and to what extent can depositions be taken for use in such procedures?*

Answer:

1. In show-cause cases, in the rare instances in which adversary procedures are actually required, subpena power, confrontation, and cross-examination can be afforded by resort to established formal investigative or court of inquiry procedures. It is deemed preferable to retain such procedures for the unusual case in which experience has shown them to be actually useful, rather than to make them automatic with the inevitable result in many routine cases of obfuscating the true issue in a welter of procedure. In an officer case of this type the true issue is always the officer's future value to the service and the Nation—not whether he has been or can be proved by admissible jury trial evidence to have committed some triable offense. For example, when two or three responsible commanding officers have expressed lack of confidence in a subordinate's ship-handling ability, it is futile for the officer thus criticized to subpena other officers not having responsibility in the premises, to testify as to the confidence they personally felt when he had the conn.

2. Depositions could be taken in show-cause procedures, but in the usual case actually encountered unsworn narrative statements do quite as well. In the exceptional situation requiring confrontation and cross-examination to resolve a controverted determinative issue of fact, it is better to utilize a formal investigation or court of inquiry and accord personal confrontation and cross-examination in lieu of employing less satisfactory written depositions.

ORIGINAL QUESTION 12

Related aide memoire question: *Would it be desirable to eliminate nonpayment of debts—even if "dishonorable"—as a basis for discharge or for prosecution? Is the argument valid that to eliminate this sanction would dry up the credit of servicemen since there are no Federal garnishment laws?*

Answer:

1. No. Prosecution for nonpayment of debts is now limited to those cases where the failure to pay is characterized as "dishonorable" and therefore discrediting to the Armed Forces. The argument suggested (drying up credit) is invalid because—first, the services are not now "collection agencies," and second, service action occurs only when failure to pay is "dishonorable." The primary concern is the reputation of the service and not the satisfaction of the creditor.

ORIGINAL QUESTIONS 11 THROUGH 13

Related aide memoire question: *In situations where the board hearing is granted with respect to an administrative discharge and the board makes a recommendation favorable to the serviceman, under what circumstances can the commander refer the matter again—to the same board or to another board for a second determination?*

Answer:

1. Under paragraph 11 of Secretary of the Navy Instruction 1900.2, of May 24, 1955, which affords a general model for boards of officers—"show-cause" proceedings, an officer who convenes a board may return its report "to the board of officers for correction of errors, amplification, clarification, and reconsideration in the light of any specified factors which may not have been previously appreciated by the board. In the absence of perceived factors which may reasonably be deemed to have escaped full appreciation by the board members, however, a report *shall not* be returned to the board for reconsideration of findings, opinion, or recommendations going to the substantial merits of the case * * *." [Emphasis supplied.]

2. The same paragraph goes on to provide for a de novo board proceeding in the Bureau of Naval Personnel or at Headquarters, U.S. Marine Corps, but "* * * if a finding, opinion, or recommendation of such a subsequent board would * * * result in action less favorable to the individual * * * than would the finding, opinion, or recommendation of a prior board, then such action shall not be effectuated unless the report of the subsequent board shows that the individual * * * has * * * been afforded an opportunity to make representations in an attempt to show cause why such less favorable action should not be taken, and that any representations so made have been fully considered by the subsequent board."

ORIGINAL QUESTION 18

Related aide memoire question: *With reference to the Army's specialized law officer plan, would there be possibilities in peacetime only of using civilians as*

*law officers—and in time of war have as law officers reserve officers and retired personnel recalled to duty?*

Answer:

1. In addition to the original response which we hereby reaffirm, the peacetime use of civilians as law officers would deprive active duty personnel of experience and training which is essential to their highly specialized function.

2. In time of war, Reserve and Retired officers who qualify would be utilized to fill mobilization requirements.

ORIGINAL QUESTION 21

Related aide memoire question: *In those cases which involve instructions given to the court members by the convening authority and staff judge advocates, is it really necessary to have such instructions? Could not the same purpose be accomplished by some other means?*

Answer:

1. It is desirable to acquaint prospective court members with their functions and duties. To appropriately enlighten prospective court members is not proscribed by law. In fact, the "Manual for Courts-Martial" sanctions it. The problem is one of content and timing. To overcome any possible criticism, the Navy has sponsored a "Handbook for Court Members" similar to the "Handbook for Jurors" used in many civilian jurisdictions. This proposal has been submitted to the Army and Air Force for comment and concurrence. The adoption of such a handbook would obviate the necessity for any other means of instructing court members.

ORIGINAL QUESTION 22–A

Related aide memoire question: *To what extent is a negotiated plea program used in special courts-martial? If a negotiated plea program is used in special courts-martial and especially in Navy special court cases involving bad conduct discharges, what legal advice, if any, is made available to the defendant as part of the negotiation?*

Answer:

1. The use of negotiated plea in special courts-martial is permitted (SecNav Inst. 5811.2). In those cases wherein the pretrial agreement contemplates a punitive discharge, if counsel for the accused is not a qualified lawyer, a qualified lawyer will be made available to the accused unless specifically waived by him.

2. In but 2.8 percent of all special courts-martial resulting in a bad conduct discharge during fiscal year 1961 was the negotiated plea used.

ORIGINAL QUESTION 22–B

Related aide memoire question: *With respect to the Air Force answer to question 22, what are the Army and Navy reactions to the objections stated by the Air Force?*

Answer:

1. In the Navy, before a guilty plea is accepted, the law officer (president of a special court-martial) inquires into the providency of the plea. In the event the answers to any of the inquiries put to the accused raise any doubt as to its providence, the guilty plea is not accepted.

2. The law recognizes the guilty plea. Upon receipt of a plea of guilty, there is no requirement on the part of the Government to go forward since this is a judicial confession. In general courts-martial, the accused is represented by qualified counsel capable of properly evaluating the case. Although there is an admitted weakness in this area in the special court-martial field, appellate reviewing authorities are vigilant in protecting against improvident pleas. In view of the savings in time and money, the safeguards provided by the code, and the absence of any known abuses, the resort to the "prima facie" requirement is not indicated.

ORIGINAL QUESTION 24

Related aide memoire question: *Are the Navy statistics based on the same system used by the Army—listing as a conviction a case in which an accused was convicted on any charge, instead of the method of computation used by the Air Force which reflects the percentage of convictions on the specific offense charged?*

Answer. Yes.

ORIGINAL QUESTION 25

Related aide memoire question: *Each service might comment on whether the statistics from the three services indicate that sentences are relatively uniform in the Army, Navy, and the Air Force.*

Answer:

1. From a comparison of statistics furnished there appears to be relative uniformity on average sentences adjudged for similar offenses listed.

ORIGINAL QUESTIONS 26 AND 27

Related aide memoire question: (*a*) *In the interest of uniformity, would it be desirable or feasible to have a joint board of review composed of members of all three armed services—but in any special case including a member of the service from which the case comes?*

Answer. No. While cases are decided according to law and not the uniform a member of the board is wearing, each service, nevertheless, has its own rules, regulations, traditions, and problems peculiar to its own service. An officer of that service is far better equipped to render judgments where these rules, regulations, traditions, and problems are involved.

(*b*) *Or would it be feasible to have an all-civilian board of review as some have recommended?*

Answer. No, for the same reasons noted in answer to question 20 dealing with civilianization of law officers.

(*c*) *To what extent, if any, are retired officers being used—with their consent—as members of boards of review?*

Answer. They are not being used.

ORIGINAL QUESTION 28

Related aide memoire question: *Do there seem to be significant differences as between the Army and the Air Force and between the Navy and the Air Force in sentence reductions in cases tried by general courts-martial? What is the explanation for these differences? What interservice differences, if any, seem to exist in boards of review action as shown by the statistics furnished here? Why do these differences exist?*

Answer. By law (art. 66c, U.C.M.J.) boards of review are charged with the duty of affirming only so much of the sentences as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. Each board of review is free to arrive at its own conclusions as to appropriateness based on the entire record of trial. Just as individuals may differ in arriving at an appropriate sentence, so, too, do boards of review. Any attempt to explain the differences between service statistics in this area would be pure conjecture.

ORIGINAL QUESTION 29

Related aide memoire question: *The statistics seem to show sharp discrepancies between the Army and Navy on the one hand, and the Air Force on the other, with respect to reduction of sentence by the convening authority. Is this primarily a reflection of the Army and Navy's negotiated guilty plea procedures? Or what does it reflect? What differences, if any, seem to exist in convening authority action as between the services and what is the explanation for these differences?*

Answer:

1. While the negotiated plea concept has had some impact at the general court-martial level in this area, it cannot be stated with any certainty that this is the primary factor. At the special court-martial level the negotiated plea concept takes on even less significance, inasmuch as less than 3 percent of special court-martial cases involve a negotiated plea. A convening authority's individual appraisal, made pursuant to law (art. 64, U.C.M.J.) of sentence appropriateness must be considered the primary factor.

ORIGINAL QUESTION 31

Related aide memoire question: *The Army answer mentions one safeguard concerning pretrial confinements that has been recognized as lawful by the Court*

*of Military Appeals. This safeguard is the requirement that the staff judge advocate approve the pretrial confinement. Do the other services have similar procedures? Could this perhaps be tied in with the full judicial program? Or would there be other possibilities formalizing this type of procedure?*

Answer:

1. The Navy has prescribed no requirement that pretrial confinement be approved by a legal officer. Navy policy discourages pretrial confinement except when essential to insure the presence of the accused or to prevent recurrence of the offenses. Implementation of this policy is considered to be primarily a function of command rather than a matter falling within the legal sphere.

Since relatively few stations with brigs have a legal officer assigned, the procedure in question could not be formalized for widespread application in the naval service.

---

## DEPARTMENT OF THE NAVY SUMMARY OF FACTS AND LEGAL ISSUES

*Milton C. Reed* v. *W. B. Franke, et al.* (Civil No. 8270, U.S.C.A., 4th Circuit, decided Nov. 7, 1961)

The plaintiff was a chief storekeeper, U.S. Navy, with 18 years of service and a record of three convictions by courts-martial for drunken driving. Immediately after the offense which resulted in his third conviction on May 20, 1960, he was hospitalized with a diagnosis of chronic alcoholism. It was recommended that he be discharged with a general discharge as unsuitable by reason of his history of alcoholism and on July 6, 1961, the Chief of Naval Personnel directed his discharge. Before this discharge could be effected the plaintiff commenced this action and a temporary restraining order was issued. Plaintiff argued that his discharge was unwarranted in that there was no basis for the finding that he was a chronic alcoholic. He also contended that since he had been convicted of drunken driving, the discharge would constitute double punishment for this offense.

The district court declined to hear arguments on the merits and dismissed the case for lack of jurisdiction in that the plaintiff had not exhausted all available administrative remedies. The plaintiff appealed and obtained a temporary injunction pending appeal. The court of appeals affirmed the decision of the district court and vacated the temporary injunction. By the time this decision was affirmed, Reed was eligible for transfer to the Fleet Reserve and it was decided to transfer him to the Fleet Reserve rather than discharge him.

---

*Joseph C. Stoll* v. *David M. Shoup* (Civil Action No. 2398–60, U.S.D.C. D.C. (not reported))

The plaintiff was an acting gunnery sergeant with over 16 years' service in the Marine Corps Band who was arrested by civil authorities on a charge of indecent exposure in a local restaurant. The arrest resulted from the complaint of four women who observed. He admitted the offense and his commanding officer recommended that he be processed for an undesirable discharge as a sexual deviate under the provisions of paragraph 10277 of the "Marine Corps Manual." The board of officers who heard his case found that the circumstances surrounding his offense did not warrant a finding that Stoll was a sexual deviate but found that his conduct was discreditable and recommended that he be discharged with a general discharge. Acting upon this recommendation, the Commandant of the Marine Corps directed Stoll's discharge. Before his discharge could be effected the plaintiff brought this action and obtained a temporary restraining order. The district court dismissed the action as premature in that the plaintiff had not exhausted available administrative remedies and this decision was affirmed by the court of appeals.

---

*Ruth F. Ives* v. *William B. Franke* (271 F. 2d 489, cert. den. 361 U.S. 965)

The plaintiff in this case served on active duty as a woman marine for about 9 months during 1952 until she was discharged for medical reasons with a diagnosis of anxiety reaction not incurred in or aggravated by service. In accordance with regulations then in effect, her discharge was characterized as general, under honorable conditions, on the basis of the conduct and proficiency marks

she had earned while on active duty. This suit was brought seeking a declaration that the plaintiff was entitled to an honorable discharge and a mandatory injunction to compel its issuance. Plaintiff contended that the characterization of her discharge was arbitrary and capricious and in violation of due process, and further asserted that the regulations of the other armed services pertaining to honorable discharges were more lenient. The district court found that the regulations under which the plaintiff's discharge were issued were not in violation of any law or constitutional provision and granted summary judgment for the Government. This decision was affirmed by the court of appeals.

---

*Chester Bud Grant* v. *William B. Franke, et al.* (Civil Action No. 3659–60 U.S.D.C. D.C. (not reported))

The plaintiff was a yeoman, second class, U.S. Navy, who was discharged with a general discharge for unfitness by reason of a history of admitted homosexual activity. After the discharge board had heard his case he obtained a temporary injunction before his discharge could be effected. Grant contended that his discharge was unwarranted because the conduct complained of had occurred more than 2 years prior to the action taken to discharge him and that the administrative action being taken was simply a way to avoid the statute of limitations applicable to trial by courts-martial for these offenses. The Government asked that the complaint be dismissed as premature because Grant had failed to show irreparable injury and had not exhausted his administrative remedies. The district court dismissed the action as premature and this decision was affirmed by the court of appeals.

---

*Robert O. Bland* v. *John D. Connally* (293 F. 2d 852)

The plaintiff was a Naval Reserve officer who served during World War II and was released to inactive duty in 1946 under honorable conditions and subsequently remained in an inactive status. During 1955 evidence was received that Bland had been a member of the Communist Party during the period 1947–50 and had since continued to be active in Communist front activities. Action was initiated to determine whether Bland's retention in the naval service was consistent with the best interests of national security in accordance with the provisions of Secretary of the Navy Instruction 5521.6 and a board of officers was convened to consider the available information, including any material which Bland might wish to submit, and to submit findings and recommendations with regard to his retention or separation. Bland appeared at a hearing of the board and objected to the proceedings in gross, requested access to the confidential files relating to his Communist activities, and presented nothing in his own behalf. The board refused Bland's request for access to confidential files, found that the allegations concerning his Communist activities were substantiated by the available evidence, and recommended that he be separated from the naval service under conditions other than honorable. He was discharged under conditions other than honorable in 1956. After exhausting all administrative remedies, the plaintiff instituted this action for judgment, declaring his entitlement to an honorable discharge. He contended that the action taken in discharging him was in violation of the first and fifth amendments to the Constitution. The district court found that Bland's discharge was not in violation of existing law or regulation and granted summary judgment for the Government. The court of appeals reversed the decision of the district court and held that the Secretary of the Navy was without authority to issue a derogatory discharge to an inactive reservist on the basis of secret information relating to his associations subsequent to separation from active duty.

---

*James Smith* v. *The United States* (Court of Claims, No. 28–60, decided December 6, 1961)

The plaintiff was a chief boatswain's mate, U.S. Navy, with over 20 years' service when he was arrested by the California civil authorities on Feb. 23, 1954, on a charge of child molesting, a felony. He was tried and convicted of a lesser charge of contributing to the delinquency of a minor and subsequently found by the court to be a sexual psychopath. He was placed in a State hospital for observation and treatment. While so hospitalized he was processed for an ad-

ministrative discharge by reason of unsuitability in accordance with the provisions of article C-10310 of the "Bureau of Personnel Manuel" and was discharged on December 7, 1954.

After exhausting administrative remedies the plaintiff instituted the above-styled action seeking entitlement to active duty pay for the unexpired term of his enlistment and the retainer pay of a fleet reservist thereafter.

Judgment was entered for the plaintiff based on the fact that he was not informed of the contemplated action to effect his discharge or given an opportunity to submit a signed statement in his own behalf as required by the pertinent regulation. In addition, the court found there was sufficient evidence that the plaintiff was suffering from a mental illness at the time of his contemplated discharge to warrant the requirement that he be brought before a medical survey board prior to effecting such discharge.

---

## DEPARTMENT OF THE AIR FORCE ANSWERS TO SUBCOMMITTEE QUESTIONNAIRE

Question 1. *What are the discharge figures, by type—i.e., honorable, general, undesirable, bad conduct, and dishonorable—with respect to each armed service for each year beginning with 1950?*

Answer. Reliable figures for the years fiscal year 1957 through fiscal year 1961 are attached. Figures by type of discharge for prior years which would serve as the basis for comparison have not been compiled.

There is also attached a table which shows the number of punitive discharges suspended by the Office of the Judge Advocate General and the number of cases in which the Secretary of the Air Force directed issuance of an honorable type of discharge in lieu of a punitive discharge.

*Character of discharge or service of enlisted personnel of the Air Force*

| Character of discharge or service | Retirements (all types) | Discharges and releases | Aggregate |
|---|---|---|---|
| Fiscal year 1957: | | | |
| Honorable | 2,526 | [1] 169,141 | 171,667 |
| General | | 11,347 | 11,347 |
| Undesirable | | 7,214 | 7,214 |
| Bad conduct | | 2,470 | 2,470 |
| Dishonorable | | 711 | 711 |
| Total | 2,526 | 190,883 | 193,409 |
| Fiscal year 1958: | | | |
| Honorable | 2,727 | [2] 171,293 | 174,020 |
| General | | 12,664 | 12,664 |
| Undesirable | | 8,300 | 8,300 |
| Bad conduct | | 2,267 | 2,267 |
| Dishonorable | | 428 | 428 |
| Total | 2,727 | 194,952 | 197,679 |
| Fiscal year 1959: | | | |
| Honorable | 4,062 | [3] 157,408 | 161,470 |
| General | | 7,380 | 7,380 |
| Undesirable | | 7,124 | 7,124 |
| Bad conduct | | 1,522 | 1,522 |
| Dishonorable | | 244 | 244 |
| Total | 4,062 | 173,678 | 177,740 |
| Fiscal year 1960: | | | |
| Honorable | 5,880 | [4] 135,657 | 141,537 |
| General | | 7,246 | 7,246 |
| Undesirable | | 4,189 | 4,189 |
| Bad conduct | | 1,342 | 1,342 |
| Dishonorable | | 207 | 207 |
| Total | 5,880 | 148,641 | 154,521 |
| Fiscal year 1961: | | | |
| Honorable | 7,854 | [5] 169,995 | 177,849 |
| General | | 7,160 | 7,160 |
| Undesirable | | 1,699 | 1,699 |
| Bad conduct | | 1,057 | 1,057 |
| Dishonorable | | 119 | 119 |
| Total | 7,854 | 180,030 | 187,884 |

[1] Includes 60,254 immediate reenlistments.
[2] Includes 56,163 immediate reenlistments.
[3] Includes 60,216 immediate reenlistments.
[4] Includes 37,724 immediate reenlistments.
[5] Includes 73,759 immediate reenlistments.

*Number of punitive discharges suspended through the Office of the Judge Advocate General*

| | Bad-conduct discharge | Dishonorable discharge |
|---|---|---|
| Fiscal year: | | |
| 1959 | 297 | 39 |
| 1960 | 93 | |
| 1961 | 65 | 3 |

*Action by the Secretary of the Air Force*

| | Substituted for bad-conduct discharge | | | Substituted for dishonorable discharge | | |
|---|---|---|---|---|---|---|
| | Honorable | General | Undesirable | Honorable | General | Undesirable |
| 1959 | 1 | 2 | | | | |
| 1960 | 1 | 4 | | | | |
| 1961 | | 9 | | | | |

Question 2. *Are trends evident with respect to different types of discharges and what are the explanations of those trends?*

Answer. As the statistics furnished in response to question No. 1 show, there has been a definite decrease in the number of persons discharged administratively with less than an honorable discharge since 1959. There has also been a substantial decrease in the number of discharges through the court-martial system during that same period of time. For example, the number of undesirable discharges in fiscal year 1957 was 7,214 compared to 1,699 in fiscal year 1961; the number of bad conduct and dishonorable discharges approved after appellate review at Headquarters, U.S. Air Force, in fiscal year 1957 was 3,118 as compared to 1,176 in fiscal year 1961.

A number of factors have contributed to this trend. They are:

(*a*) The percentage of career personnel in the Active Force structure has been increasing. Career personnel, having completed one or more enlistments, have made the adjustment to military environment, and are less likely to become involved in incidents which require their elimination from service.

(*b*) More selective enlistment criteria.

(*c*) Since 1955, the Air Force has been concentrating on the early identification of those individuals who manifest characteristics indicating an inability to adjust to military service, in order to effect their elimination from service before they become involved in serious incidents necessitating trial by court-martial or discharge under conditions other than honorable.

(*d*) The more liberal criteria used in determining the type of discharge certificate to be issued which are prescribed by DOD Directive 1332.4, dated January 14, 1959, and implementing Air Force regulations.

Question 3. *In your view are administrative discharges being used, as the Court of Military Appeals has indicated, to bypass procedures for discharge by court-martial?*

Answer. As indicated above, the Air Force in order to improve combat effectiveness and the efficiency of the force has, since 1955, been emphasizing the early identification and elimination of persons who have, through their performance of duty and conduct, evidenced an inability to adjust to military service. Many of these individuals were eliminated through the procedures prescribed in AFR 39–17 and AFR 39–16. The number of airmen so separated did increase substantially during the period 1955 to the present. However, this increase is directly attributable to the emphasis on improving the quality of the force rather than the use of administrative separation to evade the provisions of the UCMJ. In this connection, it is pointed out that prior to the 1959 DOD directive, all persons discharged under AFR 39–17 because of unfitness were furnished an undesirable discharge. Since the issuance of that directive, persons dis-

charged under AFR 39–17 may be given an honorable, a general, or an undesirable discharge depending on the circumstances in each case. Recent experience shows that more than 70 percent of those being discharged under AFR 39–17 are currently receiving an honorable discharge or a general discharge under honorable conditions. Persons discharged under AFR 39–16 can be furnished only an honorable type of discharge certificate (honorable or general).

Question 4. *To what extent is there uniformity in the armed services with respect to discharge procedures?*

Answer. It is assumed that this question addresses itself solely to those involuntary discharge procedures under which enlisted personnel receive a less than honorable discharge; that is, discharge for unsuitability, unfitness, fraudulent enlistment, disposition by civil court, and certain cases of extended absence or desertion. This reply treats only such cases.

The Department of Defense Directive No. 1332.14 Administrative Discharges, prescribes the general procedures to be followed in processing enlisted personnel for discharge for these reasons. The individual military services may within the broad guidelines contained in that directive establish such procedures as are necessary to meet the individual requirements of their particular service. Persons discharged for unsuitability may receive an honorable or a general discharge. The Department of Defense prescribes that an individual being considered for discharge for unsuitability will be afforded the opportunity to make a statement in his own behalf. The Air Force has gone somewhat beyond this. An airman with less than 8 years of service serving in the grade of A2c or below is informed in writing of the specific reasons for the proposed discharge, afforded the opportunity to appear before an evaluation officer, to submit a rebuttal to the proposed reasons for discharge or to make any other statement he desires. If the airman has more than 8 years of service or is serving in the grade of A1c. or above regardless of length of service, he is afforded the opportunity to have his case heard by a board of officers, to appear in person before it, to be represented by counsel, and to submit statements in his own behalf. He may waive these privileges but even should he forgo the privilege of a board hearing he may submit such statements as he desires for the consideration of the discharge authority. The authority to approve discharges for unsuitability is reserved to officers exercising special court-martial jurisdiction in the case of airmen with less than 8 years of service or serving in a grade below A1c. or to a wing or comparable commander in the case of A1c. and above and those with more than 8 years of service regardless of grade.

In those cases in which an individual may receive an undesirable discharge (that is, for unfitness, fraudulent enlistment, conviction by a civil court for a felony, or as a result of a desertion or unauthorized absence) Air Force regulations prescribes the procedures set forth in paragraph 8d of DOD Directive 1332.14 dated January 14, 1959. These provide for—

(1) Written notification of the specific reasons for the proposed action.

(2) The right to have his case heard by a board of officers and to appear in person before the board subject to his availability. In some cases such as when the individual is in civil confinement personal appearance may not be possible.

(3) To be represented by counsel, who, if reasonably available, should be a lawyer. This right of representation is scrupulously observed in cases when the respondent cannot be present at the board hearing; for example when he is in civil confinement.

(4) To submit statements in his own behalf.

The individual may waive any or all of these privileges. Discharge for any of the reasons specified in this paragraph with an undesirable discharge may be ordered only by an officer exercising general court-martial jurisdiction who must personally approve the discharge after review of the findings and recommendations of the board of officers, if any, which heard the case. Review at the general court-martial level must include an examination of the case by the staff judge advocate before final approval and execution of the discharge is ordered.

Question 5. *What are the criteria in each armed service for issuance of a general discharge instead of an honorable discharge?*

Answer. Enlisted personnel: The issuance of an honorable discharge is conditioned upon the proper military behavior of an airman and whether his performance of duty has been proficient and industrious. Due regard is given to the grade held and the capabilities of the person concerned. If he has served

faithfully, performed to the best of his ability, and has been cooperative and conscientious in doing his assigned tasks, he may be furnished an honorable discharge even though he may not have advanced in grade to the same extent as other airmen. As a special consideration, an airman who is otherwise ineligible, may receive an honorable discharge if he has, during his current enlistment, received a personal decoration or is discharged as a result of disability incurred in line of duty.

Normally, an airman will be furnished a general discharge, which is a discharge under honorable conditions, if his military record is not sufficiently meritorious to warrant an honorable discharge; that is if he has not been diligent and conscientious in performing his duties, has committed offenses against good order and discipline, or has otherwise conducted himself in a manner not consistent with exemplary standards. For example, a general discharge may be issued if the airman has been convicted of an offense by a general court-martial during his current enlistment or period of obligated service. Issuance of a general discharge is not mandatory, however. If there is evidence that the airman has been rehabilitated and has behaved properly for a reasonable period after being convicted, he may be issued an honorable discharge at the discretion of the discharge authority.

When there is a doubt in a particular case as to whether an honorable or general discharge should be issued, the doubt is resolved in favor of the higher discharge. The effects of an honorable or general discharge are usually identical with respect to veterans' rights and benefits.

Officers: The character of an officer's discharge is determined by the Secretary of the Air Force solely on the individual's military record. An honorable discharge is awarded when the officer's service warrants the highest type of discharge. A general discharge (under honorable conditions) is awarded when the officer's service has been honorable but not sufficiently meritorious to warrant an honorable discharge.

Question 6. *What inducements, if any, are given to a serviceman to persuade him to waive a board hearing with reference to a projected discharge? Is he given reason to anticipate more favorable action if he waives a board hearing?*

Answer. Air Force regulations do not provide for any inducement to be offered to a serviceman to waive his right to a board hearing, nor will the unofficial offer of such inducements be countenanced. In proceedings in which a board hearing is prescribed, the serviceman is permitted to waive the board only after having had military counsel made available to him and counseled as to the possible implications of his action. As a part of the certificate he must sign to waive the board is an acknowledgement of the fact that he understands he may receive an undesirable discharge, if such discharge is authorized, and the possible disabilities which he may incur as a result.

Question 7. *In instances where board hearings are held with respect to possible discharge or revocation of an officer's commission, to what extent does the action ultimately taken by the service generally conform to the recommendations of the board?*

Answer. The ultimate action taken by the Air Force conformed to the recommendation of the board of inquiry in 93 percent of the cases processed to conclusion in the last 6 years.

Question 8. *To what extent are lawyers made available to represent respondents in board hearings on discharge?*

Answer. The DOD Directive on Administrative Discharges requires that in all board proceedings in which the individual may receive an undesirable discharge, the respondent will be furnished counsel who, if reasonably available, will be a lawyer. Pertinent Air Force regulations adhere in this requirement. In addition, the Air Force has established the same requirement in discharge proceedings for unsuitability which involve board proceedings; i.e. cases in which the airman has more than 8 years of service or is serving in the grade of A1C or above. Counsel is afforded in all instances in which board proceedings are involved. Military counsel is made available to the airman, or he may select a military member of his own choosing, subject to availability. The respondent may, in lieu of the above, employ civilian counsel at his own expense to represent him.

The same is true in the case of officers.

Question 9. *What is the workload of the Discharge Review Board and the Board for the Correction of Military (or Naval) Records? What is the average or median time for review of cases by these Boards?*

Answer. The attached tables show the caseload and processing time required by the Discharge Review Board and the Board for Correction of Military Records.

AIR FORCE DISCHARGE REVIEW BOARD

*Caseload compared to relief granted*

| | Caseload | Relief granted | Percent relief granted |
|---|---|---|---|
| Fiscal year 1961 | 2,629 | 243 | 9.24 |
| Average fiscal year 1957 through 1961 (both dates included) | 2,390 | 269 | 11.25 |
| Average fiscal year 1950 through 1961 (both dates included) | 2,112 | 218 | 10.30 |

*Time lapse, discharge review cases (300-case random sample)*

| | *Calendar days* |
|---|---|
| 1. In Discharge Review Board: | |
| (*a*) Nonpersonal appearance and personal appearance cases | 43 |
| (*b*) Counsel cases (nonpersonal appearance) | 50 |
| (*c*) No counsel cases (nonpersonal appearance) | 18 |
| (*d*) Average all types | 43 |
| 2. In directorate of Administrative Services (St. Louis) (estimate based on sampling) | 16 |
| 3. In Directorate of Administrative Services (Pentagon) (estimate) | 14 |
| 4. Average time between receipt of application in St. Louis until finalization and notification of applicant by Administrative Services | 73 |

NOTE.—Times represent normal average, reflecting the usual normal backlog of the Board. Thirty-day minimum notice required in personal appearance cases, by regulation. All personal appearance cases scheduled to give 5 to 9 weeks' advance notice to applicant and counsel.

AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

| | |
|---|---|
| Backlog of cases on Jan. 1, 1962 | 1,229 |
| Average time for review 8 months | 8 |

Question 10. *In what percentage of cases do these boards grant relief to the applicant? And in what percentage of cases does a board for correction of military records provide relief previously denied by a discharge review board?*

Answer. The percentage of cases in which relief has been granted by the discharge review board is contained in the reply to question No. 9. Information pertaining to the board for correction of military records will be submitted at a later time.

Supplement to question 10.

*Air Force Board for Correction of Military Records, calendar years 1960–61*

| | Number of cases | Percent of cases |
|---|---|---|
| Application for change in type of discharge | 1078 | |
| Relief granted (all cases) | 42 | 3.9 |
| Cases in which relief was granted which were previously considered by discharge review board | 25 | 2.3 |

Question 11. *What is the procedure utilized by each service in requiring officers to "show cause" why they should be retained in the service or should retain their commission?*

Answer. No officer has an inherent right to continued service as an officer. It is a privilege which may be terminated when such action has been determined to be in the best interest of the Air Force. By virtue of his appointment, an officer enjoys a position of trust and carries a responsibility for leadership and example. This responsibility requires effective performance of duty and exemplary standards of conduct and morality demanded of officers.

Sustained substandard performance, one or more instances of misconduct or dereliction, or a combination thereof form the basis for "show cause" action. Normally, the immediate commander is in the best position to observe an officer's performance and deportment. Consequently most "show cause" action cases are originated by the immediate commander although they may be originated by commanders at any higher echelon. When a commander is convinced that elimination from the service would be in the best interest of the Air Force he makes such a recommendation to the commander of the next higher echelon, normally the wing or base commander, outlining his specific reasons thereof. The wing or base commander reviews the file and either approves the action or returns the case to the originator without further action. If he approves the recommendation he formally initiates action under the applicable regulations and forwards the case to the major air commander. At the same time he advises the individual concerned that such action has been initiated and that he may submit information in his behalf to the major air commander. Air Force Headquarters is also advised that action has been initiated.

Upon receipt by the major air commander the case is again reviewed and either approved for further action or returned to the initiating commander without further action. If further action is desired the case is referred to a selection board of not less than three senior officers. The selection board examines the case as presented along with other pertinent information from the officer's record and information submitted by the officer in his own behalf. By simple majority vote the board then determines whether the officer should show cause why he should be retained in the Air Force. If the board votes in favor of the individual the case for discharge is closed. If the board determines that the officer should be required to show cause the case is returned to the major air commander for further action. The major air commander notifies the individual of his selection and advises him that he may elect to apply for retirement if eligible, apply for discharge, tender his resignation, apply for release from active duty and transfer to the Retired Reserve if eligible, or appear with or without counsel before a board of inquiry not earlier than 30 days after notification. If the officer elects other than appearance before a board of inquiry his application is processed in lieu of further "show cause" action. If his application is disapproved by the Secretary of the Air Force the case is returned for continuation of "show cause" action. If the officer elects to appear before a board of inquiry he is notified of the date and place of the hearing and allowed adequate time to arrange for counsel and prepare his case. At the appropriate time the board of inquiry, which is composed of not less than three senior officers, is convened to receive evidence and make findings and recommendations. If the board recommends retention in the Air Force the case for discharge is closed. If the board recommends discharge the record of proceedings is forwarded to Air Force Headquarters. A copy of the record of proceedings is furnished to the respondent and he is allowed 10 days to present a brief or argument in his own behalf. Upon receipt of the record of proceedings by Air Force Headquarters, and during the 10-day period extended the respondent, the record is reviewed for administrative and procedural sufficiency. Upon receipt of the respondent's brief and if there are no administrative deficiencies, the case is forwarded along with material forwarded by the respondent to the Air Force Personnel Council, an instrumentality of the Secretary. When the case is received by the Personnel Council it is referred to a board composed of not less than three senior officers, sitting as a review board. The duty of the review board is to review the record and make a recommendation of whether or not the respondent should be retained in the Air Force. If the board votes for retention the case for discharge is closed. If the board sustains the recommendation of the board of inquiry the record of proceedings is forwarded to the office of the Judge Advocate General for a legal review. If the Judge Advocate General determines that the case is legally sufficient and that the respondent's rights have been protected during all phases of the proceedings, the case is forwarded to the Office of the Secretary for a final action. The decision of the Secretary is final.

The above procedure is that prescribed in Public Law 86-616 for nonprobationary Regular officers and extended by policy to Reserve officers.

Question 12. *To what extent have undesirable discharges been based on alleged misconduct for which a serviceman has requested, but been denied, a trial by court-martial? Is there any provision for allowing a serviceman to request a court-martial to vindicate himself with respect to alleged misconduct which he anticipates will be made the basis of proceedings leading to an undesirable discharge?*

Answer. An undesirable discharge may not be issued by administrative procedures in lieu of trial by court-martial except when it has been determined by an officer exercising general court-martial jurisdiction or higher authority that administrative discharge will be in the best interest of both the service and the individual. Air Force regulations do not, therefore, provide that an individual may demand a court-martial in lieu of an administrative discharge proceeding.

In general, the issuance of a undesirable discharge is based on frequent incidents of misconduct, not on a single instance. However, there are three exceptions to this general rule:

(*a*) Persons convicted by civil court of an offense punishable by confinement under the Uniform Code of Military Justice of more than 1 year, or of an offense involving moral turpitude. The latter term is defined for Air Force purposes as an offense involving sexual perversion, or the use of narcotics.

(*b*) Persons committing a homosexual act. Upon investigation of such incidents it is often found that the person had been involved in similar acts over a long period of time but had escaped detection.

(*c*) Persons who have been absent without leave for an extended period, generally for more than a year. In this category there are often persons who have been absent since World War II and even before.

By and large, however, the majority of individuals who receive undesirable discharges are those who have been involved in frequent acts of misconduct, and who have not responded satisfactorily to rehabilitation efforts. The pertinent regulation provides, for example, that there must be a showing of "frequent involvement of a discreditable nature with civil or military authorities," or "an established pattern for shirking," or "an established pattern showing dishonorable failure to pay just debts."

There is no provision in Air Force regulations whereby an individual can request trial by court-martial in lieu of administrative proceedings to effect his discharge for misconduct. Neither is there any provision whereby an individual can request administrative discharge proceedings in lieu of trial by court-martial. The decision as to whether a court-martial or administrative processing is appropriate to a particular case rests with military authorities.

Question 13. *Could the subcommittee be furnished with brief summaries of the facts and legal issues involved in some of the typical cases from each service with respect to the validity or legality of administrative discharges?*

Answer. A typical administrative discharge case does not ordinarily involve legal issues with respect to the validity or legality of the discharge. In the great majority of contested cases, issues are disputed on factual grounds, or administrative discharge is resisted on the basis of a past good record or on the ground that the airman or officer has been rehabilitated despite his past conduct. However, the requested information will be furnished for those cases in which such legal issues have been raised.

(1) *Airmen.*—Information on board proceedings involving the administrative discharge of airmen is maintained in the field and is not immediately available to furnish to the subcommittee. Information from the field has been requested and will be furnished to the subcommittee when received. It is anticipated that the information can be furnished on or before January 29, 1962.

(2) *Officers.*—The following are examples of cases involving officers, in which legal issues have been raised with respect to the validity or legality of administrative discharges.

(*a*) Administrative proceedings under Air Force Regulation 36–2 to revoke an officer's commission were instituted, on the ground that he had permitted a homosexual act to be performed upon him. The principal evidence against the officer consisted of his signed confession and the signed statement of the apprehending police officer. The board of inquiry recommended that he be discharged under honorable conditions (general discharge). Legal issues raised by the officer when his case was reviewed were (1) that the case against him was based upon hearsay, since the signed statement, rather than the personal testimony, of the apprehending police officer had been used; and (2) that his confession was inaccurate since the words used were not his but those suggested by investigating officials of the Air Force. The officer made no request at the time of his hearing for the personal appearance of the apprehending police officer, and he admitted that no force or coercion had been used by the investigating officials. The board proceedings were found to be legally sufficient.

(*b*) Administrative proceedings under Air Force Regulation 36–2 to revoke an officer's commission were instituted, on the ground that he had exhibited a lack of leadership. Three weeks before his hearing before the board of inquiry, the officer requested 21 witnesses to appear. His request was not answered until the day before the hearing, and none of the witnesses appeared on the day of the hearing. His request for a continuance was denied. On review, the failure to give a timely reply to the officer's request for witnesses and the denial of a continuance when the witnesses did not appear was found to be prejudicial error and the case was reversed.

(*c*) Administrative proceedings under Air Force Regulation 36–2 to remove an officer from the active list (terminate his regular commission) were instituted. The board of inquiry recommended that he be so removed. Legal issues raised by the officer were (1) that the legal adviser and recorder participated in the closed session of the board, contrary to procedural rules established by the Air Force; and (2) that the assistant recorder was not properly sworn. On review, determination was made from the record that the legal adviser and recorder had participated in closed session only to the extent necessary to put findings and recommendations in final form (as authorized by procedural rules) and that the assistant recorder had taken no part in the proceedings. The board proceedings were found to be legally sufficient.

(*d*) Administrative proceedings under Air Force Regulation 36–2 to revoke an officer's commission were instituted on the ground that he had exhibited financial irresponsibility, evidenced by numerous worthless checks and delinquencies in, and failure to liquidate, debts. The board of inquiry recommended that he be discharged under honorable conditions (general discharge). Legal issues raised by the officer were (1) that the action was initiated prematurely, in that the original file was not properly documented; (2) that the major command headquarters had exhibited a "prosecution approach" by illegally suspending him from flying status at the time this action was initiated and by failure to give the officer sufficient notice that proceedings had been instituted; (3) that the command convening the board had done so contrary to its agreement with another command; (4) that evidence before the board was primarily hearsay; (5) that the record of proceedings was not verbatim since the identity of the speaker was not always shown; and (6) that the findings and recommendations are against the weight of the evidence. The listed objections were contained in a brief filed by the officer's military counsel, and were considered by the representative of the Judge Advocate General reviewing the case for legal sufficiency. Determination was made that the board proceedings were legally sufficient.

(*e*) Administrative proceedings under Air Force Regulation 36–2 to remove an officer from the active list (terminate his Regular commission) were instituted, on the ground that he had exhibited financial irresponsibility evidenced by his failure to liquidate his debts, the continued increase in his debts, and several dishonored checks. The board of inquiry recommended that he be discharged under honorable conditions (general discharge). Legal issues raised by the officer when his case was reviewed were (1) that the board had refused to accept his (the officer's) definition of "financial irresponsibility"; (2) that the legal adviser improperly interjected himself into the proceedings; and (3) that the recorder became a prosecutor. On review, determination was made (1) that since financial irresponsibility was the ultimate determination to be made by the board, there was no error in refusing to accept the officer's definition; (2) that the record showed that the legal adviser had acted only to expedite matters by sticking to the facts, to rule on objections of the officer's counsel, or to offer the officer further opportunity to clarify the facts; and (3) that the recorder made no objection to any exhibit or testimony offered by the officer, and that although his comments were enthusiastic, they were within the area of fair comment on the evidence. The case was found to be legally sufficient.

2. In addition to the cases reviewed administratively, the following case involving an Air Force officer and raising typical legal issues was recently reviewed by the U.S. District Court for the District of Columbia.

*Murray H. Ingalls* v. *Eugene M. Zuckert, Secretary of the Air Force* (USDC DC No. 1547–1): Case was filed May 22, 1961. The plaintiff sought a declaratory judgment and mandatory injunction ordering the Secretary to reinstate plaintiff to the position of major, U.S. Air Force and for back pay or, in the alternate, for an honorable discharge.

On March 9, 1959, plaintiff was informed by his commander that he was in receipt of information to substantiate discharge action under Air Force Regu-

lation 35-66 (homosexuality). Plaintiff elected to resign rather than contest the administrative action. He was discharged under other than honorable conditions on April 24, 1959. He appealed to the Air Force Board for the Correction of Military Records. His appeal was denied May 5, 1960. He contends that his discharge from the Air Force with a discharge under other than honorable conditions was beyond statutory authority and was not authorized by any applicable rules and regulations of the Air Force; that his discharge was in violation of the fifth amendment; and that it was arbitrary and capricious. He further contends that he was not afforded legal counsel prior to submitting his resignation, although his resignation contains a positive statement to the effect that he had been afforded the opportunity of counsel, and the facts so indicate. The Government's motion for summary judgment was granted on November 20, 1961. Plaintiff has noted an appeal.

Question 14. *To what extent does the Army utilize a soldier's conviction by special court-martial as the basis for a subsequent undesirable discharge? To what extent does the Army make counsel available to an accused soldier whose case has been referred to a special court-martial?*

Answer. A single conviction by special court-martial is not, in itself, a basis for administrative discharge or the award of an undesirable discharge. However, the individual who frequently and repeatedly commits infractions and is punished under the UCMJ may render himself liable to administrative discharge. The typical case in this area usually involves two or more convictions by court-martial as well as other infractions of good order and discipline. It is emphasized that generally it is not a single incident of misconduct, but a pattern of misconduct which reflects a disregard of established standards of military conduct and a refusal to accept discipline, which leads to the administrative discharge.

In such cases, the conviction by a special court-martial, or more than one conviction, is not solely controlling in determining the type of discharge which will be awarded. Many matters such as the following are considered:

(1) The length of honorable service in current enlistment compared to period in which the unfitness was demonstrated.

(2) The proficiency of performance of the individual.

(3) The type, nature, and number of incidents of misconduct which led to discharge.

(4) Any matters in mitigation or extenuation surrounding the incidents of misconduct.

In short, the individual's military record is considered, not merely isolated incidents.

In the Air Force, legally trained counsel are almost invariably made available to airmen whose cases have been referred to special courts-martial. In those rare instances in which legally trained counsel are not available, nonlegal counsel are selected, based upon their temperament, maturity, and education. As required by the Uniform Code of Military Justice, in every case in which the prosecution is legally qualified, an equally qualified counsel is made available to the accused.

Question 15. *To what extent are legally trained counsel made available to accused servicemen whose cases are referred to summary or special courts-martial?*

Answer. The Uniform Code of Military Justice does not entitle an accused to have counsel appointed to represent him before a summary court-martial. There is no prohibition against an accused being represented before a summary court-martial by civilian counsel employed by him. The function of the summary court-martial is to exercise justice promptly for relatively minor offenses under a simple form of procedure. The selection of the officer to perform such function is made on the basis of his evidenced sound and mature judgment and ability to act fairly and impartially. He is charged with the duty of representing both the accused and the Government, assuring that the interests of both are safeguarded.

That portion of this question pertaining to special courts-martial has been answered in response to question No. 14.

Question 16. *What are the effects on a serviceman's career of conviction by summary or special court-martial?*

Answer. Whether and to what extent conviction by a summary or special court-martial would affect a serviceman's career is dependent on a number of factors. Among these factors are—

(a) The nature of the offense.
(b) The number of offenses.
(c) Indications of rehabilitation.
(d) Whether the offense was recently committed.
(e) His manner of performance of duty.

There are many individuals in the service today who, after having been tried and convicted by a court-martial, have continued in service, been promoted, and have served in an outstanding manner.

Conversely, the career of an individual who has repeatedly been involved in incidents which resulted in summary or special court-martial would undoubtedly be adversely affected. Demotion or elimination normally occurs in such cases.

Question 18. *Has the Army's specialized law officer plan been successful? If so, to what extent has it been adopted by the other services?*

Answer. The success of the specialized law officer program can best be answered by the Army.

The specialized law officer program is not suitable to Air Force requirements. The program limits the number of available skilled law officers, precluding consideration of the expanded requirements which result from national emergency or war. The limited utilization of senior judge advocates as law officers would deprive the Air Force of the urgently required full-time services of these officer lawyers as staff judge advocates of major commands, large general court-martial jurisdictions, and service in other directive capacities. A limited military judiciary would be unable to cope with the volume of cases, a critical shortage of fully trained law officers would result, and serious limitations would befall the administration of military justice within the Air Force. Under our present system of utilization of judge advocate personnel as law officers, together with a constant training program in this area, we are forming a nucleus of skilled law officers which will permit the proper functioning of our courts under emergency conditions. Modification or reversal because of law officer error in Air Force cases is rare.

Question 19. *Under the Army's specialized law officer plan, what steps are taken to assure the independence of the law officer? How is the independence of the law officer assured in the other services?*

Answer. The first portion of this question can best be answered by the Army.

In the Air Force, certification as law officer is generally limited to senior and field grade officers of extensive experience in military justice matters. Major command judge advocates have been instructed to determine both competency and integrity before submitting recommendations for certification. Air Force boards of review scrutinize with meticulous care records of trial to insure judicial competence and conformance. In no known instance since the enactment of the Uniform Code of Military Justice has an Air Force law officer been subjected to a charge of command control or judicial misconduct or impropriety.

Question 20. *Under the Army's specialized law officer plan, would it be feasible to provide that service as law officer would not be limited to officers on active duty, but could also be performed by qualified civilian employees of suitable maturity and experience?*

Answer. We do not think this plan would be feasible in the Air Force. Practical difficulty would be encountered in recruiting judicially qualified civilians. Aside from the fact that the proposal is presently precluded by law, the dispersal of our forces makes the plan impracticable. The situation would be aggravated in time of emergency or hostility during which trials frequently must take place in combat areas. It is quite clear that the problem of availability of such civilian law officers would then become acute and, in fact, the services of such personnel would be virtually unobtainable. Our Air Force law officers have proven thir competence. They have performed with proficiency since 1951 and during the Korean war without strain upon Air Force judicial resources. Air Force boards of review and Court of Military Appeals decisions attest to the judicial skill and the proficiency of their performance.

Question 21. *What instances have there been in recent years of "command influence" with respect to members of courts-martial, including the trial and defense counsel of special or general courts-martial?*

Answer. Cases in which the question of command influence have been raised have been rare in the Air Force. In those few cases in which the question was raised as the result of a letter by a commander to all members of his command concerning duties of personnel as members of a court or from a military justice lecture delivered as part of a course of instruction covering the same subject, in almost every instance the alleged "command influence" was, upon interpretation and decision by either the board of review or the Court of Military Appeals, determined to have been inadvertent. The extent to which the Air Force has recognized these isolated instances of "command influence" is indicative of the service's ability to cope with, control, and immediately correct such situations if and when they arise.

Question 22. *Has the practice of negotiated guilty pleas used by the Army and Navy been successful? If so, why is it not used by the Air Force?*

Answer. The first portion of this question can best be answered by the service concerned.

Air Force policy does not authorize the use of negotiated pleas. Our policy is to require a prima facie case as to each offense charged regardless of a plea of guilty and notwithstanding a request by the defense that the prosecution present no evidence in view of the plea of guilty. Accordingly, no useful purpose is served by negotiating a plea since it would not affect the quantum of proof required.

In Federal courts, criminal proceedings often become involved in extended review under 28 U.S.C. 2255 (Federal Custody; Remedies on Motions Attacking Sentences). In numerous instances where negotiated pleas of guilty are involved, these civilian defendants later claim that the elements of the offenses were not known to them; that their pleas were improvident; that they had an adequate defense of which counsel failed to advise them; that their counsel were incompetent; or that they did not understand the meaning and effect of the plea. Under 28 U.S.C. 2255, a hearing by the court is required if there is any question raised which is not clearly resolved by the record.

The U.S. Court of Military Appeals has cautioned that pretrial plea agreements must not transform the trial into an empty ritual (*United States* v. *Allen*, 8 USCMA 504, 25 CMR 8). The chief judge of the Court of Military Appeals has recently, in two instances, raised the question as to whether or not the negotiated plea program is "salutary" (*United States* v. *Welker*, 8 USCMA 647, 25 CMR 151; *United States* v. *Watkins*, 11 USCMA 611, 29 CMR 427).

Question 23. *What are the percentages of guilty pleas for each type of court-martial—summary, special,*[1] *and general—for each service for each year since 1950?*

Answer:

GENERAL COURT-MARTIAL

| Calendar year | Percent guilty pleas | Percent[1] not guilty pleas |
|---|---|---|
| | Airmen | |
| 1960[2] | 45.6 | 54.4 |
| 1961 | 46.9 | 53.1 |
| | Officers | |
| 1959[3] | 25.0 | 75.0 |
| 1960 | 17.6 | 82.4 |
| 1961 | 20.0 | 80.0 |

See footnotes at end of table.

[1] Figures for summary courts-martial and non-BCD special courts-martial are being obtained from the field and will be furnished to the subcommittee before Jan. 29, 1962.

SPECIAL COURT-MARTIAL (BAD-CONDUCT DISCHARGE)

| | Airmen | |
|---|---|---|
| 1960[2] | 73.0 | 27.0 |
| 1961 | 76.4 | 23.6 |

[1] If an accused is tried for 2 or more offenses and enters a plea of "not guilty" as to any offense, his case is reported in the "not guilty" column.
[2] Statistics not available prior to 1960.
[3] Statistics not available prior to 1959.

With respect to the first footnote of question No. 23, the following additional information is submitted to be forwarded to the subcommittee:

[Based on more than two-thirds (67.3 percent) of total strength of the Air Force]

SUMMARY COURT-MARTIAL

| Calendar year | Percent guilty pleas | Percent[1] not guilty pleas |
|---|---|---|
| | Airmen | |
| 1960 | 63.5 | 36.5 |
| 1961 | 62.0 | 38.0 |

SPECIAL COURT-MARTIAL (NON-BAD-CONDUCT DISCHARGE)

| | Airmen and officers | |
|---|---|---|
| 1960 | 55.4 | 44.6 |
| 1961 | 56.1 | 43.9 |

[1] If an accused is tried for 2 or more offenses and enters a plea of "not guilty" as to any offense, his case is reported in the "not guilty" column.

Question 24. *What are the percentages of convictions for each type of court-martial—summary, special, and general—for each service for each year since 1950?*[1]

Answer:

I. Based on number of offenses tried:

[In percent]

| Fiscal year | Summary | Special | General | Fiscal year | Summary | Special | General |
|---|---|---|---|---|---|---|---|
| 1950 | 95.8 | 88.6 | 86.6 | 1956 | 94.6 | 90.2 | 86.4 |
| 1951 | 94.8 | 87.8 | 87.2 | 1957 | 94.1 | 89.3 | 86.3 |
| 1952 | 95.2 | 89.5 | 87.4 | 1958 | 93.3 | 89.4 | 88.2 |
| 1953 | 94.5 | 88.4 | 90.4 | 1959 | 91.7 | 86.6 | 90.0 |
| 1954 | 94.8 | 89.6 | 88.3 | 1960 | 92.1 | 88.7 | 90.4 |
| 1955 | 95.1 | 90.3 | 89.9 | 1961 | 92.6 | 88.5 | 89.0 |

NOTE.—The above figures include officers and enlisted personnel. Statistics are not maintained which would enable officer statistics to be broken out from enlisted cases.

II. In addition to the above statistics based on the number of offenses tried, the following statistics are furnished for calendar years 1956–60, showing the total number of trials by type of court, the total number of persons convicted and acquitted, and the percentage of persons convicted of some offense. However, the latter figures are not statistically separated by type of court.

[1] See note to following table.

| Calendar year and type | Number of trials [1] | Number convicted of 1 or more offenses | Number acquitted of all charges | Percent convicted of 1 or more offenses |
|---|---|---|---|---|
| 1956—Summary court-martial | 25,892 | | | |
| Special court-martial | 9,400 | | | |
| General court-martial | 1,739 | | | |
| Total | 37,031 | 35,910 | 1,325 | 96.4 |
| 1957—Summary court-martial | 26,030 | | | |
| Special court-martial | 8,529 | | | |
| General court-martial | 1,372 | | | |
| Total | 35,931 | 34,854 | 1,278 | 96.5 |
| 1958—Summary court-martial | 20,900 | | | |
| Special court-martial | 5,980 | | | |
| General court-martial | 1,046 | | | |
| Total | 27,926 | 26,887 | 1,187 | 95.8 |
| 1959—Summary court-martial | 16,209 | | | |
| Special court-martial | 4,527 | | | |
| General court-martial | 878 | | | |
| Total | 21,614 | 20,694 | 1,025 | 95.3 |
| 1960—Summary court-martial | 13,253 | | | |
| Special court-martial | 4,134 | | | |
| General court-martial | 644 | | | |
| Total | 18,031 | 17,204 | 964 | 94.7 |

[1] Variances in totals due to joint and common trials and rehearings.

Question 25. *What are typical or "average" sentences in each service for some of the more frequent violations of the Uniform Code, such as unauthorized absence, desertion, failure to obey, larceny, and assault?*

Answer:

AVERAGE OR TYPICAL SENTENCES APPROVED BY THE OFFICE OF THE JUDGE ADVOCATE GENERAL, USAF

*General court-martial (airmen)*

| Offenses | Calendar year | Number of cases | Type of discharge | | | Confinement (average number of months) |
|---|---|---|---|---|---|---|
| | | | Dishonorable discharge | Bad-conduct discharge | None | |
| Art. 85—Desertion: | | | | | | |
| 1 year or less | 1959 | 25 | 18 | 5 | 2 | [1] 13.2 |
| | 1960 | 8 | 2 | 6 | 0 | 8.3 |
| Over 1, not over 5 years | 1959 | 9 | 8 | 1 | 0 | 16.3 |
| | 1960 | 15 | 13 | 2 | 0 | 15.3 |
| Over 5 years | 1959 | 5 | 4 | 1 | 0 | 9.6 |
| | 1960 | 2 | 2 | 0 | 0 | 18.0 |
| Art. 86—Unauthorized absence: | | | | | | |
| 30 days or less | 1959 | 2 | 0 | ----- | 2 | ----- |
| | 1960 | ----- | ----- | ----- | ----- | ----- |
| Over 30, less than 60 days | 1959 | 3 | 1 | 2 | ----- | 7.3 |
| | 1960 | 1 | ----- | 1 | ----- | 6.0 |
| Over 60 days | 1959 | 94 | 22 | 64 | 8 | [2] 7.1 |
| | 1960 | 50 | 5 | 38 | 7 | [2] 7.0 |
| Art. 121—Larceny: | | | | | | |
| Larceny, over $50 | 1959 | 64 | 12 | 23 | 29 | [3] 9.7 |
| | 1960 | 49 | 10 | 22 | 17 | [3] 7.2 |
| Larceny, $50 or less | 1959 | 7 | 1 | 2 | 4 | 5.3 |
| | 1960 | 5 | 1 | 2 | 2 | 10.8 |
| Art. 92—Failure to obey: | | | | | | |
| Failure to obey any lawful general order or regulation | 1959 | 3 | ----- | 1 | 2 | [4] 4.0 |
| | 1960 | 3 | ----- | 1 | 2 | [4] 1.0 |
| Art. 128—Assault: | | | | | | |
| Assault, with battery | 1959 | 6 | ----- | ----- | 6 | 2.0 |
| | 1960 | 5 | ----- | ----- | 5 | 3.6 |
| Assault, with dangerous weapon | 1959 | 9 | 2 | 4 | 0 | 6.0 |
| | 1960 | 9 | ----- | 4 | 5 | 7.3 |
| Intentionally inflicting bodily harm | 1959 | 5 | 1 | 3 | 1 | [5] 22.2 |
| | 1960 | 9 | ----- | 6 | 3 | 5.3 |

[1] 15 were adjudged 12 months; 3, 18 months; and 3, 2 years.
[2] In 1959, 10 of the 94 cases received no confinement which accounts for the low average. In 1960, 3 of the 50 cases received no confinement.
[3] 9 of the 64 and 10 of the 49 received no confinement.
[4] In 1959, 2 received no confinement; in 1960, 2 received no confinement.
[5] 1 of the 5 accused in 1959 was sentenced to 5 years confinement, and 1 to 2 years which influenced the average.

*Special court-martial (bad-conduct discharge),*[1] *(airmen)*

[Cases in this table include only those in which a bad-conduct discharge was adjudged and approved by the convening authority; no distinction is made with respect to those cases in which the accused were later sent to the retraining group at Amarillo and were restored to duty]

| Offense | Calendar year | Number of cases | Confinement (average months) |
|---|---|---|---|
| Art. 86—Unauthorized absence: | | | |
| 30 days or less | 1959 | 50 | 3.7 |
| | 1960 | 40 | 3.1 |
| Over 30, less than 60 days | 1959 | 93 | 4.0 |
| | 1960 | 98 | 3.8 |
| Over 60 days | 1959 | 133 | 4.1 |
| | 1960 | 194 | 4.1 |
| Art. 92—Failure to obey: | | | |
| Failure to obey any lawful general order or regulation | 1959 | 1 | 6.0 |
| | 1960 | 3 | 3.3 |
| Art. 121—Larceny: | | | |
| Larceny, over $50 | 1959 | 17 | 3.6 |
| | 1960 | 49 | 3.7 |
| Larceny, $50 or less | 1959 | 57 | 4.1 |
| | 1960 | 52 | 3.7 |
| Art. 128—Assault: | | | |
| Assault, with battery | 1959 | 2 | 3.5 |
| | 1960 | 0 | ------ |
| Assault, with dangerous weapon | 1959 | 8 | 4.9 |
| | 1960 | 6 | 3.7 |
| Intentionally inflicting bodily harm | 1959 | 3 | 5.0 |
| | 1960 | 1 | 3.0 |

[1] Figures for summary courts-martial and for special courts-martial in which no bad-conduct discharge was adjudged, or if adjudged was disapproved by the convening authority, are not available at Headquarters, USAF. The field has been requested to furnish the figures, and it is anticipated that they will be available before Jan. 29, 1962.

With respect to the footnote on page 4 of question 25, the following additional information is submitted to be forwarded to the subcommittee:

[Information based on a sampling of cases tried in calendar year 1961 in 3 commands reflects the following typical sentences]

| Offense | Special (non-bad-conduct discharge) | Summary |
|---|---|---|
| Absence without leave (art. 86, UCMJ) | Confinement at hard labor for 4 months, partial forfeiture of pay for 4 months, and reduction to lowest grade. | Confinement at hard labor for 30 days, partial forfeiture of pay for 1 month and reduction to lowest grade. |
| Failure to obey (art. 92, UCMJ) | Confinement at hard labor for 3 months, partial forfeiture of pay for 3 months, and reduction to lowest grade. | Do. |
| Larceny (art. 121, UCMJ) | do | Do. |
| Wrongful appropriation (art. 121, UCMJ) | Confinement at hard labor for 1 month, partial forfeiture of pay for 1 month, and reduction to lowest grade. | Restriction for 30 days, partial forfeiture of pay for 1 month, and reduction to lowest grade. |
| Simple assault (art. 128, UCMJ) | do | Do. |

Question 26. *To what extent are civilians used on the boards of review operating under the Uniform Code of Military Justice?*

Answer. The Air Force does not and has never used civilians as members of boards of review.

Question 27. *What is the average tour of duty on these boards and what provision, if any, is made to assure the independence of these boards?*

Answer. The average tour is approximately 3 years. No specific provisions are made to insure independence of board members and none is required. Each board operates as a completely independent appellate body and in no instance has any attempt ever been made to interfere with or compromise the integrity or independence of their functions.

Question 28. *With respect to each service and for each year since 1951, what is that percentage of cases in which boards of review have disapproved findings? In what percentage of cases have they reduced the sentence?*

Answer:

SPECIAL COURT-MARTIAL (BAD-CONDUCT DISCHARGE)

| Calendar year | Percent findings disapproved | Percent sentences reduced |
|---|---|---|
| 1960 [1] | 2.5 | 3.8 |
| 1961 | 4.4 | 4.4 |
| GENERAL COURT-MARTIAL | | |
| 1960 [1] | 5.0 | 4.6 |
| 1961 | 6.5 | 11.6 |

[1] Figures before July 1960 are not available since statistics on this matter were not maintained before July 1960.

Question 29. *To what extent have convening authorities and/or the officers exercising general court jurisdiction acted either to disapprove findings or reduce sentences in cases which they reviewed?*

Answer:

*Percent findings disapproved and/or sentences reduced*

SPECIAL COURT-MARTIAL (BAD-CONDUCT DISCHARGE)

Calendar year:
- 1960 [1] ............ 27.4
- 1961 ............ 24.0

GENERAL COURT-MARTIAL

Calendar year:
- 1960 [1] ............ 35.6
- 1961 ............ 31.3

[1] Figures before July 1960 are not available since statistics on this matter were not maintained before July 1960.

NOTE.—Information on summary and special courts-martial (non-bad-conduct discharge) has been requested from the field and will be furnished to the subcommittee when received. In addition, information has been requested regarding those cases in which these authorities have suspended sentences in whole or in part. It is anticipated that the statistics and information will be available before Jan. 29, 1962.

Question 29. *With respect to the second footnote on question No. 29, the following additional information is submitted to be forwarded to the subcommittee:*

The percentage of cases in which the convening authority and/or general courts-martial authority acted to disapprove findings or reduce sentences is as follows:

*Percent findings disapproved and/or sentences reduced*

[These percentages are based on samplings representing approximately ⅛ of the Air Force strength (32–2) and include bad-conduct discharge and non-bad-conduct discharge courts-martial]

SUMMARY COURT-MARTIAL

| Calendar year: | |
|---|---|
| 1960 | 4.2 |
| 1961 | 9.9 |

SPECIAL COURT-MARTIAL

(BAD-CONDUCT DISCHARGE AND NON-BAD-CONDUCT DISCHARGE)

| Calendar year: | |
|---|---|
| 1960 | 40.4 |
| 1961 | 26.4 |

The percentage of sentences the convening authority and/or general courts-martial authority suspended during this period is as follows:

*Percentage of sentences suspended*

[These percentages for findings disapproved and/or sentences reduced also includes the percentage of cases in which sentences were suspended; the figures below reflect a breakout of the percentages of suspended sentences]

SUMMARY COURT-MARTIAL

| Calendar year: | |
|---|---|
| 1960 | 5.1 |
| 1961 | 1.2 |

SPECIAL COURT-MARTIAL

(BAD-CONDUCT DISCHARGE AND NON-BAD-CONDUCT DISCHARGE)

| Calendar year: | |
|---|---|
| 1960 | 10.0 |
| 1961 | 4.4 |

GENERAL COURT-MARTIAL

| Calendar year: | |
|---|---|
| 1960 | 1.8 |
| 1961 | 3.0 |

Question 30. *Has the Air Force's Amarillo retraining group been successful? If so, have the other services undertaken similar retraining projects? Could excess capacity at Amarillo feasibly be used for rehabilitation of personnel from the other services?*

Answer. The Air Force believes the Amarillo retraining program has been successful. The following statistics bear this out:

Since February 1952, when the retraining program was instituted, 5,709 airmen have been processed. Of this number, 2,835 (approximately 50 percent) have been returned to duty. Of this number restored, 1,326 had bad conduct discharges, 674 had dishonorable discharges, and 1,009 had sentences which did not include punitive discharges.

Of the total number returned to duty, 70 percent have satisfactorily completed their enlistment. In many cases, airmen have reenlisted and are still on duty. A check with commanders shows that 6 months after returning to duty, 80 percent are rated in performance as average or above average, as compared with other duty airmen. Of this number, 83 percent have not been involved in any disciplinary infraction, and 12 percent had only one minor infraction on their record. The records further reflect that 12 percent of those restored have gone back as aircraft and engineering mechanics (currently 20 percent of those restored are in this category). It is also noteworthy that 54 percent of those restored to duty are performing at the skilled level in an Air Force specialty and 44 percent are performing at the semiskilled level.

*Reasons for success.*—The program has a threefold mission:

(*a*) Through its clinical capacity, it screens and evaluates the individual to determine his suitability for return to duty.

(*b*) It then undertakes to reorient, motivate, and train those selected for return to duty.

(*c*) Those not selected for return to duty benefit from the program and are better enabled to adjust to civilian life.

The accomplishment of this mission is facilitated immeasurably by the manner in which the retraining program is conducted. The retraining group is operated as a small military Air Force organization on a military Air Force base, with no physical custody or prison atmosphere. Amarillo Air Force Base is a technical training center providing the facilities for numerous formal training courses for jet engine and jet airplane mechanics, administrative clerks, supply clerks, etc. In addition, the base has broad facilities for on-the-job training in a wide variety of Air Force career fields. These training opportunities, including the formal training courses, are made available to the retrainee.

The retraining group has a large staff highly skilled in the areas of correctional treatment, clinical psychology and psychiatry, and military command. The staff includes 22 noncommissioned officers trained in correctional treatment and counseling. Each retrainee is treated as an individual case. He is evaluated as to strengths and weaknesses, both as to personality and job potential, and his program is carefully patterned to correct his weakness and to train him in a career field which he is interested in and for which he is best suited. A typical characteristic of the average retrainee is social maladjustment. To overcome this, he is subjected to group therapy, and the successful retrainee learns to give and take with other people in classrooms in group discussions, at work, and at recreation.

We feel that the Amarillo retraining program has paid dividends. We not only have given many errant airmen another chance, after receiving the benefit of correctional treatment, to earn honorable separation—we have also salvaged considerable manpower and recouped a considerable amount of the cost of training these airmen.

The second portion of this question is best answered by the service concerned.

Under present conditions, we do not believe it would be desirable to use Amarillo for retraining prisoners from other services. The prisoner population during the calendar year 1961 averaged 150, and the population is showing a slight increase at the present time. The experts in the corrections field at Amarillo advise us that today an average population of 180 should be the maximum desirable to maintain its present effectiveness.

The policy of the Department of Defense is to encourage the operation of restoration programs by the service of which the prisoner is a member. This DOD policy that each service can best conduct its own restoration training, which was developed in 1950, was based on the concept that an effective restoration program required three equally important major areas of interest:

(*a*) Social readjustment and reeducation of the prisoner.

(*b*) Military career training in a specific career specialty of a particular service.

(*c*) "Motivation" and "esprit de corps training" to attain a high degree of understanding of and loyalty toward his particular service.

It would follow that if prisoners from all three services were handled in the same retraining program, the area of social readjustment would be the only objective which would be common to all the servicemen. For these reasons, we believe that under present conditions it would be neither feasible nor desirable to use the retraining group at Amarillo for the rehabilitation of personnel from other services.

Question 31. *In view of the unavailability of a bail procedure under military law, what steps have been taken by the three services to minimize pretrial confinement?*

Answer: Since the applicability of the Uniform Code of Military Justice, the Manual for Courts-Martial, 1951, has prescribed that pretrial confinement will not be imposed unless deemed necessary to insure the presence of the accused at the trial or because of the seriousness of the offense charged (par. 20c, Manual for Courts-Martial, 1951). This is the policy of the Air Force in regard to pretrial confinement. It has been our experience that when pretrial confinement is imposed, the policy is faithfully adhered to and that responsible commanders, staff judge advocates, and provost marshals are constantly on the alert to prevent abuses of this policy. Records of trial reviewed at this headquarters confirm the fact that pretrial confinement is resorted to infrequently and only in instances which conform to policy considerations. At all installations where confinement facilities are maintained, confinement officers furnish the provost marshal and staff judge advocate a daily report of prisoner status which provides further control of the pretrial restraint policy. In addition, each board

of review is procedurally required to comment upon the time chronology in every case with particular emphasis on pretrial restraint where indicated.

Question 32. *When a serviceman is subject to trial in either a Federal district court or a court-martial, what are the criteria for determining which court shall exercise jurisdiction? Are these criteria satisfactory?*

Answer. On July 19, 1955, the Attorney General of the United States and the Secretary of Defense signed a written agreement with respect to the investigation and prosecution of crimes over which the two Departments have concurrent jurisdiction.

Generally speaking, it was agreed that the Armed Forces would have primary jurisdiction over all crimes committed on a military or naval installation if only persons subject to military law were involved. There is an exception, however, where the offense involves fraud against the Government, robbery or theft of Government property or funds, and similar offenses. In such cases, the Department of Justice has primary jurisdiction.

This exception has not always proved satisfactory in its practical application. For example, there have been several instances where the Federal Bureau of Investigation and the Department of Justice properly assumed their primary jurisdiction under the agreement, but such action had a marked adverse effect on the Armed Forces. In one case in the Air Force, over 80 military witnesses were "frozen" in place for a period of about 3 months at the request of the Department of Justice. During this period, these Air Force personnel were denied leaves of absence to which they were entitled by law, reassignment was impossible, and their usefulness to the Air Force was substantially reduced. In an operational combat command, such action could seriously affect the mission of the military departments and consequently endanger the safety and security of the United States. Our personnel must be mobile and able to move on a moment's notice to any spot in the world.

It is also significant to note that in most instances where the Department of Justice has exercised its prerogative to primary jurisdiction, the cases have eventually been disposed of in Federal court as misdemeanors. The Armed Forces could have disposed of these cases promptly and expeditiously, with full protection being given to the rights of those involved.

Negotiations are currently in progress between the Department of Defense and the Department of Justice in an attempt to solve this problem. It is hoped that an agreement can be reached whereby the Armed Forces will have primary jurisdiction over all crimes committed on a military or naval installation, provided only persons subject to the Uniform Code of Military Justice are involved.

Federal crimes committed off a military reservation have not caused the Armed Forces any significant problems. Again, generally speaking, the Department of Justice has primary jurisdiction over these offenses except where the military personnel involved are engaged in scheduled military activities or organized movement. However, the Department of Justice as a matter of course frequently relinquishes its primary jurisdiction to the Armed Forces.

Question 33. *Under circumstances where a serviceman's alleged misconduct violates both the Uniform Code of Military Justice and the law of some State, under what circumstances, if any, is the serviceman tried by court-martial if he has already been tried by a State court?*

Answer. Most trials of servicemen in State courts are for minor offenses. The greater portion of these minor offenses are traffic violations. Air Force policy provides that punishment of a civil traffic violation occurring off base by a civil court is normally deemed adequate when the punishment is equitable and reasonable. In some instances the civil offense may constitute service-discrediting conduct of such a nature that a court-martial may result. Such instances are infrequent and an airman is not usually tried by both civil authorities and the Air Force for the same offense. In serious cases where jurisdiction rests in both the Air Force and the civil authorities, the Air Force member is usually tried by either the Air Force or the civil authorities, but not by both. In those serious cases (felony type) where jurisdiction is exercised by the civilian authorities, upon conviction the Air Force is empowered by secretarial regulation to discharge such offenders.

Although the written policy is applicable only to traffic offenses, as a general rule civil punishment of misdemeanor cases will normally be considered by the Air Force as sufficient disposition of the offense.

Question 34. *In situations where State authorities have indicated their willingness to relinquish jurisdiction over a serviceman if the armed services will prosecute him, under what circumstances is prosecution undertaken by the armed services?*

Answer. Prosecution is never undertaken solely because of the request or instruction of State authorities. This type of case would be treated in the same manner as any other case under Air Force jurisdiction and its disposition would be determined in accordance with the same criteria applied in all cases of that nature. Prosecution by military authorities is undertaken only when the offense indicates punishment is appropriate and required on consideration of all the factors involved. If nonjudicial punishment is capable of adequately disposing of a minor offense, such will be the service action. If court-martial action is indicated, trial is before the lowest type court capable of adequately disposing of the offense.

Question 35. *Is legislation needed to give the Federal district courts jurisdiction over misconduct overseas by civilian dependents and employees accompanying the armed services in peacetime?*

Answer. Yes, either legislation or a constitutional amendment to authorize court-martial jurisdiction over such persons. Decisions of the U.S. Supreme Court (*Kinsella* v. *Singleton*, 361 U.S. 234 (1960); *Grisham* v. *Hagan*, 361 U.S. 278 (1960); and *McElroy* v. *Guagliardo*, 361 U.S. 281 (1960)), have declared unconstitutional article 2(11) of the Uniform Code of Military Justice (10 U.S.C. 802(11)), insofar as it provided for the amenability to court-martial jurisdiction over civilians serving with, employed by, or accompanying the U.S. Armed Forces abroad in time of peace. Following these decisions, the Department of Defense drafted atlernative proposals to meet the problem, consisting of—

(1) a constitutional amendment authorizing the exercise of court-martial jurisdiction over persons serving with, employed by, or accompanying the Armed Forces outside the United States;

(2) legislation subjecting persons owing allegiance to the United States to the jurisdiction of U.S. district courts for crimes committed outside the United States and the Canal Zone; and

(3) legislation providing for the apprehension, detention, and disposition of certain persons serving with, employed by, or accompanying the U.S. Armed Forces outside the United States and the Canal Zone.

Since the feasibility of a constitutional amendment was doubtful and the alternative proposals either involved persons not connected with the Armed Forces or required the use of civilian law enforcement agencies in the arrest, custody, and removal aspects of exercising jurisdiction, the draft proposals were forwarded to the Department of Justice on June 21, 1961, with a request that that Department assume responsibility for further action on the proposals.

With regard to the feasibility of legislation of the nature referred to in this question, the attention of the subcommittee is invited to the analysis of the practical problems involved, by Judge Burger in his dissenting opinion in *United States ex rel Guagliardo* v. *McElroy*, (259 F. 2d 927, 939).

Question 36. *Is jurisdiction* [*legislation*] *needed to give the district courts jurisdiction over violations of the Uniform Code by ex-servicemen while they were on active duty?*

Answer. Yes. However, since the persons involved are civilians not under the jurisdiction of the Department of Defense, the Department of Defense defers to the Department of Justice on the means that should be taken to fill the jurisdictional gap arising as a result of the decision of the United States Supreme Court in *United States ex rel Toth* v. *Quarles* (350 U.S. 11). In the 84th Congress, two bills were introduced (S. 2791 and H.R. 81) to fill this gap. The Department of Defense supported the principle involved in the two bills, but concluded that the approach of the bills presented certain practical and legal difficulties. In view of the nonmilitary status of the persons that would be affected by such legislation, the Department of Defense requested that the Department of Justice consider the means of eliminating the gap and offered the cooperation of the Department of Defense in the matter.

## DEPARTMENT OF THE AIR FORCE RESPONSES TO SUBCOMMITTEE AIDE MEMOIRE

[NOTE.—Numerals refer to number of original question and Air Force answers thereto. Subcommittee questions and comments relating to the Air Force are in quotation marks preceding Air Force replies]

QUESTION 1

Committee comment: *"With respect to question 1, it would be desirable to determine the extent to which the total number of discharges tends to correspond to the total strength of each service at a particular time."*

Reply:

| Fiscal year | Total enlisted strength | Total discharges |
|---|---|---|
| 1957 | 776, 566 | 193, 409 |
| 1958 | 735, 759 | 197, 679 |
| 1959 | 704, 562 | 177, 740 |
| 1960 | 680, 666 | 154, 521 |
| 1961 | 689, 557 | 187, 884 |

Committee comment: *"The statistics furnished the subcommittee do not appear to include officer cases, although presumably officer dismissal tends to follow the same trends. The subcommittee will appreciate your providing comparable information concerning officers."*

Reply:

*Character of discharge or service of officer personnel of the Air Force*

| Fiscal year | Character of discharge or service | Retirements (all types) | Discharges and releases | Aggregate |
|---|---|---|---|---|
| 1958 (last half) | Honorable | 1, 339 | 6, 265 | 7, 604 |
| | Under honorable conditions | | 25 | 25 |
| | Under other than honorable conditions. | | 49 | 49 |
| | Dismissals | | 9 | 9 |
| Total | | 1, 339 | 6, 348 | 7, 687 |
| 1959 | Honorable | 1, 283 | 8, 087 | 9, 370 |
| | Under honorable conditions | | 51 | 51 |
| | Under other than honorable conditions. | | 53 | 53 |
| | Dismissals | | 9 | 9 |
| Total | | 1, 283 | 8, 200 | 9, 483 |
| 1960 | Honorable | 1, 867 | 9, 211 | 11, 078 |
| | Under honorable conditions | | 34 | 34 |
| | Under other than honorable conditions. | | 32 | 32 |
| | Dismissals | | 6 | 6 |
| Total | | 1, 867 | 9, 283 | 11, 150 |
| 1961 | Honorable | 4, 298 | 5, 972 | 10, 270 |
| | Under honorable conditions | | 31 | 31 |
| | Under other than honorable conditions. | | 23 | 23 |
| | Dismissals | | 7 | 7 |
| Total | | 4, 298 | 6, 033 | 10, 331 |

NOTE. Statistics not readily available for further refinement, i.e., resignation in lieu of trial, resignation in lieu of board action, etc.

Committee comment: "*Also, can you furnish the subcommittee the breakdown of the basis, reason, or authority for the issuance of the general and undesirable discharges to which you refer in the information you have provided the subcommittee?*"

Reply: In fiscal year 1961, approximately 95 percent of all general discharges awarded were the result of "show cause' action (6,805 "show cause," 355 "expiration term of service"). The basis and authority for the issuance of general and undesirable discharges are the DOD directive of 1959 and the appropriate criterion outlined in Air Force regulations previously provided the subcommittee.

Following is a further partial breakdown of the basis, reason, or authority for the issuance of general and undesirable discharges in calendar year 1960:

| | Honorable | General | Undesirable | Total |
|---|---|---|---|---|
| Unfitness | 742 | 3,544 | 1,446 | 5,732 |
| Fraudulent enlistment | 55 | 117 | 47 | 219 |
| Conviction by civil court | 32 | 181 | 332 | 545 |
| Desertion, trial barred or inadvisable | 0 | 2 | 7 | 9 |
| Absent without leave, trial inadvisable | 1 | 1 | 5 | 7 |
| Homosexuality | 109 | 332 | 350 | 791 |
| Unsuitability | 6,241 | 3,567 | 0 | 9,808 |

NOTE.—Similar figures for other years are not readily available.

Committee comment: "*Why was there such a contrast between Air Force statistics for fiscal year 1957 in which 7,200 undesirable discharges were issued out of 193,000 total discharges, and the Army figures for fiscal year 1960 when 7,400 undesirable discharges were issued out of 248,000 total discharges?*

"*The number of undesirable discharges was the same but the total discharges were greater in the Army (and yet the Air Force is composed exclusively of volunteers, while Army has a substantial number of draftees). Also, the same contrast exists with respect to general discharges in these years.*"

Reply: We are not in a position to evaluate the trends in undesirable discharges in the Army. However, it is pointed out that the 7,200 undesirable discharges issued by the Air Force for fiscal year 1957 were based upon criteria in effect prior to the DOD directive of 1959. The 4,189 undesirable discharges in the Air Force for fiscal year 1960 and the 1,699 such discharges in fiscal year 1961 reflect the implementation of the DOD directive of 1959.

Committee comment: "*Why is there a contrast between fiscal year 1958 for the Air Force and fiscal year 1961 for the Army with both services issuing 8,300 undesirable discharges but total discharges being markedly greater in the Army?*"

Reply: As indicated in preceding question, we are not in a position to evaluate the trends in the Army. However, the 1958 Air Force figures again are based upon discharge criteria in effect prior to the DOD directive of 1959, whereas the 1961 figures reflect the changed criteria constituted by that directive.

Committee comment: "*As between fiscal year 1958 and fiscal year 1959 in the Air Force, why is there such a drop in general discharges without a commensurate drop in total discharges?*"

Reply: Prior to the 1959 DOD directive, the Air Force had instituted a policy liberalizing the criteria for discharges to be awarded by administrative proceedings. Particularly, this liberalization occurred in the area of enlistees who were discharged during their early months of service. In such cases, policy required that, except in extreme cases, they be issued an honorable discharge for the convenience of the Government, rather than a general or undesirable discharge by administrative board proceedings. Additionally, for a portion of fiscal year 1959, the policies of the 1959 DOD directive were in effect.

Committee comment: "*Why is there such a contrast between the number of undesirable discharges in the Air Force for fiscal year 1959 and fiscal year 1961, with roughly the same number of total discharges for those years? (Note that a similar contrast is present for 1959 and 1960, and 1960 and 1961.)*"

Reply: The contrast mentioned primarily reflects the effects of the DOD directive of 1959.

Committee comment: "*With respect to the number of punitive discharges suspended through the Office of the Judge Advocate General of the Air Force, why were so many more bad-conduct discharges suspended in 1959 than in 1960 or 1961, although the total number of bad-conduct discharges is almost identical in those 2 years? And why was there such a drop of suspensions in dishonorable discharges from 1959 through 1961 without any commensurate decrease in total dishonorable discharges?*"

Reply: The designation of the number of suspended bad-conduct discharges in the Air Force answer to question 1 reflect those bad-conduct discharges suspended Air Force wide. The drop from 297 bad-conduct discharges suspended in 1959 to 93 and 65 in 1960 and 1961, respectively, appears to be the result of a series of decisions by the Court of Military Appeals in 1959, which invalidated the then existing method employed by the services suspending punitive discharges, where warranted, until completion of appellate review or until the accused's release from confinement, whichever was the later date. The decisions required conversions of all such existing suspensions of punitive discharges into probationary suspensions for a time certain. As a result of these decisions (*United States* v. *May*, 10 U.S.C.M.A. 258, 27 C.M.R. 342: *United States* v. *Cecil*, 10 U.S.C.M.A 371, 27 C.M.R. 445), reevaluation of the suspension policy regarding punitive discharges was effected by the Air Force with a resultant determination that the probationary-type suspension of punitive discharges for a time certain would not warrant utilization of the facilities of the 3320th Retraining Group at Amarillo, Tex., for such an accused, since such action would create difficulties if the airmen failed to meet restoration criteria at the retraining group. Since probationary-type suspension results in automatic restoration upon expiration of the probationary period, the airman's incentive to earn restoration is minimized; and this has a demoralizing effect on other accused at the retraining group who must demonstrate by good conduct, efficiency, and attitude their worthiness of restoration to duty. Accordingly, variance in the numbers of suspended bad-conduct discharges reflects the limitations imposed by the *May* and *Cecil* decisions and the reevaluated suspension policy as a result thereof. Additionally, it must be noted that although these decisions affected the number of bad-conduct discharges suspended, it has not materially affected the operation of the retraining group or the number of airmen eventually restored to duty in the Air Force.

QUESTION 3

Committee comment: "*What effort, if any, was made by the Air Force, in connection with the change in policy in 1959 concerning undesirable discharges under AFR 39–17, to review the discharges that had been given under that regulation prior to 1959?*"

Reply: The Air Force has used the 1959 standards in all discharge reviews since April 1959. The Air Force Discharge Review Board determined that it would grant rehearings upon application without the submission of new or material evidence in cases where the discharge was effective prior to implementation of these standards. This practice was announced to veterans' service organizations, congressional liaison personnel, and interested Air Force staff officers.

QUESTION 4

Committee comment: "*With respect to the Navy answer to question (4), it will be noted that the Navy points out various differences in procedure as between it and the other services, particularly with respect to the availability of a Board hearing and the level at which certain determinations to discharge are made. It would be desirable to have each service comment on these differences and on which procedure is preferable or whether the procedure used by each service is the best adapted to its particular problems. For example, would it be desirable for the other services to follow the Navy practice of requiring headquarters approval for the issuance of an undesirable discharge?*"

Reply:

(*a*) Comment on Navy practice of requiring headquarters approval of undesirable discharges: In the Air Force, undesirable discharges must be approved by the officer exercising general court-martial jurisdiction, except for special

categories, such as airmen who have extensive service that might qualify them for voluntary retirement and persons convicted by foreign courts in which case the discharge is reviewed at Headquarters USAF. The officer exercising general court-martial jurisdiction is a senior officer of mature judgment and wide experience, and he has available to him a full staff capable of adequately reviewing the case and providing him with legal, medical, or such other assistance as may be appropriate. This system adequately meets Air Force needs. The Air Force is not in a position to comment on Navy practice since the needs of that service may more adequately be met by a different system. It is assumed that the Navy's procedure was developed to meet its own peculiar organizational and command structure.

(*b*) Comment on differences noted by Navy:

Navy comment: "Army personnel being considered for a discharge by reason of unsuitability are afforded an opportunity to request or waive a field board hearing. Navy personnel are not afforded this privilege."

Reply: In the Air Force, personnel being considered for discharge by reason of unsuitability are afforded the opportunity of a hearing before a board of officers or an evaluation officer. The Air Force feels that this procedure insures that the rights of both the Government and the individual are protected.

Navy comment: "In the Army, field activities have authority to effect discharges by reason of hardship/dependency. In the Navy such discharges are approved only by headquarters."

Reply: In the Air Force, wing and base commanders have authority to effect discharges by reason of hardship or dependency. The Air Force feels that the local commander has greater knowledge of, and is more responsive to, the facts giving rise to the request for discharge.

Navy comment: "Army personnel being separated as undesirable are reduced to the lowest enlisted grade prior to separation. Navy personnel are not reduced."

Reply: There is no requirement in the Air Force that an individual being separated with an undesirable discharge be reduced to the lowest enlisted grade prior to separation. Unless the individual being discharged has previously been reduced for other reasons, the Air Force perceives no useful purpose in reducing an airman solely for the purpose of discharge.

Navy comment: "Army personnel involved in homosexual acts solely as a result of immaturity, curiosity, or intoxication are not processed under homosexual procedures for possible separation. In the Navy all such cases are so processed and a decision relative to retention or discharge is made upon completion of processing."

Reply: Air Force practice is similar to that of the Navy. The Air Force feels that every case involving homosexuality should be thoroughly investigated and processed in order that a determination may be made whether reasons of immaturity, curiosity, or intoxication warrant consideration for retention of the individual concerned.

Navy comment: "Under Army procedures, special courts-martial are precluded from awarding bad conduct discharges."

Reply: In the Air Force, special courts-martial may award bad-conduct discharges. Since legally trained counsel are made available to an accused in virtually every trial by special court-martial and since the appellate processes for a special court-martial involving a bad conduct discharge are identically provided for general courts, the Air Force perceives of no reason not to use the statutory authority provided.

QUESTION 5

Committee comment: "*In applying the criteria for issuance of a general discharge instead of an honorable discharge, at what level is the determination made to give such a discharge?*

Reply: In the Air Force the determination whether a general discharge instead of an honorable discharge shall be issued is ordinarily made by the officer exercising special court-martial jurisdiction or higher, except in the case of airmen being discharged for reasons of expiration of term of service or convenience of the Government. In this regard, in fiscal year 1961 only 355 airmen discharged for reasons of expiration of term of service or convenience of the Government received general discharges after full consideration of their military records and discharge criteria. In these cases the commander issuing the discharge was required to prepare a memorandum of justification which be-

comes a part of the airman's personnel records and is thereafter available for consideration by the discharge review board in any subsequent application for review. Headquarters, U.S. Air Force is now considering a procedure whereby in cases involving the issuance of a general discharge for reasons of expiration of term of service and convenience of the Government, a requirement will be imposed to have the recommended discharge reviewed by the special court-martial authority before being ordered executed. Such authority will be empowered to upgrade the general discharge.

Committee comment: "*As to each service, what are the disabilities attached to a general discharge? And would it be possible to accomplish the same objectives without using the term 'general discharge'?*"

Reply: The effects of honorable or general discharge are usually identical with respect to veterans benefits and normally entitle an airman so discharged to full rights and benefits. However, a general discharge has been found to be a disadvantage to an airman seeking civilian employment. A general discharge received by a female airman precludes her reenlistment. Our objective in awarding different types of discharges is to characterize the service of the individual, that is, to permit the Air Force to distinguish between the individual who has performed honest, faithful, and meritorious service from the individual whose service has been deficient. These objectives could not be met without some distinction in the types of discharges awarded to individuals falling within the various categories.

Committee comment: "*The Navy indicates that a general discharge is given on the basis of minimum proficiency standards. Should 'proficiency' be a criterion for determining whether someone gets anything other than an honorable discharge?*"

Reply: As stated in Air Force answer to question 5 of the subcommittee, proficiency may properly be a criterion for the type of discharge issued if due regard is given to the grade held and the capabilities of the individual concerned.

Committee comment: "*If a general discharge does accomplish a function, and, if, as some of the courts seem to indicate, there is some stigma attached to it, should there be a board meeting for it just as for the undesirable discharge?*"

Reply: As previously indicated, of the 7,160 airmen issued general discharges in fiscal year 1961, only 355 were issued for reasons other than cause, that is, expiration of term of service and convenience of the Government. Persons issued a general discharge for cause were afforded opportunity of a hearing before a board of officers or an evaluation officer. In the 355 cases, the commanders issuing the discharge were required to prepare a memorandum of justification setting forth the specific reasons for such discharge. The proposed Air Force plan to have such discharges reviewed by the special court-martial authority before final execution will provide adequate safeguards for the protection of the rights of the individual without the necessity for a board meeting.

Committee comment: "*In connection with the general discharge, it would be desirable to ask some of the witnesses whether or not they feel that a general discharge creates a stigma and whether they would be as willing to have a general discharge as an honorable discharge. If not, why not?*"

Reply: It is recognized that the general discharge, in the eyes of the public, may carry with it some stigma. An individual would not ordinarily be as willing to have a general discharge as an honorable discharge because it would reflect that his service was not as meritorious as that of a person who received an honorable discharge.

QUESTION 6

Committee comment: "*Concerning question (6), how many separations of enlisted personnel were the result of the exercise of waivers?*"

Reply: Complete statistics are not readily available to respond fully to this question. Fiscal year 1961 statistics reveal that in show-cause cases involving homosexuals, only about 15 percent of the personnel involved requested a board hearing. A major command reported that of 1,426 unfitness show-cause cases in fiscal year 1961, only 141 persons or about 10 percent, requested a board hearing.

QUESTION 7

Committee comment: "*How often do the Air Force or the Army ultimately take action less favorable than that recommended by the full board?*"

Reply: In the Air Force, for the 5-year period 1956 through 1961, of 1,165 officer show-cause cases, ultimate action less favorable than that recommended by the board was taken in only two cases. One involved indecent liberties with the officer's 12-year-old daughter. The other involved lewd and lascivious conduct.

Committee comment: "*To what extent is a procedure available to refer the case to another board for determining if the recommendations of the first full board are unsatisfactory?*"

Reply: As indicated in Air Force answer to question 11 of the subcommittee, if a board of inquiry recommends retention of the officer in a show-cause action, the case for discharge is closed and there is no provision to return the case to another board. There are provisions to return a proceeding to a board of inquiry prior to final action by the Secretary when new and significant evidence is discovered which should be reviewed by the board of inquiry before a final determination is made. In the last 5-year record of officers' show-cause actions, only two cases have been returned to the board of inquiry for review of newly discovered significant evidence. In both cases, evidence was primarily favorable to respondents.

Committee comment: "*To what extent do the Army and the Air Force follow the Navy practice of giving notice to an individual when action less favorable than that recommended by a field board is being contemplated? How often does the Air Force or the Army take action less favorable than that recommended by a field board?*

Reply: The Navy practice referred to pertains to enlisted personnel. In the Air Force, under current regulations, the ultimate action taken in airmen cases cannot be more severe than that recommended by the board, except cases involving security matters.

Committee comment: "*The Navy indicates that in no officer case is the action taken by the Secretary of the Navy more severe than that recommended by the board of officers. Is this true of the other services?*"

Reply: As previously indicated, the same is generally true in the Air Force. For the 5-year period 1956 through 1961, of the 1,165 officer show-cause cases, ultimate action more severe than that recommended by the board was taken in only two cases.

Committee comment: "*How many separations of officers involve resignations and/or waivers of a board action after adverse action has been recommended or initiated?*"

Reply: In the Air Force, for the 5-year period 1956 through 1961, of the 1,165 officer show-cause cases finalized, 376 officers tendered resignations in lieu of further show-cause action.

QUESTION 8

Committee comment: "*With respect to the answer to question 8, you will notice in some of the answers there is reference to providing counsel 'if reasonably available.' It seems very important to determine what standards are applied by a commanding officer in ruling on the availability of counsel for respondents in administrative actions or for accused persons in summary or special courts-martial. For instance, there are some complaints that some commanders, as a matter of policy, never declare a lawyer to be 'reasonably available' for a board action or a summary or special court-martial. Perhaps statistics are available on the representation of defendants or respondents by legally trained attorneys.*"

Reply: Determination of availability of legally trained counsel.

*Administrative boards*

(*a*) Standards normally applied by commanders in determining whether legally trained counsel are available to represent respondents before administrative boards are:

(1) Whether a lawyer is physically available.

(2) Whether physically available lawyers are disqualified by prior participation in a case or by other conflict of interest.

(3) Priorities in the workload of available lawyers. In appropriate cases, a continuance may be granted to a respondent to permit a lawyer requested by a respondent to be made available to him at a later time.

Statistics indicate that lawyers are made available in approximately 85 percent of the cases before administrative boards.

(*b*) Summary courts-martial: As set forth in the Air Force answer to question 15, the Uniform Code of Military Justice makes no provision for appointment of military counsel to represent an accused before a summary court-martial.

(*c*) Special courts-martial: As set forth in the Air Force answer to question 14, legally trained counsel are almost invariably made available to accused before special courts-martial.

Committee comment: *"To what extent, if any, are enlisted lawyers used by the services as counsel to represent respondents in board hearings or accused persons in criminal proceedings?"*

Reply: There are comparatively few enlisted lawyers in the Air Force. If an enlisted lawyer is requested by a respondent or an accused, he is made available under the same rules applicable to officer lawyers. Enlisted lawyers are not detailed as counsel before a board proceeding or special court-martial in the absence of a request for them. Under the Uniform Code of Military Justice, only officer lawyers may be designated as judge advocates and certified as competent to perform trial and defense counsel duties before general courts-martial. By law, only officer lawyers so designated and certified can be appointed as counsel before a general court-martial, and normally only such persons are detailed as counsel before special courts-martial.

QUESTION 9

Committee comment: *With respect to the answers to question 9: "With respect to question 9, each service should be asked to describe the number of members on its discharge review board and the board of correction of military records, the composition of the boards, the tenure of its members, and other duties, if any, performed by the members, the number of hours spent by the members in adjudicating their cases. There have been complaints to the subcommittee that the board of correction of military records seldom grants hearings and that the board members may meet only once a week—and then only for a very short time. The truth or falsity of such allegations should be determined since the Congress relies on these boards to rectify any injustice."*

Reply: The Air Force Discharge Review Board, as convened in a given case, consists of five members. These 5 members are randomly and objectively selected from a panel of 15 to 17 officers, which includes line of the Air Force officers and medically and legally trained officers. The president of the board is usually a line general officer, and the other four members are usually colonels. Occasionally, a line colonel will be the board president and occasionally one or two lieutenant colonels, majors, or captains will serve as board members. The normal and usual tenure of board members is 4 years, occasionally 3 years, and some times 5 years. The 15 to 17 members perform full-time duties as board members or in connection with the proceedings of 6 personnel-type boards contained in an administrative activity known as the Secretary of the Air Force Personnel Council. These six boards, all in the personnel area, in one respect or another require the same type of considerations. Consequently, the board membership is not only composed of senior Air Force officers of extensive and diversified background and experience, but such members are also, after a few months of assignment to the personnel council, skilled and knowledgeable in the details of the actions of the various boards with which they are concerned. They spend an estimated 50 percent of their time adjudicating discharge review cases. The legally and medically qualified members are assigned to the boards according to indicated needs when legal and medical factors are openly evident or expected.

The Air Force Board for Correction of Military Records is composed of 12 members who are civilian officers or employees of the Department of the Air Force. All members have full-time duties other than as board members. However, each members devotes approximately 16 hours per week to correction board duties. Five individuals have been members of the board more than one decade, two members have served since March 1956, two members since October 1959, one member since July 1960, one member since April 1961, and one member since August 1961. The board normally has formal board meetings every alternate Wednesday. It meets twice each week for executive board action. Favorable action is taken in approximately 33 percent of all cases reviewed. About 30 percent of all cases are granted on the record without a hearing. To accord

a full hearing in cases where hearing is requested would impose an insurmountable burden on the board and staff, with the net results that many cases would be denied despite the best efforts of applicant and counsel, if any, because of lack of adequate development of the case by the board's staff.

Committee comment: *"In what percentage of applications filed with the boards of correction for military records during the past decade were hearings granted?"*

Reply: In the past decade, the board for correction of military records granted a hearing in 5.4 percent of the cases filed.

QUESTIONS 9 AND 10

Committee comment: *"In light of the very few cases of relief granted by a correction board after denial by a discharge review board, isn't the second review almost a complete waste of time? Should such review be required for exhaustion of administrative remedies before going into court?"*

Reply: The second review is not considered to be a waste of time, since review by a board of civilians negates any complaint that the decision was solely military and that prior actions are routinely sustained.

Such a review should be required for exhaustion of administrative remedies before going into court under the reasoning stated above.

Committee comment: *"What is the feasibility of consolidating in each service the board for discharge review and the correction board? If some sort of consolidation were decided upon, how should it be handled?"*

Reply: It is not feasible to consolidate the Air Force Discharge Review Board and the Correction Board. The discharge review board is specialized in reviewing administrative discharges. The correction board handles a large variety of cases of great complexity in addition to its function of reviewing administrative discharges. The operations of the two boards are sufficiently complex and confusing without combining them. The discharge review board specializes in developing an intimate understanding of the variety and import of various infractions in their individual service environment, and does afford, we think, very equitable disposition in the matter of reviews of administrative discharges. It might lose this effectiveness through combination with the very complex correction board operation. There is a great volume of regulations and other advisory documentation in the administrative discharge area.

Committee comment: *"To insure uniformity, would it be feasible to unify the correction boards of the three services? And the discharge review boards?*

Reply: Such a unification might be feasible but it would not be practicable. The Secretary of each military department has a statutory responsibility to run his Department. Consolidation of discharge review boards would remove the authority and responsibility of individual service Secretaries.

Committee comment: *"Isn't it true that the Air Force differs with the other two services concerning the authority of the correction board? The Air Force seems to consider that the correction board has power to wipe out the conviction itself, while the Army and Navy seem to feel that only some of the facts of a court-martial conviction can be altered but not the conviction itself. Should these diverse interpretations exist? If not, which should be adopted?"*

Reply: Under the present operating criteria, there appears to be no substantial conflict. Present practice of the Air Force Board for Correction of Military Records is to "set aside" the findings and sentence. The use of the word "void" or "voided" is no longer current.

Committee comment: *"What legal advice is made available for the Discharge Review Board and the Board of Correction for Military Records in matters involving legal problems? Do lawyers serve on either Board in any of the services?"*

Reply:

(a) Discharge Review Board: Legal advice is available from the Judge Advocate General and the General Counsel of the Air Force. In cases in which legal problems are apparent or expected, an officer-lawyer is assigned to the Board.

(b) Board for Correction of Military Records: Legal advice is available from the Judge Advocate General and General Counsel of the Air Force. Two civilian lawyers are members of the Board.

QUESTION 11

Committee comment: *"The Navy answer seems to indicate that an applicant can obtain a hearing, confrontation, and cross-examination before the Board for Correction of Navy Records if circumstances are such as to require these procedures. Is there a subpena power of this Board and what are the circumstances which require these procedures? What is the situation in the other services?"*

Reply: In the Air Force, confrontation and cross-examination before the Board for Correction of Military Records is not permitted. However, for good cause shown a respondent may be granted a hearing at which he has the right to appear with counsel and to present witness on his own behalf.

Committee comment: *"The Navy indicates that it uses procedures which permit confrontation of adverse witnesses and an opportunity to cross-examine them. Is there any similar right of confrontation provided for under Air Force and Army procedures in the same type of case?"*

Reply: With reference to Air Force answer to question 11, of the subcommittee, a respondent appearing before a board of inquiry is provided with a specific statement of reasons for which his separation is under consideration. He likewise is provided with a summary of evidence to include statements of witnesses. On occasion, military witnesses are called before the board to testify on behalf of the Air Force. The respondent has the right to cross-examine. Since the board does not have subpena power, it cannot compel civilian witnesses to appear.

Committee comment: *"In connection with show-cause procedures for eliminating officers, note the difference between the Navy on the one hand and the Army and Air Force on the other. Would it be desirable to reconcile these differences?"*

Reply: Reconsiliation would appear to be desirable and legislation is now under consideration (Bolte committee recommendations) providing for a common procedure for all three services similar to that now used by the Army and the Air Force.

Committee comment: *"Would it be desirable to provide some type of subpena power in discharge cases or show-cause cases and towhat extent can depositions be taken for use in such procedures?"*

Reply: Yes, subpena power would be desirable. Depositions can now be taken and used in board proceedings, but attendance and answers of civilian witnesses cannot be compelled.

QUESTION 12

Committee comment: *"What is the meaning of an administrative discharge in the 'best interest of the service and of the individual'? What is meant by the 'best interest of the individual'?"*

Reply: An example of an administrative discharge being in the best interest of the individual is that of a person convicted of a felony by a civil court. From the standpoint of the military, his continued retention in the service is not warranted. The approprate means of separating him from the service are administratively or by trial by court-martial. Since he has already been convicted by a civilian court, trial by court-martial with its attendant possible imprisonment would not be in his best interests. Therefore, it is more appropriate to separate him administratively.

Committee comment: *"If the individual requests trial by court-martial, should the services determine that it was not in his 'best interests' to be tried by court-martial and that he should be administratively discharged?"*

Reply: Yes. Whether an individual should be administratively separated from the service has no necessary correlation with the question of whether he should be tried by court-martial. The two determinations are separate and distinct, and whether a person demands trial by court-martial has no relevance in making a determination that he be administratively separated.

Committee comment: *"In connection with administrative discharges for prosecution under State law, is primary attention given to the wording of the information or indictment in the State court as a basis for determining what the punishment would be under the Uniform Code of Military Justice?"*

Reply: Yes. When there is a conviction by civil courts, the information or indictment must be examined as related to the guilty findings of the court for a proper determination of the offense(s) as defined in the Uniform Code of Military Justice.

Committee comment: "*With respect to the Air Force, which refers in its answer to question (12) to the undesirable discharge for failure to pay just debts, the subcommittee should note the problem which has been mentioned extensively in the correspondence, of debt collection by the armed services through the threat of court-martial, by administrative discharge. Although the armed services have regulations which prohibit them from acting as a debt collection, it has been charged that on occasion this does occur.*

"*Would it be desirable to eliminate nonpayment of debts—even if 'dishonorable'—as a basis for discharge or for prosecution? Is the argument valid that to eliminate this sanction would dry up the credit of servicemen since there are no Federal garnishment laws?*"

Reply: No. Prosecution by court-martial for this offense is rare in the Air Force. Cases prosecuted criminally in the Air Force are those in which the failure to pay is aggravated, accompanied by deceit, fraud, dishonesty, evasion, and false representations. Administrative elimination where dishonorable failure to pay just debts or an established pattern of financial irresponsibility occurs, even though no aggravating factors are present, is necessary since service retention of such personnel would provide a haven and refuge for "deadbeats," and would affect commanders' responsibilities for maintaining discipline. It is doubtful that elimination of sanctions would "dry up" servicemen's credit. However, it would probably have a deleterious effect upon the credit of servicemen.

Committee comment: "*With respect to the Navy's answer to question (12): Note that the Navy indicates that where a court-martial is denied despite the request for a trial by court-martial, the discharge directed is almost invariably under honorable conditions.*

"*Do the other services follow the same procedure?*"

Reply: No. Whether an individual demands a trial by court-martial is considered irrelevant to the question of whether he should be administratively discharged and, if so, the type of discharge which should be awarded.

### QUESTIONS 11 TO 13

Committee comment: "*In situations where the board hearing is granted with respect to an administrative discharge and the board makes a recommendation favorable to the serviceman, under what circumstances can the commadner refer the matter again—to the same board or to another board for a second determination?*"

Reply: With respect to officers, a case cannot be referred back to the same board or to another board. In the case of airmen, a case may be referred to another board only if such determination is supported by a demonstrable inconsistency between the evidence in the case and the board findings, or the findings and the recommendations. A mere disagreement with the board's interpretation of the evidence, or its recommendations, will not operate to authorize the return of the case to the same board or another board.

### QUESTION 18

Committee comment: "*With respect to the Air Force answer to question 18 and its fear about a shortage of law officers in wartime, the Army answer seems to furnish a complete solution. Could not the Air Force train qualified reservists to be recalled to duty as law officers during time of emergency?*"

Reply: There is no question but that judge advocate Reserve officers will be called upon in the event of war or national emergency. However, effective service as a law officer requires experience. Protracted periods of time between active duty tours would impair law officer efficiency. This is especially true in light of the numerous changes continually effected as a result of decisional law. We therefore do not think that this is the solution to the problem with which the Air Force will be faced in wartime. Additionally, we again note that the high degree of performance by Air Force law officers has eliminated any Air Force requirement for such a program.

Committee comment: "*Also, to what extent can retired judge advocates be called to duty as law officers (with their consent) as a solution for manpower problems?*"

Reply: Ordinarily, when a judge advocate retires, he will not consent to be recalled to active duty. Additionally, it is not the policy of the Air Force to recall such officers.

Committee comment: "*Isn't the number of judge advocates on duty in the Air Force about the same as in the Army and considerably greater proportionately than in the Navy, and, in that event, why should the Air Force expect so much more difficulty in applying the Army's field judiciary?*"

Reply: The original answer to question 18 gives our analysis of the situation in accordance with Air Force requirements. We have concluded that a limited or restricted judiciary would not improve the quality of justice in the Air Force but would impair court-martial procedures in time of war or emergency. We feel there is no need for a limited or restricted judiciary in the Air Force.

Committee comment: "*With reference to the Army's specialized law officer plan, would there be possibilities in peacetime only of using civilians as law officers—and in time of war have as law officers Reserve officers and retired personnel recalled to duty?*"

Reply: As indicated in our answer to original question 20, aside from the fact that the proposal, as pertains to civilians, is precluded by law, such a plan is impracticable. In time of war, recall of Reserves will, only to a limited extent, implement our program with respect to their utilization as law officers.

This, as we have pointed out, is due to the diminishing expertise of judge advocates who do not serve consistently, as well as to the changes effected in decisional law. Under wartime conditions, the authorized or consensual recall of retired judge advocates could, to a limited extent, provide required skills in all legal areas, including the law officer requirement. However, we do not feel that this will obviate the difficulties that would be created by adoption of the law officer program by the Air Force. It is additionally noted that such a program would preclude career judge advocate officers from obtaining the judicial training and experience which service as law officers entails, and which we feel is highly desirable in the career development of judge advocates and does in fact constitute a recognition of legal and judicial abilities individually indicated.

QUESTION 21

Committee comment: "*In those cases which involve instructions given to the court members by the convening authority and staff judge advocates, is it really necessary to have such instructions? Could not the same purpose be accomplished by some other means?*"

Reply: Training or instructions in the nature of general orientation on the operation of court-martial procedures and the responsibilities of court members is beneficial and the U.S. Court of Military Appeals has so stated. Of course, as the court points out, instructions should not suggest directly or indirectly that the findings or sentence in a particular case may be based on matters outside the record of proceedings before the court-martial. The issue of command influence, when raised, is not usually directed to the method, but to instructions given to a court already in existence when a particular case has already been referred. As indicated, in our answer to original question 21, in which the question of command influence was raised, cases within the Air Force have been rare, and both staff judge advocates and convening authorities are fully aware that instructions, when given, must be properly circumscribed.

QUESTION 22

Committee comment: "*Why does the Air Force have a policy of requiring prima facie proof even when the defense counsel requests no evidence be received?*

"*Can't the objections made by the Air Force be solved by the Army method of a full hearing before the law officer concerning the reason that the defendant is entering his plea?*"

Reply: The Air Force policy requiring a prima facie case serves to preclude a subsequent contention by an accused in habeas corpus proceedings or otherwise that defense counsel was subject to command influence, that the defense counsel was incompetent, or that for other reasons his plea was improvident or his representation was inadequate. A hearing before the law officer concerning the reasons that an accused is entering such a guilty plea does not eliminate the possibility of a subsequent contention by the accused on any of the enumerated grounds. Under the present policy of the Air Force, it is the duty of the law officer to ascertain that the accused understands the meaning and effect of his guilty plea and to offer a full explanation thereof as he determines necessary.

QUSETION 23

Committee comment: *"What is the explanation for the seeming difference in the percentage of guilty pleas in Air Force special court-martial cases involving bad conduct discharges and those not involving bad conduct discharges?"*

Reply: The following are the percentage of guilty pleas in Air Force special courts-martial.

| | Bad-conduct discharges | Non-bad-conduct discharges |
|---|---|---|
| 1960 | 73.0 | 55.4 |
| 1961 | 75.4 | 56.1 |

In a number of cases in which a bad-conduct discharge is adjudged, the allied papers reveal that the offense(s) charged are but one of several committed by the accused. By singling out one or more offenses which are established by compelling evidence of guilt, protracted litigation is avoided. In these instances, accused plead guilty not only because they have no defense, but to obviate adducing matters in aggravation. Further, in a limited number of cases, an accused deliberately seeks a bad-conduct discharge by pleading guilty, offering nothing in mitigation, and stating in posttrial interviews that he does not desire rehabilitation but wants a bad-conduct discharge.

Committee comment: *"What seems to be the explanation of the difference in percentages of guilty pleas in bad-conduct discharge special court-martial cases as between the Air Force, which generally provides legally trained counsel for the defendants, and the Navy, which generally does not?"*

Reply: A possible explanation is that the Navy is using the negotiated plea program.

QUESTION 24

Committee comment: *"Would the Air Force percentage be roughly the same as the Navy and Army, instead of somewhat lower, if based on the same method of computation as the Army?"*

Reply: Statistics are not readily available to determine with certainty that the percentages would be comparable. However, the Navy has informally advised that it used the same method of computation as the Army. Since this method involves counting as a conviction a multiple-offense case in which there has been a conviction of any offense, it is logical to believe that using the same criteria the Air Force statistics would be comparable to those of the Army and Navy.

(NOTE.—Air Force statistics were based on the number of offenses of which accused were convicted compared to the number of offenses tried. Army and Navy statistics were based on the number of cases in which there was a conviction of any offense, compared to the number of cases tried.)

QUESTION 25

Committee comment: *"Each service might comment on whether the statistics from the three services indicate that sentences are relatively uniform in the Army, Navy, and the Air Force."*

Reply: A summary of statistics relative to uniformity of sentences compiled from original answers to question No. 25 is as follows:

*Average confinement at hard labor*

[Figures represent months]

| | General courts-martial | | | Special courts-martial | | |
|---|---|---|---|---|---|---|
| | Army | Navy | Air Force | Army | Navy | Air Force |
| Desertion | 9–12 | 10½ | 13¼ | | | |
| A.w.o.l. | 6–9 | | 6¾ | 3½ | 4 | 3¾ |
| Larceny | 6–9 | 10 | 8¼ | 4 | 4½ | 3¾ |
| Assault | 9–12 | 10 | 7¾ | 4 | 4½ | 4 |
| Failure to obey | 6–9 | 10 | [1] 2½ | 2½ | 4 | 3¾ |

[1] Based on 6 cases only.

NOTE.—Other accessories are uniform. Confinement at hard labor is the accessory most subject to variance.

Generally speaking, it appears from the statistics that sentences are relatively uniform in the three services. It is noted that some variations appear in summary and special courts-martial. However, a possible explanation for such variances may be in the validity of the samplings used and differing service policies with respect to the types of cases tried by each kind of court.

QUESTION 27

Committee comment: "*Is about 3 years the actual average for a tour of duty for the board of review members or is this just the authorized tour of duty?*

Reply: Three years is the average tour. The authorized tour is 4 years. Board members, for the purposes of career development or to prepare them for a particular assignment, generally serve in some other assignment within the department in the first or last year of their tour.

Committee comment: "*The Army indicates that the chairman of a board of review rates the other two members. This system is somewhat similar to a former Navy practice, apparently disapproved by the Court of Military Appeals, of having a court-martial president rate the performance by the junior members. Doesn't such a system tend to impose control of the junior members by the chairman of the board?*"

Reply: In the Air Force, the chairman also rates the other two board members. Board members are senior judge advocates chosen because of their extensive judge advocate competence and judicial acumen to act as appellate judges, rather than in the role of jurymen as in the case of court members. They are under the overall supervision of the Director of Military Justice and The Judge Advocate General with whom they can communicate directly. They are not in any manner constrained by their relationship to the chairman. Dissenting opinions of board members attest to their complete independence.

QUESTIONS 26 AND 27

Committee comment: "*In the interest of uniformity, would it be desirable or feasible to have a joint board of review composed of members of all three armed services—but in any special case including a member of the service from which the case comes? Or would it be feasible to have an all-civilian board of review as some have recommended?*"

Reply: Although such a system might be theoretically feasible, it would not be practicable. The diversity of service problems and the respective areas unique to each of the services render lawyers of each service best qualified to review cases pertaining to his service.

Committee comment: "*To what extent, if any, are retired officers being used—with their consent—as members of boards of review?*"

Reply: In the Air Force, none.

QUESTION 28

Committee comment: "*Do there seem to be significant differences as between the Army and the Air Force and between the Navy and the Air Force in sentence reductions in cases tried by general courts-martial? What is the explanation for these differences?*

"*What interservice differences, if any, seem to exist in boards of review action as shown by the statistics furnished here? Why do these differences exist?*"

Reply: The following reflects percentage of sentence reduction by boards of review as contained in answers to question No. 28.

| | General court-martial | | Bad-conduct discharge—Special court-martial | |
|---|---|---|---|---|
| | 1960 | 1961 | 1960 | 1961 |
| Army | 28.2 | 21.1 | | |
| Navy | 31.0 | 23.0 | 13.0 | [1] 12.0 |
| Air Force | 4.6 | 11.6 | 3.8 | [1] 4.4 |

[1] Estimated.

The statistical variance between sentence reductions in general courts-martial cases by boards of review appears substantial. In explanation of the statistical variance the following factors should be noted. The Air Force figures do not include sentence reductions ordered by the retraining center at Amarillo. As set forth in the Air Force answer to question No. 30, and the answer to the final paragraph pertaining to question No. 1 in the aide memoire, the use by the Air Force of the retraining program at Amarillo results in a considerable number of individuals being sent to the retraining center for evaluation of clemency considerations. Boards of review and convening authorities, in their independent consideration of a case, frequently determine that transfer of an accused to the Amarillo retraining facility constitutes the best method of determining his restoration potential. Therefore, this action is taken rather than that of probationary suspension or other reduction in sentence.

Committee comment: "*What is the meaning of the sharp increase in sentence reductions of general courts-martial in the Air Force as between calendar year 1960 and 1961?*"

Reply: The greater percentage of reductions as reflected in these statistics is attributable to the increased use by Air Force boards of review of their authority to reassess sentences, rather than their ordering rehearings on sentences by the original court. In reality, there is not a sharp numerical increase in sentence reduction as the jump from 4.6 to 11.6 percent represents 28 more cases in which the boards of review reduced sentences in 1961 over 1960.

QUESTION 29

Committee comment: "*The statistics seem to show sharp discrepancies between the Army and Navy on the one hand, and the Air Force, on the other, with respect to reduction of sentence by the convening authority. Is this primarily a reflection of the Army and Navy's negotiated guilty plea procedures? Or what does it reflect?*

"*What differences, if any, seem to exist in convening authority action as between the services and what is the explanation for these differences?*"

Reply: In 1960 and 1961 convening authorities or officers exercising general court-martial jurisdiction disapproved findings or reduced sentences in the following percentages of cases:

| | General courts-martial | | Bad-conduct discharges—specials | |
|---|---|---|---|---|
| | 1960 | 1961 | 1960 | 1961 |
| Army | 52.8 | 54.9 | | |
| Navy | 68.0 | 58.0 | 56.0 | 57.0 |
| Air Force | 35.6 | 31.3 | 27.4 | 24.0 |

It would appear that the variance between Air Force percentages as against those of the Army and Navy can be attributed primarily to the negotiated plea procedures whereby appropriate authorities reduce sentences in consonance with pretrial agreements. It does not appear that the variance indicates any discrepancy in the administration of justice among the services without further statistical breakdown by the Army and Navy as to percentage of actions in this area compelled as a result of pretrial agreements on negotiated pleas.

Committee comment: *"The supplementary information furnished by the Air Force shows significant drops from 1960 to 1961 in the percentages of findings disapproved and sentences reduced in special courts-martial. What is the explanation for this trend and for the trend in the opposite direction with respect to summary courts-martial?"*

Reply: The Air Force statistics reflecting the percentage of cases in which findings were disapproved or sentence reduced in summary and all special courts-martial are summarized as follows:

| | Special courts | Summary courts |
|---|---|---|
| 1960 | 40.4 | 4.2 |
| 1961 | 26.4 | 9.9 |

Since the statistics in question involve a comparison of only 2 years, it is not believed that the figures can be considered as indicative of any true trend. It is noted that statistics for the other services contain considerable variation from year to year, and that trends can be ascertained only over a period of several years.

QUESTION 31

Committee comment: *"The Army answer mentions one safeguard concerning pretrial confinements that has been recognized as lawful by the Court of Military Appeals. This safeguard is the requirement that the staff judge advocate approve the pretrial confinement. Do the other services have similar procedures? Could this perhaps be tied in with the full judicial program? Or would there be other possibilities formalizing this type of procedure?"*

Reply: As set forth in the Air Force answer to question 31, a daily report of prisoner status is furnished to the base staff judge advocate. Generally, all Air Force commands require that charges be preferred against confined personnel within 24 hours following confinement or the member must be released. Charges, letters of transmittal, and supportive evidence are submitted to staff judge advocates for screening before being processed. In effect, pretrial confinement, where warranted, is monitored and approved by Air Force staff judge advocates.

QUESTION 33

Committee comment: *"There seems to be some difference between the practice of the Army and the Navy in the requirements of approval for trial by general or special court-martial of conduct that was previously tried in a State court. Would the Navy practice be a desirable requirement for the other services?"*

Reply: No. It is the general policy of the Air Force that trial by court-martial will not be instituted following a conviction by a civil court unless offenses other than those for which civilian punishment was imposed have been committed (usually of a military nature), or unless the sentence imposed by the civilian court was grossly inadequate. In view of these narrow discretionary limits, secretarial approval of trial by court-martial is not considered necessary.

---

## DEPARTMENT OF THE AIR FORCE SUMMARY OF FACTS AND LEGAL ISSUES

### 1. *Clackum* v. *United States* (Ct. Cl. 246-56)

In its decision of January 20, 1960, the Court of Claims held that the undesirable discharge given to the plaintiff in 1951 under the provisions of AFR 35-66

was invalid. The court predicated this determination on the grounds that the regulations in effect at the time of the discharge had no provisions for an administrative board hearing prior to discharge, and further that in the court's opinion, the plaintiff was uninformed of the nature of the charges against her.

In order to sustain the motion to dismiss the plaintiff's petition, the Department of Justice had stipulated facts solely for the purpose of the motion, which, although so stipulated for this purpose only, the court accepted as established facts, even though there was no hearing on the merits. The plaintiff had been informed of the nature of the charges when her commander initially prepared court-martial charges on the same basis which eventually resulted in the administrative discharge. It is true, however, that at the time of discharge, Air Force Regulation 35-66 had no provision to afford the enlisted member a right to a hearing. This regulation is no longer in effect and, since 1952, a member of the Air Force is afforded a right to an administrative board hearing prior to final determination as to whether the nature of the service warrants undesirable discharge under AFR 35-66.

2. *Murray* v. *United States* (Ct. Cl. 237-57)

In its decision of June 7, 1961, the Court of Claims held that an individual who has honorable service during his period of enlistment under the provisions of Air Force regulations is entitled to be granted an honorable discharge. The plaintiff in this case was given a general discharge pursuant to AFR 35-66, predicated upon the facts which arose during his prior enlistment. The court found that upon termination of his old enlistment, he was reenlisted with knowledge of his prior acts; that during the new enlistment he had performed honorable service, and, consequently, if the Secretary of the Air Force felt he should be discharged, he had to be given an honorable discharge under the provisions of the regulations. The court consequently found that the general discharge was invalid, and awarded the plaintiff pay from the period of his general discharge to the date when his enlistment would expire.

3. *Frank E. Branaman* v. *United States* (Civil No. 1407-60, U.S.D.C.D.C.)

Action was brought in the U.S. district court on May 11, 1960, against the Secretary of the Air Force.

The nature of the action was mandamus to compel the Secretary to change plaintiff's discharge from undesirable to honorable, based upon medical reasons. The airman was convicted in civil court in the State of Oklahoma on May 25, 1955, for the offense of conjoint robbery and sentenced to 10 years in the penitentiary. Following conviction, he was discharged from the Air Force under the provisions of AFR 39-22, felony conviction, and was given an undesirable discharge. Subsequently, he was pardoned by the State of Oklahoma and returned to Maryland where he was committed to a mental institution by the Maryland authorities. In his complaint, the airman contends that he was insane at the time of his enlistment in the Air Force, and the Air Force authorities should have discovered this condition prior to enlistment. He applied to the Air Force Discharge Review Board for change of type of discharge and to the Air Force Board for the Correction of Military Records for similar relief. In both instances he was denied relief. The legal issue was whether the action of the Secretary in denying plaintiff's application for review was arbitrary and capricious. The court sustained the action of the Secretary on November 8, 1961, and rendered summary judgment in favor of the Government.

4. *Murray H. Ingalls* v. *Eugene M. Zuckert, Secretary of the Air Force* (U.S.D.C.D.C. No. 1547-1)

Case was filed May 22, 1961. The plaintiff sought a declaratory judgment and mandatory injunction ordering the Secretary to reinstate plaintiff to the position of major, U.S. Air Force, and for backpay or, in the alternate, for an honorable discharge.

On March 9, 1959, plaintiff was informed by his commander that he was in receipt of information to substantiate discharge action under AFR 35-66 (homosexuality). Plaintiff elected to resign rather than contest administrative action. He was discharged under other than honorable conditions on April 24, 1959. He appealed to the Air Force Board for the Correction of Military Records. His

appeal was denied May 5, 1960, without a hearing. He contends that his discharge from the Air Force with the discharge under other than honorable conditions was beyond statutory authority and was not authorized by any applicable rules and regulations of the Air Force, that his discharge was in violation of the fifth amendment, and that it was arbitrary and capricious. He further contends that he was not afforded legal counsel prior to submitting his resignation although his resignation contains a positive statement to the effect that he had been afforded the opportunity of counsel, and the facts so indicate. The Government's motion for summary judgment was granted on November 20, 1961. Plaintiff has noted an appeal.

5. *William Jackson, Jr.* v. *United States* (Ct. Cl. 403–60)

Suit was initiated in the Court of Claims for pay from the time of discharge to date. Plaintiff, an Air Force enlisted man, was convicted November 16, 1956, in the State of Oklahoma for rape in the second degree. He was sentenced to serve a term of 5 years' confinement in the Oklahoma State Penitentiary. On November 24, 1956, he was discharged from the Air Force under the provisions of AFR 39–22, felony conviction, and furnished an undesirable discharge certificate. On September 20, 1957, the Court of Appeals, State of Oklahoma, reversed the decision of the district court of the State on the theory that he had been deprived the right of counsel at this trial (see *Jackson* v. *State*, 316 p. 2, 213) and remanded the case to the district court. On May 6, 1958, the district court dismissed proceedings upon motion of the county attorney because the prosecutrix was not longer available within the jurisdiction of the court. He appealed to the Air Force Board for the Correction of Military Records on February 9, 1959, requesting a change in the type of his discharge, reinstatement in the Air Force, and backpay. A hearing was held September 6, 1959, and on April 28, 1960, the Board denied his application. The issue was whether the action of the Secretary, in refusing the plaintiff's application for a change in the type of his discharge, reinstatement, and backpay, was arbitrary and capricious. A motion for summary judgment was granted in favor of the Government in January 1962.

6. *John W. Knierim, Jr.* v. *United States* (Ct. Cl. 342–61)

Suit was filed in the Court of Claims on August 24, 1961, for pay and allowances accruing since date of discharge and benefits under the Korean G.I. bill of rights. The plaintiff had enlisted in the U.S. Air Force on March 28, 1949, and was discharged on August 31, 1949, under the provisions of AR 615–369, for unsuitability, and was furnished a general discharge certificate. On May 22, 1958, he applied to the Air Force Board for the Correction of Military Records for a change in the type of his discharge from general to honorable. On October 27, 1959, the Assistant Secretary of the Air Force, after considering the recommendation of the Board for the Correction of Military Records, directed that the plaintiff's records be corrected to show that on August 31, 1949, he had been discharged for the convenience of the Government under the provisions of AR 615–365, dated October 27, 1948, as amended, and furnished an honorable discharge. The plaintiff now contends that, in view of the corrective action by the Secretary, his initial discharge was void, and that he was not in fact discharged until October 29, 1959. The Government's position is that a change in the type of discharge for the convenience of the Government does not affect the validity of the initial discharge. Case is pending.

7. *James T. Mercereau* v. *United States* (Ct. Cl. 240–60)

Suit was filed on July 6, 1960, by the plaintiff, a former Air Force Reserve colonel, for the difference between the active duty pay of a colonel from January 14, 1956, to January 3, 1960, and the pay actually received by him during this period as an enlisted man of the Air Force. On January 14, 1956, the plaintiff was discharged from all appointments held by him as a result of administrative proceedings conducted under the provisions of AFR 36–2. The basis for this action was a decline in effectiveness on the part of the officer, resulting in unacceptable standards and a progressive falling off of duty performance. He thereafter enlisted in the Regular Air Force in the grade of airman first class on February 29, 1956, and remained on active duty in an enlisted grade until his retirement on January 31, 1960. He was retired in the grade of colonel under the

provisions of section 8911 of title 10, United States Code. On April 30, 1956, while serving on active duty as an enlisted man, he applied to the Air Force Board for the Correction of Military Records to correct his records to show that his commission had not been terminated on January 3, 1956, that he was not released from active duty as an officer, and that he had remained on active duty for all purposes, and that three effectiveness reports be declared void. The Air Force Board for the Correction of Military Records recommended that the plaintiff be given the relief sought. Upon consideration by the Secretary of the Board's recommendation, the Secretary approved only so much of the Board's recommendation as corrected the plaintiff's records to show that his appointment to colonel in the Air Force Reserve was not terminated on January 13, 1956, but that the appointment remained in full force and effect, and to show that he was released from active duty on January 13, 1956, pursuant to section 39 of the Armed Forces Reserve Act of 1952 and AFR 36–12, dated February 12, 1954, as amended. The Secretary considered this action to be appropriate since he did not feel, under the circumstances of the case, that the plaintiff was wholly without fault. On July 19, 1961, the Court of Claims granted the Government's motion for summary judgment stating "we believe the Secretary modifying the recommendation of the Correction Board acted within his statutory authority as set out above and such action was neither arbitrary or capricious."

8. *First Lieutenant Kenneth H. Moldenhauer* v. *Colonel Harvey N. Brown, et al.* (USDC SD GA, Savannah Div., Civil No. 1282)

The plaintiff, an Air Force lieutenant, had been selected under AFR 36–2 to show cause why he should not be discharged from his Reserve commission as a first lieutenant, U.S. Air Force. He brought action in the U.S. District Court, Southern District, Georgia, to enjoin the convening of the Board of Inquiry from considering his case, alleging that, if the Board proceedings were conducted in accordance with established procedures, the action would result in his being illegally and arbitrarily dismissed from the Air Force without a proper hearing before a proper factfinding agency. The court refused to stay the proceeding. However, it determined that the plaintiff should be given a hearing on his complaint prior to the proceedings being forwarded to the Secretary of the Air Force. The Board convened and considered plaintiff's case, and recommended that he be retained on active duty, whereupon the complaint was dismissed.

9. *George Neff Rowe* v. *United States* (Ct. Cl. 256–60)

Action was filed in the Court of Claims on July 20, 1960. The plaintiff alleges that his discharge from the Air Force under the provisions of AFR 39–17 on July 1, 1954, with an undesirable discharge certificate was void, and that he should have been retired for physical disability. Administrative action under AFR 39–17 was based upon a history of alcoholism. Prior to his case being considered by a board of officers convened under AFR 39–17, a medical determination was made that he had no mental or physical disability or defect which warranted disposition through medical channels under the provisions of AFM 35–4. He applied to the Air Force Discharge Review Board on July 9, 1954, for review of the type of his discharge. The Board recommended that no change be made in the type of discharge. He applied for reconsideration and this request was denied on January 26, 1956. He subsequently applied to the Air Force Board for the Correction of Military Records, which Board determined on July 11, 1956, that no corrective action was indicated. Another application was filed with the Air Force Board for the Correction of Military Records on March 25, 1960. A hearing was held on this application by the Board on July 5, 1961, and on December 18, 1961, the application for relief was denied by the Assistant Secretary of the Air Force, based upon the recommendation of the Correction Board. Proceedings of this case have been stayed in the Court of Claims pending consideration of the last application to the Board for the Correction of Military Records. The issue is whether action of the Secretary of the Air Force in refusing the requested relief was arbitrary and capricious.

(The following two letters were received by Senator Keating:)

DEPARTMENTS OF THE ARMY AND THE AIR FORCE,
NATIONAL GUARD BUREAU,
*Washington, D.C., April 25, 1962.*

Hon. KENNETH B. KEATING,
*U.S. Senate.*

DEAR SENATOR KEATING: This will supplement my interim reply of March 7, 1962, in response to your request for information as to the procedures in progress to eliminate segregation in the National Guard.

At the present time there are only 10 States in which, because of State law, or practices and customs, the National Guard units are not integrated. This reflects a considerable advancement in recent years, both in the elimination of all Negro units and in the appointment and enlistment of personnel in National Guard units without regard to race. It is true that in some States there may be no Negroes in National Guard units. But this does not connote discrimination, and it is accounted for by such things as lack of applicants or, in some instances, little or no Negro population in the area from which the unit draws its personnel.

As I am sure you know, federally recognized National Guard units and personnel have dual State and Federal status. The Federal status stems from the State status. When the National Guard is in an inactive status—or, as the language of the Constitution provides, when not "called into the actual service of the United States"—there are constitutional and statutory provisions which make the attainment of the objective of our national administration with respect to integration more difficult than in the Active Armed Forces where Federal authorities have the direct authority to require integration. The National Guard, not in Federal service, is composed of State forces serving under the command of a State Governor. Section 3079, title 10, United States Code, provides "When not on active duty, members of the Army National Guard of the United States shall be administered, armed, equipped, and trained in their status as members of the Army National Guard." Section 8079 contains similar provisions for the Air National Guard.

As you mentioned in your statement, the National Guard units are organized and manned according to the structures of the active services. The procurement of personnel within these structures is the responsibility of the States. The State laws which authorize the organization, consolidation, or reorganization of National Guard units by State authorities are designed to permit them to reorganize their units to conform to the ever-changing organization of the Active Army and Air Force and the composition of Army and Air Force units, as envisioned by section 104 of title 32, United States Code. Since such laws are to be found in States where discrimination or segregation has never existed, it is apparent that they are not aimed at creating or maintaining segregation or discrimination.

The Federal recognition of a National Guard unit is a function of the Department of the Army or Department of the Air Force, respectively. To obtain or continue Federal recognition, all organizations and reorganizations of units must be approved by these Federal authorities. Support from Federal funds is contingent upon such Federal recognition.

The source of your statement that barely 5 percent of the financial support of the National Guard comes from the local or State governments is not known. The total appropriation by the Congress for fiscal year 1961 was, in round figure, $663,500,000, for the Army and Air National Guard. Information furnished us by the States reveals that the State legislatures annually provide approximately $50 million for National Guard support. Not reflected is the uncalculated but tremendous additional support the States provide through making available a large number of State-owned camps and other areas for field training purposes, such as Camp Smith at Peekskill. As a single example, estimated conservatively the value of the land provided by State or local governments on which armories have been constructed exceeds a quarter of a billion dollars.

You mentioned the statutes of certain States. North Carolina is the only State in which the statute reads as you have quoted on page 3 of your statement. West Virginia is the only State in which the statute would seem to require the organization of separate Negro units; however, that State has for a number of years maintained integrated National Guard units.

To attempt by denial of Federal funds to enforce integration at this time in the 10 States referred to at the beginning of this letter would result in a serious weakening of our Nation's combat capability. This is a risk our Nation can ill afford at this time, and it does not appear to be justified as long as progress in integration can be made through such means as we are now using. I have within the past 2 months again communicated with the adjutants general of those 10 States, urging that they give this subject their most serious consideration. The responses reflect the full appreciation of the adjutants general of the urgency of the problem. There is a cautious optimism and a definite indication that the number of segregated States will be reduced in the coming months. Thus I feel that integration is being accomplished on a gradual and relative basis which will in the reasonably near future assure that membership in the National Guard will be based entirely on ability and willingness to serve.

The problems incident to integration in the National Guard are not easily separted from the problems of the community from which the membership is drawn. Fundamentally, the concept of the National Guard is that membership is voluntary. The strength of the National Guard can be assured only by making membership appealing to qualified men of the community.

When National Guard units have been ordered into active Federal service, they are filled out by personnel assigned by the active services. Thus there is no question as to the integration of these units when in Federal status, regardless of the State of origin. We hope that their active duty experience will demonstrate to the personnel in the units of all the States that, irrespective of race, qualification to perform the duties involved should be the overriding factor in the selection of personnel for membership to fill vacancies which will occur after the units have returned to their home States.

I trust the foregoing will be helpful to you.

Sincerely,

D. W. McGowan,
*Major General,*
*Chief, National Guard Bureau.*

---

Assistant Secretary of Defense (Manpower),
*Washington, D.C., April 9, 1962.*

Hon. Kenneth B. Keating,
*U.S. Senate.*

Dear Senator Keating: Thank you for sending me a copy of your statement to the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, in which you raise the issue of equality of treatment and opportunity for Negroes in the Armed Forces.

We share the same objective in this matter, that of providing full equality of opportunity in the Armed Forces for all races. Since the issuance of Executive Order 9981 the active armed services have made a record of integration that is probably unequaled by any other organization. Problem areas do remain, but for the most part involve factors which are not directly under the control of the Department of Defense, such as the offbase community discriminatory practices to which you refer in your statement.

As part of the continuing action being taken within the Department of Defense to assure compliance with the provisions of Executive Order 9981, you will be interested to know that we have initiated an overall review of the Army, Navy, Air Force, and Marine Corps Reserves to identify any Reserve units from which otherwise qualified personnel may have been excluded because of discriminatory practices. Where such practices are found to exist, positive measures will be taken to correct the composition of units.

Considerable progress also is being made with regard to the National Guard, but as you recognize, this situation is not directly under the control of the Federal Government. It is necessary for the Department to seek progress in this area through persuasion and consultation with State Governors and adjutants general.

Significant advances have been made in the integration of Guard units. Progress in the integration of Negroes into formerly all-white units has been made by modification of statutes and practices which precluded integration in

several States. Since World War II, Connecticut, Indiana, New Jersey, New York, California, Hawaii, and Maryland have developed programs effecting integration of the National Guard. Recent progress has also been noted in the elimination of all-Negro units in Massachusetts, New Jersey, and Ohio. The District of Columbia National Guard also has been effectively integrated.

It is expected that more and more of the States will accept Negroes into their Guard units. Texas is an example of a State which recently has accepted Negroes on its own initiative.

In addition, as National Guard units have been called to Federal duty during the recent buildup of the Armed Forces, personnel have been assigned to these units, including those from Southern States, without regard to race. As a result, Negro personnel have been assigned to Guard organizations which previously were all white.

It is our hope that upon the return of these units to State status, their experience will be such that they will freely accept all qualified applicants for membership, regardless of race.

Your interest in assuring equality of treatment and opportunity for all members of the Armed Forces is appreciated.

Sincerely yours,

CARLISLE P. RUNGE.